

(h) The ultimate decision on the requirement for a cultural resource survey will be made by the Department's Land Use Regulation Program, based on information received in response to public comments or information provided by the New Jersey Historic Preservation Office regarding the presence of known historic and prehistoric resources or the potential for their presence.

(i) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

(b) deleted; (f) added; rest of section recodified to reflect changes.
Amended by R.1990 d.413, effective August 20, 1990.
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on endangered or threatened wildlife or vegetation species habitats recodified to 3.38; text on historic and archaeological resources recodified from 3.34, with survey requirements added at (d).
Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).
Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (f), rewrote the introductory paragraph.

7:7E-3.37 Specimen trees

(a) Specimen trees are the largest known individual trees of each species in New Jersey. The Department's Division of Parks and Forestry maintains a list of these trees (see "New Jersey's Biggest Trees," published by the Department's Division of Parks and Forestry, Summer 1991 for a listing of specimen trees). In addition, large trees approaching the diameter of the known largest tree shall be considered specimen trees. Individual trees with a circumference equal to or greater than 85 percent of the circumference of the record tree, as measured 4.5 feet above the ground surface, for a particular species shall be considered a specimen tree.

(b) Development is prohibited that would significantly reduce the amount of light reaching the crown, alter drainage patterns within the site, adversely affect the quality of water reaching the site, cause erosion or deposition of material in or directly adjacent to the site, or otherwise injure the tree. The site of the tree extends to the outer limit of the buffer area necessary to avoid adverse impacts, or 50 feet from the tree, whichever is greater.

(c) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Changed dates from March-April 1981 to September-October 1984.
Amended by R.1990 d.413, effective August 20, 1990.
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on critical wildlife habitats recodified to 3.39; text on specimen trees recodified from 3.35.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

In (a), substituted "Division" for "Bureau" and "the Department's" for "DEP".

7:7E-3.38 Endangered or threatened wildlife or plant species habitats

(a) Endangered or threatened wildlife or plant species habitats are areas known to be inhabited on a seasonal or permanent basis by or to be critical at any stage in the life cycle of any wildlife or plant identified as "endangered" or "threatened" species on official Federal or State lists of endangered or threatened species, or under active consideration for State or Federal listing. The definition of endangered or threatened wildlife or plant species habitats includes a sufficient buffer area to ensure continued survival of the population of the species. Absence of such a buffer area does not preclude an area from being endangered or threatened wildlife or plant species habitat.

1. Areas mapped as endangered or threatened wildlife species habitat on the Department's Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife (known hereafter as Landscape Maps) are subject to the requirements of this section unless excluded in accordance with (c)2 below. Buffer areas, which are part of the endangered or threatened wildlife species habitat, may extend beyond the mapped areas. The Department's Landscape Maps, with a listing of the endangered and threatened species within a specific area, are available from the Department's Division of Fish and Wildlife, Endangered and Nongame Species Program at the Division's web address, www.state.nj.us/dep/fgw/ensphome.

2. Information on the areas mapped as endangered or threatened plant species habitat on the Department's Landscape Maps and the occurrence of endangered or threatened plant species habitat is available from the Department's Office of Natural Lands Management, Natural Heritage Database at PO Box 404, Trenton, New Jersey 08625-0404.

3. The required endangered or threatened wildlife or plant species habitat buffer area shall be based upon the home range and habitat requirements of the species and the development's anticipated impacts on the species habitat.

(b) Development of endangered or threatened wildlife or plant species habitat is prohibited unless it can be demonstrated, through an Endangered or Threatened Wildlife or Plant Species Impact Assessment as described at N.J.A.C. 7:7E-3C.2, that endangered or threatened wildlife or plant species habitat would not directly or through secondary impacts on the relevant site or in the surrounding area be adversely affected.

(c) Applicants for development of sites that contain or abut areas mapped as endangered or threatened wildlife species habitat on the Landscape Maps shall either:

1. Demonstrate compliance with this rule by conducting an Endangered or Threatened Wildlife Species Impact Assessment in accordance with N.J.A.C. 7:7E-3C.2; or

2. Demonstrate that the proposed site is not endangered or threatened wildlife species habitat and this rule does not apply by conducting an Endangered or Threatened Wildlife Species Habitat Evaluation in accordance with N.J.A.C. 7:7E-3C.3.

(d) If the Department becomes aware of an occurrence of an endangered or threatened wildlife species on a site that is not mapped as endangered or threatened wildlife species habitat on the Department's Landscape Maps, and the Department determines that the habitat may be suitable for that species, the Department shall notify the applicant and the applicant shall demonstrate compliance with or inapplicability of this rule in accordance with (c) above.

(e) If the Department becomes aware of an occurrence of an endangered or threatened plant species on a site that is not in the Natural Heritage Database, the Department will notify the applicant and the applicant shall demonstrate compliance with this rule in accordance with (b) above.

(f) The Department is responsible for the promulgation of the official Endangered and Threatened Wildlife lists pursuant to the Endangered and Non Game Species Conservation Act, N.J.S.A. 23:2A et seq. These lists include wildlife species that are endangered and threatened in New Jersey as well as wildlife species officially listed as endangered or threatened pursuant to the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq. Because the lists are periodically revised by the Department in accordance with N.J.S.A. 23:2A-1 et seq., the lists are not published as part of this rule. The lists are found at N.J.A.C. 7:25-4.13 and 7:25-4.17, the rules adopted pursuant to the Endangered and Non Game Species Conservation Act. To obtain a copy of the most current Endangered and Threatened Wildlife lists, please contact the Department, Division of Fish and Wildlife, Endangered and Nongame Species Program at the Division's web address, www.state.nj.us/dep/fgw/ensphome, or by writing to the Division at PO Box 400, Trenton, New Jersey 08625-0400.

(g) The Department is responsible for promulgation of the official Endangered Plant Species List pursuant to N.J.S.A. 13:1B15. The Endangered Plant Species List, N.J.A.C. 7:5C-5.1, includes plant species determined by the Department to be endangered in the State as well as plant species officially listed as endangered or threatened or under active consideration for Federal listing as Endangered or Threatened. Because the Endangered Plant Species List is periodically revised based on new information documented by the Department, it is not published as part of this rule. To obtain the most current Endangered Plant Species List, please contact the Department, Division of Parks and Forestry, Office of Natural Land Management, PO Box 404, Trenton, NJ 08625-0404.

(h) For sites located within the Pinelands National Reserve and the Pinelands Protection Area, the plant species listed in the Pinelands Comprehensive Management Plan (N.J.A.C. 7:50-6.24) are also considered endangered or threatened plant species.

(i) Rationale: See the OAL Note at the beginning of this subchapter.

Amended by R.1985 d.715, effective February 3, 1986.
See: 17 N.J.R. 1466(a), 17 N.J.R. 1797(b), 17 N.J.R. 1797(c), 18 N.J.R. 314(a).

Section substantially amended.
Amended by R.1990 d.413, effective August 20, 1990.
See: 22 N.J.R. 1188(a), 22 N.J.R. 2542(b).

Text on public open space recodified to 3.40; text on endangered or threatened wildlife or vegetation species habitats recodified from 3.36, with loggerhead shrike added at (c) and American bittern, northern goshawk, black rail and barred owl added at (d); reference to endangered plant species list added at (e); (f) added.

Amended by R.1994 d.380, effective July 18, 1994 (operative July 19, 1994).

See: 26 N.J.R. 943(a), 26 N.J.R. 1561(a), 26 N.J.R. 2990(a).

Amended by R.2003 d.60, effective February 3, 2003.

See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

Rewrote the section.

7:7E-3.39 Critical wildlife habitats

(a) Critical wildlife habitats are specific areas known to serve an essential role in maintaining wildlife, particularly in wintering, breeding, and migrating.

1. Rookeries for colonial nesting birds, such as herons, egrets, ibis, terns, gulls, and skimmers; stopovers for migratory birds, such as the Cape May Point region; and natural corridors for wildlife movement merit a special management approach through designation as a Special Area.

2. Ecotones, or edges between two types of habitats, are a particularly valuable critical wildlife habitat. Many critical wildlife habitats, such as salt marsh water fowl wintering areas, and muskrat habitats, are singled out as water or water's edge areas.

3. Definitions and maps of critical wildlife habitats are currently available only for colonial waterbird habitat in the 1979 Aerial Colony Nesting Waterbird Survey for New Jersey (NJDEP, Division of Fish and Wildlife). Until additional maps are available, sites will be considered on a case-by-case basis by the Division of Fish and Wildlife.

(b) Development that would directly or through secondary impacts on the relevant site or in the surrounding region adversely affect critical wildlife habitats is discouraged, unless:

1. Minimal feasible interference with the habitat can be demonstrated;

2. There is no prudent or feasible alternative location for the development; and

3. The proposal includes appropriate mitigation measures.

iii. Based on the approved water budget prepared in accordance with N.J.A.C. 7:7E-3B.2(a)7, documentation demonstrating the mitigation site is a wetland;

iv. Documentation demonstrating that the percent coverage of the planted vegetation or targeted hydrophytes as detailed in the approved mitigation plan has been achieved.

2. For the second post-construction monitoring season to be considered successful, the post-construction monitoring report described at (d) below shall provide documentation demonstrating that the standards listed at (b)2i and ii below are satisfied. If the standards at (b)2i and ii listed below are not satisfied, then a remedial action as described at (b) above will be required, and this full growing post-construction monitoring season shall be repeated.

i. Based on the approved water budget prepared in accordance with N.J.A.C. 7:7E-3B.2(a)7, documentation demonstrating that the mitigation site continues to be a wetland;

ii. Documentation demonstrating that the percent coverage of the planted vegetation or targeted hydrophytes as detailed in the approved mitigation plan has been achieved.

3. For the final post-construction monitoring season to be considered successful, the post-construction monitoring report described at (d) below shall provide documentation demonstrating that the standards listed at (b)3i through iv below are satisfied. If one or more of the standards listed below are not satisfied, then a remedial action as described at (b) above will be required, and this full growing post-construction monitoring season shall be repeated.

i. Documentation demonstrating that the approved goals of the wetland mitigation project (including the required buffer area) prepared pursuant to N.J.A.C. 7:7E-3B.2(a) and the permit are satisfied. This documentation shall include information concerning invasive/noxious plant species and the percent coverage of these species on the site;

ii. Based on the approved water budget prepared in accordance with N.J.A.C. 7:7E-3B.2(a)7, documentation demonstrating that the mitigation site is a wetland. The documentation shall include, when appropriate, monitoring well data, stream gauge data, photographs and field observation notes collected throughout the monitoring period;

iii. Documentation demonstrating that the percent coverage of the planted vegetation or targeted hydrophytes as detailed in the approved mitigation plan has been achieved;

iv. A field delineation of the wetlands at the wetlands mitigation project site, based on techniques specified in the Federal Manual for Identifying and Delin-

ing Jurisdictional Wetlands (1989) here incorporated by reference. This manual is available from the Department's Office of Maps and Publications at (609) 777-1038 for a fee; and

v. A plan showing the flagged wetland delineation required at (b)3iv above. The wetland line shall include global positioning system data points.

(c) For intertidal and subtidal shallows mitigation projects, the post-construction monitoring required at (a)2 above shall comply with (c)1 and 2 below. If one or more of the standards listed below are not satisfied, then the post-construction monitoring shall be repeated the following lunar month(s) until all of the standards listed below are satisfied. Failure to meet the standards for a given post-construction monitoring season described at (c)1 or 2 below shall result in a remedial action. The Department, after consultation with the mitigator, shall determine the remedial actions necessary to correct the unsatisfactory condition. Remediation may include, but not be limited to, regrading of the mitigation site. The mitigator shall submit:

1. As-built plans with soundings demonstrating that the site was graded according to the approved mitigation plans; and

2. Documentation demonstrating that the mitigation site meets the definition of an intertidal subtidal shallow, that is it is permanently or twice daily submerged from the spring high tide to a depth of four feet below mean low water.

(d) The post-construction monitoring reports required at (b) and (c) above shall be submitted to the Department by November 15 of each year and shall include five copies of the following:

1. A USGS quad map showing the location of the mitigation site; a county road map showing the location (including the lot and block) of the mitigation site, of the mitigation site; and a copy of an aerial photograph of the mitigation site. The point(s) of access to the mitigation site must be clearly indicated on all maps;

2. A copy of the permit that required the mitigation;

3. A brief description of the mitigation project;

4. Photographs of the mitigation site with a location map indicating the location and direction of each photograph;

5. For mitigation projects requiring the establishment of a vegetative community, an assessment of the planted vegetation and the species that are naturally colonizing the site. This assessment shall include data sheets from the sampling points which describe the vegetation present, the percent coverage of the vegetation, the results of the analysis of the soil borings and the location of the water table;

6. Based on the approved water budget prepared in accordance with N.J.A.C. 7:7E-3B.2(a)7, documentation demonstrating that the mitigation site is a wetland or intertidal or subtidal shallows. The documentation shall include, as appropriate, monitoring well data, stream gauge data, photographs and/or field observation notes collected throughout the post-construction monitoring period;

7. Documentation, based on field data, that the approved goals of the mitigation project (including the buffer area, for wetland creation, restoration or enhancement only) prepared pursuant to N.J.A.C. 7:7E-3B.2(a), are satisfied;

8. A narrative evaluating the success/failure of the project in accordance with (b) and/or (c) above; and

9. In the event the mitigation monitoring period is a failure in accordance with (b) and/or (c) above, a narrative description of proposed actions that will permanently rectify the problems.

New Rule, R.2003 d.60, effective February 3, 2003.
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).

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**SUBCHAPTER 3C. STANDARDS FOR
CONDUCTING AND REPORTING THE
RESULTS OF AN ENDANGERED OR
THREATENED WILDLIFE OR PLANT
SPECIES HABITAT IMPACT ASSESSMENT
AND/OR ENDANGERED OR THREATENED
WILDLIFE SPECIES HABITAT
EVALUATION**

7:7E-3C.1 Purpose and scope

(a) This subchapter sets forth the standards for conducting an Endangered or Threatened Wildlife or Plant Species Habitat Impact Assessment and for conducting an Endangered or Threatened Wildlife Species Habitat Evaluation. One or both must be employed by an applicant seeking to demonstrate compliance with or inapplicability of N.J.A.C. 7:7E-3.38 when the site contains or abuts areas mapped as endangered or threatened wildlife species habitat on the Landscape Maps. This subchapter also sets forth the standards for reporting the results of an Endangered or Threatened Wildlife or Plant Species Habitat Impact Assessment and an Endangered or Threatened Wildlife Species Habitat Evaluation.

(b) An Endangered or Threatened Wildlife or Plant Species Habitat Impact Assessment is required to demonstrate that endangered or threatened wildlife or plant species habitat as defined at N.J.A.C. 7:7E-3.38(a) would not, directly or through secondary impacts on the relevant site or in the surrounding area, be adversely affected by the proposed development. The standards for conducting an impact assessment pursuant to N.J.A.C. 7:7E-3.38(b), (d) and (e) are found at N.J.A.C. 7:7E-3C.2.

(c) An Endangered or Threatened Wildlife Species Habitat Evaluation is required to demonstrate that a site does not contain suitable habitat, as defined at N.J.A.C. 7:7E-3.38(a), pursuant to N.J.A.C. 7:7E-3.38(c). The standards for conducting an evaluation are found at N.J.A.C. 7:7E-3C.3.

(d) The reporting requirements for habitat evaluations and impact assessments are found at N.J.A.C. 7:7E-3C.4.

Repeal and New Rule, R.2003 d.60, effective February 3, 2003.
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).
Section was "Performance standards".

7:7E-3C.2 Standards for conducting Endangered or Threatened Wildlife or Plant Species Habitat Impact Assessments

(a) These standards shall be used by applicants who choose not to dispute the Department designation of the site as endangered or threatened wildlife species habitat. Applicants shall demonstrate compliance with N.J.A.C. 7:7E-3.38(b) by providing information required at this section and N.J.A.C. 7:7E-3C.4. The required information shall demonstrate that the proposed development will not negatively affect the population(s) or habitat of endangered or threatened wildlife species that resulted in identification of the site, or an area abutting the site, as endangered or threatened wildlife species habitat in accordance with N.J.A.C. 7:7E-3.38(a) and/or (d).

(b) These standards shall be used by applicants if an endangered or threatened plant species has been documented to be on the site or a portion of the site or an area abutting the site. Applicants shall demonstrate compliance with N.J.A.C. 7:7E-3.38(b) by providing information required at this section and N.J.A.C. 7:7E-3C.4. The required information shall demonstrate that the proposed development will not negatively affect the population(s) or habitat of endangered or threatened plant species documented to be on the site or a portion of the site or on an area abutting the site.

(c) Impact assessments shall be conducted for each endangered or threatened wildlife or plant species described in (a) and/or (b) above. The impact assessment shall consider the likely affects of the proposed development on the local populations of the particular species on or abutting the site. The impacts shall be assessed using accepted ecological principles and scientific literature on each species and both direct and indirect impacts of the proposed development shall be considered. This assessment shall be based on habitat requirements and life history of each species, and the manner in which the proposed development may alter habitat, including, but not limited to, vegetation, soils, hydrology, human disturbance, and effects on competitor, parasite, or predator species.

Repeal and New Rule, R.2003 d.60, effective February 3, 2003.
See: 34 N.J.R. 74(a), 35 N.J.R. 632(a).
Section was "Reporting standards".