

CHAPTER 7A

FRESHWATER WETLANDS PROTECTION
ACT RULES

Authority

N.J.S.A. 13:1B-3, 58:10A-1 et seq., specifically 58:10A-4, 58:10A-6 and 13:9B-1 et seq., (P.L. 1987 c.156), specifically 13:9B-25 (section 25 of P.L. 1987 c.156).

Source and Effective Date

R.1988 d.267, effective June 6, 1988 (operative July 1, 1988).
See: 19 N.J.R. 2330(a), 20 N.J.R. 1235(a).

Executive Order No. 66(1978) Expiration Date

Chapter 7A, Freshwater Wetlands Protection Act Rules, expires on March 16, 1997.

Chapter Historical Note

Formerly, this chapter contained rules on Wetlands Management, which were adopted pursuant to N.J.S.A. 13:9A-1 et seq. and were filed and became effective on April 3, 1972 as R.1972 d.68. See: 255(a).

On May 7, 1984, Chapter 7A was repealed by R.1984 d.164. Rules concerning wetlands management are now part of the consolidated Coastal Permit Program Rules at N.J.A.C. 7:7 The wetlands maps previously listed at N.J.A.C. 7:7A-1.13 are currently codified under N.J.A.C. 7:7-2.2 See: 15 N.J.R. 2090(a), 16 N.J.R. 1073(a).

1988 Revisions: Chapter 7A, Freshwater Wetlands Protection Act Rules, became effective July 1, 1988 (operative July 1, 1988) as R.1988 d.267. See: 19 N.J.R. 2330(a), 20 N.J.R. 1235(a). Subchapters 16 and 17 became effective July 5, 1988 as R.1988 d.312. See: 20 N.J.R. 576(a), 20 N.J.R. 1553(a).

Petition for Rulemaking: Amend 7:7A-2 concerning freshwater wetlands permit exemptions.

See: 21 N.J.R. 2675(b).

Notice of Amendment: Clarifying language added to Water Quality Management Plans regarding the implementation of unavoidable determinations.

See: 22 N.J.R. 253(a).

Notice of Action on Petition.

See: 22 N.J.R. 1388(a).

The Executive Order No. 66(1978) expiration date for Chapter 7A was extended by gubernatorial waiver from June 6, 1993 to March 16, 1997.

See: 24 N.J.R. 912(a).

Law Review and Journal Commentaries

Freshwater Wetlands Protection: An Update. Lewis Goldshore, Marsha Wolf, 133 N.J.L.J. No. 14, S6 (1993).

CHAPTER TABLE OF CONTENTS

SUBCHAPTER 1. GENERAL INFORMATION

- 7:7A-1.1 Scope and authority
- 7:7A-1.2 Construction
- 7:7A-1.3 Forms and information
- 7:7A-1.4 Definitions
- 7:7A-1.5 Severability

- 7:7A-1.6 Other statutes and regulations
- 7:7A-1.7 Effective and operative dates

SUBCHAPTER 2. APPLICABILITY

- 7:7A-2.1 Jurisdiction
- 7:7A-2.2 Subchapters which apply to freshwater wetlands permits or open water fill permits
- 7:7A-2.3 Regulated activities
- 7:7A-2.4 Designation of freshwater wetlands
- 7:7A-2.5 Classification of freshwater wetlands by resource value
- 7:7A-2.6 Designation of State open waters
- 7:7A-2.7 Activities exempted from permit requirement
- 7:7A-2.8 Geographic areas exempted from freshwater wetlands permit requirement
- 7:7A-2.9 Exemption letters
- 7:7A-2.10 Hearings and appeals

SUBCHAPTER 3. GENERAL STANDARDS FOR GRANTING INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

- 7:7A-3.1 Requirements for granting individual freshwater wetland and open water fill permits
- 7:7A-3.2 Requirements for water-dependent activities
- 7:7A-3.3 Requirements for non-water dependent activities
- 7:7A-3.4 Non-water dependent activities in freshwater wetlands of exceptional resource value or in trout production waters
- 7:7A-3.5 Standard requirements for all regulated activities in freshwater wetlands and State open waters

SUBCHAPTER 4. (RESERVED)

SUBCHAPTER 5. EMERGENCY PERMITS

- 7:7A-5.1 Emergency permits
- 7:7A-5.2 Obtaining an emergency permit

SUBCHAPTER 6. TRANSITION AREAS

- 7:7A-6.1 General provisions
- 7:7A-6.2 Prohibited activities in transition areas
- 7:7A-6.3 Determination of transition areas due to the presence of freshwater wetlands on adjacent property

APPENDIX A—EXAMPLE OF TRANSITION AREA ADJACENT TO FRESHWATER WETLAND

APPENDIX B (RESERVED)

SUBCHAPTER 7. TRANSITION AREA WAIVERS

- 7:7A-7.1 General provisions
- 7:7A-7.2 Exceptional resource value freshwater wetlands: standards for transition area width reduction
- 7:7A-7.3 Intermediate resource value freshwater wetlands: standards for transition area width reduction
- 7:7A-7.4 Special activities: standards for granting transition area waivers
- 7:7A-7.5 Transition area waivers, averaging plans: Standards for modifying the shape of a transition area
- 7:7A-7.6 Application contents for transition area waivers
- 7:7A-7.7 Procedure for review of transition area waiver applications
- 7:7A-7.8 Hearings and appeal
- 7:7A-7.9 Duration, effect, modification and transfer of transition area waivers
- 7:7A-7.10 Cancellation, withdrawal, resubmission and amendment of applications

APPENDIX A EXAMPLE OF A TRANSITION AREA AVERAGING PLAN

SUBCHAPTER 8. LETTERS OF INTERPRETATION

- 7:7A-8.1 Purpose

- 7:7A-8.2 Types of letters of interpretation
- 7:7A-8.3 Application for letters of interpretation
- 7:7A-8.4 Onsite inspections
- 7:7A-8.5 Local review
- 7:7A-8.6 Effect of a letter of interpretation
- 7:7A-8.7 Reissuance of a letter of interpretation
- 7:7A-8.8 Effect of non-issuance of a letter of interpretation within time allotted
- 7:7A-8.9 Cancellation and resubmission of applications
- 7:7A-8.10 Hearings and appeal

SUBCHAPTER 9. GENERAL PERMITS

- 7:7A-9.1 General standards for issuing Statewide general permits
- 7:7A-9.2 Statewide General Permit Authorization
- 7:7A-9.3 Standards and conditions for all Statewide General Permit Authorization
- 7:7A-9.4 Use of multiple Statewide General Permits
- 7:7A-9.5 Application for activities under Statewide General Permits
- 7:7A-9.6 Hearings and appeal
- 7:7A-9.7 Duration of permit authorizations
- 7:7A-9.8 Cancellation, withdrawal, resubmission and amendment of applications

SUBCHAPTER 10. PRE-APPLICATION CONFERENCES

- 7:7A-10.1 Purpose
- 7:7A-10.2 Request for a pre-application conference
- 7:7A-10.3 Discussion of information requirements
- 7:7A-10.4 Memorandum of record

SUBCHAPTER 11. APPLICATION PROCEDURE

- 7:7A-11.1 Application contents for Individual Freshwater Wetlands and Open Water Fill Permits
- 7:7A-11.2 Recordkeeping
- 7:7A-11.3 Signatories to permit applications and reports
- 7:7A-11.4 Confidentiality

SUBCHAPTER 12. REVIEW OF APPLICATIONS

- 7:7A-12.1 Initial Department action for Individual Freshwater Wetlands and Open Water Fill Permits
- 7:7A-12.2 USEPA review
- 7:7A-12.3 Soliciting public comment
- 7:7A-12.4 Hearings on applications
- 7:7A-12.5 Final decisions
- 7:7A-12.6 Cancellation, withdrawal, resubmission and amendment of applications
- 7:7A-12.7 Hearings and appeal of permit decisions

SUBCHAPTER 13. PERMIT CONTENTS

- 7:7A-13.1 Conditions applicable to all permits
- 7:7A-13.2 Establishing permit conditions
- 7:7A-13.3 Duration of permits
- 7:7A-13.4 Effect of a permit
- 7:7A-13.5 Transfer of permits
- 7:7A-13.6 Modification or revocation and reissuance of permits
- 7:7A-13.7 Causes for modification, but not revocation and reissuance
- 7:7A-13.8 Causes for modification or revocation and reissuance
- 7:7A-13.9 Minor modifications of permits

SUBCHAPTER 14. MITIGATION

- 7:7A-14.1 Mitigation goals
- 7:7A-14.2 Wetland or State open water mitigation options
- 7:7A-14.3 Location of mitigation sites
- 7:7A-14.4 Wetland mitigation proposal requirements
- 7:7A-14.5 Acceptability of wetlands mitigation proposals
- 7:7A-14.6 Wetlands Mitigation Council

SUBCHAPTER 15. ENFORCEMENT

- 7:7A-15.1 General provisions
- 7:7A-15.2 USEPA review
- 7:7A-15.3 Administrative order

- 7:7A-15.4 Civil action
- 7:7A-15.5 Civil administrative penalty
- 7:7A-15.6 Civil penalty
- 7:7A-15.7 Criminal action
- 7:7A-15.8 Notice of violation recorded on deed to property
- 7:7A-15.9 "After the fact" permit
- 7:7A-15.10 Termination of permits
- 7:7A-15.11 Public participation

SUBCHAPTER 16. FEES

- 7:7A-16.1 Payment of fees
- 7:7A-16.2 Fees for review of requests for letters of interpretation
- 7:7A-16.3 Fees for review of individual freshwater wetlands and open water fill permits
- 7:7A-16.4 Fees for review of Statewide general permit authorization applications
- 7:7A-16.5 Fees for review and processing of transition area waiver applications
- 7:7A-16.6 Fees for the review and processing of requests for exemption letters
- 7:7A-16.7 Fees for the review and processing of requests for permit modifications
- 7:7A-16.8 Fee refunds

SUBCHAPTER 17. CIVIL ADMINISTRATIVE PENALTIES AND REQUESTS FOR ADJUDICATORY HEARINGS

- 7:7A-17.1 General penalty provisions
- 7:7A-17.2 Civil administrative penalty determination
- 7:7A-17.3 Civil administrative penalty for engaging in regulated activities without approval
- 7:7A-17.4 Civil administrative penalty for submitting inaccurate or false information
- 7:7A-17.5 Civil administrative penalty for failure to allow entry and inspection
- 7:7A-17.6 Civil administrative penalty for failure to pay a civil administrative penalty assessed under the Act
- 7:7A-17.7 Economic benefit factor
- 7:7A-17.8 Procedures for assessment of civil administrative penalties under the Act
- 7:7A-17.9 Procedures to request an adjudicatory hearing to contest an Administrative Order and/or a Notice of Civil Administrative Penalty Assessment; procedures for conducting adjudicatory hearings

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, P.L. 1987, c.156. The provisions of any State law, rule or regulation to the contrary notwithstanding, the alteration or disturbance in and around freshwater wetland areas in the State, and the discharge of dredged or fill material into State open waters are subject to this chapter and the Act.

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

This chapter shall be liberally construed to allow the Department to implement fully its statutory functions pursuant to the Act and 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.

7:7A-1.3 Forms and information

Any forms, fees or other information required to be submitted by this chapter shall be obtained from and returned to the Land Use Regulation Element, New Jersey Department of Environmental Protection, CN 401, Trenton, New Jersey 08625. Courier and hand deliveries may be delivered to 5 Station Plaza, 501 East State Street, Trenton, New Jersey. Other sources of information referred to in this chapter are available from the Office of Maps and Publications located at 428 State Street, Trenton, New Jersey 08625.

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.

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.

“Acid producing deposits” means those geologic deposits containing iron sulfide minerals (pyrite or marcasite) which oxidize upon exposure to oxygen from the air or from surface waters to produce sulfuric acid.

“Act” means the Freshwater Wetlands Protection Act, P.L. 1987, c.156.

“Administrator” means the Administrator of the Land Use Regulation Element.

“Advanced stages of construction” means having completed the foundations for buildings or structures, the subsurface improvements for roadways, or the necessary excavation and installation of bedding materials for utility lines. To determine whether a project or part of a project is in “advanced stages of construction,” the Department shall evaluate such proofs as may be provided by the applicant, including, but not limited to, possession of a valid building permit (where legally applicable), evidence of a valid ACOE permit for those activities regulated under the 404 program, and evidence documenting completion of construction activities before the date of assumption. This evidence may include, but is not limited to, the following: documentation

that the local construction official has completed the inspection listed at N.J.A.C. 5:23-2.18(b)1i(2) or 2.18(b)1i(3) for foundations of structures; reports from the municipal engineer documenting inspections of road bed construction; or billing receipts documenting the completion of the above construction activities. “Advanced stages of construction” does not include clearing vegetation, bringing construction materials to the site, site grading or other earth work associated with preparing a site for construction.

“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.

“Application for development” means the application form and all accompanying documents required by ordinance for approval of a subdivision plat, site plan, planned development, conditional use, zoning variance or direction of the issuance of a permit pursuant to N.J.S.A. 40:55D-34 or N.J.S.A. 40:55D-36.

“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.

“Bank” means the Wetlands Mitigation Bank established pursuant to section 14 of the Act.

“Best Management Practices” (BMP’s) 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 Regulations (N.J.A.C. 7:13), 1982 Standards for Soil Erosion and Sediment Control in New Jersey, Storm Water Management Regulations (N.J.A.C. 7:8), and effluent limitations or prohibitions under Section 307(a) of the Federal Act and New Jersey Department of Environmental Protection Surface Water Quality Standards (N.J.A.C. 7:9-4). 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 is only a partial listing, interested parties should contact the Department the most up to date list.

“Clean Water Act”, “Federal Act”, or “CWA” means the Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 (33 U.S.C. §§ 1251 et seq.) and any amendments and supplements thereto, and the regulations adopted pursuant thereto.

"Climax habitat" means a mature, well developed natural ecological community. See N.J.A.C. 7:7A-14.

"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. See N.J.A.C. 7:7A-3.4(a)1.

"Contiguous" means adjacent properties, even if they are separated by human-made barriers or structures or legal boundaries.

"Council" means the Wetlands Mitigation Council established pursuant to Section 14 of the Act.

"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 within established farming, ranching and silviculture lands upon planted farm, ranch or forest crops to aid and improve their growth, quality or yield.

"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 at N.J.A.C. 7:7A-1.4, within the legal boundaries of the State that will be regulated by the Department as part of the Federal 404 program with the exception of:

1. Those 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, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark including adjacent wetlands. In those waters over which the Department does not assume jurisdiction under the 404 program, the Department will retain jurisdiction under State law, and both State and Federal requirements will apply.

2. Specific bodies of water over which the Department will not assume 404 program jurisdiction include, but are not limited to:

- i. The entire length of the Delaware River within the State of New Jersey;
- ii. Waters of the United States under the jurisdiction of the Hackensack Meadowlands Development Commission; and
- iii. Greenwood Lake.

"Department" means the Department of Environmental Protection.

"Destruction of plant life which would alter the character of a freshwater wetland including the cutting of trees" means:

1. The physical removal of existing wetland vegetation; or
2. Causing the loss of life of vegetation by the application of herbicides or by other means which cause mortality to the established vegetative community.

"Detention basin" means an impoundment area made by constructing an embankment, or excavating a pit, or both, for the purpose of temporarily storing stormwater.

"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 and are subject to the New Jersey Pollutant Discharge Elimination System, N.J.S.A. 58:10A-1 et seq., program even though the extraction and deposit of such material may also require an open water fill permit or a 404 permit from the U.S. Army Corps of Engineers or a Water Quality Certification.

"Discharge of fill material" means the addition of "fill material" 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 subaqueous utility lines; and

11. Artificial reefs.

“Disturbance of the water level or water table” a term used to define regulated activity in N.J.A.C. 7:7A-2.3(a)2, means the alteration of the existing elevation of groundwater or surface water, regardless of duration of such alteration, by:

1. Adding or impounding a sufficient quantity of stormwater or water from other sources to modify the existing vegetation, values or functions of the wetland; and

2. Draining, ditching or otherwise causing the depletion of the existing groundwater or surface water levels such that the activity would modify the existing vegetation, values or functions of the wetland.

“Ditch” means a linear topographic depression with bed and banks of human construction which conveys water to or from a site. 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.

“Element” means the Land Use Regulation Element.

“Environmental commission” means a municipal advisory body created pursuant to P.L. 1968, c.245 (N.J.S.A. 40:56A-1 et seq.).

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

“Equal ecological value” means functional equivalency, including similar wildlife habitat, similar vegetative species coverage and density, equivalent flood water storage capacity, and equivalency of any other values or functions specific to a particular wetland.

“Established, ongoing farming, ranching or silviculture operation” means activities on areas subject to a farming, ranching silviculture use as of June 30, 1988. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an establishing 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 so long that modifications to the hydrological regime are necessary to resume operations.

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

“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 of material (for example, soil, sand, earth, rock, concrete, pavement, solid material of any kind, etc.) into an area which changes the resultant elevation in relation to surface water or groundwater level. “Fill” also means the material deposited.

“FW” means the general surface water classification applied to fresh waters in the Department’s Surface Water Quality Standards, N.J.A.C. 7:9-4, and subsequent amendments thereto.

“FW1” means those fresh waters that originate in and are wholly within Federal or State parks, forests, fish and wildlife lands, and other special holdings, that are to be maintained in their natural state of quality (set aside for posterity, and not subjected to any wastewater discharges of human origin), as designated in the Department’s Surface Water Quality Standards, N.J.A.C. 7:9-4, and subsequent amendments thereto.

“FW2” means the general surface water classification applied in the Department’s Surface Water Quality Standards, N.J.A.C. 7:9-4, and subsequent amendments thereto, to those fresh waters that are not designated as FW1 or Pinelands Waters.

“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 “Federal Manual for Identifying and Delineating Jurisdictional Wetlands,” and any subsequent amendments thereto, incorporated herein by reference. 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 Act and this chapter.

“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.

“Head waters” means the point on a non-tidal stream above which 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 streams that are dry for long periods of the year, the Department may establish headwaters as that point of the stream where flow of five cubic feet per second is exceeded 50 percent of the time.

“Hydric soils” 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 on New Jersey’s Official List of Hydric Soils developed by the United States Department of Agriculture Soil Conservation Service and the United States Fish and Wildlife Service National Wetlands Inventory, in “The Wetlands of New Jersey” 1985, published by the United States Fish and Wildlife Service or in the Federal Manual for Identifying and Delineating Jurisdictional Wetlands and amendments thereto. Alluvial land, as mapped by soil surveys, or other soils exhibiting hydric characteristics identified through field investigation as described in Part III, field indicators and other available information of the “Federal Manual” may also be considered a hydric soil for the purposes of wetland classification. Also, wet phase of somewhat poorly drained soils not on New Jersey’s Official List of Hydric Soils may also, on occasion, be associated with a wetland and therefore for the purposes of this Act 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, United States Army Corps of Engineers (Corps), USEPA and the United States Soil Conservation Service.

“Individual permit” means a permit issued pursuant to N.J.A.C. 7:7A-3.

“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 or isolated State open waters” means a freshwater wetland or State open water which is not connected to a surface water tributary system discharging into a lake, pond, river, stream or other surface water feature. The term “connected to” includes all surface water connections whether regulated or not, as well as connections by way of stormwater or drainage pipes. “Connected to” does not include a groundwater connection nor does it include overland flow unless there is evidence of scouring or erosion.

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

“Letters of interpretation” are letters issued by the Department for the purpose of indicating the presence or absence of wetlands, State open waters, or transition areas (see N.J.A.C. 7:7A-8); for the purpose of verifying or delineating the boundaries of freshwater wetlands, State open waters, transition areas; or to obtain a wetland 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.

“Major discharge” means:

1. Discharges of dredged or fill material into areas identified by the Department, in consultation with USEPA, the Corps and the USFWS, which could have the following impacts:
 - i. Significant adverse effects on freshwater wetlands or State open waters which are unique for a particular geographic region;
 - ii. Significant reductions in the ecological, commercial, or recreational values of more than five acres of a freshwater wetland or State open water; or

iii. Affects to a Federally listed or proposed endangered or threatened species;

2. Wetland fills involving more than 10,000 cubic yards of material.

“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-14 in order to compensate for freshwater wetlands or State open waters loss or disturbance caused by regulated activities.

“Offsite” means the area not onsite.

“Onsite” means the area located within the legal boundary of the property or properties on which the regulated activity or activities are proposed, are occurring, or have occurred, as set forth in the deed for that area, plus any contiguous land owned by the same person as set forth in the deed or deeds for that contiguous land, as these boundaries existed on July 1, 1988 or on the date of submission of the application if lots and blocks were merged subsequent to July 1, 1988.

“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.

“Permit” means an approval to engage in a regulated activity in a freshwater wetland, State open water, or transition area issued pursuant to the Act and 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.

“Placing of obstructions” means to deposit, construct, install or otherwise situate any obstacle which will affect the values or functions of a freshwater wetland.

“Plowing” means all forms of primary tillage, including moldboard, chisel, or wide-blade, plowing, discing, harrow-

ing, 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 spoil, rock, sand, or other surficial 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 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 an exemption under N.J.A.C. 7:7A-2.7(d) based on the application for or the grant of preliminary site plan approval, “project” means all buildings, structures, pavements, and other improvements specifically depicted on the site plans referenced in the resolution approving the site plan.

2. For an exemption under N.J.A.C. 7:7A-2.7(d) based on the application for or the grant of preliminary subdivision approval, “project” means:

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 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.

(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.

3. For all development determined to be exempt by the Department, it should be noted that 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 the Act. 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 the Act. Note that 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. See also N.J.A.C. 7:7A-2.7(e)1 and 2 for changes that void exemptions for projects still in the local approval process.

“Property” means the area contained within the legal boundary as defined by municipal block and lot, or right-of-way description as set forth in the deed for that area.

“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 such as buildings, asphalt, concrete, and other materials which will not allow infiltration of liquids, legally existing in the transition area prior to July 1, 1989.

“Regulated activity” means any of the activities defined at N.J.A.C. 7:7A-2.3.

“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.

“Significant adverse impact” shall be deemed to exist where it is determined that a modification of a wetland will negatively affect the ecological integrity of the wetland and its biotic components. Such modifications may include, but are not limited to:

1. An alteration of the water table or hydrologic patterns in the wetland or its subwatershed;
2. An increase in erosion resulting in increased sedimentation in the wetland or State open water;
3. A change in the natural chemistry of the ground or surface water in the wetland;
4. A loss of wetland habitat;
5. A reduction in wetland habitat diversity;
6. A change in wetlands species composition; or
7. A significant disturbance of areas used by indigenous and migratory wildlife for breeding, nesting, or feeding.

“Silviculture” means the planting, cultivating and harvesting by cutting or digging, of Christmas trees or nursery stock. After harvesting, new seedlings are replanted for a future crop. For the purposes of this chapter, “silviculture” does not include forestry activities such as the production of lumber products or firewood.

“Special aquatic site” means any site described in subpart E of the 404(b)1 guidelines (40 C.F.R. 230 et seq., or any amendments thereto), with the exception of freshwater wetlands which, for the purposes of this chapter shall not be considered special aquatic sites.

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

“State open waters” means those waters of the United States within the boundary of the State or subject to its jurisdiction that are not wetlands as defined in this section.

“Swale” means a linear topographic depression, either naturally occurring or of human construction, which drains less than 50 acres. Swales are wetland features meeting the three parameter approach, do not have distinguishable bed and banks and are not intermittent streams. A swale can not be within a larger wetland complex, nor is it an undulation in the boundary of a wetland complex. A swale is a natural or human-made feature, which has formed or was constructed in uplands to convey surface water runoff from the surrounding upland areas. The definition of swales generally does not include wetland features over 50 feet in width at the widest point which are considered by the Department to be independent wetland features.

“Threatened or endangered species” shall be those 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 al. 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 land 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” means a waiver issued by the Department to engage in any of the prohibited activities enumerated at N.J.A.C. 7:7A-6.2(a) in a transition area issued by the Department pursuant to the Act and this chapter. A transition area waiver may be issued by the Department in the transition area adjacent to either a freshwater wetlands of exceptional or intermediate resource value and may take one of the following forms:

1. Transition area waiver, Reduction. This waiver may be approved on the basis of a finding of no substantial impact or if the waiver is necessary to avoid an extraordinary or substantial hardship as defined at N.J.A.C. 7:7A-7.2(g) or 7.3(f), respectively. The waiver would result in a reduction in the standard width of a transition area without requiring an expansion of the remaining transition area for compensation;

2. Transition area waiver, Special Activities. This waiver may be issued to approve the partial elimination of the standard transition area, without requiring an expansion of the remaining transition area for compensation for the special activities set forth below:

- i. Stormwater management facilities as defined at N.J.A.C. 7:7A-7.4(b)1;

- ii. Linear development as defined at N.J.A.C. 7:7A-1.4;

iii. Activities permitted under the specific Statewide general permits listed at N.J.A.C. 7:7A-7.4(e). The Statewide general permits themselves are set forth at N.J.A.C. 7:7A-9.2(a); or

iv. Activities defined as redevelopment pursuant to N.J.A.C. 7:7A-7.4(f); or

3. Transition area waiver, Averaging Plan. This waiver may be issued to approve a plan to modify the overall shape of the standard transition area without reducing the total square footage of the standard transition area.

“Trout production waters” (TP) means water designated in the Department’s Surface Water Quality Standards, N.J.A.C. 7:9-4, for use by trout for spawning or nursery purposes during their first summer.

“USEPA” (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 Geologic Survey.

“Water-dependent uses” means development that cannot physically function without direct access to the body of water along which it is proposed. Uses, or portions of uses, that can function on sites not adjacent to the water are not considered water dependent regardless of the economic advantages that may be gained from a waterfront location.

“Watershed” means the smallest drainage area of a specific creek, stream, river, pond, lake or other surface water body within which a particular site is located.

“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 the 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 Certification (WQC)” is the determination that the Department shall make pursuant to Section 401 of the Federal Act and N.J.S.A. 58:10A-1 et seq. in the evaluation of a proposed activity which requires a Federal license or permit.

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).

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 such judgment shall have been rendered and it shall not affect or impair the remainder of this chapter or the application thereof to other persons.

7:7A-1.6 Other statutes and regulations

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

(b) The Act, on and subsequent to July 1, 1988, shall supersede any law or ordinance enacted prior to July 1, 1988 by any municipality, county, or political subdivision thereof, regulating freshwater wetlands except to the extent that such law or ordinance regulates or requires a transition area. Local laws and ordinances governing transition areas shall remain in effect until July 1, 1989, at which time the transition area provisions of the Act shall supersede such local laws and ordinances. With the exception of political subdivisions under the jurisdiction of the Pinelands Commis-

sion, no municipality, county, or political subdivision thereof shall enact, after July 1, 1987, any law, ordinance, or rule or regulation requiring a transition area adjacent to a freshwater wetland.

(c) This section shall not, however, preclude municipal advice to the Department concerning letters of interpretation pursuant to N.J.A.C. 7:7A-8.5.

(d) This chapter shall not preempt pre-existing 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, except pursuant to (e) below, those programs will not use freshwater wetlands concerns as a basis for regulation, and any such regulation by these programs of projects in freshwater wetlands will be limited to that based on other (for example, flood danger) concerns.

(e) If a proposed project does not involve a freshwater wetland or State open water, does not constitute a regulated activity, or is otherwise exempt from the provisions of the Act and this chapter, the final decision on the application shall be based solely on the requirements of other applicable permit programs. For projects exempted under the Act and this chapter's wetlands requirements under N.J.A.C. 7:7A-2.7(d) or (g), the final decision on the application will be based on the requirements of other applicable permit programs as they existed on June 30, 1988.

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

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

Internal cite corrected.

Case Notes

Regulation subjecting exempted projects to other permit programs is valid only if construed to mean that wetland regulations are not to be used when evaluating other permit program submissions. *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.

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.

7:7A-1.7 Effective and operative dates

This chapter, with the exception of N.J.A.C. 7:7A-6 and 7, became effective June 6, 1988, and became operative on July 1, 1988. N.J.A.C. 7:7A-6 and 7 became operative on July 1, 1989.

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

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

Separate operative date established for subchapters 6 and 7.

SUBCHAPTER 2. APPLICABILITY

7:7A-2.1 Jurisdiction

(a) This chapter shall apply to all regulated activities within the State of New Jersey, except as specifically provided in this chapter. This chapter shall also apply to any discharge of dredged or fill material into State open waters which are not freshwater wetlands.

(b) A person proposing to engage in a regulated activity in a wetland shall apply to the Department for a Statewide general permit authorization or an Individual freshwater wetlands permit, and a person proposing to discharge dredged or fill material into State open waters shall apply to the Department for a Statewide general permit authorization or an Individual open water fill permit. The discharge of dredged or fill material in a State open water or wetland may also need a stream encroachment permit pursuant to the Flood Hazard Area Control Act N.J.S.A. 58:16A-50 et seq. or a Water Quality Certification.

(c) An agency of the State proposing to engage in a regulated activity shall apply to the Department for a freshwater wetlands permit but shall not be required to pay a fee therefor. An agency of the State proposing to discharge dredged or fill material into State open waters shall apply for an open water fill permit, but shall not be required to pay a fee therefor.

(d) Where a proposed project requires more than one permit from the Element, the Element will require the submittal of only one application, but that application shall comply with the requirements of each applicable permit program including all fee requirements. This provision does not preclude an applicant from submitting separate applications if the timing or magnitude of a project requires it.

(e) Where a proposed project requires more than one permit from the Element, applicants are strongly encouraged to apply for all required permits at one time. In most cases this will allow the Department to issue joint permits.

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

Exception regarding board of health deleted in (b), "Division" changed to "Element" in (d) and (e).

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 Subchapters which apply to freshwater wetlands permits or open water fill permits

Any person proposing to engage in a regulated activity in a freshwater wetlands or State open water shall comply with the provisions of subchapters 1 (General information), 2 (Applicability), 3 (General standards for granting individual freshwater wetlands and open water fill permits), 5 (Emergency permits), 6 (Transition areas), 7 (Transition area waivers), 8 (Letters of Interpretation), 9 (General permits), 10 (Pre-application conferences), 11 (Application procedure), 12 (Review of applications), 13 (Permit contents), 14 (Mitigation), 15 (Enforcement), and 16 (Fees) of this chapter.

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

7:7A-2.3 Regulated activities

(a) The following activities in a freshwater wetland are regulated pursuant to the Act and are subject to the requirements of this chapter as set forth in N.J.A.C. 7:7A-2.2:

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;
3. The dumping, discharging or filling with any materials;
4. The driving of pilings;
5. The placing of obstructions; or
6. The destruction of plant life which would alter the character of a freshwater wetland, including the cutting of trees except the approved harvesting of forest products pursuant to N.J.A.C. 7:7A-2.7(b).

(b) The term "regulated activity" shall also mean the discharge of dredged or fill material into State open waters.

(c) For the purposes of this chapter, the following activities are not considered to result in the alteration of the character of a freshwater wetland:

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; and

2. The placement of temporary structures (those not requiring permanent foundations nor the deposition of fill material) not to exceed 32 square feet for the purposes of observing or harvesting fish or wildlife. These activities include the construction of observation or waterfowl blinds and the placement of traps.

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.

7:7A-2.4 Designation of freshwater wetlands

(a) The designation of freshwater wetlands shall be based upon the three-parameter approach (that is, hydrology, soils and vegetation) enumerated in the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands", and any subsequent amendments thereto.

(b) The three-parameter approach is a methodology for determining, in a consistent and repeatable manner, the presence of wetlands and the boundaries of wetlands. It requires careful consideration of such factors as vegetative species composition, saturated soil conditions, depth to seasonal high water table and the presence or absence of hydrologic indicators.

(c) 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 (as they become available);
2. United States Department of Agriculture Soil Surveys;
3. United States Fish and Wildlife Service National Wetlands Inventory (NWI) 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.

(d) 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 United States Army Corps of Engineers, USEPA, and the United States Soil Conservation Service, and any subsequent amendments thereto.

(e) The Department is developing functional, complete, and up-to-date composite freshwater wetlands maps and inventory at a scale of 1:12000 to provide guidance for freshwater wetlands general informational purposes. These maps do not supersede wetland delineations which have been accepted and approved by DEPE for a specific site. The Department will make appropriate sections of this map and inventory available on a periodic basis to the county clerk or register of deeds and mortgages in each county, as appropriate, and to the clerk of each municipality.

(f) When available, the up-to-date composite freshwater wetlands map and inventory shall be used to locate wetlands as definitively as is practicable, as an informational tool in advising the public of the approximate extent and location of wetlands, and in preparing some letters of interpretation. However, exact delineation of wetlands boundaries is required, and measurements shall be made in accordance with the three-parameter approach.

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.

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-2.5 Classification of freshwater wetlands by resource value

(a) Freshwater wetlands shall be divided into three classifications based on resource value. The classification of a particular wetland shall be a factor in, among other things, considering alternatives to the proposed regulated activity, in determining the size of the transition area, and in assessing mitigation.

(b) Freshwater wetlands of exceptional resource value shall be freshwater wetlands which exhibit any of the following characteristics:

1. Those which discharge into FW-1 waters or FW-2 trout production (TP) waters or their tributaries; or
2. Those which are present habitats for threatened or endangered species, or those which are documented habitats for threatened or endangered species, and which remain suitable for breeding, resting, or feeding by these species during the normal period these species would use the habitat.

i. An applicant shall have the opportunity to request of the Department that a documented habitat not result in the classification of a freshwater wetland as a freshwater wetland of exceptional resource value if the applicant can demonstrate 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.

(c) Freshwater wetlands of ordinary value shall be freshwater wetlands which do not exhibit the characteristics enumerated in (b) above, and which are:

1. Isolated wetlands which are more than 50 percent surrounded by development and less than 5,000 square feet in size:

i. For the purposes of this subsection, "development" shall mean the following uses that were legally existing prior to July 1, 1988 or were permitted under the Act:

- (1) Lawns;
- (2) Maintained landscaping;
- (3) Impervious surfaces;
- (4) Active railroad rights-of-way; and
- (5) Gravelled or stoned parking/storage areas and roads;

ii. For the purposes of this subsection, development must occupy more than 50 percent of the area within 50 feet of the wetland boundary in order for the wetland to meet the criterion of more than 50 percent surrounded by development.

2. Drainage ditches;
3. Swales; or
4. Detention facilities.

(d) Freshwater wetlands of intermediate resource value shall be all freshwater wetlands not defined as exceptional or ordinary.

(e) The classification system established under this section shall not restrict the Department's authority to require the creation or restoration of freshwater wetlands pursuant to the provisions of N.J.A.C. 7:7A-14.

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.

Case Notes

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-2.6 Designation of State open waters

State open waters means those waters of the United States, as defined at N.J.A.C. 7:7A-1.4, within the boundary of the State or subject to its jurisdiction that are not wetlands as defined at N.J.A.C. 7:7A-1.4.

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

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

Deleted references to U.S. Army Corps of Engineers jurisdiction.

7:7A-2.7 Activities exempted from permit requirement

(a) The exemptions in (b) and (c) below shall not apply to any discharge of dredged or fill material into freshwater wetlands or State open water incidental to any activity which involves bringing an area of freshwater wetlands or State open waters into a use to which it was not previously subject, where the flow or circulation patterns of the freshwater wetlands or waters may be impaired, or the extent or values and functions of freshwater wetlands or State open waters is reduced.

(b) Subject to the limitations of this section, the following activities, when part of an established, ongoing farming, ranching or silviculture operation, on properties which have received or are eligible for a farmland assessment, are exempt from the requirement of a freshwater wetlands permit, open water fill or transition area permit:

1. Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food and fiber, or soil and water conservation practices;

i. For the purposes of this paragraph "minor drainage" means:

(1) The discharge of material incidental to connecting upland drainage facilities to adjacent wetlands, adequate to effect the removal of excess soil moisture from upland croplands;

(2) The discharge of material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters which are in established use for such agricultural and silvicultural wetlands crop production;

(3) The discharge of material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of the Federal Act and which are in established use for the production of rice, cranberries, or other wetland crop species; or

(4) The discharge of material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not properly removed, would result in damage to or loss of existing crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of formation of such blockages in order to be eligible for exemption under this paragraph.

(5) Minor drainage in wetlands is limited to drainage within areas that are part of an established farming or silvicultural operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (for example, wetlands species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area. Any discharge of dredged or fill material into the wetlands or State open waters incidental to the construction of any such structure or waterway requires a freshwater wetlands or State open water permit, and will not be considered minor drainage.

2. Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches, provided that such facilities are for farming, ranching or silvicultural purposes and do not constitute a change in use. Any spoil from pond construction or maintenance must be placed outside the freshwater wetlands unless it is needed for the structural or environmental integrity of the pond;

3. Construction or maintenance of farm roads or forest roads constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of freshwater wetlands and State open waters are not impaired and that any adverse effect on the aquatic environment will be minimized. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. Roads constructed for forestry and silviculture purposes shall be constructed using temporary mats whenever practicable. All roads employing the placement of fill shall be removed once the land use changes from forestry to another use.

(c) Normal harvesting of forest products in accordance with a forest management plan approved by the State Forester is exempt from the requirement of a freshwater

wetlands permit or open water fill permit, subject to the limitations of this section.

(d) Subject to the limitations of this section, the following are exempt from the requirements of the Act until the State assumes the Federal 404 program. These activities may need Federal 404 permits and/or a WQC:

1. Projects (as defined in N.J.A.C. 7:7A-1.4) for which preliminary site plan or subdivision applications have 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, 1988 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. To qualify for an exemption under this N.J.A.C. 7:7A-2.7(d)1, a project must have received preliminary approval (as defined in N.J.S.A. 40:55D-6) of a subdivision or site plan. Sketch plat approval, a classification determination, or any other types of approvals referred to in the Municipal Land Use Law (e.g., building permits, variances or conditional use approval) is not sufficient to make the project eligible for an exemption under this N.J.A.C. 7:7A-2.7(d)1.

2. Projects (as defined in N.J.A.C. 7:7A-1.4) for which preliminary site plan or subdivision applications as the term is used in N.J.S.A. 40:55D-1 et seq.) have been submitted to the local authorities prior to June 8, 1987 and subsequently approved. If a project meets all criteria under this subsection to qualify for an exemption, except that the project has not yet received municipal approval, the Department will issue a letter certifying that the qualifying application was filed prior to June 8, 1987 and the project will receive an exemption upon receipt of preliminary approval from the municipality. To qualify for an exemption under this N.J.A.C. 7:7A-2.7(d)2, 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 for either a subdivision or site plan, as the case may be, and thus must have been in fact complete prior to June 8, 1987. An application for sketch plat approval, classification determination, or any of the other types of approvals referred to in the Municipal Land Use Law (e.g., building permits, variances or conditional use approval) is not sufficient to make the project eligible for an exemption under this N.J.A.C. 7:7A-2.7(d)2;

3. Projects for which permit applications have been approved and Individual permits have been issued by the United States Army Corps of Engineers prior to July 1, 1988, for projects which would otherwise be subject to State regulation on or after July 1, 1988. Such project shall be governed only by the Federal Act, and shall not be subject to any additional or inconsistent substantive requirements of the Act; provided, however that upon the expiration of a permit issued pursuant to the Federal Act any application for a renewal thereof shall be made to the appropriate regulatory agency.

(e) The activities listed in (d)1 and 2 above shall no longer be exempt from the requirement of a freshwater wetlands permit or open water fill permit if significant changes are made to the approved site or subdivision plan. A significant change will be deemed to have been made if, the change would void the preliminary approval. In addition, a significant change will be deemed to have been made if the change, while not voiding the approval, would require submittal to or approval of a new or amended application from the local authorities and:

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 in the project as approved by the local authorities, would result in more than a de minimus increase in impacts to freshwater wetlands, State open waters, or transition areas.

(f) Projects for which preliminary site plan or subdivision applications have been approved prior to July 1, 1989 shall not require transition areas.

(g) Activities authorized under United States Army Corps of Engineers Nationwide Permits prior to July 1, 1988 shall not require a freshwater wetlands permit from the Department provided the property owner can demonstrate that a Nationwide Permit provided authorization for a particular site and use prior to July 1, 1988.

(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 CWA, 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) If the USEPA's regulations providing for the delegation to the State of the Federal wetlands program conducted pursuant to section 404 of the Federal Act require a permit for any of the activities exempted by this section, the Department shall require a permit for those activities so identified by the USEPA upon assumption of the Federal program. The exemptions in (d)1 and 2 and (f) above shall be void as of the date of assumption by the Department of the Federal 404 program unless all requisite permits or concurrences with Federal permits were received from the United States Army Corps of Engineers prior to July 1, 1988 and remain valid, in which case the exemption will still be valid. Upon expiration of a permit issued pursuant to the Federal Act any application for renewal shall be made to the appropriate regulatory agency. The Department shall not require the establishment of a transition area as a condition of any renewal of a permit issued pursuant to the Federal Act prior to July 1, 1988.

1. The Department will not require a permit or waiver pursuant to the Act to allow the completion of individual buildings, structures or other improvements, which are already in "advanced stages of construction," as defined in N.J.A.C. 7:7A-1.4, prior to the date of assumption. In addition to the completion of buildings, structures or other improvements, the Department will allow the completion of their appurtenant improvements. An applicant seeking to complete improvements which are in "advanced stages of construction" prior to the date of assumption shall submit the following documentation to the Department: a valid building permit (where legally applicable), and/or a valid ACOE permit for those activities regulated under the 404 program. In addition, the applicant shall submit any of the following proofs if available and applicable: documentation that the local construction official has completed the inspection listed at N.J.A.C. 5:23-2.18(b)1i(2) or (b)1i(3) for foundations of structures; reports from the municipal engineer documenting inspections of road bed construction; billing receipts documenting the completion of the above construction activities; or any other evidence documenting construction activities prior to the date of assumption.

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).

Law Review and Journal Commentaries

Wetlands—Environmental Law—Municipal Land Use. Judith Nal-lin, 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).

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-2.8 Geographic areas exempted from freshwater wetlands permit requirement

(a) Regulated activities in the following geographic areas shall not require a freshwater wetlands permit, State open water fill or transition area permit, but may require a Federal 404 permit. However, upon assumption of the 404 program, the discharge of dredged or fill material into Waters of the United States in the following areas may require a 404 permit or a Water Quality Certificate:

1. Areas under the jurisdiction of the Hackensack Meadowlands Development Commission pursuant to N.J.S.A. 13:17-1 et seq.; and

2. Areas under the jurisdiction of the Pinelands Commission pursuant to N.J.S.A. 13:18A-1 et seq. In addition, the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetland areas within its jurisdiction.

(b) Activities in tidally influenced wetlands which are defined as coastal wetlands pursuant to the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq. shall not require a freshwater wetlands or open water fill permit.

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.

7:7A-2.9 Exemption letters

(a) A person may obtain a letter from the Department certifying that an activity is exempt from the Act and this chapter. The letter will be based on the information required by this section, and will be void if the information submitted is not complete and accurate, if the approval upon which it was based becomes invalid for any reason, or if the activity is not carried out as represented in the submittal(s) to the Department upon which the letter is based. This exemption will remain valid for the duration of the approval upon which it was based or until the State's assumption of the Federal 404 program, whichever comes first.

(b) To obtain an exemption letter, the following shall be submitted:

1. For a farming, silviculture or ranching exemption pursuant to N.J.A.C. 7:7A-2.7(a):

i. Certification of farmland assessment eligibility (The Department will accept a copy of the applicant's tax bill showing farmland assessment to document this requirement);

ii. A brief description of the activities, including the total area covered, the types of farming, silviculture, or ranching, best management practices currently employed or to be employed and the length of time the operation has been ongoing; and

iii. The fee specified in N.J.A.C. 7:7A-16.

2. For a forest products harvesting exemption pursuant to N.J.A.C. 7:7A-2.7(c):

i. A copy of a forest management plan approved by the State Forester which includes the size of the site, the length of time required to complete the project, and a brief description of the activities involved including the best management practices to be employed; and

ii. The fee specified in N.J.A.C. 7:7A-16.

3. For a preliminary local approval exemption pursuant to N.J.A.C. 7:7A-2.7(d) and a transition area exemption pursuant to N.J.A.C. 7:7A-2.7(f):

i. A folded copy of the preliminary local approval of the site plan or subdivision, including a copy of the site plan or subdivision itself and a copy of the resolution approving the site plan or subdivision; and

ii. The fee specified in N.J.A.C. 7:7A-16.

4. For a site plan or subdivision application exemption pursuant to N.J.A.C. 7:7A-2.7(d)2:

i. A copy of all of the application materials submitted to the municipality, proof that the municipality received them, and proof from the municipality that the application was under continuous consideration from the time of submittal (prior to June 8, 1987) to eventual preliminary approval or to the date of application to the Department for a letter of exemption. For the purposes of this subsection, "continuous consideration" shall mean that the application was either on the municipal board's agenda or was continued with the applicant's and the board's consent from the time of submittal until such time that a decision was made. An application that was withdrawn, or which received a final denial and subsequently resubmitted is not considered to be under "continuous consideration";

ii. A folded copy of the approved preliminary site plan or subdivision plan and a copy of the resolution approving the site plan or subdivision; and

(1) If a preliminary site plan or subdivision approval has not yet been received, the applicant shall submit a folded copy of the preliminary site plan or subdivision plat as submitted to the municipality prior to June 8, 1987, see N.J.A.C. 7:7A-2.7(d)2; and

iii. The fee specified in N.J.A.C. 7:7A-16.

5. For a Corps approved individual permit exemption pursuant to N.J.A.C. 7:7A-2.7(d)3:

i. A copy of the valid Corps permit;

ii. A folded copy of a site plan showing all activities authorized by the Individual permit; and

iii. The fee specified in N.J.A.C. 7:7A-16.

6. For an exemption letter under a Corps Nationwide permit exemption pursuant to N.J.A.C. 7:7A-2.7(f):

i. A copy of the valid Corps Nationwide permit authorization issued prior to July 1, 1988, or a copy of all information submitted to the Corps requesting authorization under an issued Nationwide permit, proof that the information was received by the Corps prior to June 10, 1988, and received subsequent authorization;

(1) The Department may inspect the site to confirm that all of the activities included in the exemption request are authorized by the applicable nationwide permits;

ii. A folded copy of a site plan showing all activities authorized by the Nationwide permit and a statement regarding how each activity meets the criteria of the approved Nationwide permit; and

iii. The fee specified in N.J.A.C. 7:7A-16.

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.

Case Notes

Developer failed to comply with requirements for documentation of nationwide permit allegedly granted by Army Corps of Engineers; matter remanded to allow developer to supplement its request. *M. Alfieri Co., Inc. v. State, Dept. of Environmental Protection and Energy*, 269 N.J.Super. 545, 636 A.2d 87 (A.D.1994), certification granted 136 N.J. 30, 641 A.2d 1041, affirmed 138 N.J. 642, 651 A.2d 99.

7:7A-2.10 Hearings and appeals

The applicant or other affected party, if aggrieved by the Department's decision on a exemption request, may request a hearing on this decision pursuant to N.J.A.C. 7:7A-12.7.

New Rule, R.1992 d.117, effective March 16, 1992.

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

SUBCHAPTER 3. GENERAL STANDARDS FOR GRANTING INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

7:7A-3.1 Requirements for granting individual freshwater wetland and open water fill permits

(a) The Department shall issue a freshwater wetlands or open water fill permit only if it finds that there is no practicable alternative to the proposed activity.

1. An alternative shall be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

2. An alternative shall not be excluded from consideration under this provision merely because it includes or requires 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.

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

7:7A-3.2 Requirements for water-dependent activities

(a) The Department shall issue a freshwater wetlands or open water fill permit only if the proposed project meets the criteria at N.J.A.C. 7:7A-3.1 above and it finds that the regulated activity is water-dependent or requires access to freshwater wetlands or State open waters as a central element of its basic function, and has no practicable alternative which would:

1. Not involve a freshwater wetland or State open water; or

2. Involve a freshwater wetland or State open water, but would have a less adverse impact on the aquatic ecosystem; and

3. Not have other significant adverse environmental consequences, that is, it shall not merely substitute other significant environmental consequences for those attendant on the original proposal.

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

Recodified from 3.1; added references to State open water.

Case Notes

Property owner was properly denied individual freshwater wetland permit sought for construction of individual residence. *Stone v. Division of Coastal Resources*, 92 N.J.A.R.2d (EPE) 148.

7:7A-3.3 Requirements for non-water dependent activities

(a) The Department shall issue a freshwater wetlands or open water fill permit for a non-water dependent activity only if it finds that the regulated activity has no practicable alternative which would:

1. Not involve a freshwater wetland or State open water; or

2. Involve a freshwater wetland or State open water but would have a less adverse impact on the aquatic ecosystem; and

3. Not have other significant adverse environmental consequences, that is, would not merely substitute other significant environmental consequences for those attendant on the original proposal.

(b) For special aquatic sites as defined in N.J.A.C. 7:7A-1.4 and all freshwater wetlands, it shall be a rebuttable presumption that there is a practicable alternative to any nonwater-dependent regulated activity, which alternative does not involve a freshwater wetland or State open water, and that such an alternative to any regulated activity would have less of an impact on the aquatic ecosystem.

(c) In order to rebut the presumption established in (b) above, an applicant for a freshwater wetlands or open water fill permit must demonstrate all of the following:

1. An alternative shall be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

2. An alternative shall not be excluded from consideration under this provision merely because it includes or requires 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.

(d) In order to rebut the presumption established in (c) above, an applicant for a freshwater wetlands permit must demonstrate all of the following:

1. That the basic project purpose cannot reasonably be accomplished utilizing one or more other sites in the general region that would avoid, or reduce, the adverse impact on an aquatic ecosystem;

2. That the basic project purpose cannot reasonably be accomplished if there is a reduction in the size, scope, configuration, or density of the project as proposed;

3. That the basic project purpose cannot reasonably be accomplished by any alternative designs that would avoid, or result in less, adverse impact on an aquatic ecosystem and;

4. That in cases where the applicant has rejected alternatives to the project as proposed due to constraints such as inadequate zoning, infrastructure, or parcel size, the applicant has made reasonable attempts to remove or accommodate such constraints.

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

Recodified from 3.2; added references to State open water.

Case Notes

No permit required for modification or widening of access road. *Griffith v. DEPE*, 94 N.J.A.R.2d (EPE) 205.

7:7A-3.4 Non-water dependent activities in freshwater wetlands of exceptional resource value or in trout production waters

(a) In order to rebut the presumption established for non-water dependent activities (see N.J.A.C. 7:7A-3.3(b)) when the activity will take place in wetlands of exceptional resource value or in trout production waters, an applicant, in addition to complying with the provisions of N.J.A.C. 7:7A-3.3, shall also demonstrate either:

1. That there is a compelling public need for the proposed activity greater than the need to protect the freshwater wetland or trout production water, and that the need cannot be met by essentially similar projects in the region which are under construction or expansion, or which have received the necessary governmental permits and approvals; or

2. That denial of the permit would impose an extraordinary hardship on the applicant brought about by circumstances peculiar to the subject property.

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

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

Recodified from 3.3; added references to trout production waters.

7:7A-3.5 Standard requirements for all regulated activities in freshwater wetlands and State open waters

(a) In addition to the other requirements set forth in this subchapter, the Department shall issue a permit for a regulated activity only if the activity:

1. Will result in a minimum feasible alteration or impairment of the aquatic ecosystem including existing contour, vegetation, fish and wildlife resources, and aquatic circulation of the freshwater wetland and hydrologic patterns of the watershed;

2. Will not jeopardize present or documented habitat or the continued existence of a local population of a threatened or endangered species listed 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 al., as defined at N.J.A.C. 7:7A-1.4;

3. Will not result in the likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of the United States Department of the Interior or the Secretary of the United States Department of Commerce, as appropriate, to be a critical habitat under the "Endangered Species Act of 1973", (16 U.S.C. §§ 1531 et seq.);

4. Will not cause or contribute to a violation of any applicable State water quality standard;

5. Will not cause or contribute to a violation of any applicable toxic effluent standard or prohibition imposed pursuant to New Jersey's "Water Pollution Control Act", N.J.S.A. 58:10A-1 et seq.;

6. Will not violate any requirement imposed by the United States government to protect any marine sanctuary designated pursuant to the "Marine Protection, Research and Sanctuaries Act of 1972", (33 U.S.C. §§ 1401 et seq.);

7. Will not cause or contribute to a significant degradation as defined at 40 C.F.R. 230.10(c), of ground or surface waters;

8. After assumption of the Federal 404 program, the project will not adversely affect properties which are listed or are eligible for listing on the National Register of Historic Places. If the permittee, before or during the course of authorized work, encounters a probable historic property that has not been listed or determined eligible for listing on the National Register, but which may be eligible for listing in the National Register, the permittee shall immediately notify the Department and proceed as directed by the Department;

9. Will not violate any provision of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., or implementing rules at N.J.A.C. 7:13;

10. Is otherwise lawful; and

11. Is in the public interest, as determined by the Department in consideration of the following:

i. The public interest in preservation of natural resources and the interest of the property owners in reasonable economic development;

ii. The relative extent of the public and private need for the proposed regulated activity;

iii. Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods, to accomplish the purpose of the proposed regulated activity;

iv. The extent and permanence of the beneficial or detrimental effects which the proposed regulated activity may have on the public and private uses for which the property is suited;

v. The quality and resource value classification pursuant to N.J.A.C. 7:7A-2.5 of the wetland which may be affected and the amount of freshwater wetlands to be disturbed;

vi. The economic value, both public and private, of the proposed regulated activity to the general area; and

vii. The ecological value of the freshwater wetlands and probable individual and cumulative impacts of the project on public health and fish and wildlife. For the purposes of this specific subsection, project shall mean the use and configuration of all buildings, pavements, roadways, storage areas and structures, and the extent of all activities associated with the proposal.

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

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

Recodified from 3.4; recodified 7:7A-3.5(a)1-7 as (a)11, i-vii.

Case Notes

Developer not entitled to freshwater wetlands permit in order to construct 47 homes. *Goodwin v. Department of Environmental Protection*, 93 N.J.A.R.2d (EPE) 83.

SUBCHAPTER 4. (RESERVED)

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

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

Subchapter 4 was entitled "General Standards for Granting an Open Water Fill Permit".

SUBCHAPTER 5. EMERGENCY PERMITS

7:7A-5.1 Emergency permits

(a) The Department may issue a temporary emergency freshwater wetlands, open water fill permit, or transition area waiver for a regulated activity only if:

1. An unacceptable threat to life, severe loss of property, or severe environmental degradation will occur if an emergency permit is not granted; and
2. The anticipated threat or loss may occur before a permit or waiver can be issued or modified under the procedures otherwise required by the Act, this chapter, and other applicable State laws.

(b) The emergency permit shall incorporate, to the greatest extent practicable and feasible but not inconsistent with the emergency situation, the standards and criteria required for non-emergency regulated activities including mitigation when required by either N.J.A.C. 7:7A-9 or 13 and shall:

1. Be limited in duration to the time required to complete the authorized emergency activity, not to exceed 90 days; and
2. Require mitigation pursuant to N.J.A.C. 7:7A-14 of the freshwater wetland, State open waters, or transition area within this 90 day period, except that if more than 90 days from the issuance of the emergency permit is re-

quired to complete restoration, the emergency permit may be extended to complete this restoration only.

(c) The emergency permit may be issued orally or in writing, except that if it is issued orally, an authorization letter shall be issued within five days thereof.

(d) Notice of the issuance of the emergency permit shall be published and public comments received, in accordance with the provisions of 40 C.F.R. 124.10 and 124.11, and of the Federal Act and applicable State law, provided that this notification shall be mailed no later than 10 days after issuance of the emergency permit.

(e) The emergency permit may be terminated at any time without prior hearing upon a determination by the Department that this action is appropriate to protect human health or the environment.

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

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

N.J.A.C. cross references to requirements added.

7:7A-5.2 Obtaining an emergency permit

(a) A person in need of an emergency permit shall inform the Administrator of the Element by telephone as to the extent of work to be performed, the reason for the emergency, and the location of the project. This information shall be presented to the Department in writing within two days following the telephone request.

(b) After the State assumes the Federal 404 program, upon receiving the request for an emergency permit for a major discharge, the Administrator will notify the Regional Administrator prior to the issuance of an emergency permit and will send a copy of the written permit upon issuance.

(c) If verbal approval is given by the Administrator the emergency work may be started. Department staff shall be kept informed by telephone (at least once per week) regarding the situation at the site. The Department will offer guidance and instructions in performing the work.

(d) If verbal approval is not given, the Department may issue a written emergency approval at any time within 15 days of the initial request.

(e) Within 15 days of the granting of an emergency approval which has been obtained and complied with in accordance with the Department's instructions, a complete freshwater wetlands, open water fill permit, or transition area waiver application with appropriate fees and "as built" drawings shall be submitted to the Department for review. After public notice and opportunity for comment pursuant to N.J.A.C. 7:7A-12.4 and 12.1(a), and 11.1(a), a freshwater wetlands, or open water fill permit, or a transition area waiver shall be issued by the Department for the activities covered by the emergency approval. This permit may contain conditions necessary to compensate for any adverse impacts to the freshwater wetlands, State open waters, or

transition areas resulting from the emergency permit or the activity. If required by either N.J.A.C. 7:7A-9 or 13, mitigation shall be provided pursuant to N.J.A.C. 7:7A-14.

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

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

New (b) added, recodified existing (b)-(d) as (c)-(e).

SUBCHAPTER 6. TRANSITION AREAS

Source and Effective Date

R.1989 d.362, effective July 3, 1989.

See: 21 N.J.R. 596(a), 21 N.J.R. 1858(a).

Subchapter Historical Note

Subchapter 6, Transition Areas, became effective on July 3, 1989, as R.1989 d.362. See: Source and Effective Date.

See section annotations for specific rulemaking activity.

7:7A-6.1 General 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 the provisions of (a) above and with N.J.S.A. 13:9B-16a:

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 freshwater wetlands of exceptional resource value and of intermediate resource value as classified in N.J.A.C. 7:7A-2.5. A transition area is not required adjacent to freshwater wetlands of ordinary resource value as classified in N.J.A.C. 7:7A-2.5 or adjacent to State open waters as defined at N.J.A.C. 7:7A-1.4.

(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 by the Department pursuant to the Act and this chapter. The types of transition area waivers are listed at N.J.A.C. 7:7A-7.1(c).

(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 by the Department pursuant to the Act and this chapter.

(f) A person shall not engage in activities prohibited in a transition area as set forth at N.J.A.C. 7:7A-6.2 except pursuant to a transition area waiver issued by the Department pursuant to this chapter.

(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 N.J.A.C. 7:7A-6, Appendix A, which is incorporated by reference in this chapter. The outside boundary line of a transition area shall parallel, that is, be equidistant from, the freshwater wetlands boundary line, unless a transition area waiver is approved under N.J.A.C. 7:7A-7.4 or N.J.A.C. 7:7A-7.5. The width of the transition area shall be measured as the minimum distance between the freshwater wetlands boundary and the outside transition area boundary.

(h) The outside boundary of a transition area is determined solely by reference to the freshwater wetlands boundary and is in no way affected by property lines. Therefore, a property within 150 feet of a freshwater wetlands may contain a transition area which arises from a freshwater wetlands on another property. Any property or piece of property encompassing the transition area of a freshwater wetlands is subject to the Act and this chapter, notwithstanding that the freshwater wetland is located on another property.

Amended by R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
Minor change in (b)6.

Case Notes

Ban on sewer hookups for new residential construction precluded use of any part of property for residential purposes; highest and best use of subject property, consisting of 36 separate contiguous parcels comprising city water reserve, open space or conservation, for purposes of township's real property tax. *East Orange City v. Livingston Tp.*, 15 N.J.Tax 36 (1995).

7:7A-6.2 Prohibited activities in transition areas

(a) Except as provided in (b) and (c) below, a person shall not conduct the following prohibited activities in transition areas:

1. Removal, excavation, or disturbance of the soil;
2. Dumping or filling with any materials;
3. Erection of structures;
4. Placement of pavements; and
5. Destruction of plant life which would alter the existing pattern of vegetation.

(b) The following activities may be conducted (that is, are not prohibited) in transition areas, provided that the activities are performed in a manner that minimizes adverse effects to the transition area and adjacent freshwater wetlands:

1. Normal property maintenance;
 - i. For the purposes of this paragraph, "normal property maintenance" means activities required to maintain lawfully existing artificial and natural features, landscaping and gardening. These activities include:
 - (1) Mowing of existing fields or lawns;
 - (2) Pruning of trees and shrubs;
 - (3) Selective cutting of trees;
 - (4) Replacement of existing non-native plants with either native or non-native species;
 - (5) Limited supplemental planting of non-native plant species that will not significantly change the character of the existing vegetational community of the transition area. The creation of a lawn is not considered supplemental planting;
 - (6) Planting of native species, that is, plants naturally occurring in transition areas in the local region, (the county agricultural agent may be consulted to obtain information regarding these species);
 - (7) Continued cultivation of existing gardens and the development of new gardens no larger than one quarter acre in size; and
 - (8) Maintenance of artificial features including the repair, rehabilitation, replacement, maintenance or

reconstruction of any previously authorized, currently serviceable structure, lawfully existing prior to July 1, 1989, or permitted under the Act and this chapter, provided such activities do not result in additional disturbance of the transition area upon completion of the activity. Minor deviations from the existing structure due to changes in materials or construction techniques and which are necessary to make repairs, rehabilitation or replacements are allowed provided such changes do not result in disturbance of additional transition area upon completion of the activity.

ii. Any activity which involves or causes the substantial alteration or change of the existing characteristics of a transition area shall not be considered normal property maintenance. Activities which involve or cause substantial alteration or change of the transition area include, but are not limited to, extensive removal or destruction of vegetation by clear cutting, cutting, mowing (except as described in (b)1i above), burning or application of herbicides, planting of ornamental plants or lawns for landscaping purposes (except as described in (b)1i above), regrading or significant changes in the existing surface contours and the placement of fill, pavement or other impervious surfaces.

2. Minor and temporary disturbances of the transition area resulting from, and necessary for, normal construction activities on land adjacent to the transition area;

i. For the purposes of this paragraph, "minor and temporary disturbances of the transition area resulting from, and necessary for, normal construction activities on land adjacent to the transition area," means activities which do not result in adverse environmental effects on the transition area or on the adjacent freshwater wetlands and which activities do not continue for a period of more than six months. Normal construction activities which would be minor and temporary disturbances include, but are not necessarily limited to, the placement of scaffolds or ladders, the removal of human-made debris by non-mechanized means which does not destroy woody vegetation, the placement of temporary construction supports, and the placement of utility lines over or under a previously authorized, currently serviceable existing paved roadway.

3. The erection of temporary structures covering a combined total of 150 square feet or less of the transition area;

i. For the purposes of this paragraph, "temporary structures" means sheds or fences which do not have a foundation, or other structures that remain in the transition area for no more than a total of six months.

(c) Projects or activities which are exempt from the requirement of a freshwater wetlands permit pursuant to N.J.A.C. 7:7A-2.7(b), (c) and (d) shall also be exempt from transition area requirements. These transition area exemptions are subject to the same limitations as the correspond-

ing freshwater wetlands permit exemptions. These limitations can be found at N.J.A.C. 7:7A-2.7.

(d) To confirm that an activity or project is exempt, an exemption letter may be requested from the Department through the procedures established for freshwater wetlands permit exemptions in N.J.A.C. 7:7A-2.9, including submittal of the fee specified at N.J.A.C. 7:7A-16.

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

At (b)2i added reference to placement of utility lines; corrected cross references in (c) and (d).

7:7A-6.3 Determination of transition areas due to the presence of freshwater wetlands on adjacent property

(a) Any person engaging in prohibited activities in a transition area without Department approval shall be in violation of the Act and this chapter. A transition area may be located on a property even though the freshwater wetlands adjacent to that transition area are located on a different property (see N.J.A.C. 7:7A-6.1(h)).

(b) To determine whether a transition area is required on a parcel, where freshwater wetlands may exist on other nearby parcels, a person may follow the procedures at (c) below or follow those procedures at (b)1 through 6 below as applicable:

1. Locate any freshwater wetlands that may be within 150 feet of the subject parcel property lines and any freshwater wetlands that may be within 50 feet of the subject parcel property lines. If there are no freshwater wetlands on the subject parcel or on land within 150 feet of the subject parcel property line, no transition areas exist on the subject parcel.

2. If there are freshwater wetlands on neighboring land within 150 feet of the parcel boundary, determine if they are classified as freshwater wetlands of ordinary resource value as specified in N.J.A.C. 7:7A-2.5. If a determination of classification by the Department is desired, a letter of interpretation classifying any freshwater wetlands can be obtained from the Department pursuant to N.J.A.C. 7:7A-8. No transition area is required adjacent to ordinary resource value wetlands.

3. If any of the freshwater wetlands on neighboring land within 150 feet of the subject parcel boundary cannot be classified as ordinary, determine whether they are freshwater wetlands of intermediate or freshwater wetlands of exceptional resource value as specified in N.J.A.C. 7:7A-2.5. If a determination of classification by the Department is desired, a letter of interpretation, including a notice of classification, classifying any freshwater wetlands can be obtained from the Department pursuant to N.J.A.C. 7:7A-8.

4. If the freshwater wetlands on the subject parcel or within 150 feet of the subject parcel property boundary are freshwater wetlands of exceptional resource value, a transition area exists on the subject parcel. In order to determine the size and shape of the transition area, obtain a delineation of the freshwater wetlands on neighboring land within 150 feet of the subject parcel boundary and determine the shape and size of the standard transition area on the subject parcel according to N.J.A.C. 7:7A-6.1(d).

- i. To avoid the necessity of delineating exceptional resource value freshwater wetlands on other properties, a person may ensure compliance with transition area requirements arising from freshwater wetlands on other properties by refraining from prohibited activities on the subject parcel within 150 feet of the property boundary.

5. If there are freshwater wetlands of intermediate resource value on land within 50 feet of the subject parcel boundary, a transition area exists on the subject parcel. In order to determine the size and shape of the transition area, obtain a delineation of the freshwater wetlands on neighboring land within 50 feet of the subject parcel boundary and determine the shape and size of the standard transition area on the subject parcel according to N.J.A.C. 7:7A-6.1(e).

- i. To avoid the necessity of delineating intermediate resource value freshwater wetlands on other properties, a person may ensure compliance with transition area requirements arising from freshwater wetlands on other properties by refraining from prohibited activities on the subject parcel within 50 feet of the property boundary.

6. It may be necessary to obtain written permission from adjacent property owners to investigate their land to within 150 feet of the subject parcel boundary. If a transition area waiver or letter of interpretation is needed, the applicant shall provide written notice to adjacent landowners that the Department may conduct an onsite field inspection as part of the application process. This notification shall be included as part of the notification process pursuant to N.J.A.C. 7:7A-7.6(a)7v, Application contents for transition area permits; N.J.A.C. 7:7A-8.3(a)10iv, Application for a letter of interpretation; N.J.A.C. 7:7A-9.5(b), Application for Statewide general permit authorization; or N.J.A.C. 7:7A-11.1(b)9, Application contents.

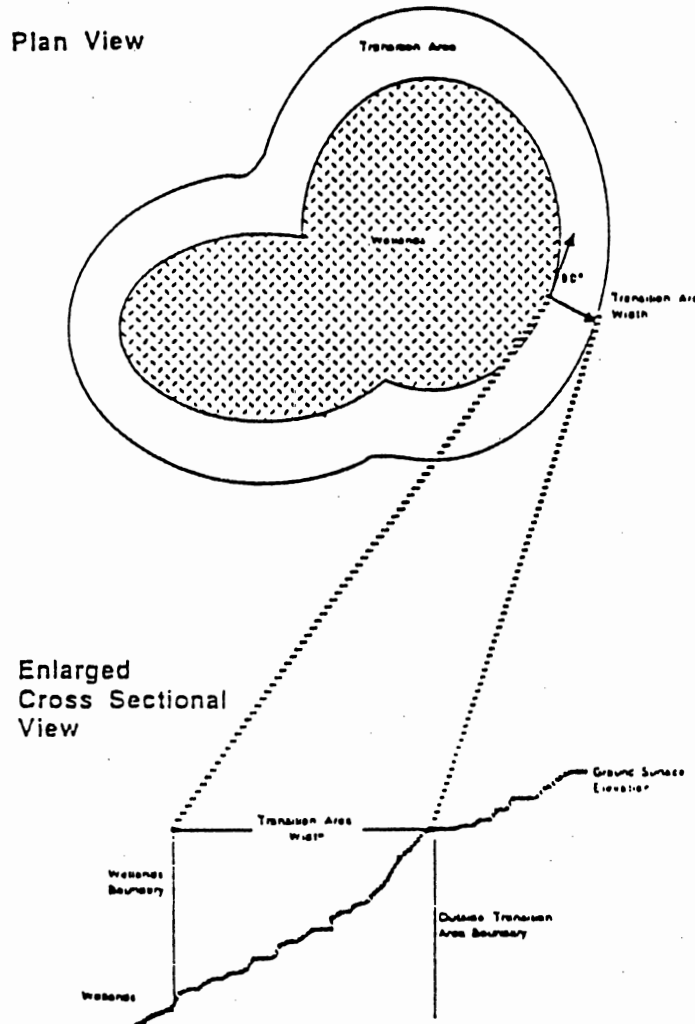
(c) Instead of following the procedures at (b)1 to 6 above, a person may ensure compliance with transition area requirements arising from freshwater wetlands on other properties by refraining from prohibited activities on the subject parcel within 150 feet of the subject parcel property line.

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

Repealed (b)5 and recodified existing 5-7 as 5 and 6; new language added at 6 regarding notification to owners of adjacent property.

Appendix A

Example of a transition area adjacent to a freshwater wetland.
 Depicted are a plan and elevational view.



Appendix B (Reserved)

See section annotations for specific rulemaking activity.

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

Appendix B contained Right of Entry Agreement For Wetlands and Transition Area Delineations.

7:7A-7.1 General provisions

(a) A transition area waiver shall not be granted by the Department pursuant to the Act and this chapter unless it includes conditions as necessary to ensure that a particular project or activity results in minimal environmental impact and unless the purposes and functions of transition areas as set forth in N.J.A.C. 7:7A-6.1(a) and (b) are satisfied.

(b) Any person proposing to engage in a prohibited activity within 150 feet of an exceptional resource value wetland, or within 50 feet of an intermediate resource value wetland, shall apply to the Department for a transition area waiver.

(c) The Department may authorize the following through a transition area waiver:

SUBCHAPTER 7. TRANSITION AREA WAIVERS

Source and Effective Date

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

Subchapter Historical Note

Subchapter 7, Transition Area Waivers, became effective on July 3, 1989 as R.1989 d.362. See: Source and Effective Date.

1. A reduction in the standard transition area width established in N.J.A.C. 7:7A-6.1(d) and (e). Reductions are determined at N.J.A.C. 7:7A-7.2 for exceptional resource value freshwater wetlands and at N.J.A.C. 7:7A-7.3 for intermediate resource value freshwater wetlands;

2. A modification in the shape, but not the square footage, of the standard transition area through a transition area averaging plan pursuant to N.J.A.C. 7:7A-7.5. This waiver is available for transition areas adjacent to both exceptional and intermediate resource value freshwater wetlands;

3. A partial elimination of the standard transition area width along a portion of the freshwater wetland to allow special activities as established in N.J.A.C. 7:7A-7.4. This waiver is available for transition areas adjacent to both exceptional and intermediate resource value freshwater wetlands; or

4. Any combination of (c)1, 2, and 3 above.

(d) Reduction or modification of a transition area shall be based solely on the transition area adjacent to a particular freshwater wetland. For property with more than one freshwater wetland, the standard transition area width and the criteria for reducing or modifying the standard width shall be applied separately to each freshwater wetland. In no case may expansion of a transition area adjacent to one freshwater wetland compensate for reduction of a transition area adjacent to a separate freshwater wetland. However, one transition area waiver application may be used to request transition area waivers for more than one transition area located on a single property.

(e) In determining whether to issue or deny a transition area waiver, the Department shall consider information submitted by the applicant; local, county, state and Federal government agencies; and interested citizens and may consider any other available information.

(f) The Department's authorization of activities under a Statewide general permit, individual freshwater wetlands permit or mitigation plan shall automatically include a transition area waiver. In addition, the approval of a mitigation plan in a transition area as a result of either a permit approval or resolution of an enforcement action under the Act and Federal Act will automatically include a transition area waiver. No fee or application will be required for these waivers. The transition area waiver will allow encroachment only in that portion of the transition area bordering on that portion of the freshwater wetland in which the authorized activity is to take place which the Department determines is necessary to accomplish the authorized activity. Any additional prohibited activities in the transition area not directly required for the authorized activity shall require a separate transition area waiver from the Department pursuant to the Act and this chapter.

(g) Every approved transition area waiver, except for those issued pursuant to (f) above and N.J.A.C. 7:7A-7.4, Special Activity waivers, shall be conditioned on the recording of a Department-approved deed restriction of activities which may be undertaken in the transition area. Prior to construction, the deed restriction shall be recorded in the office of the clerk of the county or through the register of deeds and mortgages in which the premises are situated. The restriction shall run with the land and be binding upon the applicant and the applicant's successors in interest in the premises or in any part thereof and shall include the following:

1. The Department-approved restriction shall provide that no prohibited activities will occur in the modified transition area unless the Department finds that:

i. There is compelling public need for the activity greater than the need to protect the modified transition area; and

ii. That the activity has no practicable alternative which would:

(1) Not involve a transition area;

(2) Involve a transition area but would have less adverse impact on the transition area and the adjacent wetland; and

(3) Not have other significant adverse environmental consequences, that is, it shall not merely substitute other significant environmental consequences for those attendant on the original proposal.

2. The applicant shall provide proof that the deed restriction is recorded in the office of the clerk of the county or through the register of deeds and mortgages in which the premises are situated, or provide documentation that the restriction has been accepted for recording at the above offices.

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

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

New (g) added.

Case Notes

Special transition area waiver permit proper. *Oliemuller v. Pequannock Township* and DEPE, 94 N.J.A.R.2d (EPE) 95.

7:7A-7.2 Exceptional resource value freshwater wetlands: standards for transition area width reduction

(a) This section addresses standards for overall width reduction of transition areas adjacent to exceptional resource value wetlands. A transition area adjacent to a freshwater wetland of exceptional resource value shall be 150 feet wide except pursuant to a transition area waiver approved by the Department. Except pursuant to a transition area waiver for access to an authorized activity, granted by the Department pursuant to N.J.A.C. 7:7A-7.1(f), a transition area adjacent to a freshwater wetland of exceptional resource value shall not be reduced to less than 75

feet wide unless the applicant demonstrates, to the satisfaction of the Department, that if the activity was instead proposed in the exceptional resource value wetland it would meet the standards for granting a freshwater wetlands permit.

(b) The Department shall grant a transition area waiver to reduce a transition area adjacent to a freshwater wetland of exceptional resource value from the standard transition area width only if:

1. The proposed activity would have no substantial impact as determined pursuant to (c), (d) or (e) below, on the adjacent freshwater wetland; or

2. The waiver is necessary to avoid an extraordinary hardship to the applicant, as described at (g) below.

(c) For the purposes of N.J.A.C. 7:7A-7, a substantial impact shall be deemed to exist on a freshwater wetland of exceptional resource value if one or more of the following is true, unless the applicant demonstrates otherwise to the Department's satisfaction pursuant to (h) below:

1. The freshwater wetland contains a present or "documented habitat for threatened or endangered species" as defined at N.J.A.C. 7:7A-1.4;

2. The freshwater wetland is located adjacent to FW1 waters or FW2 trout production waters;

3. The freshwater wetland is located adjacent to a component of either the Federal or State Wild and Scenic River System designated pursuant to 16 U.S.C. § 1271 et seq. or N.J.S.A. 13:8-45 et seq.; or adjacent to a waterway 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;

4. The proposed project would cause the disturbance or exposure of acid producing deposits as defined at N.J.A.C. 7:13-5.10;

5. The property is located adjacent to a local, county, State, or federal park, wildlife refuge, sanctuary, management area or area listed on the New Jersey Register of Natural Areas; or

6. The proposed activity or project includes one or more of the following:

i. Construction or expansion of a commercial or industrial facility within the following Standard Industrial Classification (SIC) major groups as designated in the Standard Industrial Classification Manual prepared by the Office of Management and Budget in the Executive Office of the President of the United States.

SIC	Industry Category
22	Textile Mill Products
23	Apparel
24	Lumber & Wood Products
25	Furniture & Fixtures
26	Paper & Allied Products

SIC	Industry Category
27	Printing, Publishing & Allied Industries
28	Chemicals & Allied Products
29	Petroleum Refining & Related Industries
30	Rubber & Miscellaneous Plastics Products
31	Leather & Leather Products
32	Stone, Clay, Glass & Concrete Products
33	Primary Metal Industries
34	Fabricated Metal Products
35	Machinery
36	Electrical & Electronic Machinery
37	Transportation Equipment
38	Measuring Analyzing & Controlling Instruments, Photographic, Medical & Optical Goods
39	Miscellaneous Manufacturing Industries
47	Transportation Services
48	Communications
49	Utilities (Electric, Gas, Sewer), excluding linear Equipment
51	Nondurable Goods Wholesaling
55	Automotive Dealers and Gasoline Service Stations;

ii. Establishment of new or expansion of existing mineral extraction and/or processing operations. This includes mining or processing of construction sand, industrial sand, gravel, ilmenite, glauconite, limestone, or other minerals; or

iii. Construction or expansion of wastewater treatment or septic systems which are located within 150 feet of an exceptional resource value wetland or within 50 feet of an intermediate resource value wetland;

iv. Establishment of a new or expansion of an existing solid waste facility.

(d) The Department will consider the proposed project to have no substantial impact, and will issue a transition area waiver reducing the standard transition area width to 100 feet, if no activity prohibited pursuant to N.J.A.C. 7:7A-6.2 is conducted within the reduced 100 foot transition area and if all of the following transition area characteristics and proposed project factors are true:

1. The property or proposed project or activity does not fall into any of the categories indicating a substantial impact as listed at N.J.A.C. 7:7A-7.2(c)1, 2, 4, or 6.

2. The existing, pre-development transition area is unvegetated or has a herbaceous vegetational community as the dominant vegetational community as determined in (e)1 below;

3. The property has been part of an established ongoing farming, ranching or silviculture operation" as defined at N.J.A.C. 7:7A-1.4 within the two years before the transition area waiver application is submitted; and

4. The proposed project will include the planting of native trees and shrubs in the reduced 100 foot transition area pursuant to a plan approved by the Department. The planting shall achieve no less than an 85 percent area coverage in the entire 100 foot transition area and ensure no less than 85 percent survival of the plants for no less than three years.

(e) If the project, activities and/or property do not result in a substantial impact as determined in (c) above, the Department shall determine the transition area width based on the slope and dominant vegetational community type of

the transition area and the development intensity of the proposed project, as described below at (e) 1 to 3, as indices of impact on a freshwater wetland of exceptional resource value, using the matrix below.

			Development Intensity		
			Low (0-10%)	Modernate (> 10-40%)	High (> 40%)
Dominant Vegetational Community	Herba- ceous	Slope %			
		0-2	100	120	140
	>2	150	150	150	
	Scrub-Shrub	0-2	75	75	80
		>2-5	95	115	130
		>5	150	150	150
	Forest	0-2	75	75	75
		>2-5	75	75	85
		>5-10	75	85	95
		>10-15	95	105	115
		>15-20	115	125	135
		>20	135	145	150

1. The dominant vegetational community in a transition area is the plant community which covers the most surface area of the transition area contained within the subject property. Vegetational communities are classified as herbaceous, scrub-shrub, or forested.

i. An herbaceous vegetational community is characterized by the presence of annual and perennial plant species or bare ground.

ii. A scrub-shrub vegetational community is characterized by shrub and herbaceous plant species with an average height equal to or less than 20 feet. A forested area with little or no herbaceous or shrub layer (understory) shall be considered a scrub-shrub vegetational community for the purposes of this chapter.

iii. A forested vegetational community is characterized by tree species with an average height greater than 20 feet accompanied by a herbaceous or shrub layer.

2. The average slope of the ground in the existing pre-activity standard transition area is measured as the arithmetic mean of slope measurements of the transition area taken every 200 feet along the outside transition area boundary. Slope shall be measured as the change in elevation of the ground from the freshwater wetlands boundary to the outside transition area boundary over the standard transition area width established in N.J.A.C. 7:7A-6.1.

3. The development intensity of the proposed project is the percentage of the surface area of the property,

measured on a horizontal scale, which will be covered by impervious surfaces at the completion of the proposed project. For the purposes of this paragraph, "property" means the municipal tax lot or lots upon which any part of the proposed project will occur. Impervious surfaces are areas which prevent the infiltration and percolation of water into the soil. Impervious cover includes, but is not limited to, pavement, rooftops, sidewalks, driveways, tennis courts and swimming pools. The area used to calculate development intensity shall exclude freshwater wetlands, transition areas, and State open waters. The sum of the square footage of freshwater wetlands, transition areas, and State open waters on the property is subtracted from the square footage of the entire property. The resulting number is divided into the square footage of all impervious cover which will result on the property upon completion of the proposed project. This quotient is multiplied by 100 percent to obtain the percentage of impervious cover, also known as the development intensity, which can be expressed mathematically as:

$$DI = IC / (PA - (FW + TA + SOW)) \cdot 100\%$$

where:

i. DI is the development intensity of the project expressed as a percentage;

ii. IC is the square footage of impervious cover which will exist on the entire subject property or properties which are affected by the proposed project, at the completion of the proposed project, including pre-existing impervious cover.

iii. PA is the square footage of the property or properties on which the proposed project or activity will occur;

iv. FW is the square footage of freshwater wetlands present on the subject property;

v. TA is the square footage of the transition area based on the standard transition area width established at N.J.A.C. 7:7A-6.1; and

vi. SOW is the square footage of State open waters on the subject property.

(f) An extraordinary hardship to the applicant will be considered to exist when:

1. The subject property is not susceptible to a reasonable use as is presently developed as authorized by the provisions of the Act and this chapter and this limitation results from unique and extreme circumstances peculiar to the subject property which:

i. Do not apply to or affect other property in the local region; and

ii. Relate to or arise out of the subject property, rather than the personal situation of the applicant, and are not the result of any action or inaction by the applicant or the owner or the owner's predecessors in title.

2. For single family residential lots which are unbuildable due to the presence of transition areas, the Department may grant a transition area reduction waiver to reduce the transition area to a minimum of 75 feet based on hardship if the following conditions are met:

i. The lot was subdivided prior to July 1, 1988 and was owned by the applicant since that time;

ii. The applicant has not received a waiver for a reduction of a transition area based on this hardship criteria for the past five years;

iii. The applicant shall demonstrate that adjacent properties cannot be purchased for fair market value to create a buildable lot;

iv. The applicant shall demonstrate that the subject property was offered for sale at fair market value to adjacent landowners and that the offer was refused;

v. The subject parcel is not contiguous with an adjacent improved parcel which was owned by the applicant on July 1, 1988; and

vi. The applicant shall demonstrate that the subject property was offered for sale at fair market value to interested public or private conservation organizations and that the offer was refused. The Department will provide applicants with a listing of conservation organizations upon request.

(g) If the applicant is unable to demonstrate that an activity will have no substantial impact on the adjacent wetland by satisfying the criteria at (c) above or at N.J.A.C. 7:7A-7.3, 7.4(e), or 7.5, an applicant may demonstrate no substantial impact through the use of scientific documentation. This documentation may include but is not limited to, nutrient or sediment transport models, buffer models such as "The Wetlands Buffer Delineation Method," prepared by Rogers, Golden and Halpern, Inc., the "Buffer Delineation Model for New Jersey Pinelands Wetlands," prepared by Charles T. Roman and Ralph E. Good, or wildlife habitat suitability studies. If the applicant elects to use a buffer model, the following shall be addressed as they relate to the adjacent wetlands: sediment, nutrient, and pollutant transport and removal, impacts on sensitive species, and potential impacts to surface water quality.

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

New (e) added defining what is considered no substantial impact and recodified (e)-(g) as (f)-(h); new (f)2 regarding single family residential lots.

7:7A-7.3 Intermediate resource value freshwater wetlands: standards for transition area width reduction

(a) This section addresses standards for overall width reduction of transition areas adjacent to intermediate resource value wetlands. A transition area adjacent to a freshwater wetland of intermediate resource value shall be 50 feet wide except pursuant to a transition area waiver approved by the Department. Except pursuant to a Department-approved transition area averaging plan issued pursuant to N.J.A.C. 7:7A-7.5, a transition area permit for access to an authorized activity granted by the Department pursuant to N.J.A.C. 7:7A-7.1(f), or a special activity permit pursuant to N.J.A.C. 7:7A-7.4, a transition area adjacent to a freshwater wetlands of intermediate resource value shall not be reduced to less than 25 feet wide.

(b) The Department shall grant a transition area waiver to reduce a transition area adjacent to a freshwater wetland of intermediate resource value from the standard transition area width only if:

1. The proposed activity would have no substantial impact, as determined pursuant to (c) and (d) below, on the adjacent freshwater wetland; or

2. The waiver is necessary to avoid a substantial hardship to the applicant, as defined in (e) below.

(c) For the purposes of this subchapter, a substantial impact shall be deemed to exist on a freshwater wetland of intermediate resource value if one or more of the following is true, unless the applicant demonstrates otherwise to the Department's satisfaction pursuant to N.J.A.C. 7:7A-7.2(g):

1. The freshwater wetland is a critical habitat for fauna or flora, as determined by the Department. Critical habitat for fauna are areas which serve an essential role in maintaining commercially and recreationally important wildlife, particularly for wintering, breeding, spawning and migrating activities. Critical habitat for flora are areas supporting rare or unique plant species or uncommon vegetational communities in New Jersey;

2. The freshwater wetland is located adjacent to a component of either the Federal or State Wild and Scenic River System designated pursuant to 16 U.S.C. § 1271 et seq. or N.J.S.A. 13:8-45 et seq.; or adjacent to a waterway 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;

3. Any soils in the transition area which are classified as acid soils as defined at N.J.A.C. 7:13-5.10 will be disturbed by the proposed activity;

4. The property is located adjacent to a local, county, State or Federal park, wildlife refuge, sanctuary, management area, or area listed on the New Jersey Register of Natural Areas; or

5. The proposed activity or project includes one or more of the operations or activities at N.J.A.C. 7:7A-7.2(c)6.

(d) If the project, activities and/or property do not meet any of the criteria in (c) above, the Department shall determine the transition area width reduction from that of the standard transition area width based on the slope and dominant vegetational community type of the transition area and the developmental intensity of the proposed project, as described at N.J.A.C. 7:7A-7.2(e)1 through 3, as indices of the impact on a freshwater wetland of intermediate resource value, using the criteria below:

1. A transition area waiver reducing the transition area width to 25 feet shall be granted if all of the following are true:

i. The dominant vegetational community type, as described in N.J.A.C. 7:7A-7.2(e)1, of the standard transition area is a forested vegetational community;

ii. The slope of the standard transition area, as determined pursuant to N.J.A.C. 7:7A-7.2(e)2, is less than or equal to one percent.

iii. The development intensity of the project, as determined N.J.A.C. 7:7A-7.2(e)3, is less than 20 percent.

2. A transition area waiver reducing the transition area width to 35 feet shall be granted if all of the following are true;

i. The dominant vegetational community type, as described at N.J.A.C. 7:7A-7.2(e)1, of the standard transition area is a forested vegetational community;

ii. The slope of the standard transition area, as determined pursuant N.J.A.C. 7:7A-7.2(e)2, is less than or equal to three percent; and

iii. The developmental intensity of the project, as determined pursuant to N.J.A.C. 7:7A-7.2(e)3, is less than 40 percent.

3. A transition area waiver reducing the transition area width to 35 feet shall be granted if all of the following are true:

i. The dominant vegetational community type, as described at N.J.A.C. 7:7A-7.2(e)1, of the standard transition area is scrub-shrub or herbaceous vegetational community;

ii. The slope of the standard transition area, as determined pursuant to N.J.A.C. 7:7A-7.2(e)2, is less than or equal to one percent; and

iii. The development intensity of the project, as determined pursuant to N.J.A.C. 7:7A-7.2(e)3, is less than 20 percent.

4. A substantial impact on the freshwater wetland shall be deemed to exist, and a transition area waiver shall not be granted pursuant to this section, if the conditions in (d)1, 2 or 3 above are not met.

(e) A substantial hardship to the applicant shall be considered to exist when:

1. The subject property is not susceptible to a reasonable use as authorized by the provisions of the Act and this chapter and this limitation results from unique circumstances peculiar to the subject property which:

i. Do not apply to or affect other property in the immediate vicinity; and

ii. Relate to or arise out of the subject property, rather than the personal situation of the applicant, and are not the result of any action or inaction by the applicant or the owner or the owner's predecessors in title.

2. For single family residential lots which are unbuildable due to the presence of transition areas, the Department may grant a transition area reduction waiver to reduce the transition area to a minimum of 25 feet based on hardship if the following conditions are met:

i. The lot was subdivided prior to July 1, 1988 and was owned by the applicant since that time;

ii. The applicant has not received a waiver for a reduction of a transition area based on this hardship criteria for the past five years;

iii. The applicant shall demonstrate that adjacent properties cannot be purchased to create a buildable lot for fair market value;

iv. The applicant shall demonstrate that the subject property was offered for sale at fair market value to adjacent landowners and that the offer was refused;

v. The subject parcel is not contiguous with an adjacent improved parcel which was owned by the applicant on July 1, 1988; and

vi. The applicant shall demonstrate that the subject property was offered for sale at fair market value to interested public or private conservation organizations and that the offer was refused. The Department will provide applicants with a listing of conservation organizations upon request.

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

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

New (d) and new (e)2 added; (e)-(f) recodified as (d)-(e).

7:7A-7.4 Special activities: Standards for granting transition area waivers

(a) The Department will issue transition area waivers for certain special activities meeting the criteria in this section. Waivers under this section are not subject to the criteria in N.J.A.C. 7:7A-7.2, 7.3 or 7.5. The Department will issue a transition area waiver to reduce or partially eliminate the standard transition area to allow for the special activities listed below at (a)1 through 3, provided the applicable conditions for each activity set forth below at (b), (c), (d), (e) and (f) are met; provided the project is designed to minimize impacts to the freshwater wetland and transition area; and provided the transition area continues to serve the purposes set out at N.J.A.C. 7:7A-6.1(a) and (b). Reductions or partial eliminations authorized under this section shall not require compensation pursuant to N.J.A.C. 7:7A-7.5. Except pursuant to a transition area waiver for access to an authorized activity issued by the Department pursuant to N.J.A.C. 7:7A-7.1(f), a transition area adjacent to freshwater wetlands of exceptional resource value shall not be reduced to less than 75 feet wide unless the applicant demonstrates, to the satisfaction of the Department, that if the activity was instead proposed in the exceptional resource value wetland it would meet the standards for granting a freshwater wetlands waiver. The special activities are:

1. Stormwater management facilities as defined at (b) below;
2. Linear development as defined at N.J.A.C. 7:7A-1.4;
3. Activities performed in the transition area which are permitted under specific Statewide general permits listed in (e) below; and
4. Activities performed in the transition area which can be defined as redevelopment as specified in (f) below.

(b) If the proposed activity is the construction of a stormwater management facility, the Department will approve a transition area waiver for the reduction or partial elimination of a transition area if there is no feasible alternative on-site location for the facility.

1. For the purposes of this paragraph, "stormwater management facility" means a facility which receives, stores, conveys or discharges stormwater runoff and is designed in accordance with all applicable local, county and state regulations. These facilities may include retention and detention basins and infiltration structures; grassed swales; filter fabric; rip-rap channels and/or stormwater outfalls.

2. An alternative onsite location shall not be considered infeasible merely because it would require one or more of the following:

- i. Relocating part or all of the stormwater management facility outside of the transition area and into the upland;
- ii. Modifying the type of stormwater management facility;
- iii. Redesigning the layout, size, scope or configuration of the buildings, roads or other aspects of the project in order to accommodate the stormwater management facility; or
- iv. Reducing the scope or density of the project generating the stormwater.

3. An alternative onsite location shall be considered feasible if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of stormwater management goals.

(c) If the proposed activity is the construction of a linear development as defined at N.J.A.C. 7:7A-1.4, the Department will approve a further transition area waiver for the reduction or partial elimination of transition area if there is no feasible alternative location for the linear development.

1. An alternative location shall be considered feasible when the proposed linear development can be located outside of the transition area by:
 - i. Modifying the route of the linear development to avoid or reduce impacts to freshwater wetlands and transition areas; or
 - ii. Reducing the width of the linear development.
2. An alternative shall be feasible if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of the overall project purposes.

3. An alternative shall not be excluded from consideration merely because it includes or requires an area not owned by the applicant which could reasonably have been or be obtained or used to fulfill the basic purpose of the proposed activity.

(d) An alternative on-site location, as described in (b) above, or an alternative location, as described in (c) above, may be considered infeasible if its use for the project would cause other significant adverse environmental consequences.

(e) No substantial impact will be deemed to exist on a freshwater wetland, and a transition area waiver will be granted for the reduction or partial elimination of transition area in order to conduct activities in the transition area which are covered by the Statewide general permits at N.J.A.C. 7:7A-9.2(a) 2, 3, 4, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, and 25.

1. With the exceptions listed below at (e)1i through iii, all limitations and conditions contained in the description of Statewide general permit activities at N.J.A.C. 7:7A-9.2(a) will also apply to those activities when authorized by a permit pursuant to this subsection. For example, where the Statewide general permit at N.J.A.C. 7:7A-9.2(a)10, minor road crossings, is limited to 0.25 acres of wetland or open water disturbance, the special activity waiver for this activity will be limited to 0.25 acres of transition area disturbance. The following exceptions to this provision will apply:

i. For a special activity transition area waiver authorizing activities listed in Statewide general permit number 10, the 200 cubic yard fill limitation does not apply;

ii. For a special activity transition area waiver authorizing construction of stormwater structures that include a swale designed for water quality as listed in Statewide general permit number 11, the limitation at N.J.A.C. 7:7A-9.2(a)11vii, concerning backfill, does not apply; and

iii. For a special activity transition area waiver authorizing activities listed in Statewide general permit number 16, the 10 cubic yard fill limitation does not apply.

2. The limits at N.J.A.C. 7:7A-9.4 on the use of multiple Statewide general permits in freshwater wetlands also apply to the use in transition areas of multiple special activity waivers issued under this subsection. For example, pursuant to N.J.A.C. 7:7A-9.4(d), an approval under the Statewide general permit at N.J.A.C. 7:7A-9.2(a)8 will be authorized only once for a single property. Likewise, only one special activity waiver for the activity covered by that Statewide general permit shall be approved in a transition area.

3. The authorization of the special activity waiver for general permit activities in transition areas listed under this subsection does not eliminate the possibility that

activities in freshwater wetlands or State open waters may be authorized under Statewide general permits. However, these waivers shall not be used to double the impact of a specific activity by combining the allowed wetland and transition area impacts. For example, one minor road crossing shall not exceed 0.25 acres of disturbance or 100 linear feet regardless of whether the crossing is entirely in wetlands and open waters, entirely in the transition area, or traverses both. The 0.25 acre limitation does not include the transition area that is necessary for access to a wetland crossing. For example the Department shall not approve an application that combines a minor road crossing (Statewide general permit number 10) in the wetlands with a minor road crossing in the transition area (Special activity waiver number 10) which results in a minor road crossing designed to cross 100 feet of wetlands and open waters and then parallels the wetland for an additional 100 feet through the transition area.

(f) A special activity waiver may be granted for the reduction or partial elimination of a transition area in order to allow redevelopment, as defined at N.J.A.C. 7:7A-1.4, of a transition area, if the following conditions are met:

1. The applicant must demonstrate to the satisfaction of the Department that the proposed activity will not result in substantial impact to the adjacent freshwater wetland;

2. The area of proposed activity must be covered by pavements or impervious surfaces legally existing in the transition area prior to July 1, 1989, or permitted under the Act. This does not include expansion of impervious surfaces or any additional disturbance of the transition area; and

3. Where practicable, a portion of the developed transition area adjacent to the wetland shall be revegetated and restricted pursuant to N.J.A.C. 7:7A-7.1(g).

(g) A person shall not commence a prohibited activity in a transition area pursuant to (e) above prior to obtaining a transition area waiver from the Department pursuant to the Act and this chapter. The limitations of N.J.A.C. 7:7A-7.2(c) and 7.3(c) do not apply to transition area waivers granted under (e) above.

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

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

Amended to establish that special activity waivers shall not be used to double the impact of a specific activity by combining the wetland and transition area impacts.

**7:7A-7.5 Transition area waiver, averaging plans:
Standards for modifying the shape of a
transition area**

(a) A transition area averaging plan, a type of transition area waiver, is a plan to modify the overall shape of the transition area without reducing the total square footage of the transition area. A transition area averaging plan may be approved for activities adjacent to either an intermediate

or exceptional resource value freshwater wetlands. An example of a transition area averaging plan is shown in N.J.A.C. 7:7A-7 Appendix A, which is incorporated by reference in this subchapter.

(b) Subject to the limitations contained in this subsection and to the limitations of (c) below, an applicant may change the shape of a transition area consistent with a Department approved transition area averaging plan. Portions of the required transition area width may be reduced provided that the reduction in width is compensated, on a square footage basis, by the expansion of another portion of the same transition area on property owned or legally controlled by the applicant, and provided that the resulting transition area continues to serve the purposes of a transition area set forth in N.J.A.C. 7:7A-6.1(a) and (b).

1. The Department shall not approve any transition area averaging plan for exceptional resource value wetlands if any of the following site conditions exist because the Department has determined that the resultant transition area will no longer serve the purposes of a transition area set forth in N.J.A.C. 7:7A-6.1(a) and (b):

i. The slope of the existing, pre-activity transition area where the reduction is proposed is greater than 25 percent;

ii. The freshwater wetland adjacent to the transition area is a breeding or nesting habitat for "threatened or endangered species", as defined at N.J.A.C. 7:7A-1.4; or

iii. The transition area averaging plan proposes to:

(1) Compensate for the reduction of the transition area by increasing the width of any portion of the transition area to more than 50 percent of the standard transition area width;

(2) Reduce the transition area in order to place or construct a new septic system which discharges onsite; or

(3) Reduce the transition area to place or construct an outfall structure that is discharging or will discharge unfiltered or otherwise untreated stormwater into the adjacent wetlands.

2. For an exceptional resource-value-wetland, in the case where an averaging plan is applied for in conjunction with a transition area reduction, regardless of the reduction width approved, the averaging plan shall be calculated on a minimum 100 foot width; or

3. In no case shall the width of any part of a transition area adjacent to a freshwater wetland of exceptional resource value be reduced to less than 75 feet except pursuant to N.J.A.C. 7:7A-7.1(f) (transition area waivers for access to authorized activities), or N.J.A.C. 7:7A-7.2(a) (standards for width reduction) unless the applicant demonstrates, to the satisfaction of the Department, that if the activity was instead proposed in the exceptional resource value wetland it would meet the standards for granting a freshwater wetlands permit.

4. The Department shall not approve any transition area averaging plan for intermediate resource value wetlands if the following site conditions exist because the Department has determined that the resultant transition area will no longer serve the purposes of a transition area set forth in N.J.A.C. 7:7A-6.1(a) and (b):

i. The slope of the existing, pre-activity transition area where the reduction is proposed is greater than 25 percent;

ii. The transition area averaging plan proposes to:

(1) Reduce any portion of the transition area to less than 10 feet;

(2) Reduce the transition area to less than 25 feet in areas of critical habitat;

(3) Reduce the transition area to 10 feet wide for a continuous distance of 100 linear feet or more along the freshwater wetlands boundary;

(4) Compensate for the reduction of the transition area by increasing the width of any portion of the transition area to more than 50 percent of the standard transition area width;

(5) Reduce the transition area to place or construct a new septic system in the transition area which discharges onsite;

(6) Reduce the transition area to place or construct an outfall structure that is discharging unfiltered or otherwise untreated stormwater into the adjacent wetlands;

(7) Place structures, impervious surfaces or stormwater management facilities as defined at N.J.A.C. 7:7A-7.4 within 20 feet of the freshwater wetlands; or

(8) Reduce the transition area to less than 25 feet within the drainage basins of currently existing or proposed National Wildlife Refuges.

(c) A transition area averaging plan shall be based on each individual freshwater wetland and its associated transition area. Any expansion(s) of a transition area to compensate for a reduction elsewhere shall be located on the same transition area as the reduction, shall be adjacent to the same freshwater wetland where the transition area was reduced, and shall be on property owned or legally controlled by the applicant.

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

Factors resulting in non-approval of a transitional area averaging plan for exceptional resource value wetlands added at (b).

7:7A-7.6 Application contents for transition area waivers

(a) Except for applications for a special activity waiver based on Statewide general permit number 25 for repair or alteration of malfunctioning individual subsurface sewage disposal systems pursuant to N.J.A.C. 7:7A-7.4(e), the application for a transition area waiver shall include the applicable fee for the review and processing of a transition area waiver application specified at N.J.A.C. 7:7A-16 and three copies of the following information. Applicants seeking authorization pursuant to N.J.A.C. 7:7A-7.4(e), shall comply with the notification procedures found at (c)4 below:

1. A completed application form, obtainable at the address at N.J.A.C. 7:7A-1.3, filled out as directed for a transition area waiver in the instructions accompanying the application form;

2. A written description of the location of the proposed activity and property including county, municipality, municipal lot(s), block(s) and street address;

3. A copy or photocopy of a portion of the U.S. Geologic Survey (U.S.G.S.) 7.5 minute quadrangle map (available from the Department's Maps and Publications Office, CN 402, Trenton, NJ 08625) with the property clearly outlined, and a determination of the State Plane Coordinates for the center of the property. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the end-points of those projects which are 1,999 feet or less, and for those projects which are 2,000 feet and longer, additional coordinates at each 1,000 foot interval;

4. A folded preliminary site plan or subdivision map of the property, or folded out-bound survey map of the property if no preliminary site plan or subdivision map exists, clearly identifying all proposed activities on the entire property, all existing structures on the property, and the freshwater wetland boundary as verified through a letter of interpretation;

i. Note: If the freshwater wetlands boundary shown on the site plan or subdivision map has not been verified by a letter of interpretation, the freshwater wetland boundary shall be visibly flagged and/or staked in the field.

5. A detailed written description of the proposed activity or activities, describing the total area to be modified by the entire project, and the total square footage of the transition area potentially affected, either temporarily or permanently.

6. A certified mail return receipt card, white receipt or green card is acceptable, from the U.S. Post Office, showing that a complete copy of the submittal to the Department requesting a transition area waiver, including all materials required by this subsection, has been submitted to the clerk of each municipality in which the prohibited activity is proposed to take place.

7. A certified mail return receipt card, white receipt or green card is acceptable, from the U.S. Post Office,

showing that a written notice has been forwarded to the municipal construction official, the environmental commission, or any other public body with similar responsibilities, planning board of each municipality, and the planning board of each county in which the activity is to occur and all landowners within 200 feet of the subject property. One written notice may be submitted for multiple applications so long as all notification requirements for each separate subsection is met. The written notice shall include, at a minimum, the following information and statement:

i. The name(s) and address(es) of the property owner(s);

ii. The property location by municipal lot(s) and block(s), municipality, county, and street address;

iii. A description of the proposed project and types of activities in the transition area;

iv. A map of the type required by (a)3 above showing the location of the property; and

v. The following statement:

"This letter is to provide you with legal notification that the referenced property owner is applying to the Land Use Regulation Element, Department of Environmental Protection, for a transition area waiver. The rules governing transition areas are found at N.J.A.C. 7:7A (Freshwater Wetlands Protection Act Rules).

A transition area waiver, if approved by the Department, will allow certain prohibited activities, as defined in N.J.A.C. 7:7A-6.2, to occur in a transition area. A transition area is an area adjacent to a freshwater wetlands which minimizes adverse environmental impacts on the freshwater wetlands and serves as an integral component of the freshwater wetlands ecosystem. A transition area can extend up to 150 feet from the freshwater wetlands boundary depending on the resource value classification of the freshwater wetlands.

A copy of the application can be viewed at the Municipal Clerk's Office or by appointment at the address below during normal business hours. The Department welcomes comments on the transition area waiver application. Procedures for the Department's review of transition area waiver applications can be found at N.J.A.C. 7:7A-7.7. Written comments should be submitted to the Department within 15 days of receiving notice. Comments will be accepted until the Department makes a decision on the application. Please submit your written comments along with a copy of this letter to:

New Jersey Department of Environmental Protection

Land Use Regulation Element

Bureau of Regulation

CN 401

Trenton, New Jersey 08625

att: (County in which the property is located)
Section Chief

As part of the Department's review of this application, Department personnel may perform a site inspection on your property. This site inspection will involve only that area of your property within 150 feet of the applicant's property line. This site visit will involve a visual inspection and possibly minor soil borings using a 4" diameter hand auger. The inspection will not result in any damage to vegetation or to improvements on your property.

The Department will notify the environmental commission or any other public body with similar responsibilities, and the planning board and the municipal construction official of each municipality and the planning board of each county in which the activity is to occur of the Department's final decision concerning this transition area waiver application";

vi. If the proposed project involves a linear facility such as a pipeline or road of more than .5 miles, instead of notifying all landowners within 200 feet of the property(ies) lines, the applicant shall give public notice by publication of a display advertisement. The advertisement shall be a minimum of four column inches and be published in at least one newspaper of local circulation and one of regional circulation in the municipality. In addition, notice shall be given to owners of all real property within 200 feet of any above surface structure related to the linear facility, such as pumping stations, treatment plants, power substations, grade separated interchanges or similar structures. This does not include utility support structures or conveyance lines.

8. Written consent by the applicant to allow access to the subject property by representatives or agents of the Department for the purpose of conducting site inspections or surveys of the freshwater wetlands and transition areas thereon; and

9. Any information establishing a claim of hardship as determined pursuant to N.J.A.C. 7:7A-7.2(f) or 7.3(e), if applicable.

(b) If the freshwater wetlands boundary on the property has not been confirmed or delineated by the Department through a letter of interpretation pursuant to N.J.A.C. 7:7A-8 and the property is greater than one acre, the applicant shall also provide as part of the transition area waiver application the information required in N.J.A.C. 7:7A-8.3(a), except for the notice requirements at 8.3(a)8 and 9, and 8.3(b)2, Application for letters of interpretation. For Special Activity Waivers based on Statewide general permits pursuant to N.J.A.C. 7:7A-7.4(e), a wetlands delineation is only required for the area of the proposed activity.

(c) In addition to the information required in (a) and (b) above, the following information shall be submitted depending on the type of transition area waiver(s) requested in the application:

1. To reduce the standard transition area width pursuant to N.J.A.C. 7:7A-7.2 and 7.3 (except pursuant to 7.2(d)):

i. A description of the dominant vegetational community in the standard transition area, as described at N.J.A.C. 7:7A-7.2(e)1;

ii. The slope of the standard transition area, as determined pursuant to N.J.A.C. 7:7A-7.2(e)2; and

iii. The development intensity of the proposed project, as determined pursuant to N.J.A.C. 7:7A-7.2(e)3.

2. To reduce the standard transition area width pursuant to N.J.A.C. 7:7A-7.2(d), a proposal containing:

i. A detailed description of the size and type of the transition area planting project;

ii. A site plan showing the location of the proposed work and a cross-sectional and plan view of the proposed work;

iii. A description of the types of native trees and shrubs to be planted and at what spacing, as well as the type of seeding, fertilization and other stabilization activities;

iv. A monitoring and maintenance plan of the reduced transition area to ensure no less than 85 percent area coverage in the entire 100 foot wide transition area and no less than 85 percent survival of the plants for three years;

v. A schedule from initiation to completion of the planting project including the dates of planting and fertilization (rates and types), dates of monitoring measurements, as well as any other activities;

vi. Existing soil type(s) and soil conditions in the transition area; and

vii. Proof that the standard transition area has been part of an "established ongoing farming, ranching or silviculture operation" as defined at N.J.A.C. 7:7A-1.4 within the two years prior to submittal of the application.

3. For a special activity transition area waiver for the construction of a stormwater management facility or a linear development pursuant to N.J.A.C. 7:7A-7.4:

i. A written alternatives analysis describing the various alternatives considered including a written description and site plan drawings of each possible alternative considered and the reason(s) each alternative is not considered feasible.

4. For a special activity transition area waiver for a general permit activity pursuant to N.J.A.C. 7:7A-7.4(e), except for those based on Statewide general permit number 25 as described below at (c)4ii:

i. All of the information required for determining compliance with the criteria of the specific general permit activity pursuant to N.J.A.C. 7:7A-9.2(a).

ii. A person proposing to engage in activities pursuant to N.J.A.C. 7:7A-7.4(e), based on Statewide general permit number 25, repair or alteration of malfunctioning individual subsurface sewage disposal systems, shall submit written notice containing a description of the proposed activities to the Department at least 30 days prior to commencement of work. This notification shall include a description and plan of the activities and their location including municipality, county, block, and lot; and an approval from the Board of Health or its designated agent for the proposed activities. If the Department fails to notify the applicant within 30 days of receiving the notification, the special activity waiver shall be deemed to have been approved, to the extent that the activity does not violate other statutes or regulations then in effect, and subject to any standard terms and conditions pursuant to N.J.A.C. 7:7A-9.3.

5. For a special activity transition area waiver for redevelopment of a transition area pursuant to N.J.A.C. 7:7A-7.4(f):

i. Plans showing the location and extent of existing impermeable surfaces in relation to transition area; and

ii. Plans showing the location and extent of proposed development and attendant features including, but not limited, to septic systems discharging onsite, and stormwater outfalls and a proposed mechanism to treat stormwater runoff prior to leaving the site.

6. For a transition area averaging plan pursuant to N.J.A.C. 7:7A-7.5, a statement that includes:

i. The total square footage of the standard transition area;

ii. The total square footage of the transition area to be disturbed by the proposed project;

iii. The total square footage proposed for transition area reduction, and proposed for transition area expansion in compensation for the proposed reduction, pursuant to the transition area averaging plan; and

iv. A site plan showing and clearly labeling the standard transition area, the proposed area of reduction of the standard transition area, and the proposed areas adjacent to the standard transition area that will be added to the standard transition area as square footage compensation for the reduction. The transition area shown on the site plan shall be reproducible in the field.

(d) Applicants shall perform recordkeeping activities for transition area waiver applications according to the requirements at N.J.A.C. 7:7A-11.2.

(e) All transition area waiver applications shall be signed according to the signatory requirements at N.J.A.C. 7:7A-11.3.

(f) All transition area application fees shall be paid according to the requirements set forth for payment of permit fees at N.J.A.C. 7:7A-16.

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

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

Requirements added at (a)3. and 7.vi; also at (c)4.; (c)3. deleted.

7:7A-7.7 Procedure for review of transition area waiver applications

(a) Within 30 days of the receipt of an application for a transition area waiver, the Department shall review the application for completeness and may return all materials contained in a deficient application with a request for additional information, or declare the application complete. If the application does not include the fee specified at N.J.A.C. 7:7A-16, no action shall be taken by the Department under this section, the submittal will not be considered an application, and completeness review will not begin.

(b) If additional information is required of an applicant, the Department shall have 15 days after receipt of the information to request clarification of the submitted additional information. In such cases, the application shall not be considered complete until the clarification is received by the Department. If no clarification of the additional information is necessary, the application shall be considered complete as of the date of receipt of the additional information.

(c) Except as indicated in (d) and (h) below, the Department shall issue or deny a transition area waiver within 90 days of receiving a complete transition area waiver application or within 90 days after receipt of the requested additional information or clarification sufficient for the application to be considered complete.

(d) If the transition area waiver application is submitted together with an individual freshwater wetlands permit application concerning the same property, the Department shall approve or deny the transition area waiver within the time period set forth in N.J.A.C. 7:7A-12 for the approval or denial of the individual freshwater wetlands permit application.

(e) Applications may be cancelled by the Department or withdrawn, amended, or resubmitted by the applicant pursuant to N.J.A.C. 7:7A-7.10.

(f) When a transition area waiver is issued pursuant to this subchapter, the Department shall send copies to all municipal and county agencies which received copies of the transition area waiver application.

(g) The Department will provide notice of application for a transition area waiver, the status of all applications, and

the final decision concerning all applications in the DEPE Bulletin, as set forth in N.J.A.C. 7:7A-12.4.

1. Copies of all transition area waiver applications will be available for public review by interested persons at the municipal clerk's office and in the offices of the Department in Trenton (see N.J.A.C. 7:7A-1.3 for address) by appointment during normal business hours.

(h) Within 20 days of publication of the notice of application in the DEPE Bulletin, interested persons may request in writing that the Department hold a public hearing on a particular application. The Department will set a time, place and date for the public hearing after the close of the 20 day hearing request period, and shall so notify the applicant. The Department will hold the public hearing within 60 days from the close of the 20 day period. The hearing shall be in the county wherein the transition area is located whenever practicable. The applicant is responsible for the cost of the hearing.

1. The Department may issue or deny a waiver without a public hearing unless there is a significant degree of public interest in the application. If the Department grants a hearing, the application shall not be considered complete until 15 days after the public hearing.

2. The Department and the applicant shall follow the public hearing procedures for freshwater wetlands permits established N.J.A.C. 7:7A-12.4(d) through (i).

(i) The Department shall establish conditions in transition area waivers as required on a case-by-case basis, to assure compliance with all applicable provisions of this chapter and the Act.

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

At (h) location of hearing and responsibility for cost requirements added.

7:7A-7.8 Hearings and appeal

The applicant or other affected party, if aggrieved by the Department's decision regarding a transition area waiver, may request a hearing on this decision pursuant to N.J.A.C. 7:7A-12.7.

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

7:7A-7.9 Duration, effect, modification and transfer of transition area waivers

(a) A transition area waiver issued by the Department shall be effective for a fixed term of five years.

(b) If construction is begun during the valid five year term of the waiver and performed on a continuous basis, the applicant may apply for an extension of the effective date of the waiver.

(c) If construction does not begin in the transition area within the five year term of the waiver, a new waiver application will be required.

(d) The issuance of a transition area waiver does not convey property rights of any sort, or any exclusive privilege.

(e) In the event of rental, lease, sale or other conveyance of the site by the permittee, the waiver shall be continued in force and shall apply to the new tenant, lessee, owner or assignee so long as there is no change in the site, proposed construction or proposed use of the facility, as described in the original application, and as long as a waiver modification pursuant to N.J.A.C. 7:7A-13 has been approved.

Amended by R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
Recodified from 7.8; added new (e).

7:7A-7.10 Cancellation, withdrawal, resubmission and amendment of applications

(a) Applications may be cancelled by the Department; or withdrawn, amended, or resubmitted by an applicant.

(b) If an application is not complete for final review within 60 days of a request for additional information, the Department shall send a letter canceling the application and stating that the application will be purged from Department files and that a new application will be required to reactivate the Department's review. If the applicant sends the Department a letter documenting good cause for not supplying the requested information within the 60 day period the Department will grant an automatic extension of 30 days. The Department will grant additional 30-day extensions upon receiving a written request for such extension from the applicant.

1. All fees submitted with an application subsequently cancelled shall be non-refundable.

(c) An applicant may withdraw an application at any time in the application review process. All fees submitted with such applications are non-returnable when a significant portion of the review has been completed. In some cases however (see (d) below) the fees may be credited toward future applications.

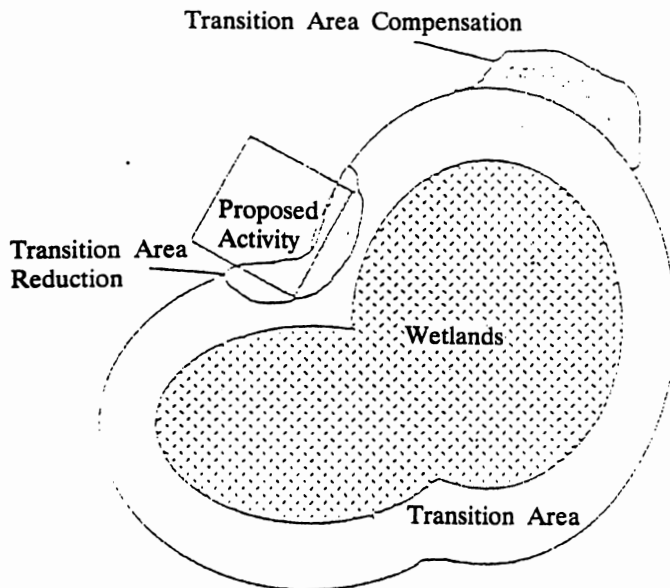
(d) If an application is cancelled, denied or withdrawn, the applicant may resubmit an application for a revised project on the same site. The resubmitted application will be treated as a new application, although references may be made to the previously submitted application. A new fee will be required unless application is resubmitted within one year of the date of denial or withdrawal, in which case the original permit fee may be credited to the new application.

(e) A waiver application may be amended at the applicant's discretion at any time as part of the waiver review process. Copies of amendments and amended information shall be distributed by the applicant to the same persons to whom copies of the initial application were distributed. All amendments to pending applications shall constitute a new submission and may at the Department's discretion require reinitiation of the entire review process.

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

Appendix A

Example of a transition area averaging plan.



The square footage in the compensation area is equal to that of the reduction area.

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

SUBCHAPTER 8. LETTERS OF INTERPRETATION

7:7A-8.1 Purpose

(a) A person proposing to engage in a regulated activity in a freshwater wetland and/or open water, or in a regulated activity which requires a transition area waiver, or desiring the information for other purposes, may request from the Department a letter of interpretation (LOI) to establish either the presence or absence, of freshwater wetlands, State open waters or transition areas or the verification of the boundary of wetlands, open waters, and/or transition areas on a project site. The information provided by this letter then may be used in applying for a permit from the Department,

for activities proposed in a freshwater wetland, State open water, or transition area.

(b) In addition to the information, in (a) above if the subject property has wetlands within or adjacent to its boundaries, or transition areas located within its boundaries, a resource value classification will be provided with the letter of interpretation.

(c) A letter of interpretation only provides information on the location or presence of wetlands, open waters, and/or transition areas and does not grant an approval to the applicant to conduct any regulated activities.

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

7:7A-8.2 Types of letters of interpretation

(a) Various types of letters of interpretation are available from the Department, depending on the type of information requested by the applicant, the size of the right-of-way or size of the parcel (based on municipal tax block and lot), or the project (based on the proposed limits of disturbance) for which the letter will be issued. The types of letters of interpretation are as follows:

1. Presence or absence determination: The Department will issue an LOI determining whether any freshwater wetlands, State open waters or transition areas exist on a right-of-way or parcel (limits defined by municipal tax block and lot boundaries or ROW description). This LOI will not determine the location of these features, but only whether they are present and the resource value classification if wetlands are present. This LOI will be issued for any size parcel.

2. Footprint of disturbance—Presence or absence determination: The Department will issue an LOI determining only the presence or absence of wetlands, State open waters or transition areas for projects which have proposed limits of disturbance totally contained within an area of one acre or less. The limits of disturbance of the proposed project shall be flagged in the field and indicated on an out bound survey. The Department may at its discretion require that the limits of disturbance be surveyed upon completion of the field inspection. The project limits shall include all possible disturbances, either temporary or permanent in nature, that are a result of the proposed regulated activities listed in N.J.A.C. 7:7A-2.3, Prohibited activities, and N.J.A.C. 7:7A-6.2, Regulated activities in transition areas. Examples of activities that shall be indicated on the plans include, but are not limited to, the following: clearing of vegetation, grading or earth work, construction of any buildings, location of wells and septic systems, placement of any impervious surfacing for walkways, driveways, or parking lots, and any landscaping.

3. Regulatory line delineation: The Department will issue a letter of interpretation, delineating the limits of any wetlands, State open water or transition areas present

on a parcel or right of way of one acre or less, whose limits are defined by municipal tax block(s) and lot(s) boundaries or ROW description. The Department may require that the wetlands line be surveyed upon completion of the field inspection.

4. **Regulatory line verification:** The Department will issue a letter of interpretation verifying an applicant's delineation of the boundaries of a wetland, open water and/or transition area present on parcels or rights-of-way over one acre in size. The limits of the parcel or right of way must be defined by municipal tax block(s) and lot(s) boundaries or ROW description.

Administrative correction to (c).

See: 21 N.J.R. 3748(b).

Repealed and replaced by R.1992 d.117, effective March 16, 1992.

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

7:7A-8.3 Application for letters of interpretation

(a) The application for a letter of interpretation shall include the applicable fee for the review and processing of a letter of interpretation application specified at N.J.A.C. 7:7A-16.2 and three copies of the following information:

1. Name and address of owner(s) of the property, municipality, county, block and lot number(s) or ROW description;

2. A folded out-bound survey of the property or a folded site plan, if available. If the applicant is applying for a presence or absence determination pursuant to N.J.A.C. 7:7A-8.2(a)1, a tax map may be substituted to satisfy this requirement. The survey or site plan should include all natural or human-made features such as structures, fences, streams, ponds, treelines, etc. In addition, the corners of the property boundary shall be visibly flagged and/or staked in the field to facilitate the on-site inspection;

3. A copy of the current municipal tax map for the subject property;

4. A copy of the appropriate county road map or other local street map clearly indicating the location of the subject property;

5. A folded copy of the appropriate portion of a U.S. Geologic Survey Quadrangle Map for the parcel site with the boundaries of the parcel (defined by tax block and lot) or project (limits of disturbance) clearly outlined, and a determination of the State Plane Coordinates for the center of the parcel. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the end-points of those projects which are 1999 feet or less, and for those projects which are 2000 feet and longer, additional coordinates at each 1000-foot interval;

6. A copy of the appropriate United States Department of Agriculture, Soil Conservation Service County Soil Survey sheet, with the boundaries of the subject parcel (defined by tax block and lot) or project (limits of disturbance) clearly outlined. The sheet number of the Soil Survey shall be included;

7. For the copies of the applications submitted to the Department, clear color photographs of the property (a minimum of four views is recommended) with a description and the location of each view;

8. Verification that a certified mail notice with return receipt requested (white receipt or green card is acceptable) and a complete copy of the request for a letter of interpretation including all materials required by this subsection, have been forwarded to the clerk of the municipality in which the parcel or project is located;

9. Verification that certified mail notice with return receipt requested (white receipt or green card is acceptable) has been forwarded to the environmental commission, or any public body with similar responsibilities, the planning board and the municipal construction official of each municipality, and the planning board of each county in which the parcel or project is located and landowners within 200 feet of the legal boundary line of the subject property or properties. Applicant must also provide a list of landowners within 200 feet. The written notices satisfying this item and item 9 above may be filed concurrently with notices required pursuant to N.J.S.A. 40:55D-1 et seq. (The Municipal Land Use Law), but should be mailed no sooner than two working days before the application package is delivered to the Department. This will allow ample time for the application to be processed to accommodate public review. The written notice shall include, at a minimum, the following information and statement:

- i. The name(s) and address(es) of the property owner(s);
- ii. The property location described by block(s) and lot(s), municipality, county, and street address;
- iii. A description of the proposed project or the reason for applying for a letter of interpretation; and
- iv. The following statement:

"This letter is to provide you with legal notification that the referenced property owner is applying to the New Jersey Department of Environmental Protection, Land Use Regulation Element for a letter of interpretation.

A letter of interpretation is a legal document that establishes either the presence or absence or limits of wetlands, open water or transition areas on a subject property as defined at N.J.S.A. 13:9B-1 et seq. The width of the transition area adjacent to a wetland is determined by the resource value classification of the wetland. This information is also provided by a letter of interpretation. If any of these features are present on a parcel the Department will regulate many aspects of development on those areas as defined in N.J.A.C. 7:7A-1.4, Regulated activities.

The complete letter of interpretation application package can be reviewed at either the municipal clerk's office or by appointment at the Land Use Regulation Element office at the address listed below. The Department welcomes comments and any information that you may provide concerning the presence of wetlands, open water or transition areas on the referenced parcel. Written comments should be submitted within 15 days of receiving this letter. Comments will be accepted until the Department makes a decision on the application. Please submit your written comments along with a copy of this letter to:

New Jersey Department of Environmental Protection
Land Use Regulation Element
Bureau of Regulation
CN 401
5 Station Plaza
Trenton, New Jersey 08625
att: (County in which the property is located)
Section Chief

As part of the Department's review of this application, Department personnel may perform a site inspection on your property. This site inspection will involve only land within 150 feet from the applicant's property line. This site visit will involve a visual inspection and possibly minor soil borings using a 4I diameter hand auger. The inspection will not result in any damage to vegetation or any improvements on your property.

The Department will notify the environmental commission, the planning board of the municipality and the municipal construction official of the Department's determination in the letter of interpretation.”;

v. If the proposed project involves a linear facility such as a pipeline or road of more than .5 miles, instead of notifying all landowners within 200 feet of the property(ies) lines, the applicant shall give public notice by publication of a display advertisement. The advertisement shall be a minimum of four column inches and be published in at least one newspaper of local circulation and one of regional circulation in the municipality. In addition, notice shall be given to owners of all real property within 200 feet of any above surface structure related to the linear facility, such as pumping stations, treatment plants, power substations, grade separated interchanges or similar structures. This does not include utility support structures or conveyance lines.

10. Unconditional written consent by the owner of the subject property to allow access to the site by representatives or agents of the Department for the purpose of conducting a site inspection or survey of the freshwater wetlands, State open waters or transition areas thereon; and

11. A fee pursuant to N.J.A.C. 7:7A-16, as indicated on the printed fee schedule which is available from the Department.

(b) In addition to the information required in (a) above, the following information shall be submitted depending on the type of letter of interpretation requested in the application:

1. For a letter of interpretation for a footprint of disturbance—presence or absence determination pursuant to N.J.A.C. 7:7A-8.2(a)2:

i. The limits of all disturbance of any proposed regulated activities, including grading, shall be clearly indicated and labeled on an out-bound survey with a scale of one inch equals no more than 50 feet. These limits must encompass no more than one acre in total. In addition, the project limits shall be visibly flagged and/or staked in the field with numbered flags and referenced by matching numbers on the out-bound survey. The flags and/or stakes shall be set in relation to known points and landmarks if available so that the limits can be reestablished. The Department may at its discretion require that the limits of disturbance be surveyed upon completion of the field inspection.

2. For a letter of interpretation for a regulatory line verification pursuant to N.J.A.C. 7:7A-8.2(a)4:

i. The applicant shall provide a folded out-bound survey or folded site plan of the property. The scale of the survey shall be one inch equals no more than 100 feet. If the subject parcel is located in either Middlesex or Mercer County or north of these counties, the survey must include topography depicting contours at no greater than five foot intervals. For counties south of Middlesex and Mercer, the survey must include topography depicting, at a minimum, two foot contours.

(1) The proposed wetlands and/or open waters boundary must be clearly indicated and labeled on the out-bound survey. The boundary must be accurate enough to allow Department personnel to locate the wetland boundary in the field. A surveyed line will only be required after the line has been verified by the Department and only for properties of five acres or more;

(2) The locations of all soil borings or pits, if applicable, shall be indicated on the survey and numbered. Soil logs should be presented with an indication of the depth to the seasonal high water table. Soil borings must be to a minimum depth of 24 inches on transects perpendicular to the wetlands boundary starting in the definite wetlands area and moving towards the uplands. In wetlands with atypical characteristics, or in wetlands which have been disturbed by human activities or as otherwise deemed appropriate, the Department may require deeper borings as needed;

(3) Vegetative species, recorded at soil boring locations, and classified using United States Fish and Wildlife Service categories as listed under "R/IND" and "NAT-IND" (Regional and National Indicators) columns in the "National List of Plant Species that Occur in Wetlands: 1988-New Jersey" and amendments thereto, compiled by the USFWS, United States Army Corps of Engineers (Corps), USEPA and the United States Soil Conservation Service;

(4) The wetlands and/or open water boundary line shall be visibly flagged and/or staked in the field with numbered flags, placed no greater than 75 feet apart, and referenced by matching numbers on the out-bound survey. The flags and/or stakes are to be set in relation to known points and landmarks if available so that the boundary can be reestablished;

(5) Name of the person who prepared the proposed wetland and/or open water boundary.

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

7:7A-8.4 Onsite inspections

(a) For properties greater than one acre in size, the Department shall require an applicant for a letter of interpretation to submit to the Department an onsite wetlands delineation using the three-parameter method to determine or verify the location of the freshwater wetland boundary. The line shall be subject to approval and verification by the Department.

(b) If the Department determines that onsite inspection by the Department is necessary, the Department shall conduct an inspection, and the time specified in this subchapter for issuance of the letter of interpretation shall be extended by 45 days.

(c) Depending upon the specific project location and its proximity to documented hydrologic indicators, and other available information and documentation, the Department may issue a letter of interpretation without conducting a site inspection.

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

Recodified from 8.3; requirement to use three-parameter method added at (a); (c) deleted and (d) recodified as (c).

7:7A-8.5 Local review

The Department, in determining the presence or absence of freshwater wetlands, State open waters and transition areas and the location of their boundaries if they are present, shall consider comments filed by municipal and county governments and interested citizens. Comments filed by the clerk, environmental commission or any public body with similar responsibilities and planning board of a municipality or county, or municipal construction official will be actively considered as part of all determinations. Written comments should be submitted to the Department within 15 days of receiving notice. Comments will be accepted until the Department makes a decision on the application.

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

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

Recodified from 8.5, USEPA review, which was repealed as part of this rulemaking.

7:7A-8.6 Effect of a letter of interpretation

A person who receives a letter of interpretation pursuant to this subchapter shall be entitled to rely on the determination of the Department, concerning the present or absence, or the extent of freshwater wetlands and/or State open waters, for a period of five years unless the letter of interpretation is determined to have been based on inaccurate information, in which case it shall be void.

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

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

References added specifically to freshwater wetlands and State open waters.

7:7A-8.7 Reissuance of a letter of interpretation

A letter of interpretation may be extended beyond the five year time period, but not to exceed five years from the original expiration date. Requests for extensions shall be made in writing to the Department before the letter has expired and shall include the file number, a copy of the originally approved plans and fee as specified at N.J.A.C. 7:7A-16.2. Applicants will be required to submit a new application if an extension is not applied for prior to the expiration date of the letter of interpretation. The term of the letter may be extended provided that the information upon which the original letter was based remains valid.

New Rule, R.1992 d.117, effective March 16, 1992.

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

7:7A-8.8 Effect of non-issuance of a letter of interpretation within time allotted

(a) Within 20 days after receipt of a request for a letter of interpretation, the Department may require the submission of any additional information necessary to issue the letter of interpretation.

(b) If no additional information is requested, the Department shall issue a letter of interpretation within 30 days after receiving the request.

(c) If additional information is requested by the Department in order to issue a letter of interpretation, the Department shall issue a letter of interpretation within 45 days after receipt of the information sufficient to declare the application complete.

(d) Any person who requests a letter of interpretation pursuant to the provisions of the Act and this chapter, and does not receive a response from the Department within the deadlines imposed in this subchapter, shall not be entitled to assume that the site of the proposed activity which was the subject of the request for a letter of interpretation is not in a freshwater wetland or a transition area.

(e) A person who requests a letter of interpretation and does not receive a response within the above deadlines may directly apply for a freshwater wetlands permit. In the event that a letter of interpretation is not issued within the deadlines imposed in this subchapter, the letter of interpretation fee will be applied to a permit application fee at the applicant's request.

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

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

Recodified from 8.7; new (a)-(c) added; existing (a) and (b) recodified as (d) and (e).

7:7A-8.9 Cancellation and resubmission of applications

If an application is not complete for final review within 60 days of a request for additional information, the Department shall send a letter cancelling the application and requiring the application for a freshwater wetlands permit or transition area waiver. A new application will be required to reactivate the Department's review. If the applicant sends the Department a letter documenting good cause for not supplying the requested information within the 60 day period the Department will grant an automatic extension of thirty days. The Department will grant additional 30-day extensions upon receiving a written request for such extension from the applicant.

New Rule, R.1992 d.117, effective March 16, 1992.

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

7:7A-8.10 Hearings and appeal

(a) An applicant or other affected party may request an adjudicatory hearing to contest a decision on a letter of interpretation pursuant to this subchapter, by complying with the procedures set forth in (b), (c) and (d) below.

(b) Before requesting an adjudicatory hearing, the applicant or other affected party shall make a good faith effort to resolve any dispute arising during the letter of interpretation process with the project review officer.

(c) If the good faith efforts provided in (b) above do not resolve the dispute, the applicant or other affected party may submit a request for an adjudicatory hearing to the Department in writing at the following address:

Office of Legal Affairs
Attention: Adjudicatory Hearing Request
Department of Environmental Protection
CN 402
Trenton, New Jersey 08625-0402

(d) The applicant or other affected party shall submit the written request under (c) above within 30 days of the Department's decision or the date on which the decision is published in the DEPE Bulletin, whichever is later. Failure to submit the written request within the allotted time shall operate as a waiver of any right to an adjudicatory hearing.

1. Upon receipt of such a request, the Commissioner may refer the matter to the Office of Administrative Law, which shall assign an administrative law judge to conduct a hearing on the matter in the form of a contested case hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

2. Within 45 days of receipt of the administrative law judge's decision, the Commissioner shall affirm, reject, or modify the decision.

3. The Commissioner's action shall be considered final agency action for the purposes of the Administrative Procedure Act, and shall be subject only to judicial review as provided in the Rules of Court.

New Rule, R.1993 d.159, effective April 19, 1993.

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

SUBCHAPTER 9. GENERAL PERMITS

7:7A-9.1 General standards for issuing Statewide general permits

(a) This section details the process for the issuance of new Statewide General permits and the readoption of previously issued Statewide General permits (except for Statewide general permits numbers 6 and 7). The remaining sections in this subchapter detail the process for authorizing various activities under the issued Statewide general permits. Before issuing or reissuing a Statewide general permit, the Department will propose a draft Statewide general permit in the form of a rule proposal pursuant to the New Jersey Administrative Procedure Act. N.J.S.A. 52:14B-1 et seq. In addition to these public notice and comment procedures, the Department will send a copy of the draft general permit to USEPA, and will issue a public notice meeting the requirements of N.J.A.C. 7:7A-11.1(a).

(b) The Department may issue Statewide general permits only if all of the following conditions are met:

1. The activities meet the limitations specified in (c)1 below;

2. After conducting an environmental analysis, the Department determines that the regulated activities will cause only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment, and will cause only minor impacts on freshwater wetlands and State open waters;

3. After determining that the activity will be in conformance with the purposes of the Act, and will not violate the Federal Act; and

4. After providing public notice and opportunity for a public hearing.

(c) In addition to the conditions in N.J.A.C. 7:7A-13.1, N.J.A.C. 7:7A-9.3, and the applicable requirements of N.J.A.C. 7:7A-13.2, each general permit shall contain limitations as follows:

1. A specific description of the type(s) of activities which are authorized, including limitations for any single operation, to ensure that the requirements of (a) above are satisfied. At a minimum, these limitations shall include:

- i. The maximum quantity of material that may be discharged;
- ii. The type(s) of material that may be discharged;
- 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.

2. A precise description of the geographic area to which the general permit applies, including, when appropriate, limitations on the type(s) of water(s) or wetlands where operations may be conducted, to ensure that the requirements of (a) above are satisfied.

(d) The Department may modify a general permit issued pursuant to this subchapter by adding special conditions applicable to a particular project or activity which must be met in order to qualify for authorization under the general permit.

(e) The Department may rescind a 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 Act and this chapter.

(f) The Department shall review each general permit a minimum of every five years. This review shall include public notice and opportunity for public hearing. Upon this review the Department shall either modify, reissue or revoke all general permits.

(g) If a general permit is not modified or reissued within five years of publication in the New Jersey Register, it shall automatically expire.

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

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

Repealed and replaced (a) and (b), deleted (e) and recodified (f)-(h) as (e)-(g).

Case Notes

Freshwater wetlands permit denied; not an isolated site. Middletown Board of Education v. Department of Environmental Protection, 94 N.J.A.R.2d (EPE) 147.

Wetlands natural drainage flow was associated with a surface water tributary system; freshwater wetlands permit denied. Stavros v. DEPE, 94 N.J.A.R.2d (EPE) 23.

7:7A-9.2 Statewide General Permit Authorization

(a) The following activities in freshwater wetlands and State open waters may be authorized under the following Statewide General Permits provided the activity is in compliance with specific conditions contained in the Statewide General Permit and with the provisions in (b) below and the standards and conditions for all Statewide General Permits in N.J.A.C. 7:7A-9.3 and provided the activities are in compliance with the Act, this chapter, and the Federal Act:

1. The repair, rehabilitation, replacement, maintenance or reconstruction of any previously authorized, currently serviceable structure, fill, roadway, public utility, active irrigation or drainage ditch, or stormwater management facility lawfully existing prior to July 1, 1988 or permitted under the Act, provided such activities do not deviate from plans of the original activity and further provided that the previously authorized structure, fill, roadway, utility, ditch or facility has not been and will not be put to uses differing from those specified in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repairs, rehabilitation or replacements are allowed provided such changes do not result in disturbance of additional freshwater wetlands or State open waters upon completion of the activity;

2. Discharge of material for backfill or bedding for utility lines, provided there is no change in preconstruction elevation and bottom contours. Excess material must be removed to an upland disposal area. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. The activities allowed by this Statewide General Permit shall comply with the following conditions:

- i. The activity encompasses no more than one acre of wetlands;
- ii. The width of the area of disturbance within the right-of-way for the project is no more than 20 feet;
- iii. The project is not located in a wetland of exceptional resource value;
- iv. The upper-most 18 inches of any excavation is backfilled with the original soil material if feasible and otherwise with suitable material. The excavation must be backfilled to the preexisting elevation;

- v. The area above the excavation is replanted in accordance with applicable BMPs with native, indigenous wetland species; and
 - vi. The activity is designed so as not to interfere with the natural hydraulic characteristics of the wetland and watershed;
3. Discharge of return water from an upland, contained, dredged material disposal area provided the State has issued a site specific or generic certification (Water Quality Certificate) under section 401 of the Federal Act. The dredging itself may also require State and Federal permits;
 4. All regulated activities, including work, discharges, and the construction or placement of structures, which are undertaken, authorized or otherwise expressly approved in writing by the Department for the investigation, clean-up or removal of hazardous substances as defined by or pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., or pollutants, as defined by the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., provided the following conditions are met.
 - i. If the proposed cleanup activity is to take place in an exceptional resource value wetland, the Statewide General Permit authorization shall be issued only if the Department finds that there are no practicable alternatives to the investigation, cleanup and removal of the hazardous substances or pollutants that would involve less or no disturbance or destruction of wetlands or State open waters.
 - ii. Mitigation shall be performed according to the procedures for mitigation at N.J.A.C. 7:7A-14 for all disturbance or destruction of freshwater wetlands or State open waters caused by a cleanup authorized under this general permit. The mitigation plan may be incorporated as part of the document by which the Department approves the cleanup or it may be submitted as part of the Statewide General Permit authorization application. The Statewide General Permit authorization will not be issued until the mitigation plan is submitted and approved by the Element according to the standards at N.J.A.C. 7:7A-14.
 5. Minor work or temporary structures required for the removal for non-historic wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This Statewide General Permit does not authorize maintenance dredging, stream cleaning, shoal removal, or river bank snagging.
 6. Regulated activities in freshwater wetlands (applicants should be advised that these wetlands may not qualify for filling under Nationwide permit number 26 in areas below NGVD elevation 10) or State open waters which are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream, provided:
 - i. The activity would not result in the loss or substantial modification of more than one acre of freshwater wetland or State open waters;
 - ii. The activity will not take place in a wetland of exceptional resource value as defined in N.J.A.C. 7:7A-2.5(a)1 nor in State open waters defined as a special aquatic site; and
 - iii. The activity will not take place in wetlands designated as priority wetlands by the USEPA.
 7. Regulated activities in ditches of human construction or swales provided:
 - i. They are located in headwater areas;
 - ii. They are not exceptional resource value wetlands;
 - iii. They are not designated a priority wetlands by the USEPA;
 - iv. The activity would not result in the loss or substantial modification of more than one acre of wetlands or State open waters; and
 - v. The proposed activity will not result in a disruption of a surface water connection and the isolation of adjacent wetlands or State open waters.
 8. The construction of additions or appurtenant improvements to be constructed within 100 feet of 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 disturbance.
 9. The construction of State or Federally funded roads which:
 - i. Were planned and developed in accordance with the "National Environmental Policy Act of 1969", the Federal Act, and Executive Order Number 53 (approved November 21, 1983); and
 - ii. Were the subject of an application made prior to July 1, 1988 to and were subsequently approved by the United States Army Corps of Engineers for an individual or general permit under the Federal Act, provided that:
 - (1) Upon expiration of a permit, any application for a renewal or modification thereof shall be made to the Department; and
 - (2) The Department shall not require transition areas as a condition of the renewal or modification of the permit.
 10. Minor road crossing fills and expansion of existing road crossing fills including attendant features, both temporary and permanent, that are part of a single and complete project for crossing a freshwater wetland or State open water, provided that:

i. The crossing is bridged, culverted or otherwise designed to prevent the restriction of, and to withstand, expected high flows;

ii. The disturbance of any freshwater wetlands does not extend more than 50 feet on either side of the ordinary high water mark of State open waters. Where no State open waters are present, the total length of the disturbance or modification of freshwater wetlands caused by the crossing shall be no greater than 100 feet. The 50 or 100 foot crossing length limit does not apply to widening of existing roadways;

iii. The total area of freshwater wetlands and/or State open waters disturbed or modified does not exceed 0.25 acres;

iv. The total fill (gross) to be placed, per crossing, in State open waters does not exceed 200 cubic yards of fill below the top of bank or high water mark;

v. The crossing is designed to minimize disturbance and other detrimental effects upon freshwater wetland or State open waters through the use of best management practices including, but not limited to:

(1) Minimizing cartway, shoulder widths and side slopes of the roadway;

(2) Stabilizing all disturbed areas in accordance with the Standards for Soil Erosion and Sediment Control;

(3) Using suitable, clean, non-toxic fill material; and

(4) Designing the crossing so as not to impede fish passage, when a watercourse is present, by maintaining the existing gradient and bottom contours of the watercourse; using open arch or box culverts; and using single large open arches or culverts to span the watercourse.

11. Construction of stormwater outfall structures and associated stormwater conveyance structures such as pipes, headwalls, rip-rap and other energy dissipation structures, provided the following conditions are met:

i. The structures are designed to minimize the area of freshwater wetlands or State open waters disturbance;

ii. The limit of disturbance or modification of freshwater wetlands or State open waters for any conveyance structures does not exceed 20 feet in width;

iii. The total area of freshwater wetlands or State open waters disturbed or modified does not exceed 0.25 acres;

iv. The facility is designed in accordance with the Standards for Soil Erosion and Sediment Control in New Jersey, promulgated by the New Jersey State Soil Conservation Committee, Division of Rural Resources, New Jersey Department of Agriculture. If applicable, the facility shall be designed in accordance with a soil erosion and sediment control plan approved by the appropriate Soil Conservation District. If no plan is required the applicant shall certify to the Department that the proposed facility is in accordance with the standards for Soil Erosion and Sediment Control;

v. All stormwater which is discharged into a freshwater wetland or State open water from an outfall constructed under this Statewide general permit is first filtered or otherwise treated outside of the freshwater wetland or State open water, to minimize sediment, pollutants, and any other detrimental effects upon the freshwater wetland or State open water. Detention basins, contour terraces and grassed swales are examples of pre-discharge treatment techniques which may be required by the Department. This Statewide General Permit does not authorize placement of detention facilities in freshwater wetlands or State open waters. The Department will take into consideration whether the outfall is part of a Regional Stormwater Management Plan already approved by the Department;

vi. The total amount of rip-rap or any other material used for energy dissipation at the end of the headwall placed in the freshwater wetland or State open water does not exceed 10 cubic yards per outfall structure;

vii. Excavated areas for the placement of conveyance pipes shall be returned to the pre-existing elevation using the original topsoil to backfill from a depth of 18 inches to the original grade and revegetated with indigenous wetland species (indigenous includes species found on a particular site as well as those found in a particular physiographic region of the State);

viii. Pipes used for stormwater conveyance through the wetlands shall be properly sealed with anti-seep collars at a spacing sufficient to prevent drainage of the surrounding wetlands and designed not to exceed the pre-existing elevation;

ix. If a detention basin is being proposed as the method of pre-treatment for water quality, routing calculations shall show that the basin has been designed for the one-year storm event according to the Stormwater Management Regulations (N.J.A.C. 7:8) and all subsequent amendments thereto; and

x. If a swale is being proposed to convey stormwater through the wetlands, profiles from the outlet to the receiving water body, cross-sections, and design support information shall show that the proposed swale will not result in drainage of the wetlands. Swales in wetlands will only be permitted where onsite conditions prohibit the construction of a buried pipe to convey stormwater to the outfall.

12. Surveying activities such as soil borings and the cutting of vegetation for narrow (three to five feet in width) survey lines. Survey lines of less than three feet in width shall not require Department authorization. Soil borings dug by hand, using non-mechanized means, no greater than three feet in diameter or in depth, shall not require Department authorization pursuant to N.J.A.C. 7:7A-2.3(c).

13. Dredging activities in wetland for lake maintenance or restoration provided:

i. The lake is lowered in accordance with a lake lowering permit approval by the Division of Fish, Game and Wildlife;

ii. The lake remains lowered for the minimal amount of time necessary to accomplish the desired maintenance activities;

iii. Documentation (documentation may include aerial photography, original construction plans, core borings, etc.) shows that the area to be dredged will be confined to the original configuration and bottom contours of the lake;

iv. The total wetlands area to be disturbed for access is no more than 0.25 acre. Temporary effects on adjacent wetlands due to the draw down of the lake to perform maintenance activities are not included in the acreage calculation;

v. The Department may require sediment sampling and laboratory analysis if the project site is known or suspected to be contaminated with toxic substances. The results of representative samples shall indicate that the soil materials to be removed are non-contaminated;

vi. There is no detrimental effect to spawning of resident or downstream fish populations;

vii. If located in exceptional resource value wetlands, the activity will not negatively impact the documented threatened or endangered species or its habitat;

viii. No spoil material will be deposited and no dewatering will occur in freshwater wetlands, open waters or other environmentally sensitive areas; and

ix. Dredging for a specific lake will not be authorized more than once every five years.

14. Placement of water level recording devices, water quality monitoring and testing devices, and similar scientific devices, and the drilling of monitoring wells.

15. Mosquito control water management activities conducted by a county mosquito control agency, or Federal agency on Federal land, provided:

i. Best management practices are employed including, but not limited to, shallow swales no more than three feet wide, and low sills no more than three feet wide;

ii. Disturbance of vegetation is minimized;

iii. Only light equipment is used;

iv. Excavated spoils are removed or spread evenly in a shallow layer no more than three inches deep on-site;

v. The existing hydrologic condition of the hydric soils is maintained (that is, excessive drainage is not permitted);

vi. The activities do not take place in exceptional resource value freshwater wetlands; and

vii. The county mosquito control agency or Federal agency submits individual, site-specific project proposals to the Administrator of the State Office of Mosquito Control Coordination, and the Administrator determines that the project is necessary to control a documented mosquito problem to existing residents. After approval by the Administrator, the project shall then be submitted to the Department for Statewide General Permit review in accordance with the requirements of this chapter.

16. Fish and wildlife management activities which do not involve the discharge of more than 10 cubic yards of clean fill, carried out in publicly owned or controlled wildlife management areas, parks or reserves. These activities include, but are not limited to:

i. The placement of artificial nesting structures, nesting islands, observation blinds, sign posts, or fencing;

ii. The clearing, burning or removal of vegetation to increase habitat diversity or to control nuisance flora (when carried out in accordance with an approved wildlife management plan); and

iii. The blocking or filling of human-made drainage ditches for the purpose of restoring previously existing wetland conditions.

17. Trail and/or boardwalk construction on publicly owned or controlled park land, wildlife management areas or reserves, in freshwater wetlands or State open waters, provided:

i. The width of the trail or boardwalk does not exceed six feet, except for barrier free trails or boardwalks designed in accordance with the Barrier Free Subcode of the Standard Uniform Construction Code, N.J.A.C. 5:23-7. This general permit does not authorize construction of restrooms, gazebos, rain shelters, or any covered or enclosed structure;

ii. Natural materials such as wood chips or wooden planks are used to the maximum extent practicable;

iii. The project does not interfere with the natural hydrology of the area; and

iv. The project does not encroach upon or adversely affect the habitat of any threatened or endangered species.

18. The repair, rehabilitation, replacement, maintenance or reconstruction as required by the Dam Safety Standards (N.J.A.C. 7:20-1), of any previously authorized, currently serviceable dam structure, as defined at N.J.A.C. 7:20-1.2, including appurtenant structures, lawfully existing prior to July 1, 1988 or permitted under the Act, provided that the previously authorized structure has not been put to uses differing from those specified in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repairs, rehabilitation, replacement, maintenance or reconstruction are allowed provided that:

i. The activity is conducted in accordance with a Dam Permit issued pursuant to N.J.A.C. 7:20-1;

ii. The activity results in the filling of no more than one acre of wetlands or State open waters;

iii. If located in exceptional resource value wetlands, the activity will not negatively impact the documented threatened or endangered species or its habitat;

iv. The activity is designed to minimize disturbance and other detrimental effects upon freshwater wetlands or State open waters through the use of best management practices including, but not limited to:

(1) Stabilizing all disturbed areas; and

(2) Using suitable, clean, non-toxic fill material; and

v. The activity will not increase the normal water surface elevation. The normal water surface elevation is the historic level as of the date of completed dam construction and inundation.

19. The construction of public or private recreational and fishing docks, or piers on pilings, cantilevered or floating, and public boat ramps that meet the following criteria:

i. The following criteria shall be met for the construction of docks and piers:

(1) There shall be a maximum of one dock per lot;

(2) If located in exceptional resource value wetlands, the activity will not have a negative impact on a documented threatened or endangered species or its habitat;

(3) The proposed activity does not fill or disturb more than 0.10 acres of wetlands or State open waters. This limitation includes the area shaded directly under the dock;

(4) The width of the dock or pier does not exceed six feet, will be constructed perpendicular to the shoreline, where feasible, and the maximum allowable length will be the minimum length necessary to reach deep water from the shoreline for launching. However, structures shall be constructed a minimum of 50-feet outside of any authorized navigation channel and shall not hinder navigation. The 50 foot limitation does not apply to construction of docks or piers in human-made lagoons;

(5) Space between horizontal planking is no less than 0.25 inches and the width of horizontal planking is no more than four inches; and

(6) The height of the dock or pier above the ground surface shall be no less than four feet.

ii. The following criteria shall be met for the construction of a boat ramp:

(1) It shall be demonstrated that there is no feasible onsite alternative location that will involve less or no disturbance of wetlands;

(2) The boat ramp shall be constructed of concrete or natural materials such as crushed stone or shells and placed at a location requiring the minimum feasible cut or fill;

(3) The proposed activity does not fill or disturb more than 0.10 acres of wetlands or State open waters; and

(4) If located in exceptional resource value wetlands, the activity will not impact a documented threatened or endangered species or its habitat.

20. The placement of gabions, rip-rap, geo-textiles, or other binding mat material for the purpose of bank stabilization activities in State open waters provided:

i. The bank stabilization activity is less than 150 feet in length;

ii. The activity is required by and designed in accordance with the Standards for Soil Erosion and Sediment Control in New Jersey, N.J.S.A. 4:24-42;

iii. The activity is limited to an average of less than one cubic yard of rip-rap per running foot placed along the bank within State open waters;

iv. The material to be placed is the minimum necessary for erosion protection according to the 1982 Standards for Soil Erosion and Sediment Control in New Jersey;

v. No material is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;

vi. Only suitable, clean, non-toxic fill material is used;

vii. The activity is a single and complete project, not associated with any other construction activity. For example, this activity cannot be used at the same location as a minor road crossing or a stormwater outfall structure; and

viii. The activity will not violate the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 or implementing rules at N.J.A.C. 7:13-1.

21. The construction or installation of new above ground utility lines including the installation of wood poles, steel poles, lattice towers, conductors, guy anchors, and pad mount transformers for the transport of electrical energy, telephone or telegraph messages, radio or television communication, or the discharge of fill to provide access to these new lines. The activities allowed by this Statewide General Permit shall comply with the following conditions:

i. The construction of the line (which constitutes a single and complete project of independent utility) including installation of structures, placement of fill for access and the clearing and maintenance of vegetation which would alter the character of the freshwater wetland, including the clearing of trees disturbs no more than one acre of wetlands or State open waters;

ii. The limits of clearing for construction is no more than 60 feet wide;

iii. The area to be maintained including vegetative clearing and maintenance of fill as a permanent right-of-way is a maximum of 20 feet in width;

iv. If located in exceptional resource value wetlands, the activity will not negatively impact associated water quality or the documented threatened or endangered species or its habitat;

v. When practicable, installation is done from outside wetland areas. If installation requires encroachment in wetlands, the activity shall be performed when the ground is frozen or extremely dry; otherwise only matting or track equipment shall be used. Matting will remain in place for no more than five days to the maximum extent practical;

vi. After completion the area used to gain access to the installation location is replanted as required in accordance with applicable BMPs with indigenous wetland species; and

vii. The activity is designed so as not to interfere with the natural hydraulic characteristics of the wetland and watershed.

22. (Reserved)

23. (Reserved)

24. The placement of bulkheads adjacent to human-made lagoons provided that:

i. The bulkhead is to be placed between two lawfully existing bulkheads which are not more than 75 feet apart;

ii. The connecting bulkhead shall not extend waterward of a straight line connecting the ends of the existing bulkheads;

iii. The width of wetlands on the subject lot, adjacent to the lagoon does not exceed an average of five feet;

iv. The total area of wetlands to be filled or disturbed does not exceed 375 square feet; and

v. The activities will not take place in a wetland of exceptional resource value as defined in N.J.A.C. 7:7A-2.5(b) or in a State open water defined as a special aquatic site (in 40 CFR 230.1).

25. The repair or alteration of malfunctioning individual subsurface sewage disposal systems provided:

i. There is no expansion or change in the use of the building or facility which will result in an increase in the volume of sanitary sewage;

ii. Alterations made to correct a malfunctioning system shall meet the requirements of N.J.A.C. 7:9A-3.3(c) and shall be undertaken only at the authorization of the administrative authority (the board of health having jurisdiction or its authorized agent acting on its behalf);

iii. It is demonstrated to the administrative authority that there is no alternative location onsite available with a seasonally high water table deeper than 1.5 feet from the existing ground surface which can support a properly functioning subsurface sewage disposal system; and

iv. The total wetland area to be affected by the repair or alteration does not exceed 0.25 acres.

(b) The Department may require an application for an Individual permit if the Department finds that additional permit conditions would not be sufficient, or that special circumstances make this action necessary to ensure compliance with the Act, this chapter, any permit or order issued pursuant thereto, or the Federal Act. In addition, when the regulated activity(ies) of a project exceed either the individual limits allowed under the issued Statewide general permits or the cumulative limit of stacked Statewide general permits, then the impacts of the entire project shall require an Individual Permit and will be reviewed under the standards at N.J.A.C. 7:7A-3.

(c) Under no circumstances shall a project's impacts be segmented and a portion of the project submitted for review under Statewide general permits while the remainder of the project is submitted for review under an Individual Permit.

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).

Case Notes

Magnitude of wetland disturbance had to be determined on basis of total length of proposed roadway regardless of property boundaries. *Zimmer v. Department of Environmental Protection*, 93 N.J.A.R.2d (EPE) 199.

Property owner not entitled to permit sought to build residences on subdivided island lots. *McCoy v. Department of Environmental Protection*, 93 N.J.A.R.2d (EPE) 1.

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.

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.

Developers not authorized to fill fresh water wetlands pursuant to terms and conditions of statewide general permit. *Zaloom v. Division of Coastal Resources*, 92 N.J.A.R.2d (EPE) 50.

7:7A-9.3 Standards and Conditions for all Statewide General Permit Authorizations

(a) All regulated activities authorized under Statewide General Permits listed in N.J.A.C. 7:7A-9.2 are subject to the specific conditions listed under each permit. In order to be authorized to conduct activities under these general permits, persons must comply with the standard conditions set forth at (b) below, as well as the conditions at N.J.A.C. 7:7A-13.1 and 13.2, the procedures in N.J.A.C. 7:7A-9.4 and mitigation pursuant to N.J.A.C. 7:7A-14 where specified must be followed.

(b) The following standards must be met in order for a regulated activity to be authorized under the Statewide General Permits identified in N.J.A.C. 7:7A-9:

1. The request for authorization to fill or modify wetlands or State open waters is associated with a proposed project or construction activity and is not solely being requested for the purpose of eliminating a natural resource in order to avoid future regulation. For the purposes of this specific subsection, project shall mean the use and configuration of all buildings, pavements, roadways, storage areas and structures, and the extent of all activities associated with the proposal;

2. The regulated activity shall not occur in the proximity of a public water supply intake;

3. The regulated activity shall not jeopardize a threatened or endangered species and the activity shall not destroy, jeopardize, or adversely modify the historic or documented habitat of such 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; and

5. The activity shall not adversely affect properties which are listed or are eligible for listing on the National Register of Historic Places. If the permittee, before or during the course of work authorized, encounters a probable historic property that has not been listed or determined eligible for listing on the National Register, but which may be eligible for listing in the National Register, the permittee shall immediately notify the Department and proceed as directed by the Department.

(c) The following conditions shall be met in order for a regulated activity to be authorized under the Statewide General Permits identified in N.J.A.C. 7:7A-9:

1. Any discharge of dredged or fill material shall consist of suitable material free from toxic pollutants (see section 307 of the Federal Act) in toxic amounts;

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

3. In order to protect the fishery resources and/or the spawning of the downstream resident fish population, any activity within or adjacent to a stream channel which may introduce sediment into the stream or cause the stream to become turbid is prohibited during the time frames listed below or any subsequent updates to this listing as provided by the New Jersey Division of Fish, Game and Wildlife. The total restriction period will not exceed six months:

Timing restrictions:

Stream Classification	Dates of Restriction
Trout Production	
general brook/brown	September 15-March 15
rainbow trout	February 1-April 30
Trout Maintenance	March 15-June 15
Trout Stocked	March 15-June 15
Anadromous	

American Shad—For the Delaware River upstream of the Delaware Memorial Bridge, and for tidal Rancocas and Raccoon Creeks

April 1-June 30 and
September 1-November 30

American Shad—For the Delaware River from the Delaware Bay to the Delaware Memorial Bridge, and tidal Maurice River

March 1–April 30 and
October 1–November 30

All other waterways classified for anadromous fish

April 1–June 30;

For waterways classified, on a case by case basis, as spawning areas for warm water fish

May 1–June 30.

4. During construction activities, all excavation must be monitored to check for the presence of acid-producing deposits pursuant to N.J.A.C. 7:13-5.10 of the Flood Hazard Area Control Rules. If any such deposits are encountered, the mitigation and disposal standards described in N.J.A.C. 7:13-5.10 must be implemented. If any such deposits are encountered, an annual post-planting monitoring program shall be established to ensure that the reestablishment of vegetation in temporarily disturbed areas, shall have a minimum 85 percent plant survival and coverage rate after two complete growing seasons. Failure to achieve this survival rate will require implementation of additional corrective measures and/or reevaluation of the acid producing soils mitigation proposal to ensure the 85 percent survival rate requirement.

5. 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. 7:13-1.

6. Best management practices shall be followed whenever applicable.

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) added establishing conditions which must be met in order for a regulated activity to be authorized under the Statewide General Permits at N.J.A.C. 7:7A-9.

Case Notes

Proposed disturbance of isolated wetlands for construction of stormwater outfall and associated stormwater conveyance structure met permit requirements. *Clothier v. Department of Environmental Protection*, 95 N.J.A.R.2d (EPE) 229.

7:7A-9.4 Use of multiple Statewide General Permits

(a) The Department may approve activities under the authority of more than one Statewide General Permit onsite as defined at N.J.A.C. 7:7A-1.4, Definitions. No activity is authorized by a Statewide General Permit without an approval letter from the Department indicating that a Statewide General Permit authorizes the particular activity at the particular location.

(b) The Department may issue an approval letter, authorizing activities covered under a single Statewide General

Permit, for more than one location on a single property, provided that the total area of wetlands or State open waters disturbed or modified by activities covered by the Statewide General Permit does not exceed the maximum allowed under that general permit.

(c) The Department may approve activities covered by different general permits onsite, provided that the individual limits of each general permit are complied with and that the total area of wetlands, and State open waters disturbed or modified does not exceed one acre with the exception of Statewide general permit number 17. For example, the Department could approve on-site a minor road crossing disturbing 0.25 acres, stormwater outfall structures disturbing a total of 0.25 acres, and the filling of 0.5 acres of a ditch.

(d) An individual permit will be required for review of all regulated impacts onsite (as defined at N.J.A.C. 7:7A-1.4) if the cumulative impact of one acre will be exceeded by any combination of Statewide General Permits, or if the individual limits of Statewide General Permits 2, 6, 7, 8, 10, 11, 19, 21, or 24 will be exceeded by the proposed activities.

(e) For Statewide General Permits at N.J.A.C. 7:7A-9.2(a)1, 3, 4, 5, 12, 14, 16 and 17, the Department may issue approvals for any number of activities on a single property covered by any number of these general permits. Later activities on the same property will also be eligible for approval under these Statewide general permits.

(f) Statewide general permit numbers 13, 15, 18, and 20 shall be authorized onsite only once every five years.

Amended by R.1989 d.373, effective July 17, 1989.
See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

At (c), added language referencing Statewide General Permits at 10 and 11 and examples.

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

Repealed and replaced (d).

7:7A-9.5 Application for activities under Statewide General Permits

(a) Except for Statewide General Permit number 25 pursuant to N.J.A.C. 7:7A-9.2(a)25, a person proposing to engage in an activity covered by a Statewide General Permit shall provide a fee pursuant to N.J.A.C. 7:7A-16 and three copies of the following information to the Department at least 30 working days prior to commencement of work. Applicants seeking authorization pursuant to N.J.A.C. 7:7A-9.2(a)25, shall comply with the notification procedures found at (f) below:

1. An application form completed as per the instructions for a Statewide general permit;
2. Any information necessary to determine whether the conditions of the general permit will be satisfied, including, but not limited to, the following information:

i. Complete wetlands delineation including field delineation, folded plans at an appropriate scale, and wetlands field data sheets including soils and vegetation information (no formal report is required) for the area to be disturbed under the Statewide general permit application;

ii. A copy of the appropriate portion of the U.S. Geologic Survey Quadrangle (USGS) Map for the project site and a determination of the State Plane Coordinates for the center of the project. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the end-points of those projects which are 1,999 feet or less, and for those projects which are 2,000 feet and longer, additional coordinates at each 1,000 foot interval;

iii. For projects that are located in municipalities listed below at (a)2iii(1) and all amendments thereto, pursuant to (a)2iii(2) below, the applicant shall submit a signed statement certifying that the proposed activities will not result in any direct or indirect adverse impacts to Swamp pink (*Helonias bullata*) or its documented habitat; and

(1) Municipalities which have documented record of *Helonias bullata*:

Atlantic County

Egg Harbor Township
Town of Hammonton
Mullica Township

Burlington County

Evesham Township
Maple Shade Township
Medford Township
Pemberton Township
Southampton Township
Woodland Township
Medford Township

Camden County

Berlin Township
Clementon Borough
Gibbsboro Borough
Gloucester Township
Haddonfield Borough
Lindenwold Borough
Pine Hill Borough
Pine Valley Borough
Runnemede Borough
Voorhees Township
Waterford Township
Winslow Township

Cape May County

Cape May Point Borough
Dennis Township
Lower Township
Middle Township
Upper Township

Cumberland County

Bridgeton City
Downe Township
Fairfield Township
Hopewell Township
Lawrence Township
Millville City
Stow Creek Township
Upper Deerfield Township
Vineland City

Gloucester County

Clayton Borough
Deptford Township
East Greenwich Township
Elk Township
Franklin Township
Glassboro Borough
Mantua Township
Monroe Township
Newfield Borough
Washington Township
Wenonah Borough
West Deptford Township
Woodbury Heights Borough
Woolwich Township

Mercer County

West Windsor Township

Middlesex County

East Brunswick Township
Edison Township
New Brunswick City
Sayreville Borough

Monmouth County

Brielle Borough
Colts Neck Township
Freehold Township
Howell Township
Wall Township

Morris County

Mount Olive Township
Randolph Township
Roxbury Township

Ocean County

Barneget Township
Brick Township
Dover Township
Jackson Township
Lacey Township
Lakewood Township
Little Egg Harbor Twp.
Manchester Township
Plumsted Township
Stafford Township

Salem County

Alloway Township
Lower Alloways Township

Pittsgrove Township
 Quinton Township
 Upper Pittsgrove Township

New Jersey Department of Environmental Protection
 Land Use Regulation Element
 Bureau of Regulation
 CN 401
 5 Station Plaza
 Trenton, New Jersey 08625

(3) The Department will publish notice in the New Jersey Register of any amendments to the list at (a)2iii(1) above based upon updated information and make such information available at its offices and through the Office of Administrative Law.

4. Photographs of the portion of the property for which authorization is being requested.

(b) In addition, a person proposing to engage in an activity covered by a Statewide General Permit shall provide verification that a certified mail notice with return receipt requested and a complete copy of the application has been forwarded to the clerk of the municipality and that a certified mail notice with return receipt requested (white receipts or green cards are acceptable) has been forwarded to the environmental commission, or any public body with similar responsibilities, municipal planning board, county planning board, municipal construction official, and landowners within 200 feet of the legal boundary lines of the property(ies) on which the proposed activity will occur. Applicant must also provide a list of landowners within 200 feet. The notice shall contain:

1. A description of the proposed activity;
2. A description of the location of the activity including county, municipality, lot(s), block(s), and a plan of the site detailing existing structures, wetlands boundaries and proposed structures or activities, or both; and
3. The following statement:

“This letter is to provide you with legal notification that the referenced property owner is applying to the New Jersey Department of Environmental Protection, Land Use Regulation Element for a Statewide general permit.

A Statewide general permit will allow the property owner to conduct certain limited activities in freshwater wetlands or State open waters.

The complete Statewide general permit application package can be reviewed at either the municipal clerk's office or by appointment at the Land Use Regulation Element office at the address listed below. The Department of Environmental Protection welcomes comments and any information that you may provide concerning the wetlands or open waters on the referenced parcel. Written comments should be submitted to the Department within 15 days of receiving notice. Comments will be accepted until the Department makes a decision on the application. Please submit your written comments along with a copy of this letter to:

att: (County in which the property is located) Section Chief

As part of the review of this application, Department personnel may perform a site inspection on your property. This site inspection will involve only that area within a maximum of 150 feet from the border of the applicant's property. This site visit will involve a visual inspection and possibly minor soil borings using a 4" diameter hand auger. The inspection will not result in any damage to the vegetation or improvements on your property.

The Department will notify your municipal environmental commission, planning board and the municipal construction official, as well as the county planning board of the Department's approval or denial of the Statewide general permit application.”

(c) If the proposed project involves a linear facility such as a pipeline or road of more than .5 miles, instead of notifying all landowners within 200 feet of the property(ies) lines, the applicant shall give public notice by publication of a display advertisement. The advertisement shall be a minimum of four column inches and be published in at least one newspaper of local circulation and one of regional circulation in the municipality. In addition, notice shall be given to owners of all real property within 200 feet of any above surface structure related to the linear facility, such as a pumping station or treatment plant, power substations, grade separated interchanges or similar structures. This does not include utility support structures or conveyance lines.

(d) The Department, within 30 days of receipt of this notification, shall either return the package as incomplete or accept the application as administratively complete and notify in writing the person proposing to engage in the activity covered by a general permit as to whether they are covered by the Statewide General Permit, or whether an individual permit is required for the activity pursuant to (e) below. Activities begun or carried out without this written notification shall be a violation of the Statewide General Permit, the Act and this chapter. Issuance of authorizations shall be published in the DEPE Bulletin.

(e) Upon receiving an application for a general permit, the Department may require that the owner apply for an individual permit. Cases where an individual permit may be required include, but are not limited to:

1. The activity has more than a minimal adverse environmental effect;

2. The cumulative effects on the environment of the authorized activities are more than minimal;
3. The applicant or project is not in compliance with the conditions of the general permit; or
4. Public comment indicates that the application does not meet general permit criteria.

(f) A person proposing to engage in activities pursuant to N.J.A.C. 7:7A-9.2(a)25, repair or alteration of malfunctioning individual subsurface sewage disposal systems, shall submit written notice containing a description of the proposed activities to the Department at least 30 days prior to commencement of work. This notification shall include a description and plan of the activities and their location including municipality, county, block, and lot; and an approval from the Board of Health or its designated agent for the proposed activities. If the Department fails to notify the applicant within 30 days of receiving the notification, the activity shall be deemed to have been authorized, to the extent that the activity does not violate other statutes or regulations then in effect, and subject to any standard terms and conditions pursuant to N.J.A.C. 7:7A-9.3.

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.

Case Notes

Man-made system part of route of wetland; wetland not excluded from surface water tributary system; developer not entitled to permit. Emanuel v. Department of Environmental Protection, 93 N.J.A.R.2d (EPE) 122.

7:7A-9.6 Hearings and appeal

An applicant or other affected party may request an administrative hearing on any decision to issue or deny an authorization made by the Department pursuant to N.J.A.C. 7:7A-12.7.

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

7:7A-9.7 Duration of permit authorizations

(a) Authorizations for Statewide general permits shall be effective for a fixed term not to exceed five years from the date of authorization.

(b) The term of an authorization shall not be extended beyond the maximum duration specified in this section. However, if necessary, an authorization may be renewed through the application process set forth in this chapter.

(c) If the term of the authorization exceeds the expiration date of the issued general permit, and the permit upon which the authorization is based is modified to include more stringent standards or conditions, or is not reissued, the applicant must comply with the requirements of the new regulations by applying for a new GP authorization or an Individual permit. For those applicants whose activities will no longer comply with the new regulations, if prior to the expiration date of the GP, the applicant is able to document that the activity was either under contract or under construction, the Department will allow the applicant one additional year, from the date of expiration of the issued general permit (not the authorization date), to complete the authorized activity. If the GP authorizing a particular activity is reissued without amendments, or with amendments expanding the authorized scope of activities, the authorization remains effective for the authorized five-year term.

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

7:7A-9.8 Cancellation, withdrawal, resubmission and amendment of applications

(a) Applications may be cancelled by the Department; or withdrawn, amended, or resubmitted by an applicant.

(b) If an application is not complete for final review within 60 days of a request for additional information, the Department shall send a letter canceling the application and stating that the application will be purged from Department files and that a new application will be required to reactivate the Department's review. If the applicant sends the Department a letter documenting good cause for not supplying the requested information within the 60 day period the Department will grant an automatic extension of 30 days. The Department will grant additional 30-day extensions upon receiving a written request for such extension from the applicant.

1. All fees submitted with an application subsequently cancelled shall be non-refundable.

(c) An applicant may withdraw an application at any time in the application review process. All fees submitted with such applications are non-returnable when a significant portion of the review has been completed. In some cases however (see (d) below) the fees may be credited toward future applications.

(d) If an application is cancelled, denied or withdrawn, the applicant may resubmit an application for a revised project on the same site. The resubmitted application will be treated as a new application, although references may be made to the previously submitted application. A new fee will be required unless application is resubmitted within one year of the date of denial or withdrawal, in which case the original permit fee may be credited to the new application.

(e) A permit application may be amended at the applicant's discretion at any time as part of the permit review process. Copies of amendments and amended information shall be distributed by the applicant to the same person to whom copies of the initial application were distributed. All amendments to pending applications shall constitute a new submission and may at the Department's discretion require reinitiation of the entire review process.

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

SUBCHAPTER 10. PRE-APPLICATION CONFERENCES

7:7A-10.1 Purpose

A pre-application conference is optional, but highly recommended. It allows the Department to inform potential applicants of the various procedures and policies which apply to the freshwater wetlands, open water fill, stream encroachment, and coastal program permitting process. Department staff will candidly discuss the apparent strengths and weaknesses of the proposed permit application at this conference, but the Department shall in no way commit itself to approval or rejection of a proposed project as a result of these discussions.

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 stream encroachment and coastal program.

7:7A-10.2 Request for a pre-application conference

(a) Potential applicants may request a pre-application conference with the Department. A request for a pre-application conference shall be made in writing and shall include a project description, a tax lot and block designation of the site, the location of the project site, including the municipality and county, the general location of freshwater wetlands and State regulated waters, a copy of the appropriate United States Soil Conservation Service map(s) locating the project, and a United States Geological Survey quadrangle map showing the site. The Department encourages the applicant to obtain a letter of interpretation prior to the pre-application conference.

(b) The Department shall, within 15 days of receipt of such request, schedule a pre-application conference.

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

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

7:7A-10.3 Discussion of information requirements

The Department shall candidly discuss the level of detail and areas of emphasis which will be necessary to allow the Department to review the application if one is submitted.

7:7A-10.4 Memorandum of record

(a) After the pre-application conference, the Department shall prepare a written memorandum of record summarizing the discussion of the apparent strengths and weaknesses of the proposed project, the apparent sensitivity of the land and water features of the site, and the level of detail and areas of emphasis necessary in the materials that the potential applicant may be required to submit as part of the application.

(b) The memorandum of record shall be mailed to the potential applicant or his or her agent, if designated in writing, and to the municipality, within 30 days after the pre-application conference. If the potential applicant submits an application, a copy of the memorandum of record shall be included with the application, and shall be included in the Department's file on the application.

(c) The memorandum of record shall not be construed as a decision of the Department. The Department is in no way bound by any information or statement recorded in the memorandum of record.

SUBCHAPTER 11. APPLICATION PROCEDURE

7:7A-11.1 Application contents for Individual Freshwater Wetlands and Open Water Fill Permits

(a) The Element will issue joint permits for projects requiring more than one Element permit whenever possible. It is strongly recommended that an applicant requiring more than one Element permit submit all applications materials simultaneously to facilitate joint permit processing. For example, the submission of all information necessary for both a Freshwater Wetlands permit and a Stream Encroachment permit at the same time will facilitate the issuance of a joint permit.

(b) The application for a freshwater wetland permit or open water fill permit shall include 10 copies of the following information:

1. A completed freshwater wetlands permit or open water fill permit application form including the names and addresses of all owners of property adjacent to the property which is the site of the proposed project. All activities which the applicant plans to undertake which are reasonably related to the same project should be included in the same permit application and will be considered simultaneously with the review of the individual permit. Only one application fee will be required to review all regulated activities in freshwater wetlands, State open waters and transition areas associated with the project;

2. A folded preliminary site plan or subdivision map of the proposed regulated activities, or other map of the site if no preliminary site plan or subdivision map exists;

3. A written description of the proposed regulated activity, the total area to be used, filled or modified, the total area of the freshwater wetland or State open waters potentially affected, identification of the watershed in which the project is located, and the relationship of the area affected to the area of the entire freshwater wetland or State open waters complex, for example, one-half acre to be filled of a 15 acre freshwater wetland. In addition, project elements affecting transition areas should be detailed;

4. A description of the source of any fill material and a description of the type, composition and quantity of the material. For dredge projects, submit the information as listed at N.J.A.C. 7:7A-4.3(c)2;

5. A description of alternatives to the proposed activity or discharge, including alternative sites, construction methods, methods of discharge, and reasons for rejecting the alternatives pursuant to N.J.A.C. 7:7A-3, General Standards for Granting Individual Freshwater Wetlands and Open Water Fill Permits;

6. The purpose and intended use of the proposed activity, including whether it is water-dependent; a description of the uses of any structures to be erected; and a schedule for the progress and completion of the proposed activity;

7. A list of the approvals required by other Federal, interstate, State and local agencies for the activity, including all approvals or denials received;

8. A copy or photocopy of a portion of the U.S.G.S. 7.5 minute quadrangle map (available from the Department's Maps and Publications Office, CN 402, Trenton, NJ 08625) showing the location of the property and its general vicinity, indicating and labeling the location of the proposed activity and the property boundaries, and a determination of the State Plane Coordinates for the center of the property. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the end-points of those projects which are 1,999 feet or less, and for those projects which are 2,000 feet and longer, additional coordinates at each 1,000 foot interval;

9. Verification that a complete copy of the application for an Individual permit, including all materials required by this subsection, has been submitted to the clerk of the municipality in which the proposed regulated activity will occur. Verification that a certified mail notice with return receipt requested (white receipt or green card is acceptable) and a copy of the vicinity map in (a)8 above have been forwarded to the environmental commission or any other public body with similar responsibilities, and planning board of the municipality in which the proposed regulated activity will occur; the planning board, environmental commission and county mosquito control agency of the county in which the proposed regulated activity will occur; landowners within 200 feet of the property or properties on which the proposed regulated activity will occur (applicant shall also provide a list of all landowners within 200 feet), and all persons as identified by the Department who requested to be notified of proposed regulated activities (the Department will furnish a list of such persons upon request), which notice may, at the applicant's option, be filed concurrently with notices required pursuant to N.J.S.A. 40:55D-1 et seq. A copy of the notice shall be included in the application to the Department. The notice shall include the following:

i. The name and address of the applicant and, if different, the address or location of the activity or activities regulated by the permit;

ii. The name, address, and telephone number of the applicant or agent to contact for further information;

iii. A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills, and a description of the type, composition and quantity of materials to be discharged;

iv. A plan and elevation drawing showing the general and specific site location (drawings may be 8.5 by 11 inches);

v. Any other information which is necessary to evaluate the likely impact of the proposed activity;

vi. The following statement:

"This letter is to provide you with legal notification that the referenced property owner is applying to the New Jersey Department of Environmental Protection, Land Use Regulation Element for an Individual Freshwater Wetlands permit.

An Individual permit will allow the property owner to conduct activities in freshwater wetlands or State open waters.

The complete Individual permit application package can be reviewed at either the municipal clerk's office or by appointment at the Land Use Regulation Element office at the address listed below. The Department of Environmental Protection welcomes comments and any information that you may provide concerning the wetlands or open waters on the referenced parcel. Please submit your written comments within 15 days of receiving this letter. In addition, interested persons may request in writing that the Department hold a public hearing on this application. Requests shall be made in writing within 30 days after the notice of application in the DEPE Bulletin and shall state the nature of the issues proposed to be raised at the hearing. Both comments and hearing requests should be sent along with a copy of this letter to:

New Jersey Department of Environmental Protection
Land Use Regulation Element
Bureau of Regulation
CN 401
5 Station Plaza
Trenton, New Jersey 08625

att: (County in which the property is located) Section Chief

As part of the review of this application, Department personnel may perform a site inspection on your property. This site inspection will involve only that area within a maximum of 150 feet from the border of the applicant's property. This site visit will involve a visual inspection and possibly minor soil borings using a 4" diameter hand auger. The inspection will not result in any damage to the vegetation or improvements on your property.

The Department will notify your municipal environmental commission, planning board and the municipal construction official of the Department's approval or denial of the Individual permit application";

10. Verification that notice of the proposed activity has been published as a display advertisement in an official newspaper used by the municipality, in which the activity is proposed, for legal notice. For projects proposing more than 10 acres of fill, notification shall also be published in a newspaper of regional circulation;

11. A statement detailing any potential adverse environmental effects of the regulated activity and any measures necessary to prevent and/or minimize those effects, and any information necessary for the Department to make the findings pursuant to N.J.A.C. 7:7A-3. Applicants should review N.J.A.C. 7:7A-3 in great detail and provide all the listed information to avoid unnecessary delays in permit processing;

12. A fee as set forth in the fee schedule published by the Department at N.J.A.C. 7:7A-16;

13. A list and brief description of all freshwater wetlands, special aquatic sites as defined at N.J.A.C. 7:7A-1.4, public use areas, wildlife refuges, and public water supply intakes in the affected or adjacent areas that may require special protection or preservation;

14. A list of plants fish, shellfish and/or wildlife in the proposed activity or discharge site which may be dependent on water quality and quantity;

15. Uses of the proposed activity or discharge site which might affect human health and welfare; and

16. A description of technologies or management practices by which the applicant proposes to minimize adverse environmental effects of the activity or discharge.

(NOTE: The Department shall upon request provide permit applicants with guidance, either through the application form or on an individual basis, regarding the level of detail of information and documentation required under this subsection. The level of detail shall be reasonably commensurate with the type and size of the proposed project, proximity to critical areas, and degree of environmental degradation.)

(c) The application shall also include 10 copies (including one of reproducible quality—a mylar copy is not required) of a site plan, on 8½ inch by 11 inch paper if appropriate (if larger than 8½ inch by 11 inch, all copies shall be folded) indicating the following:

1. All existing structures and related appurtenances on the lot and immediately adjacent lots;

2. Distances and dimensions of areas, structures and lots, including freshwater wetlands, State open waters, transition areas, limits of inundation for the 100 year flood for non-delineated streams or flood hazard area flood for delineated streams (if applicable), mean high water line (if appropriate), upland property, roads and utility lines;

3. A complete delineation of the wetlands boundary(ies) in accordance with the requirements of N.J.A.C. 7:7A-8.3(a) and (b). A letter of interpretation issued by the Department may be submitted to satisfy this requirement;

4. The proposed area which will be used for the activity or discharge;

5. The general site location in relation to development in the region;

6. The scale of the plan and a north arrow; and

7. A title block for each sheet containing the following information:

i. The name of the applicant and the name or the proposed project (if any);

ii. Identification of the proposed activity;

- iii. County and municipality;
- iv. Lot and block;
- v. Number of the sheet and the total number of sheets in set; and
- vi. Preparer, and date of the drawing and all revisions.

(d) The application shall also include color photographs of sufficient quality and quantity to show the project site including:

- 1. Location of known freshwater wetlands and State open waters; and
- 2. Proposed location of the regulated activity.

(e) If the proposed project involves the discharge of dredged or fill material, the application shall include a cross-sectional view of the proposed project showing the following:

- 1. Water elevations;
- 2. Water depths at waterward face of proposed work, or if dredging is proposed, showing dredging grade;
- 3. Cross-section of fill;
- 4. Elevation of spoil areas;
- 5. Location of wetlands; and
- 6. Delineation of disposal site.

(f) A mitigation plan meeting the requirements of N.J.A.C. 7:7A-14.4 may be submitted with the permit application. The Department requires an approved mitigation plan as a condition precedent to engaging in a regulated activity.

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.

7:7A-11.2 Recordkeeping

Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under N.J.A.C. 7:7A-11.1 for a period of at least three years from the date the application is submitted to the Department.

7:7A-11.3 Signatories to permit applications and reports

- (a) All permit applications shall be signed as follows:
 - 1. For a corporation, by a principal executive officer of at least the level of vice president;
 - 2. For a partnership or sole proprietorship, by a general partner or the proprietor, respectively;

3. For a municipality, State, Federal, or other public agency, by either a principal executive officer or ranking elected official; or

4. By individual owners of record.

(b) All reports required by permits and other information requested by the Department shall be signed by a person described in (a) above, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

- 1. The authorization is made in writing by a person described in (a) above;
- 2. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, or position of equivalent responsibility. A duly authorized representative may, thus, be either a named individual or any individual occupying a named position; and
- 3. The written authorization is submitted with the application to the Department.

(c) If an authorization under (b) above is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of (b) above must be submitted to the Department prior to or together with any reports, information, or applications to be signed by an authorized representative.

(d) Any person signing a document under (a) or (b) above shall make the following certification:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

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

7:7A-11.4 Confidentiality

(a) Any information submitted to the Department pursuant to these regulations may be claimed as confidential by the submitter at the time of submittal.

(b) Claims of confidentiality for the following information will be denied:

- 1. The name and address of any permit applicant or permittee;

2. Effluent data;
3. Permit application; and
4. Permit decision.

(c) Claims of confidentiality for all information not listed in (b) above will be denied unless the claimant can show that the information should be kept confidential under the requirements and procedures of 40 CFR Part 2.

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

SUBCHAPTER 12. REVIEW OF APPLICATIONS

7:7A-12.1 Initial Department action for Individual Freshwater Wetlands and Open Water Fill Permits

(a) Upon receipt of an application, which includes the fee specified in N.J.A.C. 7:7A-16, the Department shall, if appropriate, transmit copies to other reviewing agencies. In addition, the Department will publish notice of the application in the DEPE Bulletin. If the application does not include the appropriate fee, no action will be taken by the Department under this section, and the submittal will not be considered an application, and completeness review will not begin.

(b) Within 30 days of receipt of the application, the Department shall review the application for completeness and may return the application as incomplete, make any necessary requests for more information, or declare the application complete. However, after assumption by the State of the 404 program, this deadline for requesting additional information shall not apply if requests for more information are made by the Department because of comments received from the USEPA.

1. If the application is returned as incomplete a new application will be required;
2. New notices meeting the requirements at N.J.A.C. 7:7A-11.9 will be required if the new application is not filed within 60 days.

(c) If additional information is required of an applicant, the Department shall have 15 days after receipt of that information to request further clarification. In such cases, the application shall not be considered complete until all the additional information is received by the Department.

1. Copies of information submitted in response to deficiency letters shall, at the discretion of the Department, be distributed to the same persons to whom copies of the initial application were distributed and to reviewing agencies who have requested such information or who will require it in order to complete their review.

Amended by R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
Requirement that the appropriate fee must be included.

7:7A-12.2 USEPA review

(a) The Federal Act requires that, after assumption by the State of the 404 program, the USEPA oversees the State's administration of the program. The procedures in (b) through (j) below explain USEPA's oversight role, and the procedures which the State will follow to facilitate USEPA's oversight.

(b) Permits for at least the following categories of activities will require USEPA review. Generally, any projects not meeting the criteria listed below will be considered waived from the requirement of EPA review. However, any permits either individually or as a category may be elevated for EPA review:

1. Discharges with reasonable potential for adverse impacts on waters of another state, as provided in N.J.A.C. 7:7A-12.3(d);
2. Major discharges as defined at N.J.A.C. 7:7A-1.4;
3. Discharges into or within critical areas established under State or Federal law including, but not limited to, fish and wildlife sanctuaries or refuges, national and historic monuments, wilderness areas and preserves, national and State parks, components of State and Federal Wild and Scenic River systems, and sites identified or proposed under the National Historic Preservation Act of 1966, 16 U.S.C. § 470 et seq.;
4. Proposed Statewide general permits;
5. Discharges known or suspected to contain toxic pollutants in toxic amounts under Section 307(a)(1) of the Federal Act, or hazardous substances in reportable quantities under Section 311 of the Federal Act;
6. Discharges located in proximity of a public water supply; and
7. Discharges with potential for adversely affecting threatened or endangered species, identified pursuant to the Endangered Species Act of 1973, 16 U.S.C. 1531 et al. and subsequent amendments thereto.

(c) The Department shall promptly transmit to the Regional Administrator:

1. A copy of the complete permit application received by the Department for which permit review has not been waived under (b) above. The Department shall supply the Regional Administrator with copies of the complete permit applications for which permit review has been waived whenever requested by USEPA;
2. A copy of a draft Statewide general permit whenever the Department intends to propose a general permit;
3. Notice of every significant action taken by the State agency related to the consideration of any permit applica-

tion for which Federal review has not been waived, or of any draft Statewide general permit; and

4. A copy of every permit decision for which review has not been waived.

(d) If USEPA intends to comment upon, object to, or make recommendations with respect to a permit application, draft Statewide general permit, or the State's failure to accept the recommendations of an affected state pursuant to N.J.A.C. 7:7A-12.3(d); USEPA may notify the State of this intent within 30 days of receipt of the permit application. If the State has been so notified, the permit shall not be issued until after the receipt of such comments or within 90 days of the USEPA's receipt of the application, draft Statewide general permit or State response, whichever comes first. The USEPA may notify the State within 30 days of receipt that there is no comment but that USEPA reserves the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a hearing.

(e) When the Department has received a USEPA objection or requirement for a permit condition to a permit application or draft Statewide general permit under this section, the State shall not issue the Federal 404 permit unless the steps required by the USEPA to eliminate the objection have been taken.

(f) Within 90 days of receipt by the Department of an objection or requirement for a permit condition by the USEPA, the State or any interested person may request that the USEPA hold a public hearing on the objection or requirement. USEPA shall conduct a public hearing whenever requested by the state proposing to issue the permit, or if warranted by significant public interest based on requests received.

(g) If a public hearing is held under (f) above, USEPA shall, following that hearing, reaffirm, modify or withdraw the objection or requirement for a permit condition, and notify the Administrator of this decision.

1. If the USEPA withdraws the objection or requirement for a permit condition, the State may issue the Federal 404 permit.

2. If the USEPA does not withdraw the objection or requirement for a permit condition, the Department must either issue a revised permit satisfying the USEPA's objection or including the required permit condition, or notify USEPA of its intent to deny the permit within 30 days of receipt of the USEPA's notification.

(h) If no public hearing is held under (f) above, the Department shall, within 90 days of receipt of the objection or requirement for a permit condition, either issue the revised permit to satisfy USEPA's objections or notify USEPA of its intent to deny the permit.

(i) In the event that the Department neither satisfies USEPA's objections or requirement for a permit condition nor denies the permit, the Federal 404 permit application will no longer be processed by the Department and shall be transferred to the Army Corps of Engineers for processing.

(j) No Federal 404 permit shall be issued by the Department in the following circumstances:

1. When the Regional Administrator has objected to issuance of the permit and the objection has not been resolved;

2. When the proposed discharges would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the USEPA under Section 404(c) of the Federal Act, or when the discharge would fail to comply with a restriction imposed thereunder; or

3. If the Army Corps of Engineers determines, after consultation with the Secretary of the Department in which the Coast Guard is operating, that anchorage and navigation of any of the navigable waters would be substantially impaired.

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

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

Recodified from 2.3; original 2.2, Draft permits, was repealed by this rulemaking.

7:7A-12.3 Soliciting public comment

(a) The Department shall provide notice of application pursuant to N.J.A.C. 7:7A-12.1 for an individual freshwater wetlands or open water fill permit, or transition area waiver, in addition to the applicant's notice requirements in N.J.A.C. 7:7A-11.1(a), in the DEPE Bulletin upon receipt of the application. The public shall have 30 days from publication to submit written comments.

(b) Copies of all freshwater wetlands and open water fill permit applications, and transition area waiver applications will be available for public scrutiny by interested persons in the municipal clerk's office and by appointment in the offices of the Department in Trenton (see N.J.A.C. 7:7A-1.3 for address) during normal business hours.

(c) The status of all permit applications shall be published in the DEPE Bulletin, and shall constitute notice to all interested persons except those specifically provided with notice in this chapter.

(d) If a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any state(s) other than New Jersey, the Department shall provide an opportunity for such state(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted, the Department shall notify the affected state and the USEPA in writing, prior to permit issuance, of the State's failure to accept these recommendations, together with the reasons for so doing. The Regional Administrator shall then have the time provided for in N.J.A.C. 7:7A-12.2(d) to comment upon, object to, or make recommendations.

Amended by R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
Recodified from 2.4, added new (d).

7:7A-12.4 Hearings on applications

(a) Within 30 days after publication of the notice of application in the DEPE Bulletin, interested persons may request in writing that the Department hold a public hearing on a particular application. Requests shall state the nature of the issues proposed to be raised at the hearing.

(b) The Department may issue or deny a permit without a public hearing, unless there is a significant degree of public interest in the application as manifested by written requests for a hearing within 20 days after the publication of notice of the permit application in the DEPE Bulletin or unless a hearing is requested by USEPA.

(c) If a hearing is to take place, the Department shall, within 15 days of declaring the application complete or within 30 days of publication in the DEPE Bulletin (whichever is later), set a date, place, and time for the public hearing and shall so notify the applicant, in accordance with the following:

1. The hearing shall be in the county wherein the freshwater wetland or State open waters is located whenever practicable.

(d) The Department shall publish a notice announcing the date, place, and time of the public hearing in the DEPE Bulletin.

(e) The applicant shall give public notice of the public hearing at least 30 days before the hearing.

1. This notice shall comply with the notice requirements for applications found at N.J.A.C. 7:7A-11.1(b)7, 9 and 10 using the following format:

"NOTICE OF STATE FRESHWATER WETLANDS
INDIVIDUAL PERMIT APPLICATION
PUBLIC HEARING

TAKE NOTICE that the New Jersey Department of Environmental Protection, Land Use Regulation Element, will hold a public hearing on the following permit application submitted under the Freshwater Wetlands Protection Act N.J.S.A. 13:9B-1 et seq.

APPLICANT: Name

FILE NUMBER: Element's file number

PROJECT NAME: Name (if any)

PROJECT DESCRIPTION: Detailed description of the proposed improvements including all construction activities

LOCATION: Block and Lot

MUNICIPALITY: Municipality in which project is located

COUNTY: County in which project is located
PROJECT ADDRESS: Street address of project

The Land Use Regulation Element invites the public to attend the hearing and present written or oral comments on the application.

HEARING DATE & TIME: As assigned by Element

HEARING LOCATION: As assigned by Element

HEARING OFFICER: Your project review officer

DATE OF PREVIOUS HEARING (If one was held):

A copy of the complete application is available for review at the township clerk's office. The Land Use Regulation Element invites the public to submit written comments on the Freshwater Wetlands Individual Permit application within fifteen (15) days of the hearing to:

Your project review officer
Department of Environmental Protection
Land Use Regulation Element
CN 401/501 E. State St., 5 Station Plaza
Trenton, NJ 08625

DATE OF THIS NOTICE: Date";

2. Proof of notice shall be submitted to the Department at least three days prior to the public hearing. In cases where proof of publication is unavailable three days prior to the hearing, the applicant may submit a notarized affidavit stating that notice of the hearing has been published, and specifying the date and newspaper in which such notice was published.

(f) The Department shall maintain a copy of the hearing transcript and all written comments received. The transcript and written comments shall be made part of the official record on the application and shall be available for public inspection in its Trenton Office. See N.J.A.C. 7:7A-1.3 for address.

(g) The applicant shall provide a court reporter, bear the cost of the hearing and provide the Department with a transcript.

(h) The presiding official at the non-adversarial public hearing shall have broad discretion with respect to oral and written presentations by interested persons. This discretion shall be exercised to allow every person the opportunity to speak, to reasonably limit the length of individual testimony, and to ensure the maintenance of an orderly forum. At the conclusion of statements by interested persons, the applicant shall be afforded the opportunity to speak on the statements offered by interested persons.

(i) Any interested person may submit information and comments, in writing, concerning the application within 15 days after the hearing.

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

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

Recodified from 12.5, increased number of days from 20 to 30 in (a) and added notice at (e).

7:7A-12.5 Final decisions

(a) Until the State assumes the implementation of the Federal Act, the Department shall issue or deny a permit within 180 days of submittal of a complete application, except as may otherwise be provided by the Federal Act.

(b) If the Department issues, denies or requests modification of a permit, the Department shall send notice thereof to the applicant.

(c) The Department may issue a permit imposing conditions necessary for compliance with the Act, this chapter, the Federal Act and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. Any regulated activities undertaken under authority of any issued permit shall constitute an acceptance by the applicant of the entire permit including all conditions therein.

(d) Decisions by the Department shall be published in the DEPE Bulletin and a copy of every issued individual permit for which USEPA review has not been waived shall be transmitted to USEPA.

(e) The permit application review process may be extended by mutual agreement between the applicant and the Department.

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

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

Recodified from 12.6, further requirements added at (c) and (d).

7:7A-12.6 Cancellation, withdrawal, resubmission and amendment of applications

(a) Applications may be cancelled by the Department; or withdrawn, amended, or resubmitted by an applicant.

(b) If an application is not complete for final review within 60 days of a request for additional information, the Department shall send a letter canceling the application and stating that the application will be purged from Department files and that a new application will be required to reactivate the Department's review. If the applicant sends the Department a letter documenting good cause for not supplying the requested information within the 60 day period, the Department will grant an automatic extension of 30 days. The Department will grant additional 30-day extension upon receiving a written request for such extension from the applicant.

1. All fees submitted with an application subsequently cancelled shall be non-refundable.

(c) An applicant may withdraw an application at any time in the application review process. All fees submitted with such applications are non-returnable when a significant portion of the review has been completed. In some cases however (see (d) below) the fees may be credited toward future applications.

(d) If an application is cancelled, denied or withdrawn, the applicant may resubmit an application for a revised project on the same site. The resubmitted application will be treated as a new application, although references may be made to the previously submitted application. A new fee will be required except for applications that are withdrawn and resubmitted within one year of the withdrawal date.

(e) A permit application may be amended at the applicant's discretion at any time as part of the permit review process. Copies of amendments and amended information shall be distributed by the applicant to the same person to whom copies of the initial application were distributed. All amendments to pending applications shall constitute a new submission and may at the Department's discretion require reinitiation of the entire review process.

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

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

Recodified from 12.7; changes in (b), (c) and (d).

7:7A-12.7 Hearings and appeal of permit decisions

(a) An applicant who receives a final agency action or other affected party may request of the Commissioner an administrative hearing on any decision to issue or deny a permit made by the Department pursuant to the Act and this chapter. When a request for an administrative hearing is filed by an affected party contesting an approved permit, the effective date of the approved permit may be stayed at the discretion of the Commissioner until the matter is resolved.

(b) Such request shall be submitted in writing within 30 days of the DEPE Bulletin publishing date, or the date of receipt of the permit decision, whichever is later. The request shall state in what way the Department has acted improperly in issuing or denying the permit, and what issues will be raised by the requestor should a hearing be held.

(c) The request for a hearing shall be sent to:

Office of Legal Affairs
ATTENTION: Adjudicatory Hearing Requests
Department of Environmental Protection
401 East State Street
CN 402
Trenton, New Jersey 08625-0402

1. Upon receipt of such a request, the Commissioner may refer the matter to the Office of Administrative Law, which shall assign an administrative law judge to conduct a hearing on the matter in the form of a contested case hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

2. Within 45 days of receipt of the administrative law judge's decision, the Commissioner shall affirm, reject, or modify the decision.

3. The Commissioner's action shall be considered final agency action for the purposes of the Administrative Procedure Act, and shall be subject only to judicial review as provided in the Rules of Court.

Administrative change to (a).

See: 23 N.J.R. 3325(b).

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

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

Recodified from 12.8; added requirements and address to which to send requests added.

SUBCHAPTER 13. PERMIT CONTENTS

7:7A-13.1 Conditions applicable to all permits

(a) The following conditions apply to all individual and Statewide general freshwater wetlands and open water fill permits:

1. **Duty to comply:** The permittee shall comply with all conditions of the permit. Any permit noncompliance constitutes a violation of the Act and this chapter, and is grounds for enforcement action, for permit termination, revocation and reissuance, or modification, or for denial of a permit renewal application. In some cases, permit noncompliance may also constitute a violation of the Federal Act.

2. **Duty to reapply:** If the permittee wishes to continue an activity regulated by the permit after the expiration date of the permit, the permittee must apply for and obtain a new permit.

3. **Duty to halt or reduce activity:** It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit.

4. **Duty to minimize environmental impacts:** The permittee shall take all reasonable steps to prevent, minimize or correct any adverse impact on the environment resulting from activities conducted pursuant to the permit, or from noncompliance with the permit. Mitigation consistent with N.J.A.C. 7:7A-14 will also be required for freshwater wetlands permits, open water fill permits and those Statewide General permits described at N.J.A.C. 7:7A-9.2(a).

5. **Proper operation and maintenance:** The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of the permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up

or auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of the permit. This provision requires the proper execution of any approved mitigation plan designed to mitigate losses caused by the permitted activity.

6. **Permit actions:** The permit may be modified, revoked and reissued, suspended, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated non-compliance does not stay any permit conditions.

7. **Property rights:** The permit does not convey any property rights of any sort, or any exclusive privilege.

8. **Duty to provide information:** The permittee shall furnish to the Department within a reasonable time, any information which the Department requests to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit, or to determine compliance with the permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by the permit.

9. **Inspection and entry:** The permittee shall allow the Department, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

i. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of the permit;

ii. Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;

iii. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under the permit; and

iv. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Federal Act, by the Act, or by any rule or order issued pursuant thereto, any substances or parameters at any location.

10. **Monitoring and records requirements** are as follows:

i. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

ii. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for the permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the Commissioner at any time.

iii. Records of monitoring information shall include:

- (1) The date, exact place, and time of sampling or measurements;
- (2) The individual(s) who performed the sampling or measurements;
- (3) The date(s) analyses were performed;
- (4) The individual(s) who performed the analyses;
- (5) The analytical techniques or methods used; and
- (6) The results of such analyses.

11. Signatory requirement: All applications, reports, or information submitted to the Department shall be signed and certified as required in N.J.A.C. 7:7A-11.3.

12. Reporting requirements are as follows:

i. Planned changes: The permittee shall give notice to the Department as soon as possible of any planned physical alterations or additions to the permitted project or activity.

ii. Anticipated noncompliance: The permittee shall give advance notice to the Department of any planned changes in the permitted project or activity which may result in noncompliance with permit requirements.

iii. Transfers: The permit is not transferable to any person except after notice to the Department. The Department may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Act (see N.J.A.C. 7:7A-13.5). In some cases, modification or revocation and reissuance is mandatory.

iv. Monitoring reports: Monitoring results shall be reported at the intervals specified elsewhere in the permit.

v. Twelve hour reporting: The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 12 hours from the time the permittee becomes aware of the potentially dangerous circumstances. A written submission shall also be provided within five days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and, if the noncompliance has not been corrected, the anticipated length of time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.

vi. Other noncompliance: The permittee shall report all instances of noncompliance not reported pursuant to (a)12 i, iv, and v above, at the time monitoring reports are submitted. The reports shall contain the information listed in (a)12v above.

vii. Other information: Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Department, it shall promptly submit such facts or information.

13. The permittee need not comply with the conditions of the permit to the extent and for the duration that such noncompliance is authorized in an emergency permit.

14. Regulated activities are not conducted under the authority of the permit if they are not specifically identified and authorized in the permit.

15. The permittee shall maintain the authorized work areas in good condition and in accordance with the requirements contained in the permit.

16. If any applicable water quality standards are revised or modified, or if a toxic effluent standard or prohibition under section 307(a) of the Federal Act is established for a pollutant present in the permittee's discharge and is more stringent than any limitation in the permit, the permit shall be promptly modified, pursuant to N.J.A.C. 7:7A-13.6, to conform to the standard, limitation or prohibition.

17. All projects authorized by an individual or general permit issued pursuant to this chapter shall be posted with a sign, prominently displayed at the main entrance to the property or worksite, at all times from commencement to completion of the permitted activity. The sign shall contain at least the following information:

- i. The work which is authorized by the Department;
- ii. The type of permit applied for or authorizing the work, and the permit or application number;
- iii. A Department phone number for verification; and
- iv. The location nearest the site at which the permit may be inspected.

Amended by R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
Language added at (a)1 and 4.

7:7A-13.2 Establishing permit conditions

(a) In addition to conditions required in all permits (N.J.A.C. 7:7A-13.1), the Department shall establish conditions in permits, as required on a case-by-case basis, under N.J.A.C. 7:7A-13.3 (duration of permits) and N.J.A.C. 7:7A-13.1(a)10 (monitoring).

(b) The Department shall also establish conditions in permits, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of the Federal Act, the Act, the Water Pollution Control Act, this chapter and other appropriate rules or regulations.

1. For the purposes of this subsection, an applicable requirement is a State statutory or regulatory requirement which takes effect prior to final administrative disposition of a permit, or prior to the modification or revocation and reissuance of a permit, to the extent allowed in N.J.A.C. 7:7A-13.

2. New or reissued permits, and to the extent allowed under N.J.A.C. 7:7A-13.6, modified or revoked and reissued permits, shall incorporate each of the applicable requirements referenced in N.J.A.C. 7:7A-13.1.

(c) In addition to the requirements in N.J.A.C. 7:7A-13.6, each permit shall include information meeting the following requirements, when applicable:

1. A specific identification and description of the authorized activity, including:

- i. The name and address of the permittee and the permit application identification number;
- ii. The use or purpose of the regulated activity;
- iii. The type and quantity of the materials to be discharged or used as fill;
- iv. Any structures proposed to be erected;
- v. The location and boundaries of the activity site(s), including a detailed sketch and the name and description of affected freshwater wetlands, State open waters, and transition areas, identification of the major watershed and subwatershed; and
- vi. A reference to the specific site plans depicting the approved regulated activity(ies);

2. Provisions ensuring that the regulated activity will be conducted in compliance with the environmental guidelines issued under section 404(b) (1) of the Federal Act (40 C.F.R. Part 230), the Act, and this chapter, including conditions to ensure that the regulated activity shall be conducted in a manner which minimizes adverse impacts upon the physical, chemical, and biological integrity of the waters of the United States, such as requirements for restoration or mitigation;

3. Any requirements necessary to comply with water quality standards established under applicable Federal or State law. If an applicable water quality standard is promulgated after the permit is issued, it shall be modified as provided in N.J.A.C. 7:7A-13.6;

4. Requirements necessary to comply with any applicable toxic effluent standard or prohibition under section 307(a) of the Federal Act or applicable State or local law. If an applicable toxic effluent standard or prohibition is

promulgated after the permit is issued, it shall be modified as provided in N.J.A.C. 7:7A-13.6;

5. Applicable best management practices (BMPs) as provided in the memorandum of agreements included in the State application for assumption of the Federal permit program in section 404 of the Federal Act;

6. Any conditions necessary for general permits as required under N.J.A.C. 7:7A-9.3;

7. A specific date on which the permit shall automatically expire, unless previously revoked and reissued or modified or continued, if the authorized work has not been commenced; and

8. Reporting of monitoring results. All permits shall specify:

- i. Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate);
- ii. Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring; and
- iii. Applicable reporting requirements based upon the impact of the regulated activity.

(d) All permit conditions shall be incorporated either expressly or by reference. If incorporated by reference, a specific citation to the applicable rules or regulations or requirements shall be given in the permit.

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)1, iv added.

7:7A-13.3 Duration of permits

Freshwater wetlands and open water fill permits shall be effective for a fixed term not to exceed five years.

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

7:7A-13.4 Effect of a permit

(a) Compliance with a permit during its term constitutes compliance, for purpose of enforcement, with sections 301, 307, and 403 of the Federal Act, with the Act, and with this chapter. However, a permit may be modified, revoked and reissued, suspended, or terminated during its term for cause as set forth in this chapter.

(b) The issuance of a permit does not convey property rights of any sort, or any exclusive privilege.

7:7A-13.5 Transfer of permits

A permit may be transferred by the permittee to a new owner or operator only if the permit has been modified or revoked and reissued under N.J.A.C. 7:7A-13.6, or a minor modification made under N.J.A.C. 7:7A-13.9 to identify the new permittee and incorporate such other requirements as may be necessary under the Federal Act, this chapter, or any permit or order issued pursuant thereto.

7:7A-13.6 Modification or revocation and reissuance of permits

(a) When the Department receives any information (for example, through a site inspection, through submission of information by the permittee as required by a permit, through a request for modification or revocation and reissuance, or through a review of the permit file), the Department may determine whether one or more of the causes for modification or revocation and reissuance listed in N.J.A.C. 7:7A-13.7 and 13.8 exist. If cause exists, the Department may modify or revoke and reissue the permit accordingly, subject to the limitations of (e) below, and may request an updated application, if necessary.

(b) Any permit modification not processed as a minor modification must be made for cause and with the public notice and hearings procedures required for permit applications under N.J.A.C. 7:7A-11.1(a)7, 9 and 10, 12.1(a), 12.3, 12.4, and 12.5.

(c) If cause does not exist under this chapter, the Department shall not modify or revoke and reissue the permit.

(d) If a permit modification satisfies the criteria in N.J.A.C. 7:7A-13.9 for "minor modifications", the permit may be modified without public review.

(e) When a permit is modified, only the conditions subject to modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision, public hearings and comments, and the permit may be reissued for a new term.

(f) No Federal 404 permit shall be modified or revoked and reissued if USEPA objects (see N.J.A.C. 7:7A-12.3).

(g) Any modification except for those issued pursuant to N.J.A.C. 7:7A-13.9(b)4 will be published in the DEPE Bulletin.

(h) Except for minor modifications of permits as described at N.J.A.C. 7:7A-13.9, a fee shall be submitted for modifications according to the requirements set forth for permit fees at N.J.A.C. 7:7A-16.

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

References added at (b), new (f) and (h) added, existing (f) recodified as (g).

7:7A-13.7 Causes for modification, but not revocation and reissuance

(a) The following are causes for modification, but not for revocation and reissuance of permits. The following may only be causes for revocation and reissuance as well as modification when the permittee requests or agrees.

1. Material and substantial alterations or additions proposed to the permitted project or activity after permit issuance which justify the application of permit conditions that are different or absent from the existing permit.

2. Permits may be modified during their terms if the Department receives information which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) which would have justified the application of different permit conditions at the time of issuance. (For general permits, see N.J.A.C. 7:7A-9.5.) This cause shall include any information indicating that cumulative effects on the environment are unacceptable.

3. The standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations, or by judicial decision after the permit was issued. Permits may be modified during their terms for this cause only as follows:

i. For promulgation of amended standards or regulations, when:

(1) The permit condition requested to be modified was based on a USEPA or Department approved or promulgated water quality standard; and

(2) The Department or USEPA has revised, withdrawn, or modified that portion of the rule or regulation on which the permit condition was based, or has approved a State action with regard to a water quality standard on which the permit condition was based; and

(3) A permittee requests modification in accordance with this chapter within 90 days after Federal Register or New Jersey Register notice of the action on which the request is based.

ii. For judicial decisions, a court of competent jurisdiction has remanded and stayed USEPA or the Department promulgated standards, if the remand and stay concern that portion of the standards on which the permit condition was based, and a request is filed by the permittee in accordance with this chapter within 90 days of judicial remand.

7:7A-13.8 Causes for modification or revocation and reissuance

(a) Cause exists to modify or, alternatively, revoke and reissue a permit when:

1. Cause exists for termination under N.J.A.C. 7:7A-15.10 (termination of permits), and the Department determines that modification or revocation and reissuance is more appropriate under the circumstances; or

2. The Department has received notification, as required under N.J.A.C. 7:7A-13.5 of a proposed transfer of the permit and the transfer does not meet the criteria at N.J.A.C. 7:7A-13.9(b)3.

7:7A-13.9 Minor modifications of permits

(a) Upon the consent of the permittee, the Department may modify a permit to make the minor corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of N.J.A.C. 7:7A-13.6. Any permit modification not processed as a minor modification under this section must be made for cause and must follow the modification procedures in N.J.A.C. 7:7A-13.6.

(b) Minor modifications may only:

1. Correct typographical errors;
2. Require more frequent monitoring or reporting by the permittee;
3. Allow for a change in ownership or operational control of a project activity where the Department determines that no other change in the permit is necessary, provided that a written agreement containing a date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Department; and
4. Allow for a change in materials or construction techniques required by another permitting agency provided the change will not result in additional wetland, State open water or transition area impacts from that of the originally approved permit.

Amended by R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
Repealed and replaced (b)4.

SUBCHAPTER 14. MITIGATION

7:7A-14.1 Mitigation goals

(a) The Department shall require mitigation as a condition of an individual freshwater wetlands or State open water fill permit, and certain Statewide general permits. Mitigation may include restoration, creation, enhancement, or donation of money or land or both to the Mitigation Bank, or to other public or private non-profit conservation organizations. Donations of land to public or private non-profit conservation organizations shall first be approved by the Mitigation Council and the Department in consultation with USEPA.

(b) When an individual freshwater wetlands permit, State open water fill permit or certain Statewide general permits allow the disturbance or loss of wetlands or State open waters, this disturbance or loss shall be compensated for as specified below at N.J.A.C. 7:7A-14.2, unless the applicant can prove, through the use of productivity models or other similar studies, that by restoring or creating a lesser area, there will be a replacement of wetlands or State open water of equal ecological value. In order to demonstrate equal ecological value, the applicant shall survey and provide written documentation regarding, at a minimum, existing soil, vegetation, water quality functions, flood storage capacity, soil erosion and sediment control functions, and wildlife habitat conditions and detail how the proposed mitigation plan will replace the ecological values of the wetland to be lost or disturbed.

(c) Mitigation must be performed prior to or concurrently with permitted activities that will permanently disturb wetlands or State open waters, and immediately after activities that will temporarily disturb wetlands or State open waters. Applicants shall be required to obtain a secured bond, or other surety acceptable to the Department including an irrevocable letter of credit or money in escrow, that shall be sufficient to hire an independent contractor to complete and maintain the proposed mitigation should the applicant default. The performance bond for the construction of the proposed mitigation shall be posted in an amount equal to 115 percent of the estimated cost of construction of the mitigation activity. In addition, a maintenance bond to assure the success of the mitigation shall be posted in an amount equal to 30 percent of the estimated cost of construction. The performance and maintenance bonds will be reviewed annually and shall be adjusted to reflect current economic factors.

1. The performance bond or other surety will be released upon an inspection by the Department confirming completion of construction and planting of the mitigation site. The maintenance bond will be released upon the Department's confirmation that the three-year, post-planting monitoring period has been successfully completed and that no additional maintenance is required in order to meet the specifications of the approved mitigation plan.

(d) The Department shall not consider a mitigation proposal in determining whether a project should be awarded a permit but shall require mitigation as a condition of any permit found to be acceptable under the criteria listed in N.J.A.C. 7:7A-3.

(e) As a condition of every creation or enhancement plan authorized under this subchapter, an applicant shall sign a Department approved conservation easement and register this restriction on the deed for the subject parcel. This restriction will provide that no regulated activities will occur in the created or enhanced wetland area. This restriction shall be memorialized in a deed restriction meeting the

Department's requirements and shall run with the land and be binding upon the applicant and the applicant's successors in interest in the premises or any part thereof. The freshwater wetland permit will not become effective until the deed restriction is registered with the county clerk. Any regulated activities undertaken on the site before a copy of the registered restriction is submitted to the Department will be considered in violation of the Act and this chapter.

1. No future development will be permitted on the mitigation site unless the Department finds that the regulated activity has no practicable alternative which would:

- i. Not involve a freshwater wetland or State open water; or
- ii. Involve a freshwater wetland, or State open water but would have a less adverse impact on the aquatic ecosystem;
- iii. Not have other significant adverse environmental consequences, that is it shall not merely substitute other significant environmental consequences for those attendant on the original proposal; and
- iv. That there is a compelling public need for the activity greater than the need to protect the mitigation site.

2. To satisfy this condition the applicant shall provide a receipt showing that the restriction has been registered at the county clerk's office.

(f) Except for publicly funded projects, as described at (f)1 below, any mitigation carried out offsite shall be on private property.

1. Mitigation for publicly funded projects may be carried out on public lands provided that these lands were private lands purchased by a public agency expressly for the purpose of performing mitigation.

(g) When loss or disturbance of freshwater wetlands or State open waters results from a violation of the Act, this chapter, or any permit, order or approved mitigation plan issued pursuant thereto, the mitigation portion of the penalty shall be that specified in N.J.A.C. 7:7A-15. The Department may, at its discretion, condition approval of a mitigation plan, or a permit, or both, on the resolution of the violation.

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

Changes 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.

Case Notes

Court upheld regulation, deferring to agency's expertise in setting fixed acreage ratios to mitigate adverse environmental impacts. *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.

In the absence of scientifically supported standard fixed acreage ratios for enhancement to replace wetlands, site specific ratios have to be used. *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.

Regulation offering option of fixed acreage ratios to mitigate adverse environmental impacts did not violate statute. *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.

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.

7:7A-14.2 Wetland or State open water mitigation options

(a) The Department distinguishes between four types of mitigation: restoration, creation, enhancement, and contribution. Depending on the circumstances under which wetlands or State open waters are lost or disturbed, different types of mitigation may be required by the Department. The types of mitigation are explained below:

1. Restoration refers to actions performed on the site of a regulated activity, within six months of the regulated activity, in order to reverse or remedy the effects of the activity on the wetland or State open waters, and to restore the site to pre-activity condition.

i. Restoration will be required at a ratio of one acre restored to one acre lost, modified or disturbed. If restoration type actions are performed more than six months after the regulated activity which disturbed the wetland, these actions will no longer be considered restoration, but will be considered creation, and will be governed by the provisions of (a)2 below. At the Department's discretion, restoration activities may exceed six months in cases where a violation has occurred.

2. Creation refers to actions performed to establish freshwater wetland or State open water characteristics, habitat and functions on upland areas. The creation of freshwater wetlands or State open waters shall be governed by the following provisions:

i. Creation will be required at a ratio of two acres created to one acre lost or disturbed unless the applicant demonstrates equal ecological value pursuant to N.J.A.C. 7:7A-14.1(b). Where the Department permits mitigation on less than a 2:1 basis, frequent monitoring will be required by the permittee. In such cases, the Department will require additional mitigation or further remedial action if a net loss of equal ecological value occurs during the three-year monitoring period. Under no circumstances shall the mitigation area be smaller than the disturbed area. Creation of wetlands from other existing climax habitats is discouraged.

ii. Creation shall not be permitted on a site that retains wetlands characteristics. Rather such a site is only eligible for enhancement activities pursuant to (a)3 below.

iii. In addition to the wetlands created in the ratio required, the mitigation site shall include the appropriate transition area. The transition area width will be that which is required for the resource value classification of the closest adjacent wetland areas and will be a minimum of 50 feet.

3. Enhancement refers to actions performed to improve the characteristics, habitat and functions of an existing, degraded wetland such that the enhanced wetland will have resource values and functions similar to an undisturbed wetland. The ratio of enhanced wetlands to wetlands disturbed or modified will be determined based on the documented assessment of the loss of ecological value of the wetlands disturbed or modified.

4. Contribution refers to the donation of money or land to the Mitigation Bank or to other public or private non-profit conservation organizations as approved by the Mitigation Council and the Department in consultation with EPA. Donations shall only be considered if the Department in consultation with USEPA determines that other forms of mitigation are not feasible onsite or offsite in the same watershed. For the purposes of this subsection only, feasible shall include a determination of whether other types of mitigation would be as ecologically beneficial as the donation.

i. If money is donated, the donation shall be equivalent to the lesser of the following costs:

(1) Purchasing and enhancing existing degraded freshwater wetlands, resulting in preservation of freshwater wetlands of equal ecological value to those which are being lost; or

(2) Purchase of property and the cost of creation of freshwater wetlands of equal ecological value to those which are being lost.

ii. If the Department determines that land donation is appropriate, as part or all of a contribution, only land which has been determined by the Mitigation Council to have the potential to be a valuable component of the freshwater wetlands ecosystem will be acceptable to satisfy the mitigation requirement.

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

References added to State open waters; further requirements established.

Case Notes

Court upheld regulation, deferring to agency's expertise in setting fixed acreage ratios to mitigate adverse environmental impacts. *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 379, certification denied 122 N.J. 374, 585 A.2d 380.

In the absence of scientifically supported standard fixed acreage ratios for enhancement to replace wetlands, site specific ratios have to be used. *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.

Regulation offering option of fixed acreage ratios to mitigate adverse environmental impacts did not violate statute. *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.

7:7A-14.3 Location of mitigation sites

(a) All mitigation projects shall be carried out on-site to the maximum extent practicable.

1. For the purposes of this subsection, the term practicable shall mean that all efforts have been exhausted after taking into consideration cost, existing technology, and logistics in light of the overall project purposes.

(b) If on-site mitigation is found to be impracticable, the mitigation shall be carried out within the same watershed to the maximum extent practicable.

(c) If the Department determines that mitigation onsite or in the same watershed is not feasible or less ecologically beneficial, the Department may approve mitigation in a different watershed.

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) added.

7:7A-14.4 Wetland mitigation proposal requirements

(a) A proposal for mitigation shall include the following information, as appropriate:

1. A description of the size and type of mitigation project proposed, including a transition area, a description of the freshwater wetlands which are being lost or disturbed and how the proposal satisfies the requirement for creation of wetlands of equal ecological value within the same watershed;

2. The names and addresses of current and proposed owner(s) of the mitigation project site;

3. The language of a proposed conservation easement or deed restriction which provides for the maintenance of the mitigation site as a natural area in perpetuity;

4. A monitoring and maintenance plan to ensure 85 percent survival and 85 percent areal coverage of the mitigation plantings for at least three years after planting;

5. A description of the existing and proposed vegetation on the mitigation site including scientific names. Spacing of all plantings must be shown along with the

stock type, that is, bare root, potted, seed, and source of the plant material;

6. A description of the existing and proposed hydrology of the site including the elevation of adjacent surface water and the depth to the seasonal high water table;

7. Existing soil types and proposed soil characteristics;

8. A schedule from initiation to completion of the project including dates of excavation, planting, fertilizing (rates and type), etc.;

9. A metes and bounds description of the proposed mitigation site, which will form the basis for the deed restriction;

10. Five folded copies of a site plan for the mitigation project which includes:

i. Project location within the region and in relation to adjacent development;

ii. The lot and block number of the project location;

iii. Existing and proposed elevations and grades of the project shown in one foot intervals; and

iv. Plan views and cross sectional views; and

11. A copy or photocopy of a portion of the U.S.G.S. 7.5 minute quadrangle map (available from the Department's Maps and Publications Office, CN 402, Trenton, NJ 08625) showing the location of the property and its general vicinity, indicating and labeling the location of the proposed mitigation and the property boundaries, and a determination of the State Plane Coordinates for the center of the property. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the end-points of those projects which are 1999 feet or less, and for those projects which are 2000 feet and longer, additional coordinates at each 1000 foot interval.

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 requirement at (a)11.

Case Notes

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.

7:7A-14.5 Acceptability of wetlands mitigation proposals

(a) Wetlands and State open water mitigation proposals shall be reviewed by the Department for acceptability. The Department will base the acceptability determination upon the following criteria:

1. Location of the mitigation site as described under N.J.A.C. 7:7A-14.3 and in relation to adjacent development;

2. Size of the proposed mitigation project as described under this subchapter;

3. Suitability of the selected vegetative species to survive in the proposed environment;

4. Suitability of the monitoring program and maintenance to ensure 85 percent survival and 85 percent areal coverage of the mitigation plantings for at least three years following planting;

5. Suitability of the proposed substrate (soil) to support the selected vegetative species;

6. Success of other mitigation projects within the area;

7. Proposed elevations and hydrology;

8. Ability of the site to support wildlife; and

9. Any other relevant consideration.

(b) When a mitigation plan is submitted subsequent to the permit decision, within 30 days of the receipt of the submission, the Department shall review the submission for completeness and make any necessary requests for additional information, or declare the submission complete. Within 60 days of accepting a submission as complete, the Department shall issue a decision on the acceptability of a proposed mitigation plan unless extended by consent of the permittee.

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 (b).

7:7A-14.6 Wetlands Mitigation Council

(a) The Wetlands Mitigation Council shall have oversight of the creation and implementation of the Wetlands Mitigation Bank. The Wetlands Mitigation Bank will serve all programs within the Land Use Regulation Element for which wetlands and open water mitigation is required as a condition of a permit. The Council duties and functions shall include:

1. Accepting donations of money or land when the Department has determined donation to be an acceptable form of mitigation for a permit or a violation;

2. Determining if land to be donated has the potential to be a valuable component of the wetlands or surface water ecosystem;

3. Disbursement of funds from the Wetlands Mitigation Bank to finance mitigation projects;

4. Purchasing land to provide areas for restoration of degraded freshwater wetlands and to preserve wetlands, and surface waters and transition areas determined to be of critical importance; and

5. Reviewing and approving the establishment of private mitigation banks.

(b) The Council may transfer any funds or lands restricted by deed, easement or other appropriate means to mitigation and freshwater wetlands conservation purposes, to a State or Federal conservation agency that consents to the transfer, to expand or provide for:

1. Freshwater wetlands preserves;
2. Transition areas around existing freshwater wetlands to preserve freshwater wetland quality;
3. Future mitigation sites for freshwater wetlands restoration; or
4. Research to determine more successful mitigation techniques.

(c) Under no circumstances will the resources of the Mitigation Bank be used to aid permittees or violators in locating mitigation sites required of them because of their permit or violation.

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

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

Added (a)5, review and approval of the establishment of private mitigation banks.

SUBCHAPTER 15. ENFORCEMENT

7:7A-15.1 General provisions

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

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

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

Stylistic changes only.

Case Notes

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

7:7A-15.2 USEPA review

The Department shall make available without restriction any information obtained or used in the implementation of the Act to USEPA upon request.

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

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

Stylistic changes only.

7:7A-15.3 Administrative order

(a) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Act, or of any permit, order, rule or regulation issued pursuant thereto, the Department may issue an order:

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

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

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

Editorial changes only.

7:7A-15.4 Civil action

(a) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Act, or of any rule or regulation adopted, or permit or order issued, pursuant to the Act, the Department is authorized to institute a civil action in Superior Court for appropriate relief. Such relief may include, singly or in combination:

1. A temporary or permanent injunction;
2. Assessment of the violator for the costs of any investigation, inspection, or monitoring survey which led to the establishment of the violation, and for the reasonable costs of preparing and bringing legal action under this section;
3. Assessment of the violator for any costs incurred by the State in removing, correcting, or terminating the adverse effects upon the freshwater wetlands, State open waters or transition areas resulting from any unauthorized regulated activity for which legal action under this section may have been brought;
4. Assessment against the violator for compensatory damages for any loss or destruction of wildlife, fish or aquatic life, and for any other actual damages caused by an unauthorized regulated activity. Assessments under this section shall be paid to the State Treasurer except that compensatory damages shall be paid by specific order of the court to any persons who have been aggrieved by the unauthorized regulated activity; and/or
5. A requirement that the violator restore or rehabilitate the site of the violation to the maximum extent practicable and feasible as defined in N.J.A.C. 7:7A-1.4. If the violator does not do so, the State may take correc-

tive action, and will assess the violator pursuant to this chapter.

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

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

7:7A-15.5 Civil administrative penalty

(a) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Act, or of any rule or regulation adopted, or permit or order issued, pursuant to the Act, the Department is authorized to assess a civil administrative penalty of not more than \$10,000 for each violation. Each day during which each violation continues shall constitute an additional, separate, and distinct offense. Specific penalty amounts, and procedures for their assessment and for adjudicatory hearings on penalties assessed, can be found at N.J.A.C. 7:7A-17.

1. Any amount assessed under this section shall fall within the ranges established by N.J.A.C. 7:7A-17.

2. No assessment shall be levied pursuant to this section until after the party has been notified by certified mail or personal service pursuant to N.J.A.C. 7:7A-17.8.

3. The ordered party shall have 20 days from receipt of the notice within which to deliver to the Department a written request for a hearing in accordance with N.J.A.C. 7:7A-17.9. Such hearing shall be conducted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

4. The authority to levy an administrative order is in addition to all other enforcement powers. The payment of any assessment shall not be deemed to affect the availability of any other enforcement powers in connection with the violation for which the assessment is levied.

5. Any civil administrative penalty assessed under this section may be compromised by the Department upon the posting of a performance bond by the violator, or upon such terms and conditions as the Department may establish by regulation.

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

"Commissioner" changed to "Department" throughout.

Case Notes

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

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

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

7:7A-15.6 Civil penalty

(a) Each person who violates the Act or this chapter, or an administrative order or a court order issued pursuant to the Act, and who fails to pay a civil administrative assessment in full pursuant to N.J.A.C. 7:7A-15.5, shall be subject, upon order of a court, to a civil penalty not to exceed \$10,000 per day of such violation. Each day during which the violation continues shall constitute an additional, separate, and distinct offense.

(b) Any civil penalty imposed pursuant to this section may be collected with costs in a summary proceeding pursuant to the penalty enforcement law, N.J.S.A. 2A:58-1 et seq. The Superior Court shall have jurisdiction to enforce the penalty enforcement law in conjunction with the Act and this chapter.

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

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

Editorial changes only.

Case Notes

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

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

7:7A-15.7 Criminal action

(a) A person who willfully or negligently violates the Act, or any regulation or order issued pursuant thereto, shall be guilty, upon conviction, of a crime of the fourth degree and shall be subject to a fine of not less than \$2,500 nor more than \$25,000 per day of violation.

(b) A second offense under this subsection shall subject the violator to a fine of not less than \$5,000 nor more than \$50,000 per day of violation.

(c) A person who knowingly makes a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under the Act, or under any permit, order or rule issued pursuant to the Act, or who falsifies, tampers with or knowingly renders inaccurate, any monitoring device or method required to be maintained pursuant to the Act or any order or rule issued pursuant thereto, shall, upon conviction, be subject to a fine of not more than \$10,000.

7:7A-15.8 Notice of violation recorded on deed to property

In addition to the penalties prescribed in this subchapter, a notice of violation of the Act shall be recorded on the deed of the property wherein the violation occurred, on order of the Department, by the clerk or register of deeds and mortgages of the county wherein the affected property is located and with the clerk of the Superior Court and shall remain attached thereto until such time as the violation has been remedied and the Department orders the notice of violation removed.

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

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

"Commissioner" changed to "Department" throughout.

7:7A-15.9 "After the fact" permit

(a) The Department may issue an "after the fact" permit for the regulated activity that has already occurred only when:

1. The Department has determined that the restoration or rehabilitation of the site to its previolation condition would increase the harm to the freshwater wetlands, State open waters or its ecology; or the regulated activity meets the standards for permit approval pursuant to the Act or the Federal Act;
2. Assessment against the violator for costs or damages enumerated in N.J.A.C. 7:7A-15.4 has been made and collected;
3. The creation or enhancement of freshwater wetlands or State open waters at another site has been required of the violator;
4. An opportunity has been afforded for public hearing and comment; and
5. The reasons for the issuance of the "after the fact" permit are published in the DEPE Bulletin and in a newspaper of general circulation in the geographic area of the violation.

(b) Any person violating an "after the fact" permit issued pursuant to this section shall be subject to the provisions of this chapter.

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

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

Language in (a) recodified as new (b)1; existing (b)1-4 recodified as 2-5.

7:7A-15.10 Termination of permits

(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

1. Noncompliance by the permittee with the permit or any condition of the permit;
2. The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; or
3. The permit has unanticipated negative environmental impacts such as, but not limited to, excessive erosion and subsequent siltation, destruction of vegetation not covered by the permit, die-off of aquatic biota, etc. which become apparent during construction.

(b) Prior to a termination, the Department shall furnish written notice to the permittee by certified mail. The notice shall provide 10 days within which the permittee shall either remedy the violations, or unanticipated negative environ-

mental impacts, offer a plan as to how to bring the permit back into compliance or correct the unanticipated impact, or request a hearing pursuant to (e) below. Within 60 days of Department approval of a plan, the violations or unanticipated impact shall be remedied.

(c) If the requirements of (b) above have not been met within 10 days of the Department's notice, the permit shall automatically terminate and the unanticipated negative environmental impacts or violations shall be remedied. Once the violations are remedied, the Department may reinstate the permit or require the applicant to apply for a new permit, following the application procedures in this chapter.

(d) Should a permit be terminated, the permittee shall restore the site to its pre-activity condition to the maximum extent practicable and feasible or otherwise compensate for any loss in resource value through mitigation pursuant to N.J.A.C. 7:7A-14. This restoration shall be accomplished within 90 days unless the Department authorizes in writing a longer period of time.

(e) A request for a hearing under (b) above shall be filed with the Department at the following address:

Office of Legal Affairs

ATTENTION: Adjudicatory Hearing Requests

Department of Environmental Protection

401 East State Street

CN 402

Trenton, New Jersey 08625-0402

Administrative change to (b) and (f).

See: 23 N.J.R. 3325(b).

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

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

At (a) references added to unanticipated negative impacts; (e) repealed and replaced regarding public participation.

7:7A-15.11 Public participation

(a) The State shall provide for public participation in the State enforcement process by providing assurance that the State agency or enforcement authority will:

1. Investigate and provide responses to all citizen complaints submitted pursuant to State procedures;
2. Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and
3. Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action in the DEPE Bulletin.

Repealed and replaced by R.1992 d.117, effective March 16, 1992.

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

Former section was entitled "Remedies not exclusive."

SUBCHAPTER 16. FEES

7:7A-16.1 Payment of fees

(a) Except when submitted by an agency of the State, each request for a letter of interpretation, or freshwater wetlands permit application, open water fill permit application, letter of authorization for a Statewide general permit activity, transition area permit application, or request for a letter of exemption shall be accompanied by the appropriate fee as set forth at N.J.A.C. 7:7A-16.2 to 16.6. Except when submitted by an agency of the State, no request, application, or notice will be considered complete, and therefore will not be acted on by the Department, unless accompanied by the appropriate fee.

(b) All fees shall be paid by personal check, certified check, attorney check, or money order. Checks and money orders shall be payable to "Treasurer, State of New Jersey" and submitted with the application.

(c) Each check or money order shall be marked to identify the nature of the submittal (for example, freshwater wetlands Individual permit application) for which the fee is paid and the name of the applicant.

(d) The Department shall assess a single permit fee for a project which requires a permit under this chapter (including individual permits, general permits, and transition area waivers) and one or more of the following permits: CAFRA permit issued pursuant to the Coastal Area Facility Review Act, N.J.S.A. 13:19-1; waterfront development permit issued pursuant to the Waterfront Development Act, N.J.S.A. 12:5-3; coastal wetlands permit issued pursuant to the Wetlands Act of 1970, N.J.S.A. 13:9A-1; or stream encroachment permit pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50. The permit fee for the project is equal to the sum of the following:

1. The single highest permit fee for the above listed permits required for the project; and
2. Seventy-five percent of the sum of the permit fees for all other permits required for the project.

(e) Any fee under this subchapter that is subject to N.J.A.C. 7:1L shall be payable in installments in accordance with N.J.A.C. 7:1L.

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

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

At (a) added to list of documents which must be accompanied by a fee.

Amended by R.1993 d.111, effective March 1, 1993.

See: 24 N.J.R. 2768(a), 25 N.J.R. 924(a).

Added subsection (d).

Amended by R.1995 d.205, effective April 17, 1995. See: 26 N.J.R. 3922(a), 27 N.J.R. 1576(b).

7:7A-16.2 Fees for review of requests for letters of interpretation

(a) If a request is made for a letter of interpretation to determine:

1. Whether freshwater wetlands, State open waters or transition areas are present or absent on a parcel of land or right-of-way, pursuant to N.J.A.C. 7:7A-8.2(a)1, the fee shall be \$100.00;
2. Whether freshwater wetlands, State open waters or transition areas are present or absent on a footprint of land, pursuant to N.J.A.C. 7:7A-8.2(a)2, the fee shall be \$200.00.

(b) Any request for a letter of interpretation which requires any freshwater wetlands or State open water boundary delineation, or verification of a delineation, shall be accompanied by the following fee:

1. For a parcel of land or right-of-way which is smaller than one acre, pursuant to N.J.A.C. 7:7A-8.2(a)3, the fee shall be \$250.00 or
2. For parcel of land or right-of-way, with total acreage of one acre or more, pursuant to N.J.A.C. 7:7A-8.2(a)4, the fee shall be \$250.00 plus \$35.00 per acre or any fraction thereof, with a total not to exceed \$50,000. For example, the fee for line verification of a parcel with a total acreage of 7.2 acres would be $\$250.00 + (8 \text{ acres} \times \$35.00) = \$530.00$.

(c) For a request for the reissuance of a letter of interpretation pursuant to N.J.A.C. 7:7A-8.7, the fee shall be 25 percent of the original fee or \$100.00, whichever is larger.

(d) If in order to review and process a request for a letter of interpretation, more than one inspection by the Department is necessary because of any act or omission of the applicant, the Department may assess an additional fee for each additional visit in an amount not to exceed \$1,000. No letter of interpretation shall be issued until this fee has been paid.

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

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

Added some new fees; increased some fees.

7:7A-16.3 Fees for review of individual freshwater wetlands and open water fill permits

(a) The fee for the review and processing of an individual freshwater wetlands and open water fill permit or individual water quality certificate application shall be \$1,000 plus \$100.00 per one-tenth acre, or any fraction thereof, of freshwater wetlands or State open waters affected by any regulated activities. For a permit requiring both an individual freshwater wetlands and open water fill permit, the fee shall be \$1,000 plus \$100.00 per one-tenth acre, or any fraction thereof, of freshwater wetlands and State open waters affected by any regulated activities.

(b) For projects that require both an individual freshwater wetlands/open water fill permit and a transition area permit, only one fee for the review and processing of the permit shall be required, the higher of the two fees.

(c) If, in order to review and process a freshwater wetlands permit application, more than one inspection by the Department is necessary because of any act or omission of the applicant, the Department may assess an additional fee for each additional visit in an amount not to exceed \$1,000. No permit shall be issued until this fee has been paid.

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

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

Further clarification of fees.

7:7A-16.4 Fees for review of Statewide general permit authorization applications

(a) The fee for review of a Statewide general permit authorization application pursuant to N.J.A.C. 7:7A-9.4(a) shall be \$250.00.

(b) If a proposed project requires more than one type of general permit, the fee shall be \$250.00 for the first general permit and \$100.00 for each additional general permit.

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

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

Recodified from 16.5; former section 16.4 entitled "Fees for review of open water fill permit applications" was repealed by this rulemaking; increased fees at (b).

7:7A-16.5 Fees for review and processing of transition area waiver applications

(a) Each request for a transition area waiver shall be accompanied by the appropriate fee as follows:

1. If a letter of interpretation has been performed on the property by the Department pursuant to N.J.A.C. 7:7A-8 confirming or delineating the freshwater wetlands boundary, the transition area waiver application fee shall be:

i. For a property or right of way of one acre or less: \$100.00;

ii. For a property or right of way over one acre: \$250.00 plus \$20.00 per acre, or any fraction thereof, of the standard transition area affected or disturbed by the proposed activity; and

iii. For review of applications for more than one type of transition area waiver, the fee shall be \$250.00 plus \$20.00 per acre, or any fraction thereof of the standard transition area affected or disturbed by the proposed activity, plus \$100.00 for each additional special activity waiver.

2. If no letter of interpretation for the property has been prepared by the Department pursuant to N.J.A.C. 7:7A-8 confirming or delineating the freshwater wetlands

boundary, the transition area waiver application fee shall be:

i. For a property or right of way of one acre or less: \$350.00;

ii. For a property or right of way over one acre: \$450.00 plus \$40.00 per acre, or any fraction thereof, of the total property; and

iii. For review of applications for more than one type of transition area waiver, the fee shall be \$450.00 plus \$40.00 per acre, or any fraction thereof of the total property plus \$100.00 for each additional special activity waiver.

3. If a letter of interpretation for the property which provides only a determination of the presence or absence of freshwater wetlands has been prepared for a property by the Department pursuant to N.J.A.C. 7:7A-8, the transition area waiver application fee shall be:

i. For a property or right of way of one acre or less: \$350.00; and

ii. For a property or right of way over one acre: \$450.00 plus \$40.00 per acre, or any fraction thereof, of the total property.

4. For special activity permits for activities covered by Statewide general permits, the waiver application fee shall be:

i. For the review of a special activity waiver pursuant to N.J.A.C. 7:7A-7.4(e): \$250; and

ii. If a proposed project requires more than one type of special activity waiver, the fee shall be \$250.00 for the first special activity waiver and \$100.00 for each additional special activity waiver.

5. If, in order to review and process a transition area waiver application, more than one site inspection by the Department is necessary because of any act or omission of the applicant, the Department may assess an additional fee for each additional visit in an amount not to exceed \$1,000. No transition area waiver shall be issued until this additional fee is paid.

New Rule, R.1989 d.362, effective July 3, 1989.

See: 21 N.J.R. 596(a), 21 N.J.R. 1858(a).

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

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

Recodified from 16.6; increase of some fees and addition of others.

7:7A-16.6 Fees for the review and processing of requests for exemption letters

The fee for the review and processing of a request for an exemption letter certifying that a project or activity is exempt from freshwater wetlands or open water fill permit requirements, or from transition area requirements, shall be \$100.00.

New Rule, R.1989 d.362, effective July 3, 1989.

See: 21 N.J.R. 596(a), 21 N.J.R. 1858(a).
 Recodified from 16.7 by R.1992 d.117, effective March 16, 1992.
 See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

7:7A-16.7 Fees for the review and processing of requests for permit modifications

Except for minor modifications pursuant to N.J.A.C. 7:7A-13.9 for which no fee will be charged, the fee for the review and processing of a request for permit modification shall be 25 percent of the original fee.

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

7:7A-16.8 Fee refunds

All fees submitted with an application that is declared administratively complete shall be non-refundable.

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

SUBCHAPTER 17. CIVIL ADMINISTRATIVE PENALTIES AND REQUESTS FOR ADJUDICATORY HEARINGS

7:7A-17.1 General penalty provisions

(a) This subchapter shall apply only to violations of the Act and this chapter which involve freshwater wetlands and transition areas. This subchapter shall not apply to regulated activities in State open waters. The penalty procedures and amounts for State open water fill violations are set by N.J.A.C. 7:14-8. This subchapter shall also govern the procedures for requesting an adjudicatory hearing on a notice of civil administrative penalty assessment or an administrative order.

(b) Each violation of any provision of the Act or any rule, administrative order, approved mitigation plan, waiver or permit issued pursuant thereto, shall constitute an additional, separate, and distinct violation for which a separate penalty may be assessed.

(c) Each day during which such violation exists and/or continues shall constitute an additional, separate, and distinct violation for which a separate civil administrative penalty may be assessed. A violation shall be considered to continue as long as it is not rectified, remedied, repaired, or removed, to the satisfaction of the Department. For example, each day that an obstruction, structure, piling, fill or discharge placed or constructed in violation of the Act remains in place shall constitute an additional, separate, and distinct violation. Also for example, for destruction, dredging, or removal of freshwater wetlands components such as soil or vegetation, each day between the destruction or removal and the replacement, restoration, or remediation to the satisfaction of the Department shall constitute an additional, separate, and distinct violation.

1. For the purposes of calculating the duration of any violation, the first day of the violation shall be the day which is the earliest point in time that the Department can establish that the violation occurred, had occurred, or was occurring.

2. The last day of the violation shall be as follows:

i. The day upon which a complete application for a permit or waiver to pursue the activity is submitted to the Department;

ii. The day upon which a complete restoration plan is submitted to the Department (in the case of an unpermissible activity); or

iii. The first day upon which a good faith effort was made to comply with the Department's requirements. If such a good faith effort is shown, the Department may, in its sole discretion, consider the first day of such efforts to be the last day of the violation.

3. To demonstrate a good faith effort, the violator shall show that all regulated and prohibited activity has been halted, shall promptly submit any information required by the Department, shall promptly remedy all deficiencies in any application or other materials submitted to the Department, and shall otherwise promptly comply with all Department requirements.

4. For the purposes of penalty assessment, the number of days required by the Department to render a decision and give notice of such decision on a submitted permit application or restoration proposal shall be excluded from the per day penalty calculation.

(d) In addition to the civil administrative penalties assessed under this subchapter, restoration and/or mitigation may be required pursuant to N.J.A.C. 7:7A-14 and 15.

(e) The Department may in its discretion settle any civil administrative penalty assessed under this chapter.

Amended by R.1992 d.117, effective March 16, 1992.
 See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
 New (c)1-4 added.

7:7A-17.2 Civil administrative penalty determination

(a) Except for those violations set forth in N.J.A.C. 7:7A-17.4 through 17.6, the Department may assess a civil administrative penalty for violations described in this section using three factors: conduct of violator, acreage of impact, and the resource value classification of impacted wetland. Point values are assigned to the three ranges within each factor, as described below. For each violation, the total number of points are determined and the total is used at (c) below to determine penalty amount per day.

(b) The following is a description of the factors to be used in penalty determination and the point values assigned to them:

1. The conduct factor of the violation shall be determined as major, moderate or minor as follows:

- i. Major shall include an intentional, deliberate, purposeful, knowing or willful act or omission by the violator and is assigned three points;
- ii. Moderate shall include any unintentional but foreseeable act or omission by the violator and is assigned two points; and
- iii. Minor shall include any other conduct not identified in (b)1i or ii above and is assigned one point.

2. The acreage of wetlands impacted by the violation factor shall be determined as:

- i. An impact to greater than three acres of wetlands is assigned three points;
- ii. An impact to one to three acres of wetlands is assigned two points;
- iii. An impact to less than one acre of wetlands is assigned one point.

3. The resource value classification factor shall be determined as:

- i. An impact to exceptional resource classification wetlands is assigned three points;
- ii. An impact to intermediate resource classification wetlands is assigned two points;
- iii. An impact to ordinary resource classification wetlands is assigned one point.

(c) The total points from the above factors shall be used to determine the penalty assessment per day according to the following table:

Total Points	Penalty Amount Per Day
9	\$10,000
8	9,000
7	7,500
6	6,000
5	4,500
4	3,000
3	1,500

Amended by R.1992 d.117, effective March 16, 1992.
 See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
 Repealed use of "major" and "minor" seriousness and added factors to be used in determining penalties.

Case Notes

Engaging in regulated activity in a freshwater wetland without a permit warranted civil penalty and restoration order. Department of Environmental Protection and Energy v. Toufayan, 95 N.J.A.R.2d (EPE) 71.

Assessment of \$9,000 penalty against homeowner for improperly placing fill within 100-year floodplain and for placing asphalt paving in wetlands transition zone was proper. Department of Environmental Protection v. Ruelan. 93 N.J.A.R.2d (EPE) 239.

Evidence established that diverting stream and filling stream bed violated statutes; penalty assessed. Department of Environmental Protection v. DiFlorio. 93 N.J.A.R.2d (EPE) 187.

7:7A-17.3 Civil administrative penalty for engaging in regulated activities without approval

(a) The Department may assess a civil administrative penalty in accordance with the provisions of this section against each violator who engages in a regulated activity in a freshwater wetland without a freshwater wetlands permit or engages in a prohibited activity in a transition area without a transition area waiver.

(b) For each violation under this section, the Department may assess a penalty of up to \$10,000. Each day, from the day the prohibited activity begins to the day its effects are rectified, remedied, repaired, or removed to the satisfaction of the Department, shall constitute an additional, separate, and distinct violation.

Amended by R.1992 d.117, effective March 16, 1992.
 See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
 Penalty in (b) established as a maximum not a blanket assessment. Administrative correction.
 See: 24 N.J.R. 1333(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.

Mowing of a wetlands area without permit; belief that mowing was continuing an established and necessary practice was mitigating factor. DEPE v. Juliano, 94 N.J.A.R.2d (EPE) 133.

Assessment of \$9,000 penalty against homeowner for improperly placing fill within 100-year floodplain and for placing asphalt paving in wetlands transition zone was proper. Department of Environmental Protection v. Ruelan. 93 N.J.A.R.2d (EPE) 239.

7:7A-17.4 Civil administrative penalty for submitting inaccurate or false information

(a) The Department may assess a civil administrative penalty pursuant to this section against each violator who submits inaccurate information or who makes a false statement, representation, or certification in any application, record, or other document required to be submitted or maintained, under the Act or any rule, administrative order, permit, mitigation plan, or waiver issued pursuant thereto.

(b) Each day, from the day that the violator knew or had reason to know that it submitted inaccurate or false information to the Department until the day of receipt by the Department of a written correction by the violator, shall be an additional, separate, and distinct violation.

(c) The Department shall determine the amount of the civil administrative penalty for violations described in this section based on the conduct of the violator as follows:

- 1. For each intentional, deliberate, purposeful, knowing, or willful act or omission by the violator, the civil administrative penalty shall be in an amount of not more

than \$10,000 nor less than \$8,000 for violations described in N.J.A.C. 7:7A-15; and

2. For each other violation, the penalty shall be in the amount of \$1,000.

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

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

Changes made in (b).

7:7A-17.5 Civil administrative penalty for failure to allow entry and inspection

(a) The Department may assess a civil administrative penalty pursuant to this section against each violator who refuses, inhibits or prohibits immediate lawful entry and inspection of any premises, building or place by any authorized Department representative.

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

(c) The Department shall determine the amount of the civil administrative penalty for violations described in this section as follows:

1. For refusing, inhibiting or prohibiting immediate lawful entry and inspection of any premises, building or place for which an administrative order, freshwater wetlands permit, open water fill permit, transition area waiver, approved mitigation plan or general permit authorization notification exists for the property in question under the Act, the civil administrative penalty shall be no more than \$10,000 nor less than \$7,000; and

2. For any other refusal, inhibition or prohibition of immediate lawful entry and inspection, the civil administrative penalty shall be in an amount not more than \$7,000 nor less than \$1,500.

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

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

Language changes in (b).

7:7A-17.6 Civil administrative penalty for failure to pay a civil administrative penalty assessed under the Act

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

(b) The Department shall assess a civil administrative penalty pursuant to this section in an amount equal to the unpaid civil administrative penalty up to a maximum of \$10,000 per violation.

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

7:7A-17.7 Economic benefit factor

The Department may, in addition to any other civil administrative penalty assessed pursuant to this subchapter, include as a civil administrative penalty the economic benefit (in dollars) which the violator has realized as the result of not complying, or by delaying compliance with the requirements of the Act or any rule, permit, mitigation plan, waiver or administrative order issued pursuant thereto. If the total economic benefit was derived from more than one violation, the total economic benefit amount may be apportioned among the violations from which it was derived so as to increase each civil administrative penalty assessment to an amount no greater than \$10,000 per violation.

7:7A-17.8 Procedures for assessment of civil administrative penalties under the Act

(a) To assess a civil administrative penalty under the Act, the Department shall notify the violator by certified mail (return receipt requested) or by personal service. This Notice of Civil Administrative Penalty Assessment shall:

1. Identify the section of the Act, rule, mitigation plan, permit or administrative order violated;
2. Concisely state the facts alleged to constitute the violation;
3. Specify the amount of the civil administrative penalty to be imposed; and
4. Advise the violator of the right to request an adjudicatory hearing pursuant to the procedures in N.J.A.C. 7:7A-17.9.

(b) Payment of a civil administrative penalty is due upon receipt by the violator of the Department's Final Order in a contested case, or when a Notice of Civil Administrative Penalty Assessment becomes a Final Order, as follows:

1. If no hearing is requested pursuant to N.J.A.C. 7:7A-17.9, a Notice of Civil Administrative Penalty Assessment becomes a Final Order on the 21st day following receipt of the Notice of Civil Administrative Penalty Assessment by the violator;
2. If the Department denies the hearing request, a Notice of Civil Administrative Penalty Assessment becomes a Final Order upon receipt by the violator of notice of such denial; or
3. If the Department conducts an adjudicatory hearing, upon receipt by the violator of a final order of a contested case.

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

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

Deleted "waiver" at (a)1.

7:7A-17.9 Procedures to request an adjudicatory hearing to contest an Administrative Order and/or a Notice of Civil Administrative Penalty Assessment; procedures for conducting adjudicatory hearings

(a) To request an adjudicatory hearing to contest an Administrative Order, and/or a Notice of Civil Administrative Penalty Assessment issued pursuant to the Act, the violator shall submit the following information in writing to the Department, addressed to the Office of Legal Affairs, ATTENTION: Adjudicatory Hearing Requests, Department of Environmental Protection, CN 402, Trenton, New Jersey 08625-0402:

1. The name, address, and telephone number of the violator and its authorized representative;
2. The violator's defenses to each of the findings of fact, stated in short and plain terms;
3. An admission or denial of each of the findings of fact. If the violator is without knowledge or information sufficient to form a belief as to the truth of a finding, the violator shall so state and this shall have the effect of a denial. A denial shall fairly meet the substance of the findings denied. When the violator intends in good faith to deny only a part or a qualification of a finding, the violator shall specify so much of it as is true and material and deny only the remainder. The violator may not generally deny all the findings but shall make all denials as specific denials of designated findings. For each find-

ing the violator denies, the violator shall allege the fact or facts as the violator believes it or them to be;

4. Information supporting the request and copies of other written documents relied upon to support the request;
5. An estimate of the time required for the hearing (in days and/or hours); and
6. A request, if necessary, for a barrier-free hearing location accessible to physically disabled persons.

(b) If the Department does not receive the hearing request within 20 days after receipt by the violator of the Notice of Civil Administrative Penalty Assessment and/or the Administrative Order being challenged, the Department shall deny the hearing request.

(c) If the violator fails to include all the information required by (a) above, the Department may deny the hearing request.

(d) If it grants the request, the Department shall file the request for a hearing with the Office of Administrative Law. The hearing shall be held before an administrative law judge and in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

Administrative change to (a).
See: 23 N.J.R. 3325(b).

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