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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.

“Category one waters” means waters designated as category one waters in the Department’s Surface Water Quality Standards at N.J.A.C. 7:9B. As of September 4, 2001, N.J.A.C. 7:9B-1.15 defines category one waters as those waters designated in the tables in N.J.A.C. 7:9B-1.15(c) through (h), for purposes of implementing the antidegradation policies set forth at N.J.A.C. 7:9B-1.5(d), for protection from measurable changes in water quality characteristics because of their clarity, color, scenic setting, other characteristics of aesthetic value, exceptional ecological significance, exceptional recreational significance, exceptional water supply significance, or exceptional fisheries resource(s). These waters may include, but are not limited to:

1. Waters originating wholly within Federal, interstate, State, county, or municipal parks, forests, fish and wildlife lands, and other special holdings that have not been designated as FW1 at N.J.A.C. 7:9B-1.15(h) Table 6;
2. Waters classified at N.J.A.C. 7:9B-1.15(c) through (g) as FW2 trout production waters and their tributaries;
3. Surface waters classified in this subchapter as FW2 trout maintenance or FW2 nontrout that are upstream of waters classified in this subchapter as FW2 trout production;
4. Shellfish waters of exceptional resource value; or
5. Other waters and their tributaries that flow through, or border, Federal, State, county, or municipal parks, forests, fish and wildlife lands, and other special holdings.

“Commissioner” means the Commissioner of the Department of Environmental Protection.

“Compelling public need” means that based on specific facts, the proposed regulated activity will serve an essential health or safety need of the municipality in which the proposed regulated activity is located, that the public health and safety benefit from the proposed use and that the proposed use is required to serve existing needs of the residents of the State, and that there is no other means available to meet the established public need.

“Conservation restriction” means a restriction, easement, covenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural, scenic or open or wooded conditions, or for conservation of soil or wildlife, or for outdoor recreation or park use, or as suitable habitat for fish or wildlife, to forbid or limit any or all:

1. Construction or placing of buildings, roads, signs, billboards or other advertising, or other structures on or above the ground;
2. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials;

3. Removal or destruction of trees, shrubs or other vegetation;

4. Excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance;

5. Surface use except for purposes permitting the land or water area to remain predominantly in its natural condition;

6. Activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or fish and wildlife habitat preservation; and/or

7. Other acts or uses detrimental to the retention of land or water areas according to the purposes of this chapter.

“Contiguous” means adjacent properties, even if they are separated by human-made barriers or structures or legal boundaries. Contiguous properties shall include, but are not limited to: land areas which directly abut or are separated by a general access roadway or other right-of-way, including waterways; and properties which are part of a subdivision that was under common ownership on July 1, 1988.

“Critical habitat for fauna or flora” means:

1. For fauna, areas which serve an essential role in maintaining commercially and recreationally important wildlife, particularly for wintering, breeding, spawning and migrating activities;

2. For flora, areas supporting rare or unique plant species or uncommon vegetational communities in New Jersey.

“Cultivating” means physical methods of soil treatment, employed upon planted farm, ranch or forest crops to aid and improve the growth, quality or yield of the crops.

“Degraded wetland” means a wetland in which there is impaired surface water flow or groundwater hydrology, or excessive drainage; a wetland which has been partially filled or excavated, contaminated with hazardous substances, or which has an ecological value substantially less than that of undisturbed wetlands in the region.

“Delegable waters” means all waters of the United States, as defined in this section, within New Jersey, except waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce, shoreward to their ordinary high water mark. This term includes all waters which are subject to the ebb and flow of the tide, shoreward to their mean high water mark, including wetlands that are partially or entirely located within 1000 feet of their ordinary high water mark or mean high tide. Waters that are not delegable waters include, but are not limited to:

1. The entire length of the Delaware River within the State of New Jersey;

2. Waters of the United States under the jurisdiction of the Hackensack Meadowlands Development Commission; and

3. Greenwood Lake.

“Department” means the Department of Environmental Protection.

“Detention basin” or “detention facility” means a human-made impoundment area made by constructing an embankment, or excavating a pit, or both, for the purpose of temporarily storing stormwater.

“Developable upland” means an upland area that could be developed under the laws that apply to the site.

“Discharge of dredged material” means any addition of dredged material into State open waters or freshwater wetlands. The term includes the addition of dredged material into State open waters or freshwater wetlands and the runoff or overflow from a contained land or water dredge material disposal area. Discharges of pollutants into State open waters resulting from the subsequent onshore processing of dredged material are not included within this term. Such discharges of pollutants may, however, be subject to the New Jersey Pollutant Discharge Elimination System (NJPDES) rules at N.J.A.C. 7:14A.

“Discharge of fill material” means the addition of fill into State open waters or freshwater wetlands. The term includes, but is not limited to, the following activities:

1. Placement of fill that is necessary for the construction of any structure;
2. The building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction;
3. Site-development fill for recreational, industrial, commercial, residential, and other uses;
4. Causeways or road fills;
5. Dams and dikes;
6. Artificial islands;
7. Property protection or reclamation devices, or both, such as riprap, groins, seawalls, breakwaters, and revetments;
8. Beach nourishment;
9. Levees;
10. Fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and underground utility lines; and
11. Artificial reefs.

“Ditch” means a linear topographic depression with bed and banks of human construction, which conveys water to or from a site, which is surrounded by uplands and which is not located within a wetland. This does not include channelized or redirected natural water courses.

“Documented habitat for threatened or endangered species” means areas for which:

1. There is recorded evidence of past use by a threatened or endangered species of flora or fauna for breeding, resting, or feeding. Evidence of past use by a species may include, but is not limited to, sightings of the species, or of its sign (for example, skin, scat, shell, track, nest, herbarium records, etc.), as well as identification of its call; and
2. The Department makes the finding that the area remains suitable for use by the specific documented threatened or endangered species during the normal period(s) the species would use the habitat.

“Drainage” means active or passive methods for changing the hydrologic conditions of wetlands or State open water, such as lowering groundwater or surface water levels through pumping, ditching, or otherwise altering water flow patterns.

“Dredging” means removal of wetlands or State open water soils or sediments through use of mechanical, hydraulic, or pneumatic tools or other means.

“Dredged material” means material that is excavated or dredged from waters of the United States.

“Dumping” means the discharge, placement or abandonment of solid, semi-solid or liquid materials.

“Environmental commission” means a municipal advisory body created pursuant to N.J.S.A. 40:56A-1 et seq.

“EPA priority wetlands” means wetlands which are designated as priority wetlands by EPA, and are listed on the “Priority Wetlands List for the State of New Jersey,” which is available from the Department’s Office of Maps and Publications at the address listed at N.J.A.C. 7:7A-1.3.

“Established, ongoing farming, ranching or silviculture operation” means activities on areas subject to a farming, ranching, or silviculture use as of June 30, 1988, which use has been pursued continuously since June 30, 1988. Activities on areas lying fallow as part of a conventional rotational cycle that does not exceed five years are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle for so long that modifications to the hydrological regime are necessary to resume operations, or for more than five years, whichever is shorter.

"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;

6. A discharge within a critical area established under State or Federal law, including but not limited to a National or State park; fish or wildlife sanctuary or refuge; National or historical monument; wilderness area or preserve; a site identified or proposed under the National Historic Preservation Act; or a component of the National Wild and Scenic Rivers system;

7. The filling of five or more acres of freshwater wetlands and/or State open waters;

8. Any regulated activity that results in a significant reduction in the ecological, commercial, or recreational values of five or more acres of freshwater wetlands or State open waters;

9. A culvert enclosure longer than 100 feet; or

10. Channelization of more than 500 feet of a river or stream.

“Maximum extent practicable” means to the maximum extent after weighing, evaluating and interpreting alternatives to protect the ecological integrity of a wetland or State open water.

“Mitigation” means activities carried out pursuant to N.J.A.C. 7:7A-15 in order to compensate for freshwater wetlands or State open waters loss or disturbance caused by regulated activities.

“Natural Resources Conservation Service” or “NRCS” means the arm of the U.S. Department of Agriculture (USDA) that provides technical assistance with USDA conservation programs associated with soil, water, and other related natural resources. The Natural Resources Conservation Service was previously known as the Soil Conservation Service.

“1989 Federal Manual” means the Federal Manual for Identifying and Delineating Jurisdictional Wetlands, published in 1989 by the EPA, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture’s Natural Resources Conservation Service (formerly the Soil Conservation Service), as amended and/or supplemented, which Manual is incorporated herein by reference.

“Non-delegable waters” mean waters that are not delegable waters.

“Normal rainfall year” means a 12 month period in which the precipitation at a location is within 10 percent of the average annual precipitation for that location, calculated using the standard averaging period for “normals,” established by the World Meteorological Organization, except that the Department may determine normal rainfall on a case-by-case basis in unusual situations, such as where the sampling period begins immediately following prolonged drought conditions. As of September 4, 2001, the World Meteorological Organization has defined the standard aver-

aging period as 1961 through 1990. Information regarding the standard averaging period can be found in the USDA’s Natural Resources Conservation Service website at www.nrcs.usda.gov/water/climate.

“Offsite” means the area not onsite.

“Onsite” means the area located within the site, as defined in this section.

“Open water fill permit” means the type of New Jersey Pollution Discharge Elimination System permit issued pursuant to this chapter and N.J.S.A. 58:10A-1 et seq., which governs the discharge of dredged or fill material into State open waters.

“Ordinary high water mark” means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

“Palustrine emergent” means a wetlands vegetation pattern in which persistent and non persistent grasses, rushes, sedges, forbs and other herbaceous or grass-like plants are the dominant vegetation.

“Part of a surface water tributary system” means connected to a surface water that discharges into a lake, pond, river, stream or other surface water feature. The connection may be through any surface water feature, whether regulated or not, including a stormwater or drainage pipe. The connection may be through a secondary flow channel or other feature. However, the connection may be through overland flow only if there is evidence of scouring, erosion, or concentrated flows. The connection may not be through groundwater alone. Wetlands adjacent to a surface water are connected to the surface water and are part of the surface water tributary system.

“Permit” means an approval to engage in a regulated activity in a freshwater wetland, State open water, or transition area, issued by the Department under this chapter. The Department issues the following permits under this chapter:

1. Freshwater wetlands permits including general permit authorizations;
2. Open water fill permits; and
3. Transition area waivers.

“Permittee” means a person to whom the Department has issued a permit or a waiver under this chapter.

“Person” means an individual, corporation, partnership, association, the Federal government, the State, municipality, commission or political subdivision of the State or any interstate body.

“Pilings” means timber, metal, concrete or other similar structures driven, dropped, poured, or placed to support a vertical load.

“Plowing” means all forms of primary tillage, including moldboard, chisel, or wide-blade, plowing, discing, harrowing, and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of dredged material, rock, sand, or other surface materials in a manner which changes any area of wetlands to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing will never involve a discharge of material.

“Practicable alternative” means other choices available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes, and may require an area not owned by the applicant which could reasonably have been or be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity.

“Preliminary approval” means the conferral of certain rights pursuant to the Municipal Land Use Law at N.J.S.A. 40:55D-46, 48 and 49 prior to final approval after specific elements of a development plan have been agreed upon by the planning board and the applicant.

“Project” means the following:

1. For the purpose of a transition area exemption under N.J.A.C. 7:7A-2.8(f) based on the application for or the grant of a preliminary site plan approval:

i. All buildings, structures, pavements, and other improvements specifically depicted on the site plans referenced in the resolution approving the site plan; and

2. For the purpose of a transition area exemption under N.J.A.C. 7:7A-2.8(f) based on the application for or the grant of a preliminary subdivision approval:

i. Where subdivision approval is the last stage of municipal review before the owner/applicant may apply for a building permit to begin construction, the “project” is the development of the subdivision consistent with the lot coverage, use, and density restrictions of the zoning ordinance in effect at the time of the subdivision approval; or

ii. Where site plan approval is required prior to construction, “project” means the proposed economic development, whether commercial, industrial or residential, intended to be constructed on that portion of a tract of land that is the focus of the qualifying approval. Although “project” is not limited to specific structures shown on the subdivision plans, it is limited to development on those portions of a tract of land that were the focus of the qualifying subdivision application or approval. Development on other lands, such as development on the remainder of a larger tract or on a contiguous property in common ownership, are not included within a “project.”

In order to determine if an applicant qualifies for an exemption under this definition, the Department will determine the existence of a proposed economic development at the time of the subdivision application. Because the purpose of the exemption is to protect that degree of investment in planning and development that the preliminary site plan or subdivision application normally represents, where the subdivision is merely a division of land and no substantial investment was made in planning or development, there can be no exempted project. Therefore, an application for the subdivision of lands simply for future development, yet to be planned, or simply for resale shall not qualify for an exemption. To determine the existence of a proposed economic development and to determine which portion of a tract was the focus of subdivision approval or application, the Department will examine the resolution granting approval and any documentation submitted with the application, including, but not limited to, drainage, engineering, traffic, utility, landscaping, soil and environmental plans and reports as well as the subdivision plan. In cases where the above information is unclear, the Department may consider money spent or obligated on engineering and design in the preparation of the subdivision application to determine if a substantial investment has been made in an economic development. Money spent or obligated for the initial purchase, carrying costs, or legal services will not be considered in determining the existence of a proposed economic development.

iii. The following are examples of how the Department will determine the “project” exempted on the basis of the application for or grant of preliminary subdivision approval:

(1) Where a project was to be developed in three sections but a complete application for preliminary approval was submitted, accepted and subsequently approved for only one section, only the development planned for that section is exempt and the development envisioned for sections two and three is not exempt. This is not altered by the fact that some depiction of that future development on the remainder of the parcel might be required by a local planning board in concept or sketch form;

(2) Where an entire parcel is subdivided into five conforming residential lots, the residential development planned on all five lots is exempt. However, where the focus of the subdivision application and approval is on less than the entire tract of land, which lesser portion is divided into five single family house lots, and the remainder of the tract is left as a bulk parcel for further subdivision or other planning board approval, only development on the five lots is exempt. It is irrelevant that the configuration of the remainder lot has been changed by the subdivision or that the remainder lot has been renumbered;

(3) Where the land to be divided for a commercial industrial park straddles two townships and the developer received approval to subdivide the land in township A and sold the unsubdivided portion in township B to another developer, only the development on the land in township A could be considered the subject of township A's subdivision approval. Therefore, only the development on the land in township A is exempt. It is irrelevant that the original developer had, from the start, contemplated a commercial industrial park for the property in both townships or that the office building contemplated on the land in township B did not require further subdivision;

(4) Where land is divided for the sole purpose of bequeathing it sometime in the future to one's children to be developed as they wish, no economic development was contemplated when the application was made or approval granted. After the land passes to the children and one of them decides to build, that development is not exempt. The purpose of the exemption is to protect that degree of investment in planning and development that the preliminary site plan or subdivision application normally represents. Where the subdivision is merely a division of land and no investment was made in the planning or development, there can be no exempted project; and

(5) Where land is subdivided but requires further subdivision, other than de minimis changes for road right of ways or other infrastructure, before the applicant can proceed to the next step of municipal approval (either building permits or site plan approvals), there is no evidence of intended economic development at the time of initial subdivision application or approval, because the proposed economic development only comes into being with the subsequent, untimely subdivision. Therefore, there is no basis for exemption.

"Property as a whole" means all property assembled as one investment or to further one development plan. The property as a whole may include more than one municipal tax block or lot. The property as a whole may also include blocks or lots that were previously sold or developed, if those blocks or lots and the remaining unsold or undeveloped blocks or lots were part of one investment or develop-

ment plan. In determining the property as a whole in a particular case, the Department shall consider existing legal precedent regarding what constitutes "property as a whole" at the time of the determination.

"Public hearing" means an administrative non-adversarial type hearing before a representative or representatives of the Department providing the opportunity for public comment, but does not include cross-examination.

"Redevelopment" means the construction of structures or improvements on or below impervious surfaces, as defined in this section, or other significantly disturbed area.

"Regulated activity" means any of the activities described at N.J.A.C. 7:7A-2.2 or at N.J.A.C. 7:7A-2.6.

"Residential development project" means the construction of a new structure for residential use and the area within 20 feet of the structure on all sides, measured outward from the outside edge of the foundation of the structure. An addition to an existing residence is a residential development project if the addition has a foundation. A residential development project may include construction of one or more single family home(s) or multi-unit residential building(s).

"Seeding" means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

"Silviculture" means the art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society on a sustainable basis. The normal harvesting of forest products is a part of some silviculture operations.

"Site" means the area within the legal boundary of the property(ies) or right-of-way for which a letter of interpretation is requested, or upon which a regulated activity is proposed, is occurring, or has occurred, plus any contiguous land owned or controlled by the same person(s). This term also includes an area which is the subject of an application for a letter of interpretation or which is the location of a proposed mitigation bank. For the purposes of this definition, the legal boundary of a property or right-of-way shall be the boundary as it existed on July 1, 1988 except that if additional contiguous lots and/or blocks were acquired after July 1, 1988, or if lots were merged after July 1, 1988, these lots are included in the site, and the legal boundary of the property or right-of-way shall be the boundary of all contiguous land owned or controlled by the same person(s), as it exists on the date an application is submitted under this chapter. The legal boundary of a property is set forth in the deed(s) for the property or other legally binding document that sets forth a boundary. The legal boundary of a right-of-way is set forth in the document creating the right-of-way.

“Soil Conservation District” means a local subdivision of the New Jersey Department of Agriculture (NJDA), established pursuant to N.J.S.A. 4:24-1 et seq. Generally, each Soil Conservation District administers NJDA programs for a single county, although some administer programs for more than one county. The Soil Conservation Districts are overseen by the New Jersey State Soil Conservation Committee in the NJDA, which promulgates the Standards for Soil Erosion and Sediment Control in New Jersey, N.J.A.C. 2:90.

“Special aquatic site” means a site described in subpart E of the 404(b)1 guidelines (40 C.F.R. 230 et seq.), except freshwater wetlands which, for the purposes of this chapter, shall not be considered special aquatic sites. In general, special aquatic sites are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted functions and values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region. As of September 4, 2001, the following special aquatic sites are described in subpart E of the 404(b)1 guidelines (40 C.F.R. 230 et seq.): sanctuaries and refuges, wetlands (note: while freshwater wetlands are excluded from the definition of a special aquatic site for purposes of this chapter, other wetlands, such as most coastal wetlands, would be considered special aquatic sites), mud flats, vegetated shallows, coral reefs, and riffle and pool complexes.

“State Forester” means the chief forester employed by the Department.

“State open waters” means all waters of the State as defined in this section, including waters of the United States as defined in this section, but excluding ground water as defined at N.J.A.C. 7:14A, and excluding freshwater wetlands as defined in this section. The following waters will generally not be considered State open waters for the purposes of this chapter. However, the Department shall determine, on a case-by-case basis, if a particular watercourse or water body listed below is a State open water:

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. Water-filled depressions created in dry land incidental to construction or remediation 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 definition of “waters of the United States”;

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

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

8. Stormwater management facilities created in uplands.

“Stormwater management facility” means a facility which receives, stores, conveys or discharges stormwater runoff and is designed in accordance with applicable local, county and State regulations. These facilities may include retention basins, detention basins, infiltration structures, grassed swales, rip-rap channels and/or stormwater outfalls.

“Swale” means a linear topographic depression, either naturally occurring or of human construction, which meets all of the following criteria:

1. It is surrounded by uplands except where runoff flows out of it. A depression is not a swale if it is located within a larger wetland or if it is merely an undulation in a wetland boundary;
2. It has formed or was constructed in uplands to convey surface water runoff from the surrounding upland areas;
3. It drains less than 50 acres;
4. It is not a seep or spring;
5. It is not an intermittent stream;
6. It has no definite bed and banks; and
7. At its widest point, it is generally 50 feet wide or narrower.

“Temporary disturbance” means a disturbance caused by permitted regulated activities that are permanently discontinued within six months after they are begun.

“Threatened or endangered species” means a species identified pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq., or those identified pursuant to the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq., and subsequent amendments thereto.

“Tidal waters” means fresh or saline waters under tidal influence, up to the head of the tide.

“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

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.

(b) The Freshwater Wetlands Protection Act, on and subsequent to July 1, 1988, shall supersede any law or ordinance enacted by any municipality, county, or political subdivision thereof, regulating freshwater wetlands or freshwater wetlands transition areas except that the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetland areas within its jurisdiction. No municipality, county, or political subdivision thereof shall enact any law, ordinance, or rule or regulation requiring a transition area adjacent to a freshwater wetland, except that the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetland areas within its jurisdiction.

(c) This section shall not, however, preclude municipal advice to the Department concerning letters of interpretation or other matters.

(d) This chapter shall not preempt State regulatory programs which affect regulated activities in freshwater wetlands, including but not limited to Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., and

State approved municipal water quality management plans. These programs will continue to regulate based on the concerns covered by their respective enabling statutes and rules, and may, through such regulation, have some impact on projects in freshwater wetlands. However, those programs will not use freshwater wetlands concerns as a basis for regulation, and any regulation by these programs of projects in freshwater wetlands will be limited to that based on other (for example, flood danger) concerns.

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

Existing use zoning exception did not exempt owner from environmental requirements. *Stabile Estate v. DEPE*, 94 N.J.A.R.2d (EPE) 6.

7:7A-2.2 Regulated activities in freshwater wetlands and State open waters

(a) The following activities are regulated under this chapter when performed in a freshwater wetland unless excluded under (c) below:

1. The removal, excavation, disturbance or dredging of soil, sand, gravel, or aggregate material of any kind;
2. The drainage or disturbance of the water level or water table so as to alter the existing elevation of groundwater or surface water, regardless of the duration of such alteration, by:
 - i. Adding or impounding a sufficient quantity of stormwater or other water to modify the existing vegetation, values or functions of the wetland; or
 - ii. Draining, ditching or otherwise causing the depletion of the existing groundwater or surface water so as to modify the existing vegetation, values or functions of the wetland;
3. The dumping, discharging or filling with any materials;
4. The driving of pilings;
5. The placing of obstructions, including depositing, constructing, installing or otherwise situating any obstacle which will affect the values or functions of a freshwater wetland;
6. The destruction of plant life which would alter the character of a freshwater wetland, including killing vegetation by applying herbicides or by other means, the physical removal of wetland vegetation, and/or the cutting of trees; and
7. Placement of any portion of a residential development project, as defined at N.J.A.C. 7:7A-1.4.

(b) The term "regulated activity" shall also mean the discharge of dredged or fill material into State open waters, except for a discharge into a non-delegable State open water which is subject to the Waterfront Development Law, N.J.S.A. 12:5-3.

(c) Notwithstanding (a) above, the following activities are not regulated activities:

1. Surveying or wetlands investigation activities, for the purpose of establishing or reestablishing a boundary line or points, which use only hand held equipment and do not involve the use of motorized vehicles to either

clear vegetation or extract soil borings. The clearing of vegetation along the survey line or around the survey points shall not exceed three feet in width or diameter respectively and shall not be kept clear or maintained once the survey or delineation is completed;

2. The placement of temporary structures (such as observation blinds, waterfowl blinds, artificial nesting structures, or sign posts) for observing, managing, or harvesting fish or wildlife, provided the structures:

- i. Do not have permanent foundations;
- ii. Do not require the deposition of fill material; and
- iii. Have a footprint no larger than 32 square feet;

3. Placement of one or more small guy anchors that screw into the ground to secure a guy wire supporting a utility pole, provided that the area of disturbance caused by each guy anchor is no more than 15 inches in diameter;

4. Hand trimming of trees or other vegetation, provided the trimming does not alter the character of the freshwater wetland; and

5. The driving of one or more pilings in a State open water, if the pilings are not regulated by the ACOE under the Federal 404 program. The ACOE regulates the placement of pilings if the placement would have the effect of a discharge of fill material. Examples of activities that are and are not regulated by the ACOE are:

i. Activities that generally do not have the effect of a discharge of fill material and thus are not regulated are:

- (1) Placing pilings for linear projects, such as bridges, elevated walkways, and utility line structures; and
- (2) Placement of pilings for piers or docks;

ii. Activities that generally do have the effect of a discharge of fill material and thus are regulated include, but are not limited to:

- (1) Projects where the pilings are so closely spaced that sedimentation rates would be increased;
- (2) Projects in which the pilings themselves effectively would replace the bottom of a water body;
- (3) Projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States;
- (4) Projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions; and
- (5) Projects where the pilings are intended to be used for structural support of a building such as a commercial or residential structure.

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

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

Added new (c) regarding those activities not considered as resulting in alteration of the character of freshwater.

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-2.2, Subchapters which apply to freshwater wetlands permits or open water fill permits, was repealed.

7:7A-2.3 Identifying freshwater wetlands

(a) Freshwater wetlands shall be identified and delineated using the three-parameter approach (that is, hydrology, soils and vegetation) enumerated in the 1989 Federal Manual, as defined at N.J.A.C. 7:7A-1.4.

(b) To aid in determining the presence or absence of freshwater wetlands, the Department may refer to any of the following sources of information:

1. New Jersey Freshwater Wetlands maps prepared by the Department and available as indicated in (f) below;
2. United States Department of Agriculture Soil Surveys;
3. USGS quad maps;
 - i. NWI maps shall be used to indicate the approximate location of some freshwater wetlands;
 - ii. NWI maps have been determined to be unreliable for the purposes of locating the actual wetlands boundary;
4. United States Geologic Survey topographic maps;
5. Letters submitted by applicants containing site specific data;
6. Comments filed by municipal and county governments and interested citizens; and
7. Comments filed by State or Federal agencies.

(c) Vegetative species classified as hydrophytes and indicative of freshwater wetlands shall include, but not be limited to, those plants listed in "National List of Plant Species that Occur in Wetlands: 1988 New Jersey," compiled by the United States Fish and Wildlife Service in cooperation with the ACOE, USEPA, and the United States Soil Conservation Service, and any subsequent amendments thereto.

(d) To obtain a determination from the Department of the presence, absence, or boundaries of freshwater wetlands on a particular site, a person may apply to the Department for a letter of interpretation under N.J.A.C. 7:7A-3.

(e) The Department has developed freshwater wetlands maps at a scale of 1:12000 to provide guidance and for general informational purposes. These freshwater wetlands maps can help to determine the approximate extent and location of wetlands. However, these maps are for guidance only and do not take the place of nor supersede a wetland delineation that the Department has approved through a letter of interpretation issued for a particular site.

(f) The Department has provided the New Jersey freshwater wetlands maps to the following offices for public inspection:

1. The county clerk or registrar of deeds and mortgages in each county;
2. The municipal clerk of each municipality; and
3. The Department's Maps and Publications Sales Office, located at the address listed in N.J.A.C. 7:7A-1.3.

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

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

Added new (c)1. and recodified existing 1.-6. as 2.-7.

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

Engaging in regulated activities in freshwater wetlands and transition area without permit warranted imposition of civil penalty. Department of Environmental Protection v. Ludlam, 95 N.J.A.R.2d (EPE) 233.

Nursery required to seek permit to fill in intermittent stream; designated as priority wetlands. Brookside Nursery v. DEPE, 94 N.J.A.R.2d (EPE) 106.

7:7A-2.4 Classification of freshwater wetlands by resource value

(a) Freshwater wetlands shall be divided into three classifications based on resource value. The Department shall consider the resource value classification of a wetland in, among other things, evaluating alternatives to the proposed regulated activity, in determining the size of the transition area, and in determining the amount and/or type of mitigation required.

(b) A freshwater wetland of exceptional resource value, or exceptional resource value wetland, is a freshwater wetland which:

1. Discharges into FW-1 or FW-2 trout production waters or their tributaries;
2. Is a present habitat for threatened or endangered species; or
3. Is a documented habitat for threatened or endangered species, and which remains suitable for breeding, resting, or feeding by these species during the normal period these species would use the habitat.

(c) The Department identifies present or documented habitat for threatened or endangered species for purposes of (b) above using the Landscape Project method, which focuses on habitat areas required to support local populations of threatened or endangered wildlife species. The details of this method are described in the Land Use Regulation Program's freshwater wetlands technical manual, available from the Department's Office of Maps and Publications at the address in N.J.A.C. 7:7A-1.3. An applicant may request that a documented habitat not result in the classification of a freshwater wetland as a freshwater wetland of exceptional resource value. Such a request shall include a demonstration of the long-term loss of one or more habitat requirements of the specific documented threatened or endangered species, including, but not limited to, wetlands size or overall habitat size, water quality, or vegetation density or diversity. Upon such a request, the Department shall review all available information, and shall make a final classification of the wetland.

(d) A freshwater wetland of ordinary resource value, or an ordinary resource value wetland, is a freshwater wetland which does not exhibit any of the characteristics in (b) above, and which is:

1. An isolated wetland, as defined at N.J.A.C. 7:7A-1.4, which:

- i. Is smaller than 5,000 square feet; and
- ii. Has the uses listed below covering more than 50 percent of the area within 50 feet of the wetland boundary. In calculating the area covered by a use, the Department will only consider a use that was legally existing in that location prior to July 1, 1988, or was permitted under this chapter since that date:

- (1) Lawns;
 - (2) Maintained landscaping;
 - (3) Impervious surfaces;
 - (4) Active railroad rights-of-way; and
 - (5) Gravelled or stoned parking/storage areas and roads;
- 2. A drainage ditch;
 - 3. A swale; or
 - 4. A detention facility created by humans in an area that was upland at the time the facility was created.

(e) A freshwater wetland of intermediate resource value, or intermediate resource value wetland, is any freshwater wetland not defined as exceptional or ordinary.

(f) The classification system established under this section shall not restrict the Department's authority to require the creation or restoration of freshwater wetlands under N.J.A.C. 7:7A-

(g) To obtain a Department determination of the resource value classification for a particular wetland, an applicant may obtain a letter of interpretation from the Department under N.J.A.C. 7:7A-3.

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

In (b)2: Deleted language to clarify definition of "documented habitat for endangered or threatened species" for use in classifying freshwater wetlands.

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

New (c)i., i-iii added defining for this subsection "isolated wetlands" and "development" and requiring investigation of area within 50 ft. of wetland boundary.

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

Amended by R.2002 d.234, effective July 15, 2002.
See: 34 N.J.R. 390(a), 34 N.J.R. 2436(b).

Rewrote (c).

Public Notice: Notice of Revision and Updating of Freshwater Wetlands Technical Manual to Incorporate Version 2.0 of the Landscape Maps.

See: 36 N.J.R. 1129(a).

Case Notes

Department of Environmental Protection could adopt landscape method to classify those wetlands which support the habitats of threatened or endangered species, even if the species had not been seen in that particular area; Freshwater Wetlands Protection Act did not limit identification of wetlands of exceptional value to habitats which had a sighted or documented presence of an endangered or threatened species, evidence supported idea that species were not stationary and needed large contiguous blocks of habitat to survive, and landscape method helped implement that idea. In the Matter of Adopted Amendments to N.J.A.C. 7:7A-2.4, 365 N.J.Super 255, 839 A.2d 60.

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).

Wetland was suitable habitat for endangered species even though none had been sighted on wetland; exceptional resource value. Rossi v. Division of Coastal Resources, 92 N.J.A.R.2d (EPE) 244.

Intermittent stream; man-made alterations; not "ditch" ranked as ordinary value wetlands. Classic Custom Homes v. Land Use Regulation Program, 92 N.J.A.R.2d (EPE) 230.

7:7A-2.5 General transition area provisions

(a) A transition area serves as:

1. An ecological transition zone from uplands to freshwater wetlands which is an integral portion of the freshwater wetlands ecosystem, providing temporary refuge for freshwater wetlands fauna during high water episodes, critical habitat for animals dependent upon but not resident in freshwater wetlands, and slight variations of freshwater wetland boundaries over time due to hydrologic or climatologic effects; and

2. A sediment and storm water control zone to reduce the impacts of development upon freshwater wetlands and freshwater wetlands species.

(b) Acts or acts of omission in a transition area that adversely affect a transition area's ability to serve as any of the areas described below at (b)1 to 7 shall be deemed inconsistent with (a) above:

1. A temporary refuge for freshwater wetlands fauna during high water episodes;

2. A habitat area for activities such as breeding, spawning, nesting and wintering for migrating, endangered, commercially and recreationally important wildlife;

3. An area to accommodate slight variations in freshwater wetland boundaries over time due to hydrologic or climatologic effects;

4. A remediation and filtration area to remove and store nutrients, sediments, petrochemicals, pesticides, debris and other pollutants as they move from the upland towards the freshwater wetlands;

5. A buffer area to keep human activities at a distance from freshwater wetlands, thus reducing the impact of

noise, traffic, and other direct and indirect human impacts on freshwater wetlands species;

6. A corridor area which facilitates the movement of wildlife to and from freshwater wetlands and from and to uplands, streams and other waterways; and

7. A sediment and storm water control area to reduce the adverse effects of development or disturbance upon freshwater wetlands, flora and fauna, and nearby waterways.

(c) A transition area is required adjacent to a freshwater wetland of exceptional resource value and of intermediate resource value as classified in N.J.A.C. 7:7A-2.4. A transition area is not required adjacent to a freshwater wetland of ordinary resource value or adjacent to a State open water.

(d) The standard width of a transition area adjacent to a freshwater wetland of exceptional resource value shall be 150 feet. This standard width shall only be modified through the issuance of a transition area waiver. The types of transition area waivers are listed at N.J.A.C. 7:7A-6.1(a).

(e) The standard width of a transition area adjacent to a freshwater wetland of intermediate resource value shall be 50 feet. This standard width shall only be modified through the issuance of a transition area waiver. The types of transition area waivers are listed at N.J.A.C. 7:7A-6.1(a).

(f) A person shall not engage in regulated activities, as described at N.J.A.C. 7:7A-2.6, in a transition area except pursuant to a transition area waiver.

(g) A transition area shall be measured outward from a freshwater wetland boundary line on a horizontal scale perpendicular to the freshwater wetlands boundary line as shown in Figure 1 below. The outside boundary line of a transition area shall parallel, that is, be equidistant from, the freshwater wetlands boundary line, unless the Department issues a transition area waiver. The width of the transition area shall be measured as the minimum distance between the freshwater wetlands boundary and the outside transition area boundary.

(f) Subject to the limitations of this section including (g) below, the following projects, as defined at N.J.A.C. 7:7A-1.4, are exempt from transition area requirements, but are subject to freshwater wetlands and State open water requirements:

1. A project for which a preliminary site plan or subdivision application received formal preliminary approvals from local authorities pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., prior to July 1, 1989, provided those approvals remain valid under the Municipal Land Use Law. This excludes approvals which were given prior to the August 1, 1976 effective date of the Municipal Land Use Law; and

2. A project for which a preliminary site plan or subdivision application as defined in N.J.S.A. 40:55D-1 et seq., was submitted to the local authorities prior to June 8, 1987 and was subsequently approved. To qualify for an exemption under this paragraph, an application for preliminary approval must have been in proper form, must have been accompanied by all plans, data and information called for by the local land use ordinance and by statute, and thus must have been in fact complete prior to June 8, 1987.

(g) The following limits apply to the transition area exemptions at (f) above:

1. To be eligible for a transition area exemption under (f) above, a project must have preliminary site plan or subdivision approval. The exemptions do not apply to an application for, or grant of, any other approval under the Municipal Land Use Law, such as a sketch plat approval, general development plan, classification determination, building permit, variance, or conditional use approval;

2. A project listed in (f) above shall no longer be exempt from transition area requirements if significant changes are made to the approved site or subdivision plan. A significant change will be deemed to have been made if either of the following criteria is met:

i. The change would void the preliminary approval; or

ii. The change would require submittal to or approval of a new or amended application from the local authorities and either of the following criteria is met:

(1) The change would result in a change in land use on the project site, for example, from single family houses to multi-family units or a golf course; or

(2) The change would increase impacts to freshwater wetlands, State open waters, or transition areas;

3. A project listed in (f) above shall no longer be exempt if the municipal approval upon which the exemption was based becomes invalid for any reason; and

4. For all development determined to be exempt by the Department, once the development is constructed, the exempted "project" has been built. If, for example, the owner of a commercial building decides afterward that it is necessary to construct an addition, and goes back to the municipal authority for a new or amended site plan or subdivision approval, the exemption has been "used up" and the addition is subject to the permitting requirements of this chapter. Similarly, for residential approvals, once the houses and any accessory structures planned along with the house (for example, detached garages, barns, storage sheds, pools) are constructed, the exemption has been exhausted and any later additions or structural improvements are subject to the permitting requirements of this chapter. If there is an interruption of more than one year before construction of an accessory structure claimed to have been planned along with the house, there is a rebuttable presumption that the structure constitutes a later addition and will require a permit.

(h) If any discharge of dredged or fill material resulting from the activities exempted by this section contains any toxic pollutant listed under section 307 of the Federal Act, such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a freshwater wetlands or open water fill permit.

(i) A project covered by an individual permit issued by the U.S. Army Corps of Engineers prior to July 1, 1988 shall be governed only by the Federal Act, and shall not be subject to additional or inconsistent substantive requirements of this chapter. However, when the ACOE permit expires, any application for an extension shall be made to the Department under N.J.A.C. 7:7A-14.6. The Department shall not require a transition area as a condition of any extension of an ACOE permit issued prior to July 1, 1988.

INVALIDITY ANNOTATION: See: 21 N.J.R. 3482(a).

N.J.A.C. 7:7A-2.7(d)1 and 2 held invalid as providing permit exemption termination deadlines without statutory authority. *In the Matter of the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A-1.1 et seq., ___ N.J.Super. ___, Dkt. No. A-132-88T5 (App.Div. September 7, 1989).*

INVALIDITY ANNOTATION: See: 21 N.J.R. 3482(b).

N.J.A.C. 7:7A-2.7(f) held invalid as providing an exemption from transition area requirements without statutory authority. *In the Matter of Appeal of the 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), ___ N.J.Super. ___, Dkt. No. A-5802-87T3 (App.Div. September 7, 1989).*

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

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

Changes in exemptions reflect court decisions that have occurred since the rule adoptions of May 16, 1988 and July 3, 1989, as well as a formal opinion by the Attorney General.

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

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

Amendments based on Attorney General Formal Opinion No. 3(1990) and Formal Opinion No. 3: Reprise (1991) clarifying which projects qualify for an exemption from permit requirements.

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.2001 d.312, effective September 4, 2001.

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

Law Review and Journal Commentaries

Insight to New Wetland Procedures of the Nineties. Alfred A. Porro, Jr., 168 N.J.Law. 17 (Mag.) (April 1995).

Wetlands—Environmental Law—Municipal Land Use. Judith Nalin, 138 N.J.L.J. 76 (1994).

Case Notes

Wetlands regulation was invalid to extent that it conflicted with section of Freshwater Wetlands Protection Act. MCG Associates v. Department of Environmental Protection, 278 N.J.Super. 108, 650 A.2d 797 (A.D.1994).

Township planning board could require conditional use approval, rather than site plan approval only, of church's building despite church's First Amendment claim. Macedonian Orthodox Church v. Planning Bd. of Tp. of Randolph, 269 N.J.Super. 562, 636 A.2d 96 (A.D.1994).

Developer granted permit by Army Corps of Engineers was entitled to exemption from Fresh Water Wetlands Protection Act. A.R. Criscuolo and Associates, Inc. Defined Ben. Pension Plan and Trust v. New Jersey Dept. of Environmental Protection, 249 N.J.Super. 290, 592 A.2d 313 (A.D.1991).

Regulation exempting development activities authorized by Army Corps of Engineers was valid. A.R. Criscuolo and Associates, Inc. Defined Ben. Pension Plan and Trust v. New Jersey Dept. of Environmental Protection, 249 N.J.Super. 290, 592 A.2d 313 (A.D.1991).

For exemption of project from permit and transition area requirements based on a preliminary site plan submitted prior to 1987, application must have been under municipal land use law. In re Stemark Associates/Request to Vacate Exemption Letter Denial, 247 N.J.Super. 13, 588 A.2d 830 (A.D.1991).

Property was not entitled to exemption from permit and transition area requirements, despite evidence of subdivision prior to 1987. In re Stemark Associates/Request to Vacate Exemption Letter Denial, 247 N.J.Super. 13, 588 A.2d 830 (A.D.1991).

Regulation eliminating "transition areas" for projects that received preliminary approval prior to July 1, 1989 was not authorized. 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), 240 N.J.Super. 224, 573 A.2d 162 (A.D.1989) reversed 118 N.J. 552, 573 A.2d 143.

Regulation as adopted was not so substantially different from proposed version to require holding of new hearings. 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), 240 N.J.Super. 224, 573 A.2d 162 (A.D.1989) reversed 118 N.J. 552, 573 A.2d 143 (1990).

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).

Regulation limiting statutory exemption was not authorized. Matter of Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A-1.1 et seq., 238 N.J.Super. 516, 570 A.2d 435 (A.D.1989).

Placement of fill material on wetlands without freshwater permit and transition waiver warranted civil penalty when not part of farming activity. Department of Environmental Protection v. Rapisardi, 95 N.J.A.R.2d (EPE) 248.

Engaging in regulated activities in freshwater wetlands and transition area without permit warranted imposition of civil penalty. Department of Environmental Protection v. Ludlam, 95 N.J.A.R.2d (EPE) 233.

Clay mining with soil removal permit could not be expanded to outside wetlands area. Department of Environmental Protection v. Mt. Bethel Humus, 95 N.J.A.R.2d (EPE) 202.

Permit to construct driveway on priority wetlands part of surface water tributary system connected to inland river was not issued. Edwards v. Njdepe/LUR, 95 N.J.A.R.2d (EPE) 129.

Conversion of wetlands to a farm pond required permit when not in aid of silviculture use. Calella v. Department of Environmental Protection, 95 N.J.A.R.2d (EPE) 79.

Property owner seeking to build house on lots was not exempt under "grandfather" provisions. Brown v. Department of Environmental Protection, 93 N.J.A.R.2d (EPE) 195.

Applicant was not entitled to an exemption to the freshwater wetlands permit requirements; absence of preliminary site plan approval. N.J.S.A. 13:9B-4(d). Mt. Bethel Humus Co., Inc. v. New Jersey Dept. of Environmental Protection and Energy, Land Use Regulation Program, 93 N.A.J.R.2d (EPE) 136.

Developer was not entitled to exemption from Freshwater Wetlands Protection Act for tract of land partially situated in two municipalities. Masucci v. Land Use Regulation Program, 93 N.J.A.R.2d (EPE) 110.

The Freshwater Wetlands Protection Act did not provide exemption for projects on land subdivided prior to enactment of Municipal Land Use Law. Manroe Builders, Inc. v. New Jersey Department of Environmental Protection, 93 N.J.A.R.2d (EPE) 103.

Developer was not entitled to exemption from permitting requirements of Freshwater Wetlands Protection Act; local approval of subdivision plan. M. Alfieri Co., Inc. v. Department of Environmental Protection, 92 N.J.A.R.2d (EPE) 227.

Fill of wetlands authorized prior to effective date of Freshwater Wetlands Protection Act; permit modification granted. Lawrencewood II, Inc., v. Department of Environmental Protection, 92 N.J.A.R.2d (EPE) 36.

Projects exempt from Freshwater Wetlands Protection Act include those listed in the Act, those with prior applications filed under Municipal Land Use Law, those with Army Corps of Engineers permits, and those with nationwide permits. Atty.Gen.F.O.1990, No. 3.

7:7A-2.9 Geographic areas exempted from permit and/or waiver requirement

(a) Regulated activities in areas under the jurisdiction of the Hackensack Meadowlands Development Commission under N.J.S.A. 13:17-1 et seq. do not require a permit under this chapter, but may require other State and/or Federal wetlands approvals, such as a Federal 404 permit from the ACOE, and/or a Water Quality Certificate issued by the Department, and/or a Federal Consistency Determination issued under the Federal Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq.

(b) The discharge of dredged or fill material in a freshwater wetlands or State open water under the jurisdiction of the Pinelands Commission is subject to freshwater wetlands and open water fill permit requirements under this chapter. However, regulated activities in areas under the jurisdiction of the Pinelands Commission, other than the discharge of dredged or fill material, are not subject to this chapter. Transition areas are not regulated under this chapter in areas under the jurisdiction of the Pinelands Commission. However, the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetland areas within its jurisdiction, which include transition area regulations. For information on freshwater wetlands and transition areas in the Pinelands under this chapter and under the Pinelands Comprehensive Management Plan (CMP), contact the Pinelands Commission at (609) 894-7300 or through its website at www.state.nj.us/pinelands.

iii. The depth of fill permitted;

iv. The maximum extent to which an area may be modified; and

v. The size and type of structure that may be constructed; and

2. A precise description of the geographic area to which the general permit applies, including, when appropriate, limits on the type(s) of water(s) or wetlands where activities may be conducted.

(d) The Department may modify an adopted general permit as it applies to a particular project by adding special conditions which must be met in order to qualify for authorization under the general permit.

(e) The Department may repeal an adopted general permit and thereafter require individual permits for activities previously covered by the general permit, if it finds that the general permit no longer meets the standards of the Freshwater Wetlands Protection Act and this chapter.

(f) The Department shall review each general permit at least every five years. This review shall include public notice and opportunity for public hearing. Upon this review the Department shall modify, readopt or repeal each general permit.

(g) If a general permit is not modified or readopted in accordance with (f) above within five years of publication of its adoption in the New Jersey Register, it shall automatically expire.

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-4.2 Using a general permit to authorize specific activities

(a) To use a general permit to authorize regulated activities, an applicant shall submit an application for a general permit authorization, using the application procedures for all permits and waivers set forth at N.J.A.C. 7:7A-10, except in an area under the jurisdiction of the Pinelands Commission. In such an area, the application shall be submitted to the Pinelands Commission rather than to the Department, in accordance with the Pinelands Comprehensive Management Plan (CMP). For information on freshwater wetlands and transition areas in the Pinelands, contact the Pinelands Commission at (609) 894-7300 or through its website at www.state.nj.us/pinelands.

(b) Each general permit specifies whether it covers activities in freshwater wetlands, transition areas, State open waters, or a combination thereof. An authorization issued under a general permit that covers activities in freshwater wetlands satisfies the requirement for a freshwater wetlands permit. An authorization issued under a general permit that covers activities in State open waters satisfies the require-

ment for an open water fill permit. An authorization issued under a general permit that covers activities in a transition area satisfies the requirement for a transition area waiver.

(c) Each general permit authorization shall include a limited transition area waiver to allow access to the authorized activity, in accordance with N.J.A.C. 7:7A-6.1(a)6. No fee or application is required for this waiver and the disturbance authorized under this waiver is not counted in calculating the amount of disturbance under the general permit. An access transition area waiver allows regulated activities only:

1. In that portion of the transition area bordering on that portion of the freshwater wetland in which the activity authorized by the general permit will take place; and

2. For an activity that the Department determines is necessary to accomplish the activity authorized in the wetlands under the general permit. An activity not directly required in order to obtain access to the activity authorized in the wetlands under the general permit shall require a separate transition area waiver.

(d) Usually, a general permit is the only wetlands approval required for activities in freshwater wetlands in New Jersey. However, if an activity is located in non-delegable waters, as defined at N.J.A.C. 7:7A-1.4, both a general permit authorization from the Department and a Federal 404 program approval from the ACOE may be required. In addition, if an activity is located in wetlands or transition areas in an area under the jurisdiction of the Pinelands Commission, approval may be required from the Pinelands Commission, in accordance with the Pinelands Comprehensive Management Plan (CMP). For information on freshwater wetlands and transition areas in the Pinelands, contact the Pinelands Commission at (609) 894-7300 or through its website at www.state.nj.us/pinelands.

(e) The Department shall deny an application for a general permit authorization and require an application for an individual permit if the Department finds that:

1. Additional permit conditions added under N.J.A.C. 7:7A-4.1 and/or 13.2 would not be sufficient to ensure compliance with this chapter and other applicable laws; or

2. Special circumstances make an individual permit necessary to ensure compliance with the Freshwater Wetlands Protection Act, this chapter, any permit or order issued pursuant thereto, or the Federal Act.

(f) The limits on disturbance in each general permit apply to the entire site upon which activities authorized under the general permit occur. An applicant shall not segment a project or its impacts by applying for general permit authorization for one portion of the project and applying for an individual permit for another portion of the project. Similarly, an applicant shall not segment a project or its impacts by

separately applying for general permit authorizations for different portions of the same project.

(g) Unless otherwise specified, the limits on disturbance under a general permit apply to total disturbance, including both temporary and permanent disturbance.

(h) If a regulated activity is not covered by any general permit or combination of general permits, an individual freshwater wetlands or open water fill permit must be obtained under N.J.A.C. 7:7A-7 in order to authorize the activity under this chapter. If a regulated activity in a transition area is not covered by any general permit or combination of general permits, an individual transition area waiver must be obtained under N.J.A.C. 7:7A-6 in order to authorize the activity under this chapter.

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-4.3 Conditions that apply to all general permit authorizations

(a) A person acting under the authority of a general permit shall comply with:

1. The conditions listed under the general permit itself;
2. The standard conditions for all general permits set forth at (b) below;
3. The conditions for all permits at N.J.A.C. 7:7A-13;
4. The limits on the use of multiple general permits in N.J.A.C. 7:7A-4.4; and
5. If required under a particular general permit, mitigation pursuant to N.J.A.C. 7:7A-15.

(b) The following conditions apply to all activities conducted under the authority of a general permit:

1. Activities performed under a general permit shall be associated with a proposed project. The Department shall not authorize activities under a general permit for the purpose of eliminating a natural resource in order to avoid regulation. For the purposes of this subsection, project shall mean the use and configuration of all buildings, pavements, roadways, storage areas and structures, and all associated activities;
2. The regulated activity shall not occur in the proximity of a public water supply intake;
3. The activities shall not destroy, jeopardize, or adversely modify a present or documented habitat for threatened or endangered species; and shall not jeopardize the continued existence of any local population of a threatened or endangered species;

4. The activity will not occur in a component of either the Federal or State Wild and Scenic River System; nor in a river officially designated by Congress or the State Legislature as a "study river" for possible inclusion in either system while the river is in an official study status; except that the activity may occur in these waters if approved by the National Park Service in accordance with 40 CFR § 233;

5. The activity shall not adversely affect properties which are listed or are eligible for listing on the New Jersey or National Register of Historic Places unless the applicant demonstrates to the Department that the proposed activity avoids or minimizes impacts to the maximum extent practicable or the Department determines that any impact to the affected property would not impact the property's ability to continue to meet the criteria for listing at N.J.A.C. 7:4-2.3 or otherwise negatively impact the integrity of the property or the characteristics of the property that led to the determination of listing or eligibility. The Department shall not issue a conditional permit if it finds that the mitigation proposed is inadequate to compensate for the adverse affect. Any permit for an activity which may adversely affect a property listed or eligible for listing on the New Jersey or National Register of Historic Places shall contain conditions to ensure that any impact to the property is minimized to the maximum extent practicable and any unavoidable impact is mitigated. If the permittee, before or during the work authorized, encounters a probable historic property that may be eligible for listing in the New Jersey or National Register, the permittee shall immediately notify the Department and proceed as directed;

6. Any discharge of dredged or fill material shall consist of clean, suitable material free from toxic pollutants (see 40 CFR 401) in toxic amounts, and shall comply with all applicable Department rules regarding use of dredged or fill material;

7. Any structure or fill authorized shall be maintained as specified in the construction plans;

8. During construction activities, all excavation must be monitored for the presence of acid-producing deposits. If any such deposits are encountered, the permittee shall implement the mitigation and disposal standards in the Flood Hazard Area Control Act Rules at N.J.A.C. 7:13 and shall establish an annual post-planting monitoring program to ensure the reestablishment of vegetation in temporarily disturbed areas. The plantings shall have a minimum 85 percent plant survival and coverage rate after two complete growing seasons. If the plantings fail to achieve this survival rate, the Department will require the permittee to implement additional corrective measures;

9. The activity will not result in a violation of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 or implementing rules at N.J.A.C. 7:13;

10. If activities under the general permit meet the definition of "major development" at N.J.A.C. 7:8-1.2, the Stormwater Management Rules at N.J.A.C. 7:8 apply.

11. If activities under the general permit involve excavation or dredging, the applicant shall use an acceptable disposal site for the excavated or dredged material. No material shall be deposited or dewatered in freshwater wetlands, transition areas, State open waters or other environmentally sensitive areas. The Department may require testing of dredged material if there is reason to suspect that the material is contaminated. If any dredged material is contaminated with toxic substances, the dredged material shall be removed and disposed of in accordance with Department-approved procedures;

12. The amount of rip-rap or other energy dissipating material shall not exceed the minimum necessary to prevent erosion, as calculated under the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90;

13. Best management practices, as defined at N.J.A.C. 7:7A-1.4, shall be followed whenever applicable;

14. If the general permit activities are subject to the Department's Water Quality Management Planning rules at N.J.A.C. 7:15, the activities shall be consistent with those rules and with the applicable approved Water Quality Management Plan (208 Plan) adopted under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.;

15. The timing requirements at (c) below shall be met; and

16. Activities authorized under a general permit shall not take place in a vernal habitat, as defined at N.J.A.C. 7:7A-1.4, or in a transition area adjacent to a vernal habitat.

(c) In order to protect the fishery resources and/or the spawning of the fish population, any activity which may introduce sediment into a stream or cause a stream to become turbid shall not be performed during the time periods listed in Table A below:

Table A¹

RESTRICTED TIME PERIODS FOR WATERS WITH FISHERY RESOURCES

Water body or water body classification	Time period (inclusive) during which activities shall not be performed
Brook trout production waters; Brown trout production waters; and All other trout production waters except Rainbow trout production waters	September 15 through March 15
Rainbow trout production waters	February 1 through April 30
Trout-stocked waters; Trout maintenance waters; and An area within one mile upstream of a trout-stocked or a trout maintenance water	March 15 through June 15
All unimpeded tidal waters open to the ocean, including: Coastal bays; Delaware Bay and River up to any impassable barrier; and Water bodies identified as anadromous migratory pathways.	April 1 to June 30
Water bodies that support general game fish	May 1 to June 30
Water bodies that support pickerel	Ice out to April 30
Water bodies that support walleye	March 1 to May 30
Water bodies used by American Shad for migrations in the Delaware River:	
—Mouth of Delaware Bay to Delaware Memorial Bridge; and —Tidal Maurice River.	March 1 through June 30; and October 1 through November 30
—Delaware Memorial Bridge to Trenton; and —Tidal portions of Rancocas, Raccoon, and Crosswicks Creeks.	March 1 through June 30; and September 1 through November 30
—Delaware River from Trenton to New York State line.	April 1 through June 30; and September 1 through November 30

¹Note that the Delaware River Basin Commission (DRBC) imposes additional timing restrictions on certain activities in waters under DRBC jurisdiction. Contact the U.S. Fish and Wildlife Service's River Basin Coordinator through the DRBC at (609) 883-9500 for information on these additional timing restrictions.

(d) The Department may reduce, extend or otherwise modify the timing requirements listed at (c) above on a case-by-case basis provided:

1. The applicant demonstrates that the impact to the fishery resource shall be less if the regulated activities

occur during the timing restriction rather than during an unrestricted period;

2. The combined effects of the timing restrictions above would restrict activities to less than 183 calendar days per year. In such a case, the Department may allow regulated activities to occur for up to 183 calendar days if

the applicant demonstrates to the Department that proper steps will be taken that will minimize the impact to the fishery resources;

3. The Department determines that regulated activities must occur during periods when local schools are not in session in order to avoid increased risks or excessive delays to school buses or vans; or

4. The Department determines that, due to the nature of the project or an unusual circumstance on site, the timing restriction must be modified or extended in order to prevent a substantial adverse impact to the fishery resource, to the aquatic environment, or to a threatened or endangered species or its habitat.

(e) If an activity will take place in a non-delegable water, as defined at N.J.A.C. 7:7A-1.4, and the activity requires approval from the ACOE under the Federal 404 program, the activities authorized under the general permit shall not begin until the permittee obtains the required Federal 404 program approval.

(f) No activity is authorized under a general permit without a written approval from the Department, except for the following, which are subject to the notice and application requirements set forth in the applicable provisions cited below:

1. Maintenance of an off-stream stormwater management facility, as authorized under general permit 1 at N.J.A.C. 7:7A-5.1(d);
2. Repair of a malfunctioning septic system, as authorized under general permit 25 at N.J.A.C. 7:7A-5.25; and
3. Minor channel or stream cleaning activities, as authorized under general permit 26 at N.J.A.C. 7:7A-5.26.

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

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

Amended by R.2002 d.320, effective October 7, 2002.

See: 33 N.J.R. 2937(a), 33 N.J.R. 3631(a), 34 N.J.R. 3518(a).

In (b), added 16.

Amended by R.2003 d.409, effective October 20, 2003.

See: 34 N.J.R. 3420(a), 35 N.J.R. 4873(a).

Rewrote (b)5.

Amended by R.2004 d.48, effective February 2, 2004.

See: 35 N.J.R. 119(a), 35 N.J.R. 1328(a), 36 N.J.R. 670(a).

Rewrote (b)10.

7:7A-4.4 Use of multiple general permits

(a) The Department may authorize activities under one or more general permits on a single site, provided that:

1. The individual limits of each general permit are complied with. If activities under one general permit are conducted in more than one place on a site, the total disturbance caused by all activities at all locations onsite under that general permit shall be summed in order to determine if the limits in the general permit are met; and

2. The total combined area of wetlands, State open waters, and transition areas disturbed or modified on the site under general permits 2, 6, 7, 8, 10A, 10B, 11, 12, 13, 14, 17, 18, 19, 21, 22, 24, 25, and 26 does not exceed one acre with the exception of the following:

i. Disturbance of State open waters as part of a lake dredging project under general permit 13 at N.J.A.C. 7:7A-5.13. However, disturbance of wetlands or transition area in the lake or for access to the dredging project shall be counted toward the one acre limit in this subsection;

ii. Disturbance of State open waters as part of a channel or stream cleaning project under general permit 26 at N.J.A.C. 7:7A-5.26. However, disturbance of wetlands or transition area in the channel or stream or for access to the channel or stream cleaning project shall be counted toward the one acre limit in this subsection;

iii. Disturbance of a transition area solely for access to a general permit activity performed in a wetland in accordance with N.J.A.C. 7:7A-4.2(c); and

iv. Disturbance authorized under general permit 17 on a publicly owned site.

(b) The Department may authorize activities under a general permit more than once on the same site, and/or at different times on the same site. However, the total disturbance authorized on a site under general permits since July 1, 1988 shall meet the criteria for use of multiple general permits set forth at (a)1 and 2 above.

(c) If a general permit is not listed at (a)2 above, any acreage disturbed under that general permit is not counted towards the one acre limit in (a)2 above, regardless of whether the general permit is used singly or in combination with other general permits, and regardless of whether the general permit is used once or repeatedly.

(d) In addition to the limits above in this section, the Department shall not authorize activities under general permit numbers 13, 15, or 18 more often than once every five years on a single site.

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-4.5 Application for authorization to act under General Permits

(a) An applicant for authorization to act under a general permit shall follow all application procedures and information requirements at N.J.A.C. 7:7A-10, Application Contents and Procedures, unless the activity is one of the following, in which case the application requirements are found in the general permit itself:

1. Maintenance of an off-stream stormwater management facility under N.J.A.C. 7:7A-5.1(d);

2. Repair or modification of a malfunctioning individual subsurface sewage disposal system under N.J.A.C. 7:7A-5.25; or

3. Minor channel or stream cleaning under N.J.A.C. 7:7A-5.26.

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-4.6 Combined general permit authorization and flood hazard area permit

(a) An applicant may obtain a combined freshwater wetlands general permit authorization and flood hazard area

permit for an activity that is in a freshwater wetlands and also in an area regulated under the Department's Flood Hazard Area Control Act rules under the following provisions:

1. N.J.A.C. 7:7A-5.2A, authorizing an underground utility line;

2. N.J.A.C. 7:7A-5.10C, authorizing a minor road crossing;

3. N.J.A.C. 7:7A-5.11A, authorizing an intake or outfall structure;

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.

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

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

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

Rewrote (a).

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-5.2A Combined general permit 2 and flood hazard area permit

(a) If an activity authorized under general permit 2 also requires a flood hazard area permit under N.J.A.C. 7:13, the Department shall issue a combined flood hazard area permit and general permit 2 authorization for the activity if all of the following requirements are met:

1. The underground utility line meets the requirements for authorization under general permit 2 at N.J.A.C. 7:7A-5.2;
2. The underground utility line meets the applicable requirements of the Department's Flood Hazard Area Rules at N.J.A.C. 7:7A-13; and
3. Either of the following criteria is met:
 - i. The site is covered by a valid letter of interpretation showing the boundaries of any wetlands on the site, issued by the Department under N.J.A.C. 7:7A-3; or
 - ii. The activities will result in disturbance of State open waters only, and will not involve regulated activities in a freshwater wetland or transition area, as described at N.J.A.C. 7:7A-2.

(b) The combined permit provided for under this section shall be subject to the conditions for combined permits found at N.J.A.C. 7:7A-4.6. An application for the combined general permit 2 and flood hazard area permit shall meet the application requirements at N.J.A.C. 7:7A-10.7.

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-5.3 General permit 3—Discharge of return water

(a) General permit 3 authorizes the discharge of return water from an upland, contained, dredged material disposal area into State open waters, and placement of a pipe above ground for the discharge through freshwater wetlands and/or transition areas. The dredging itself may also require other State and Federal permits.

(b) Activities under general permit 3 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.

See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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.

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

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

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

Rewrote (a).

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-5.4 General permit 4—Hazardous site investigation and cleanup

(a) General permit 4 authorizes activities in freshwater wetlands, transition areas, and State open waters, which are undertaken by the Department or expressly approved in writing by the Department's Site Remediation Program, for the investigation, cleanup or removal of:

1. Hazardous substances as defined in the Department's rules governing hazardous substances at N.J.A.C. 7:1E, Appendix A; or
2. Pollutants, as defined in the New Jersey Water Pollution Control Act implementing rules at N.J.A.C. 7:14A.

(b) There is no acreage limit on activities under general permit 4. However, disturbance shall be the minimum that is necessary for compliance with the Department's technical requirements for site remediation, N.J.A.C. 7:26E, and mitigation shall be performed for all disturbances of freshwater wetlands or State open waters caused by a cleanup authorized under this general permit except that mitigation is not required to compensate for disturbance of wetlands or State open waters that have formed as a direct result of the remediation activities. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.

(c) The mitigation proposal required under (b) above may be incorporated into the document by which the Department approves the cleanup and/or it may be submitted as part of the General permit application. The Department shall not issue an authorization under general permit 4 until the mitigation proposal, or an equivalent document that ensures that the requirements of N.J.A.C. 7:7A-15 are met, is approved. Mitigation shall be performed prior to or concurrently with cleanup activities.

(d) Activities under general permit 4 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.

See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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.

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

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

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

Rewrote (a).

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-5.5 General permit 5—Landfill closures

(a) General permit 5 authorizes activities in freshwater wetlands, transition areas and/or State open waters that are undertaken by the Department's Division of Solid and Hazardous Waste, or authorized through a solid waste facility closure and post-closure plan or disruption approval issued by the Department under N.J.A.C. 7:26-2A.9.

(b) General permit 5 authorizes a disturbance authorized through a closure plan, post-closure plan, or disruption approval only if:

1. The activities that will cause the disturbance are necessary to properly close the solid waste facility and to properly maintain and monitor it after closure. For example, an access road necessary for landfill closure may be authorized under general permit 5, but an access road that is not necessary for landfill closure, but that will facilitate development of the site, is not authorized under general permit 5; and

2. The amount of disturbance is the minimum necessary in order to adequately close and/or maintain the landfill. For example, a disturbance for an access road through wetlands may be necessary to properly close the landfill in accordance with (b)2 above, but the road shall be the minimum size possible.

(c) There is no acreage limit on activities under general permit 5. However, mitigation shall be performed to compensate for disturbance of freshwater wetlands and/or State open waters authorized under general permit 5, except that mitigation is not required for disturbance of wetlands located on top of the landfill, or on the intermediate or permanent cover of the landfill. The mitigation shall meet the procedural and substantive requirements at N.J.A.C. 7:7A-15.

(d) The mitigation proposal required under (c) above may be incorporated into the closure and post-closure plan or disruption approval and/or it may be submitted as part of the general permit application.

(e) The Department shall not issue an authorization under general permit 5 until the mitigation proposal is approved. Activities under general permit 5 shall not begin until the Department has approved the mitigation proposal. Mitigation shall be performed prior to or concurrently with closure or disruption activities.

(f) Activities under general permit 5 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

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-5.6 General permit 6—Non-tributary wetlands

(a) General permit 6 authorizes regulated activities in freshwater wetlands, transition areas adjacent to those wetlands, and/or State open waters, if the freshwater wetlands and/or State open waters are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream.

(b) Activities under general permit 6 shall be limited as follows:

1. The activities shall disturb no more than one acre of a freshwater wetland and/or State open water, which is not a water of the United States, as defined at N.J.A.C. 7:7A-1.4;

2. The activities shall disturb no more than one acre of a transition area; and

3. The activities shall disturb no more than one-half acre of a freshwater wetland and/or State open water, which is a water of the United States, as defined at N.J.A.C. 7:7A-1.4.

(c) Activities under general permit 6 shall not take place in any of the following, nor in a transition area adjacent to the following:

1. An exceptional resource value wetland, as described at N.J.A.C. 7:7A-2.4;

2. A State open water that is a special aquatic site, as defined at N.J.A.C. 7:7A-1.4;

3. USEPA priority wetlands; or

4. A State open water that is larger than one acre.

(d) Activities under general permit 6 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.
Amended by R.1990 d.446, effective September 4, 1990.
See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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.

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

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

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

Rewrote (a).

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

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

Amended by R.2002 d.320, effective October 7, 2002.

See: 33 N.J.R. 2937(a), 33 N.J.R. 3631(a), 34 N.J.R. 3518(a).

Rewrote (b); in (c), deleted 5.

Case Notes

Denial of development permit was upheld where wetlands were determined to be part of surface water tributary system. *Jedan Associates v. New Jersey Department of Environmental Protection*, 96 N.J.A.R.2d (EPE) 298.

Developer was not entitled to Freshwater Wetlands General Permit Number 6 in order to construct parking deck; however, developer could be entitled to Statewide General Permit Number 7 to refill ditch. *Mall at IV Group v. Department of Environmental Protection*, 92 N.J.A.R.2d (EPE) 195.

7:7A-5.7 General permit 7—Human-made ditches or swales in headwaters

(a) General permit 7 authorizes activities in freshwater wetlands that are human-made ditches or in freshwater wetlands that are swales, provided the ditch or swale is located in a headwater. In accordance with the definition of a “swale” at N.J.A.C. 7:7A-1.4, a swale may be naturally occurring or of human construction.

(b) For the purpose of this section, “headwater” means a water or wetland that is upstream of the point on a non-tidal stream where the average annual flow is less than five cubic feet per second. The Department may estimate this point from available data by using area annual precipitation, area drainage basin maps, and the average annual runoff coefficient, or by similar means. For a stream that is dry for long periods of the year, the Department may establish the downstream boundary of the headwater as that point in the stream where water flow exceeds five cubic feet per second at least 50 percent of the time. In general, the Department considers a water body with a drainage area of less than 50 acres to be a headwater.

(c) Activities under general permit 7 shall not take place in the following:

1. A ditch or swale that is, or is located within, an exceptional resource value wetlands, as described at N.J.A.C. 7:7A-2.4; or

2. A ditch or swale that is, or is located within, a USEPA priority wetland, as defined at N.J.A.C. 7:7A-1.4.

(d) Activities under general permit 7 shall not result in either of the following:

1. The loss or substantial modification of more than one acre of freshwater wetlands; or
2. A disruption of a surface water connection, resulting in the isolation of wetlands or State open waters which were not isolated at the time of the general permit application.

(e) Activities under general permit 7 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.

See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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.

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

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

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

Rewrote (a).

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

Headwater wetlands not “swale”; no permit could be issued for filling wetlands. *Dykeman v. New Jersey Department of Environmental Protection*, 92 N.J.A.R.2d (EPE) 217.

Developer was not entitled to Freshwater Wetlands General Permit Number 6 in order to construct parking deck; however, developer could be entitled to Statewide General Permit Number 7 to refill ditch. *Mall at IV Group v. Department of Environmental Protection*, 92 N.J.A.R.2d (EPE) 195.

7:7A-5.8 General permit 8—House additions

(a) General permit 8 authorizes activities in freshwater wetlands and/or transition areas, necessary for the construction of additions or appurtenant improvements to residential dwellings lawfully existing prior to July 1, 1988, provided that the improvements or additions require less than a cumulative surface area of 750 square feet of fill and/or disturbance and will not result in new alterations to a freshwater wetlands outside of the 750 square foot area. General permit 8 does not authorize activities in State open waters.

(b) To be authorized under general permit 8, an addition or improvement shall be located within 100 feet of the residential dwelling.

(c) Activities under general permit 8 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.

See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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.

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

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

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

Rewrote (a).

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-5.9 General permit 9—Airport sight line clearing

(a) General permit 9 authorizes the selective cutting of certain vegetation in freshwater wetlands and transition areas, at a public use aeronautical facility, as defined in the New Jersey Department of Transportation (NJDOT) rules at N.J.A.C. 16:54-1.3.

(b) General permit 9 authorizes the cutting of vegetation only as necessary to comply with the protected air space provisions for a public use aeronautical facility, mandated by the Federal Aviation Administration (FAA) and set forth in the New Jersey Department of Transportation rules at N.J.A.C. 16:54-4.2(a)1iii and 2ii.

(c) General permit 9 covers only activities necessary to enable an aeronautical facility to comply with New Jersey Department of Transportation rules. The cutting of vegetation in wetlands and/or transition areas as part of a project that increases the area of pavement or buildings at an airport is not authorized under general permit 9, and would require an individual permit under this chapter.

(d) In addition to meeting all applicable application requirements at N.J.A.C. 7:7A-10, an applicant for authorization under general permit 9 shall provide a certification from the Director of the Division of Aeronautics in the New Jersey Department of Transportation, containing:

1. A copy of the current license for the public use aeronautical facility;

2. A description of the area that must be cleared to ensure compliance with New Jersey Department of Transportation rules, including descriptions and drawings of the required approach slopes, the airport layout, and/or other aspects of the facility, as applicable; and

3. A statement citing the applicable regulation, and an explanation of why the proposed cutting of vegetation is necessary to bring existing operations into compliance with New Jersey Department of Transportation and FAA rules, or to maintain the compliance of existing operations with those rules.

(e) The permittee shall minimize adverse environmental impacts as follows:

1. Activities shall be timed to minimize disturbance of threatened and endangered species. The Department will specify the required timing in the general permit authorization when issued;

2. The permittee shall leave all tree stumps, brush stumps, and root systems in place;

3. The permittee shall minimize disturbance of freshwater wetlands and transition areas through use of matting, equipment running on oversized tires, or other similar practices; and

4. Cut vegetation shall be disposed of in a manner that will minimize adverse environmental impacts on wetlands and transition areas, taking into consideration State Forest Fire Service requirements at N.J.S.A. 13:9-23 and/or other applicable laws.

(f) Activities under general permit 9 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

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-5.10A General permit 10A—Very minor road crossings

(a) General permit 10A authorizes the following activities in freshwater wetlands, transition areas, and/or State open waters:

1. Construction of one or more new road crossings, including attendant features such as shoulders, sidewalks and embankments;

2. Expansion, widening, or upgrading of one or more existing paved or unpaved roads or drives; and

3. Activities necessary to reduce horizontal curves in an existing paved road to comply with New Jersey Department of Transportation safety regulations.

(b) The Department shall issue a general permit 10A authorization only if the activities comply with the limits in one of the following scenarios:

1. Short crossing scenario:

i. The disturbance of freshwater wetlands and/or State open waters is no longer than 100 feet for each crossing, as calculated under (e) below; and

ii. The total cumulative disturbance of freshwater wetlands, transition area, and State open waters onsite under general permit 10A is one quarter acre or less; or

2. Long crossing scenario: The total cumulative disturbance of freshwater wetlands, transition area, and State open waters onsite under general permit 10A is one-eighth acre or less. Under the long crossing scenario, the length of the crossing is not limited.

(c) If a proposed road crossing skirts along the edge of a wetland or transition area or touches the wetland or transition area, without actually crossing through the wetland or transition area, the applicant shall, in addition to meeting the requirements at (b) above, demonstrate in accordance with N.J.A.C. 7:7A-5.10B(d) that there is no alternative onsite location and/or configuration for the road crossing that would provide access to the developable upland with less adverse environmental impact.

(d) Activities under general permit 10A shall minimize environmental impact as follows:

1. The applicant shall design the crossing to ensure that fish passage is unimpeded during times when the water level is at its lowest, unless the applicant demonstrates that the water body is unsuitable for habitation by fish and will remain so for the foreseeable future. The applicant shall ensure fish passage by maintaining the existing gradient and bottom contours of the water body to the extent possible, and by using arches, culverts, or other structures that will ensure fish passage;

2. The applicant shall install cross drains or other devices to ensure that the crossing does not alter the

hydrology of the freshwater wetlands and/or State open waters on either side of the crossing; and

3. The amount of rip-rap or other energy dissipating material used shall be the minimum necessary to prevent erosion, and shall not exceed 200 cubic yards of fill below the top of bank or high water mark, unless a larger amount is required in order to comply with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90.

(e) The length limit at (b)1 above applies to each separate road crossing on the site. The following apply to the calculation of the length of disturbance caused by a road crossing:

1. The length of the disturbance resulting from a crossing is measured along its longest dimension;

2. A crossing that connects more than two upland areas that are separated by the same wetland or State open water is considered one crossing. That is, a road that repeatedly traverses the same wetland or State open water is considered one crossing. Thus, the total length of disturbance is the sum of all the lengths of crossing that traverse that particular wetland or water. For example, if a road crosses three arms of an irregularly shaped wetland, the total length of disturbance would be the sum of the lengths of all three crossings. See Figures 2 and 3 below for an illustration of this; and

3. If the road crosses State open waters with adjacent wetlands, the total length of disturbance is the sum of the disturbances in both the State open waters and the adjacent wetlands.

(f) Activities under general permit 10A shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

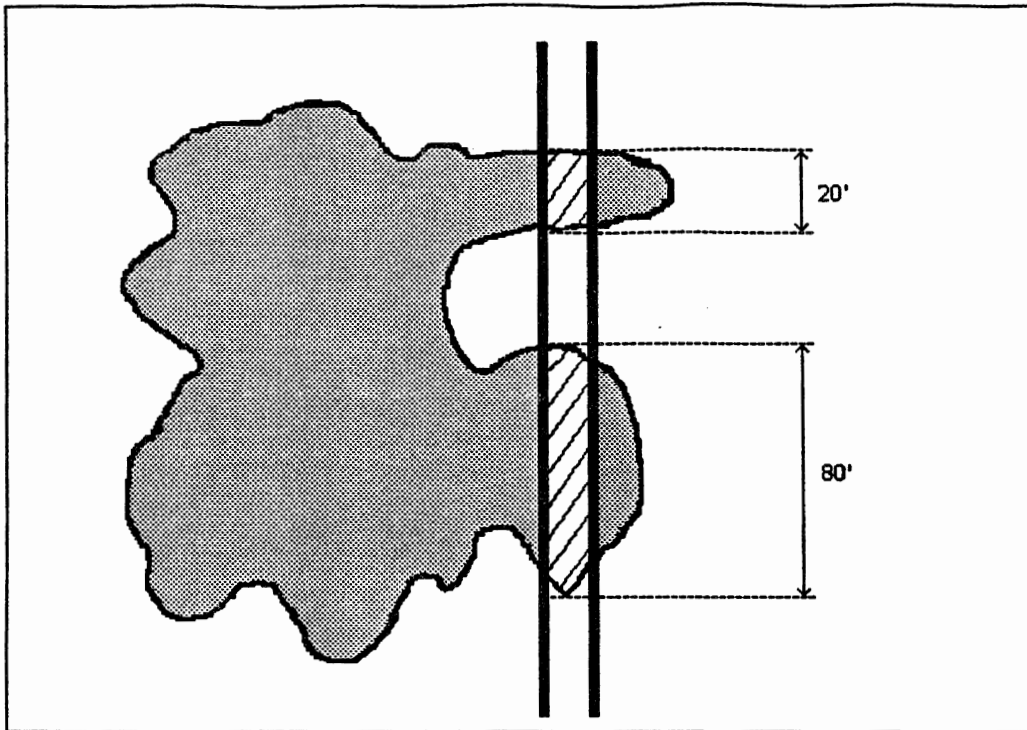


Figure 2
One Road Crossing That Crosses Two Fingers Of One Freshwater Wetland