

**CHAPTER 7A**  
**FRESHWATER WETLANDS**  
**PROTECTION ACT RULES**

**Authority**

N.J.S.A. 13:9B-1 et seq.

**Source and Effective Date**

R.2008 d.291, effective September 4, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

**Chapter Expiration Date**

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 7A, Freshwater Wetlands Protection Act Rules, expires on September 4, 2015. See: 43 N.J.R. 1203(a).

**Chapter Historical Note**

Chapter 7A, Wetlands Management, was adopted as R.1972 d.68, effective April 13, 1972. See: 3 N.J.R. 255(a), 4 N.J.R. 96(d).

Chapter 7A, Wetlands Management, was repealed by R.1984 d.164, effective May 7, 1984 (operative June 1, 1984). See: 15 N.J.R. 2090(a), 16 N.J.R. 1073(a).

Chapter 7A, Freshwater Wetlands Protection Act Rules, was adopted as new rules by 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).

Subchapter 16, Fees, and Subchapter 17, Civil Administrative Penalties and Requests for Adjudicatory Hearings, were adopted as R.1988 d.312, effective July 5, 1988. See: 20 N.J.R. 576(a), 20 N.J.R. 1553(a).

Subchapter 6, Transition Areas, and Subchapter 7, Transition Area Waivers, were adopted as new rules by R.1989 d.362, effective July 3, 1989. See: 21 N.J.R. 596(a), 21 N.J.R. 1858(a).

Petitions for Rulemaking. See: 21 N.J.R. 2675(b), 22 N.J.R. 253(a), 22 N.J.R. 1388(a).

Subchapter 4, General Standards for Granting an Open Water Fill Permit, was repealed by R.1992 d.117, effective March 16, 1992. See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

The Executive Order No. 66(1978) expiration date for Chapter 7A, Freshwater Wetlands Protection Act Rules, was extended by gubernatorial directive from June 6, 1993 to March 16, 1997. See: 24 N.J.R. 912(a).

The Executive Order No. 66(1978) expiration date for Chapter 7A, Freshwater Wetlands Protection Act Rules, was extended by gubernatorial directive from March 16, 1997 to March 16, 1998. See: 29 N.J.R. 1308(b).

The Executive Order No. 66(1978) expiration date for Chapter 7A, Freshwater Wetlands Protection Act Rules, was extended by gubernatorial directive from March 16, 1998 to March 16, 1999. See: 30 N.J.R. 1319(a).

The Executive Order No. 66(1978) expiration date for Chapter 7A, Freshwater Wetlands Protection Act Rules, was extended by gubernatorial directive from March 16, 1999 to March 16, 2000. See: 31 N.J.R. 871(b).

The Executive Order No. 66(1978) expiration date for Chapter 7A, Freshwater Wetlands Protection Act Rules, was extended by gubernatorial directive from March 16, 2000 to December 31, 2000. See: 32 N.J.R. 1252(a).

The Executive Order No. 66(1978) expiration date for Chapter 7A, Freshwater Wetlands Protection Act Rules, was extended by gubernatorial directive from December 31, 2000 to June 30, 2001. See: 33 N.J.R. 553(a).

The expiration date for Chapter 7A, Freshwater Wetlands Protection Act Rules, was extended by gubernatorial directive from June 30, 2001 to August 7, 2001. See: 33 N.J.R. 2640(b).

Chapter 7A, Freshwater Wetlands Protection Act Rules, was re-adopted as R.2001 d.312, effective August 3, 2001. As a part of R.2001 d.312, effective September 4, 2001, N.J.A.C. 7:7A-2.2 was repealed, and N.J.A.C. 7:7A-2.3 was recodified as N.J.A.C. 7:7A-2.2; N.J.A.C. 7:7A-2.4 and 7:7A-2.5 were recodified as N.J.A.C. 7:7A-2.3 and 7:7A-2.4; Subchapter 3, General Standards for Granting Freshwater Wetlands and Open Water Fill Permits, was recodified as Subchapter 7, Individual Freshwater Wetlands and Open Water Fill Permits; Subchapter 3, Letters of Interpretation, was adopted as new rules; Subchapter 5, Emergency Permits, was recodified as Subchapter 8; Subchapter 6, Transition Areas, was recodified as N.J.A.C. 7:7A-2.5 through 7:7A-2.7 and existing N.J.A.C. 7:7A-2.7 through 7:7A-2.9 were recodified as N.J.A.C. 7:7A-2.8 through 7:7A-2.10; Subchapter 6, Transition Area Waivers, was adopted as new rules; Subchapter 7, Transition Area Waivers, was repealed; N.J.A.C. 7:7A-8.6 and 7:7A-8.7 were recodified as N.J.A.C. 7:7A-3.6; N.J.A.C. 7:7A-9.2 was recodified as Subchapter 5, Adopted General Permits; N.J.A.C. 7:7A-9.1, 7:7A-9.3 and 7:7A-9.4 were recodified as Subchapter 4, General Provisions for General Permits; N.J.A.C. 7:7A-9.23 was recodified as N.J.A.C. 7:7A-5.23; Subchapter 10, Pre-Application Conferences, was recodified as Subchapter 9; Subchapter 11, Application Procedure, was recodified as Subchapter 10, Application Contents and Procedure; N.J.A.C. 7:7A-11.3 and 7:7A-11.4 were recodified as N.J.A.C. 7:7A-10.10 and 7:7A-10.11; Subchapter 14, Mitigation, was repealed, and Subchapter 14, Changes to Issued Permits or Waivers, was adopted as new rules; Subchapter 15, Enforcement, was recodified as Subchapter 16; N.J.A.C. 7:7A-15.1 through 7:7A-15.5 were recodified as N.J.A.C. 7:7A-16.1 through 7:7A-16.5; N.J.A.C. 7:7A-15.6 and 7:7A-15.7 were recodified as N.J.A.C. 7:7A-16.13 and 7:7A-16.14; N.J.A.C. 7:7A-15.8 and N.J.A.C. 7:7A-15.9 were recodified as N.J.A.C. 7:7A-16.16 and 7:7A-16.17; N.J.A.C. 7:7A-15.10 was recodified as N.J.A.C. 7:7A-14.5; N.J.A.C. 7:7A-15.11 was recodified as N.J.A.C. 7:7A-16.18; Subchapter 15, Mitigation, was adopted as new rules; Subchapter 16, Fees, was recodified as Subchapter 11; N.J.A.C. 7:7A-16.1 was recodified as N.J.A.C. 7:7A-11.1; N.J.A.C. 7:7A-17.1 and 7:7A-17.3 were repealed; N.J.A.C. 7:7A-17.2 was recodified as N.J.A.C. 7:7A-16.8; N.J.A.C. 7:7A-17.4 through 7:7A-17.7 were recodified as N.J.A.C. 7:7A-16.9 through 7:7A-16.12; and N.J.A.C. 7:7A-17.8 and 7:7A-17.9 were recodified as N.J.A.C. 7:7A-16.6 and 7:7A-16.7. See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Subchapter 17, Reconsideration by Department of Its Action or Inaction Concerning a Permit, was adopted as new rules by R.2003 d.44, effective January 21, 2003. See: 34 N.J.R. 2388(a), 35 N.J.R. 418(a).

In accordance with N.J.S.A. 52:14B-5.1d, the expiration date of Chapter 7A, Freshwater Wetlands Protection Act Rules, was extended by gubernatorial directive from August 3, 2006 to August 3, 2007. See: 38 N.J.R. 3303(a).

In accordance with N.J.S.A. 52:14B-5.1c, Chapter 7A, Freshwater Wetlands Protection Act Rules, expires on January 30, 2008. See: 39 N.J.R. 3587(a).

In accordance with N.J.S.A. 52:14B-5.1d, the expiration date of Chapter 7A, Freshwater Wetlands Protection Act Rules, was extended by gubernatorial directive from January 30, 2008 to September 4, 2008. See: 40 N.J.R. 620(a).

Chapter 7A, Freshwater Wetlands Protection Act Rules, was re-adopted as R.2008 d.291, effective September 4, 2008. See: Source and Effective Date. See, also, section annotations.

**Law Review and Journal Commentaries**

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

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#### SUBCHAPTER 1. GENERAL INFORMATION

##### 7:7A-1.1 Scope and authority

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

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

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

Rewrote the section.

##### Case Notes

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

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

**7:7A-1.2 Construction of this chapter**

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

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

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

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

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

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

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

**7:7A-1.3 Forms and information; Internet web site**

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

1. Through the Division of Land Use Regulation website at [www.state.nj.us/dep/landuse](http://www.state.nj.us/dep/landuse); or
2. By contacting the Division of Land Use Regulation at:

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

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

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

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

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

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

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

Added address for other sources of information.

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

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

Rewrote the section.

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Section was "Forms and information, internet web site". Substituted "Division of Land Use Regulation" for "Land Use Regulation Program" throughout.

**7:7A-1.4 Definitions**

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

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

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

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

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

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

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

"Architectural survey" means an intensive-level historic architectural survey completed by an architectural historian whose qualifications meet the Secretary of the Interior's Professional Qualifications Standards and related guidance as part of the larger Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation as referenced in 36 CFR 61, as amended and supplemented, incorporated herein by reference.

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

inserted the last sentence; in definition "Swale", recodified the former second sentence of paragraph 1 as subparagraph 1i and added subparagraph 1ii; in definition "Vernal habitat", rewrote the first sentence, inserted "or contains" in paragraph 1, inserted "or immediately adjacent to" in subparagraphs 2i and 2ii and inserted "reproducing" and "populations" in paragraph 4.

Petition for Rulemaking.

See: 41 N.J.R. 3319(b), 3964(a).

Amended by R.2009 d.372, effective December 21, 2009.

See: 41 N.J.R. 1565(a), 41 N.J.R. 4735(a)

Substituted definition "Category One waters" for definition "Category one waters"; in definition "Category One waters", substituted "such" for "category one waters" following "as", and deleted the last two sentences and paragraphs 1 through 5.

#### Case Notes

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

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

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

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

Property owners' argument that the wetlands on the property were tidally influenced, and therefore did not qualify as "freshwater wetlands" was rejected; freshwater wetlands included "tidally influenced wetlands which have not been included on a promulgated map pursuant to the Wetlands Act of 1970," and the owners offered no evidence showing that the wetlands on the property were included on the map. *Fitting v. N.J. Dep't of Env'tl. Prot.*, OAL Dkt. No. ESA 2714-07, 2009 N.J. AGEN LEXIS 753, Final Decision (September 25, 2009).

Where petitioner sought to use the subject property for a proposed used car sales operation in 2005, and petitioner's predecessor had only obtained in 1977 a preliminary and final subdivision approval for a division of the land, and, assuredly, petitioner sought to develop that land into a full-scale business operation, what the local authority approved in 1977 was nothing like what petitioner now proposed; thus, it was entirely correct for the Department of Environmental Protection to identify petitioner's "project" as not the "project" that the local authority approved in 1977, but instead a different "project," and as such, petitioner had no subdivision approval under the Municipal Land Use Law that would allow any exemption from the requirements of the Freshwater Wetlands Protection Act. *Haubrich v. N.J. Dep't of Env'tl. Prot./Land Use Regulation*, OAL Dkt. No. ESA 09194-06N, 2008 N.J. AGEN LEXIS 95, Initial Decision (January 16, 2008).

Property owner's argument that the wetlands on the property were tidally influenced, and therefore did not qualify as "freshwater wetlands" was rejected; Department of Environmental Protection regulations define freshwater wetlands as including "tidally influenced wetlands which have not been included on a promulgated map pursuant to the Wetlands Act of 1970," and the owner offered no evidence showing that the wetlands on the property were included on a promulgated map pursuant to the Wetlands Act of 1970 and offered no scientific evidence of tidal influence. *Cummings v. N.J. Dep't of Env'tl. Prot.*, Land Use Regulation Program, OAL Dkt. No. ESA 4466-06, 2007 N.J. AGEN LEXIS 920, Final Decision (July 2, 2007).

Property owner's argument that a drainage easement existed on the property and that, accordingly, the corresponding wetlands were wetlands of "ordinary resource value" and thus not subject to transition area requirements, was rejected since a drainage easement does not equate to a manmade drainage ditch and the purported fact that drainage patterns corresponded with the mapped drainage easements did not establish the presence of a manmade drainage ditch. *Cummings v. N.J. Dep't of Env'tl. Prot.*, Land Use Regulation Program, OAL Dkt. No. ESA 4466-06, 2007 N.J. AGEN LEXIS 920, Final Decision (July 2, 2007).

Where the Department contended that water flowed overland from the petitioner's wetlands to a nearby stormwater inlet, making petitioners ineligible for a GP6 permit under N.J.A.C. 7:7A-5.6, the sand, staining, and saturated earth relied on by the Department all occurred not on the property in question but rather along Lake Avenue; it is not an unreasonable interpretation of N.J.A.C. 7:7A-1.4 to require that the evidence of scouring, erosion, or concentrated flow occur either on the property in question, or clearly establish the link between that property and the water tributary system. *Ellis v. N.J. Dep't of Env'tl. Prot.*, Land Use Regulation, OAL Dkt. No. ESA 8925-03, 2006 N.J. AGEN LEXIS 226, Final Decision (February 27, 2006).

#### 7:7A-1.5 Severability

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

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

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

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

#### 7:7A-1.6 Other statutes and regulations

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

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

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

(d) This chapter shall not preempt State regulatory programs which affect regulated activities in freshwater wetlands, including but not limited to Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., and State approved municipal water quality management plans. These programs will continue to regulate based on the concerns covered by their respective enabling statutes and rules, and may, through such regulation, have some impact on projects in freshwater wetlands. However, those programs will not use freshwater wetlands concerns as a basis for regulation, and any regulation by these programs of projects in freshwater wetlands will be limited to that based on other (for example, flood danger) concerns.

(e) If a proposed project does not involve a freshwater wetland or State open water, does not constitute a regulated activity, or is exempt under this chapter, the final decision on the application shall be based solely on the requirements of other applicable permit programs.

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.

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

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

In (a), deleted "the provisions of the Act or" following "department", "be construed to" preceding "limit", and "provisions of" following "any other"; rewrote (b); in (c), substituted "or other matters" for "pursuant to N.J.A.C. 7:7A-8.5"; in (d), deleted "pre-existing" following "preempt", "except pursuant to (e) below," preceding "those programs" and "such" preceding "regulation by"; rewrote (e).

#### 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 Hearings and appeals

(a) Subject to the limits on third party hearings at (k) below, a person may request an administrative hearing to contest a decision under this chapter on any of the following actions:

1. An exemption letter request;
2. An application for a letter of interpretation;
3. An application for authorization to act under a general permit;
4. An application for a transition area waiver;
5. An application for an individual freshwater wetlands permit;

6. An application for an individual open water fill permit; or

7. An application for a modification or extension of any Department issued document.

(b) A person seeking to contest an administrative order or a penalty assessment arising from an enforcement matter under this chapter shall do so under N.J.A.C. 7:7A-16.7.

(c) A request for an administrative hearing shall:

1. Be in writing;
2. Contain all information required by the administrative hearing request checklist, available from the Department at the address in N.J.A.C. 7:7A-1.3;
3. Explain in what way the person submitting the request believes the Department has acted improperly;
4. Explain what issues the person submitting the request will raise if a hearing is held; and
5. Be submitted to the Department at the following address, with a copy to the Division of Land Use Regulation at the address at N.J.A.C. 7:7A-1.3(b):

Office of Legal Affairs  
 Attention: Administrative Hearing Requests  
 Department of Environmental Protection  
 401 East State Street, 4th Floor  
 P.O. Box 402  
 Trenton, New Jersey 08625-0402

(d) To contest a decision listed at (a) above, a person shall submit a hearing request within 30 days after notice of the decision is published in the DEP Bulletin. If a person submits the hearing request after this time, the Department shall deny the request. The DEP bulletin is available through the Department's website at [www.state.nj.us/dep](http://www.state.nj.us/dep).

(e) As part of a request for an administrative hearing, a person may request that the Department determine whether the matter for which the administrative hearing is requested is suitable for mediation by the Department's Office of Dispute Resolution. The Department shall promptly notify the person who submitted the request of its determination. If the Department determines the matter is suitable for mediation, it shall also notify the person who submitted the request of the procedures and schedule for mediation.

(f) A request by a permittee for a hearing shall automatically stay operation of a permit, including a transition area waiver or general permit authorization, unless the permittee shows good cause why the permit should continue in effect while being contested. If a hearing is requested by a permittee, all permitted activities shall stop upon the date the hearing request is submitted, and shall not be started again until the matter is resolved, unless the Department grants an exception in writing. If a person other than the permittee requests a hearing, the requester may also request a stay of

the permit. The Department shall grant the request for a stay of the permit if the requester shows good cause why the permit should be stayed.

(g) When the Department receives an administrative hearing request, the Commissioner may refer the matter to the Office of Administrative Law for an administrative hearing 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, or may deny the request for a hearing. If the Commissioner refers the matter to the Office of Administrative Law, the Department shall so notify the person who submitted the request and the applicant.

(h) If the Department agrees to settle a matter for which a hearing request has been submitted under this section, and the settlement will result in Department approval of a regulated activity, public notice of the settlement shall be provided as follows:

1. The person who requested the hearing shall send by certified mail a notice of intent to settle the matter. A form for the notice may be obtained from the Department at the address in N.J.A.C. 7:7A-1.3. The notice shall be sent to:

i. Each person provided notice of the application for the permit or approval which is the subject of the appeal; and

ii. Each person who commented on the application;

2. The Department shall publish a notice of intent to settle in the DEP Bulletin, and shall accept comments on the notice for at least 30 days;

3. After the 30 day comment period provided for in (h)2 above, the person who requested the hearing shall send by certified mail a notice of settlement. A form for the notice may be obtained from the Department at the address in N.J.A.C. 7:7A-1.3. The notice shall be sent to:

i. Each person provided notice of intent to settle under (h)1 above; and

ii. Each person who commented on the notice of intent to settle provided under (h)2 above; and

4. The Department shall publish a notice of the final settlement in the DEP Bulletin.

(i) After a hearing, the administrative law judge will submit an initial decision to the Commissioner. Within 45 days of receiving the initial decision, the Commissioner shall affirm, reject, or modify the decision, 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.

(j) The Commissioner's action under (i) above shall be considered final agency action for the purposes of the Administrative Procedure Act, and shall be subject only to judicial review in the Appellate Division of the Superior Court, as provided in the Rules of Court.

(k) Nothing in this section shall be construed to provide a right to an administrative hearing in contravention of N.J.S.A. 52:14B-3.1 through 3.3 of the Administrative Procedure Act.

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

Section was "Effective and operative dates".  
Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (b), updated the N.J.A.C. reference; in (c)5, inserted " with a copy to the Division of Land Use Regulation at the address at N.J.A.C. 7:7A-1.3(b)" in the introductory paragraph and inserted "401 East State Street, 4th Floor" in the address.

## SUBCHAPTER 2. APPLICABILITY

### 7:7A-2.1 Jurisdiction; permit or waiver requirement

(a) A person proposing to engage in a regulated activity, as described at N.J.A.C. 7:7A-2.2, shall first obtain a general permit authorization or an Individual freshwater wetlands or open water fill permit. A person proposing to engage in a

prohibited activity, as described at N.J.A.C. 7:7A-2.6, in a transition area shall first obtain approval from the Department through a transition area waiver or general permit authorization. The discharge of dredged or fill material in a State open water or wetland may also require a stream encroachment permit pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.

(b) An agency of the State proposing to engage in a regulated activity shall first obtain a freshwater wetlands and or open water fill permit, and/or a transition area waiver, but shall not be required to pay an application fee.

(c) On March 2, 1994, the Department assumed responsibility for administering the Federal wetlands program (also known as the 404 program) in delegable waters, as defined at N.J.A.C. 7:7A-1.4. In non-delegable waters, the ACOE retains jurisdiction under Federal law, and both Federal and State requirements apply. A project in non-delegable waters requires two permits, one from the Department under this chapter and one from the ACOE under the Federal 404 program.

(d) A permit issued under this chapter shall constitute the water quality certificate required under the Federal Act at 33 U.S.C. § 1341 for any activity covered by this chapter. If a discharge of dredged or fill material into waters of the United States, as defined at N.J.A.C. 7:7A-1.4, does not require a permit under this chapter but does require a water quality certificate, the Department shall use the standards and procedures in this chapter to determine whether to issue the water quality certificate, except in the New Jersey Coastal zone, as described at N.J.A.C. 7:7E-1.2(b). For a discharge of dredged or fill material in the Coastal zone, the Department shall use the standards and procedures in the Coastal Permit Program rules and the Coastal Zone Management rules, N.J.A.C. 7:7 and 7:7E, respectively, to determine whether to issue a water quality certificate.

(e) A permittee shall be responsible for ensuring that the permitted project complies with all requirements in this chapter. However, any person who owns the property on which the project occurs, or who manages, oversees or works on the project, may share liability for work or activities that are not performed in accordance with this chapter.

(f) Only an activity specifically identified as authorized in a permit, including a transition area waiver or general permit authorization, shall be authorized under that permit.

(g) Failure to obtain a permit or waiver to conduct regulated or prohibited activities, or to conduct regulated or prohibited activities in accordance with an approved permit or waiver, shall constitute a violation of the Freshwater Wetlands Protection Act and this chapter and shall be subject to enforcement action in accordance with 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).

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

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

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

Rewrote the section.

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Rewrote (e); and added (g).

#### Case Notes

N.J.S.A. 13:9B-9(a)(2) of the New Jersey Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 through 13:9B-30, requires an applicant for a wetlands permit who proposes to mitigate the adverse impact upon wetlands of a development project on its property at an off-site location to give notice to owners of property within 200 feet of the mitigation site. *Rinaldo v. RLR Inv.*, 387 N.J. Super. 387, 904 A.2d 725, 2006 N.J. Super. LEXIS 238 (App.Div. 2006).

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

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

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

1. The removal, excavation, disturbance or dredging of soil, sand, gravel, or aggregate material of any kind;

2. The drainage or disturbance of the water level or water table so as to alter the existing elevation of groundwater or surface water, regardless of the duration of such alteration, by:

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

ii. Draining, ditching or otherwise causing the depletion of the existing groundwater or surface water so as to modify the existing vegetation, values or functions of the wetland;

3. The dumping, discharging or filling with any materials;

4. The driving of pilings;

5. The placing of obstructions, including depositing, constructing, installing or otherwise situating any obstacle which will affect the values or functions of a freshwater wetland; and

6. The destruction of plant life which would alter the character of a freshwater wetland, including killing vegetation by applying herbicides or by other means, the physical removal of wetland vegetation, and/or the cutting of trees.

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

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

1. Surveying or wetlands investigation activities, for the purpose of establishing or reestablishing a boundary line or points, which use only hand held equipment and do not involve the use of motorized vehicles to either clear vegetation or extract soil borings. The clearing of vegetation along the survey line or around the survey points shall not exceed three feet in width or diameter respectively and shall not be kept clear or maintained once the survey or delineation is completed;

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

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

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

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

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

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

(1) Placing pilings for linear projects, such as bridges, elevated walkways, and utility line structures; and

(2) Placement of pilings for piers or docks;

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

(1) Projects where the pilings are so closely spaced that sedimentation rates would be increased;

(2) Projects in which the pilings themselves effectively would replace the bottom of a water body;

(3) Projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States;

(4) Projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions; and

(5) Projects where the pilings are intended to be used for structural support of a building such as a commercial or residential structure.

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

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

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

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

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

Former N.J.A.C. 7:7A-2.2, Subchapters which apply to freshwater wetlands permits or open water fill permits, was repealed.

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (a)5, inserted "and" at the end; in (a)6, substituted a period for "and" at the end; and deleted (a)7.

#### Case Notes

N.J.S.A. 13:9B-9(a)(2) of the New Jersey Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 to 13:9B-30, requires an applicant for a wetlands permit who proposes to mitigate the adverse impact upon wetlands of a development project on its property at an off-site location to give notice to owners of property within 200 feet of the mitigation site. *Rinaldo v. RLR Inv.*, 387 N.J. Super. 387, 904 A.2d 725, 2006 N.J. Super. LEXIS 238 (App.Div. 2006).

INVALIDITY ANNOTATION: Validity of N.J.A.C. 7:7A-2.2(a)7 affected. In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478, 852 A.2d 1083 (2004).

Initial Decision (2008 N.J. AGEN LEXIS 331) adopted, which concluded that DEP had established by a preponderance of the credible evidence that after purchasing the subject property with notice of a conservation easement and the restrictions it imposed, landowners placed fill within the transition area and maintained mowed areas that were within the restricted conservation and wetland areas; \$4,500 penalty and proposal for full restoration ordered. *N.J. Dep't of Env'tl. Prot. v. Huber*, OAL Dkt. No. ESA 0505-04, Final Decision (April 30, 2008).

Although freshwater wetlands violations may not be legalized simply by exempting owners who purchase property with preexisting violations, mitigation plans that arise from violations are to be evaluated on a case-by-case basis, and the subject landowners may present information in their restoration proposal concerning the adverse effects of removing a preexisting retaining wall and deck. *N.J. Dep't of Env'tl. Prot. v. Huber*, OAL Dkt. No. ESA 0505-04, 2008 N.J. AGEN LEXIS 331, Final Decision (April 30, 2008).

Initial Decision (2006 N.J. AGEN LEXIS 176) adopted, which concluded that where respondent knowingly engaged in the unauthorized ditching and disruption of wetlands, a penalty of \$6,000 was warranted since the wetlands were of intermediate resource value (two points), the total disturbance was under an acre (one point), and the violation was intentional (three points). *N.J. Dep't of Env'tl. Prot. v. Wagner*, OAL Dkt. No. ESA 04815-04, 2006 N.J. AGEN LEXIS 579, Final Decision (April 21, 2006).

#### 7:7A-2.3 Identifying freshwater wetlands

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Case Notes

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

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

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

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

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

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

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

(d) A freshwater wetland of ordinary resource value, or an ordinary resource value wetland, is a freshwater wetland

which does not exhibit any of the characteristics in (b) above, and which is:

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

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

- (1) Lawns;
  - (2) Maintained landscaping;
  - (3) Impervious surfaces;
  - (4) Active railroad rights-of-way; and
  - (5) Gravelled or stoned parking/storage areas and roads;
2. A drainage ditch;
  3. A swale; or
  4. A detention facility created by humans in an area that was upland at the time the facility was created regardless of the wetland resource classification of the wetland under this chapter, or the classification of the body of water, as FW-1 or FW-2 trout production, to which it discharges.

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

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

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

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

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

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

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

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

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

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

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

Amended by R.2002 d.234, effective July 15, 2002.

See: 34 N.J.R. 390(a), 34 N.J.R. 2436(b).

Rewrote (c).

Public Notice: Notice of Revision and Updating of Freshwater Wetlands

Technical Manual to Incorporate Version 2.0 of the Landscape Maps.  
See: 36 N.J.R. 1129(a).

Public Notice: Notice of Revision and Updating of the Landscape Maps.  
See: 40 N.J.R. 2572(b).

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (c), substituted "Division of Land Use Regulation" for "Land Use Regulation Program's"; and in (d)4, inserted "regardless of the wetland resource classification of the wetland under this chapter, or the classification of the body of water, as FW-1 or FW-2 trout production, to which it discharges".

Petition for Rulemaking.

See: 41 N.J.R. 3319(b), 3964(a).

#### Case Notes

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

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

Property owner's argument that a drainage easement existed on the property and that, accordingly, the corresponding wetlands were wetlands of "ordinary resource value" and thus not subject to transition area requirements, was rejected since a drainage easement does not equate to a manmade drainage ditch and the purported fact that drainage patterns corresponded with the mapped drainage easements did not establish the presence of a manmade drainage ditch. *Cummings v. N.J. Dep't of Env'tl. Prot., Land Use Regulation Program*, OAL Dkt. No. ESA 4466-06, 2007 N.J. AGEN LEXIS 920, Final Decision (July 2, 2007).

Department of Environmental Protection has statutory authority to classify wetlands as exceptional resource value based on the presence of threatened species habitat; the Department's authorization under the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq., is not limited to identifying only endangered species. *ZRB, LLC v. N.J. Dep't of Env'tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 6180-04, 2007 N.J. AGEN LEXIS 921, Final Decision (July 2, 2007).

General Permit No. 6 was properly denied under N.J.A.C. 7:7A-4.3(b) where the human disturbance caused by the proposed subdivision would adversely impact the adjacent present habitat of the barred owl, a threatened species, and because petitioner had not carried its burden by the preponderance of the evidence that its freshwater wetlands did not remain suitable barred owl habitat on at least a seasonal basis. *ZRB, LLC v. N.J. Dep't of Env'tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 6180-04, 2007 N.J. AGEN LEXIS 921, Final Decision (July 2, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 78) adopted, which concluded that order to remove driveway and penalty were proper where landowners stipulated that they violated the Freshwater Wetlands Protection Act by constructing the driveway in wetlands without obtaining a permit from the Department and the owners failed to establish any basis to excuse their failure to seek a permit; in addition, the ALJ found that the Department's expert testimony on bald eagle habitat was more reliable than that of the landowner's expert and thus that the wetlands were properly determined to be of "exceptional" resource value. *N.J. Dep't of Env'tl. Prot. v. Shinn*, OAL Dkt. No. ESA 02964-02S, 2006 N.J. AGEN LEXIS 578, Final Decision (April 3, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 621) adopted, which concluded that 1974 land use approval received from the municipal planning board did not exempt the subject property from the transition area buffer requirement applicable to property of exceptional resource value; the Municipal Planning Act under which the approval was given did not apply since it was prior to adoption of the 1975 Municipal Land Use Law. *Masset v. N.J. Dep't of Env'tl. Prot./Land Use Regulation Program*, OAL Dkt. No. ESA 11951-04, 2005 N.J. AGEN LEXIS 1301, Final Decision (December 5, 2005).

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

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

#### 7:7A-2.5 General transition area provisions

(a) A transition area serves as:

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

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

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

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

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

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

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

5. A buffer area to keep human activities at a distance from freshwater wetlands, thus reducing the impact of noise, traffic, and other direct and indirect human impacts on freshwater wetlands species;

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

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

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

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

(e) The standard width of a transition area adjacent to a freshwater wetland of intermediate resource value shall be 50

feet. This standard width shall only be modified through the issuance of a transition area waiver. The types of transition area waivers are listed at N.J.A.C. 7:7A-6.1(a).

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

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

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 paved roadway surface. Fencing will not be regulated if it is installed on the boundary between the transition area and upland area; and

3. The erection of one or more temporary structures covering a combined total of 150 square feet or less of the transition area. For the purposes of this paragraph, a "temporary structure" means a shed or fence without a foundation, or a structure that remains in the transition area for no more than six months. Chain link fences are not considered temporary structures.

(c) Certain regulated activities are exempt from transition area requirements under N.J.A.C. 7:7A-2.8(f). In addition, an activity that is exempt from freshwater wetlands permit requirements under N.J.A.C. 7:7A-2.8(c) for farming activities, or N.J.A.C. 7:7A-2.8(d) for forestry activities, is also exempt from transition area requirements, subject to the limits on freshwater wetlands exemptions at N.J.A.C. 7:7A-2.8. A person may request an exemption letter confirming the exemption status of an activity by using the procedures at N.J.A.C. 7:7A-2.10.

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).

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

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

Former N.J.A.C. 7:7A-2.6, Designation of State open waters, was repealed.

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (a)4, inserted "and" at the end; in (a)5, substituted a period for "; and" at the end; deleted (a)6; rewrote the introductory paragraph of (b) and (b)1i(1); added new (b)1i(2); recodified former (b)1i(2) through (b)1i(8) as (b)1i(3) through (b)1i(9); rewrote (b)1i(5) and (b)1i(8); in (b)1ii, inserted "and shall require a transition area waiver in accordance with this chapter" and " , alteration, "; in (b)2, substituted " . Fencing will not be regulated if it is installed on the boundary between the transition area and upland area; and" for a semicolon at the end; and in (b)3, inserted the last sentence.

#### Case Notes

INVALIDITY ANNOTATION: Validity of N.J.A.C. 7:7A-2.6(a)6 affected. In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478, 852 A.2d 1083 (2004).

Initial Decision (2006 N.J. AGEN LEXIS 299) adopted, which concluded that petitioner could not obtain an exemption from transition area requirements to construct a single-family home on the basis that previous fill activity on the property pursuant to a 1994 GP6 permit had already disturbed the area; the 1994 permit was to fill a portion of the property for recreational purposes, an entirely different proposal, and there still remained environmental benefit consistent with the transition area goals if the land remained undeveloped. Tucker v. N.J. Dep't of Env'tl. Prot., OAL Dkt. No. ESA 8272-05S, 2006 N.J. AGEN LEXIS 674, Final Decision (May 26, 2006).

Any argument that the property no longer serves any transition area purpose should be made in support of an application for a transition area waiver, not in opposition to a denial of a request for a transition area

exemption. Tucker v. N.J. Dep't of Env'tl. Prot., OAL Dkt. No. ESA 8272-05S, 2006 N.J. AGEN LEXIS 674, Final Decision (May 26, 2006).

#### 7:7A-2.7 Transition areas due to freshwater wetlands on adjacent property

(a) The outside boundary of a transition area is determined solely by reference to the freshwater wetlands boundary and is not affected by property lines. Therefore, a property within 150 feet of a freshwater wetlands may contain a transition area that arises from a freshwater wetlands on another property. Every property containing a transition area is subject to this chapter, even if the freshwater wetland that causes the transition area is located on another property.

(b) To determine whether a site has transition areas on it caused by wetlands on another property:

1. Determine whether there are any wetlands on any property within 150 feet of the site's property line. If not, there are no transition areas on the site due to wetlands on nearby properties;

2. If there are freshwater wetlands on another property within 150 feet of the site's property line, determine the resource value classification of the wetlands on the nearby property. For a Department-issued resource value classification of the wetlands, obtain an LOI under N.J.A.C. 7:7A-3;

3. If all of the freshwater wetlands on nearby properties within 150 feet of the site's property line are ordinary resource value wetlands, there is no transition area on the site arising from wetlands on other properties;

4. If any of the freshwater wetlands on nearby properties within 150 feet of the site's property line cannot be classified as ordinary resource value wetlands, determine the transition area on the site as follows:

i. If any wetlands on nearby properties are intermediate resource value wetlands, and are within 50 feet of the site's property line, there is at least some transition area on the site arising from these wetlands. In order to determine the size and shape of the transition area, obtain a delineation of the wetlands on the nearby properties and determine the transition area for each under N.J.A.C. 7:7A-2.5(e); and

ii. If any wetlands on nearby properties are exceptional resource value wetlands, and are within 150 feet of the site's property line, there is at least some transition area on the site arising from these wetlands. In order to determine the size and shape of the transition area, obtain a delineation of the wetlands on the nearby properties and determine the transition area for each under N.J.A.C. 7:7A-2.5(d); and

5. To avoid obtaining an LOI and/or delineating wetlands under (b)3 and 4 above, a person can ensure compliance with transition area requirements arising from wetlands on other properties by assuming that there are ex-

ceptional resource value wetlands on all adjacent properties and refraining from any regulated activities within 150 feet of the site's property line.

(c) It may be necessary to obtain written permission from adjacent property owners to investigate their land within 150 feet of the site's boundary.

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.

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

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

#### Case Notes

Court invalidated N.J.A.C. 7:7A-2.7(d)1, because the regulation improperly limited the statutory exemptions that had been extended to various municipal board approvals under N.J.S.A. 13:9B-4(d). In re Freshwater Wetlands Prot. Act Rules, 238 N.J. Super. 516, 570 A.2d 435, 1989 N.J. Super. LEXIS 497 (App.Div. 1989).

#### Law Review and Journal Commentaries

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

#### 7:7A-2.8 Activities exempted from permit and/or waiver requirement

(a) This section sets forth certain activities that are exempt from certain permit requirements in this chapter. However, even if an activity is exempt under this chapter, it may still require a permit from the Army Corps of Engineers under the Federal wetlands program, and/or a water quality certificate issued by the Department. Any activity conducted under an exemption that does not meet all standards, conditions, or limitations of the exemption shall constitute a violation of this chapter, and shall be subject to enforcement action in accordance with N.J.A.C. 7:7A-16.

(b) The farming, ranching, and silviculture exemptions in (c) and (d) below are subject to the following limits:

1. The exemptions 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;

2. The exemptions apply only as long as the area is used for the exempted activity. Therefore, if the area stops being used for farming, ranching, or silviculture, the exemption no longer applies;

3. The exemptions apply only to the portion of the property which meets all requirements for the exemption. For example, if half of a 20-acre property has been actively farmed since June 30, 1988 and half has not, the half that

has been actively farmed would be considered to be part of an established, ongoing farming operation and would therefore be eligible for the farming exemption. The remainder would not be eligible for the farming exemption;

4. The normal harvesting of forest products, including the clear cutting of a non-cultivated, wooded wetland area, must be part of a forest management plan that addresses wetlands, and that is reviewed and approved by the State Forester before the activities are undertaken. A woodland management plan prepared for tax purposes but that does not address wetlands is insufficient to qualify for the exemption; and

5. If an area with hydric soils has been drained for farming purposes through the use of drainage structures such as tiles or ditches, the Department shall presume that the area has wetlands hydrology for the purpose of identifying a freshwater wetland under N.J.A.C. 7:7A-2.3. To rebut this presumption of wetlands hydrology, all drainage structures shall be removed or completely disabled and the area shall be left undisturbed for at least one normal rainfall year, after which the presence or absence of wetlands hydrology shall be determined through use of technical criteria, field indicators, and other information, in accordance with the 1989 Federal manual.

(c) 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 under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq., are exempt from the requirement of a freshwater wetlands or open water fill permit, or transition area waiver:

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

- i. 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;

- ii. 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 the farming activities and the discharge occur in wetlands and waters which are in established use for such agricultural and silvicultural wetlands crop production, and the ditching or water control facilities do not alter the bottom elevations of any watercourse;

- iii. 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;

iv. 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; and

v. Minor drainage in wetlands is limited to drainage within areas that are part of an established farming or silvicultural operation. It includes maintenance of existing drainage tile or other drainage structures. 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 use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any new canal, ditch, dike or other waterway or structure. 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 dredged material 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;

i. A pond constructed in an actively farmed area does not constitute a change in use. A field in which no crops or pasturing has occurred for five years or more is considered abandoned and is not considered an actively farmed area. Forest land is not considered an actively farmed area; however, an area that has been undergoing normal harvesting of forest products is considered an actively farmed area if it is part of a forest management plan in accordance with (d) below;

ii. To qualify for this exemption, a farm pond shall be:

(1) Part of a farm conservation plan developed in conjunction with the Natural Resources Conservation

Service and approved by the Soil Conservation District, as appropriate;

- (2) Located outside a watercourse;
- (3) Created by excavation and not by creating an embankment within a watercourse;
- (4) Not associated with development as that term is defined in the Municipal Land Use Law, N.J.S.A. 40:55D-4;
- (5) Intended exclusively for agricultural purposes. The applicant shall submit a description of the purpose of the pond with any application for an exemption letter under N.J.A.C. 7:7A-2.10; and
- (6) Sized appropriately for the intended use under (c)2ii(5) above.

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. Once the land use changes from forestry or farming to another use, that is, once the property no longer qualifies for a farmland assessment, all roads employing the placement of fill shall be removed within 30 days;

i. Construction of a farm road shall be undertaken only in accordance with the following:

(1) The road shall be part of a farm conservation plan developed in conjunction with the Natural Resources Conservation Service and approved by the Soil Conservation District, as appropriate;

(2) The location of the road shall be selected to minimize disturbance to wetlands, transition areas and watercourses. If there is an alternative location for a farm road that will have less impact to wetlands, transition areas, and watercourses, the alternative location shall be used;

(3) The road shall be necessary to support or provide access for a farming activity. A road that supports or provides access to proposed development is not a farm road and requires a permit in accordance with this chapter;

(4) The farm road shall not exceed 14 feet in width unless it must be wider to accommodate a large piece of equipment such as a combine. In the latter case, the road shall be no wider than 20 feet;

(5) The farm road shall be built at grade. If not built at grade, the applicant shall demonstrate to the Department why fill material is necessary for the farming operation with any application for an exemption letter under N.J.A.C. 7:7A-2.10; and

(6) In accordance with (c)3i(5) above, if fill material is necessary, it shall be no more than six inches deep and shall be limited to 0.25 acres of wetland disturbance. In addition, pipes shall be installed to maintain wetland hydrology;

ii. "Maintenance of a farm road" means:

(1) The existing road remains the same width before and after maintenance activities;

(2) The placement of all fill is entirely within the existing footprint of the existing road; and

(3) A culvert shall be used only to replace an existing culvert. If it is necessary to install a culvert for the first time, the Department will consider the project to be construction of a new road subject to the limitations in (c)3i above.

(d) Normal harvesting of forest products in accordance with a forest management plan approved by the State Forester before the conduct of the forest management activities is exempt from the requirement of a freshwater wetlands permit, transition area waiver, or open water fill permit, subject to the limitations of this section. A woodland management plan prepared for tax purposes but that does not address wetlands is insufficient to qualify for the exemption. However, the removal of stumps results in a discharge of dredged or fill material, and a change in use and an impairment of flow or circulation. Therefore, under (b)1 above, the removal of stumps is not exempt and shall require a permit under this chapter.

(e) Until March 2, 1994, when the Department assumed responsibility for the Federal 404 program, the Department issued certain exemptions based on prior local approvals. However, as of March 2, 1994, these exemptions are void as they apply to freshwater wetlands permit and open water fill requirements. The exemptions continue to apply to transition area requirements, and are described at (f) below.

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

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

prior to the August 1, 1976 effective date of the Municipal Land Use Law; and

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

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

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

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

i. The change would void the preliminary approval; or

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

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

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

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

4. For all development determined to be exempt by the Department, once the development is constructed, the exempted "project" has been built. If, for example, the owner of a commercial building decides afterward that it is necessary to construct an addition, and goes back to the municipal authority for a new or amended site plan or subdivision approval, the exemption has been "used up" and the addition is subject to the permitting requirements of this chapter. Similarly, for residential approvals, once the houses and any accessory structures planned along with the house (for example, detached garages, barns, storage sheds, pools) are constructed, or the certificate of occupancy is

issued, the exemption has been exhausted and any later additions or structural improvements are subject to the permitting requirements of this chapter. If there is an interruption of more than one year before construction of an accessory structure claimed to have been planned along with the house, there is a rebuttable presumption that the structure constitutes a later addition and will require a permit.

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

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

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

N.J.A.C. 7:7A-2.7(d)1 and 2 held invalid as providing permit exemption termination deadlines without statutory authority. *In the Matter of the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A-1.1 et seq.*, 238 N.J. Super. 516, 570 A.2d 435 (App.Div. 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 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 (App.Div. 1989).

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

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

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

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

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

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

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

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

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (a), inserted the last sentence; in (b)2, substituted "as" for "at"; in (b)3, substituted "20-acre" for "20 acre", inserted "since June 30, 1988", deleted "not" preceding "been" once and preceding "be" twice, and inserted ". The remainder would not be eligible for the farming exemption"; rewrote (b)4; in (c)1ii, substituted "the farming" for "these" and inserted "wetlands and" and "and the ditching or water control facilities do not alter the bottom elevation of any watercourse"; in the introductory paragraph of (c)2, deleted "and" from the end; added (c)2i and (c)2ii; in (c)3, substituted "Once" for "All roads employing the placement of fill shall be removed once", inserted "or farming" and "that is, once the property no longer qualifies for a farmland assessment, all roads employing the placement of fill shall be removed within 30 days", and substituted a semicolon for a period at the end; added (c)3i and (c)3ii; in (d), inserted "before the conduct of the forest management

activities" and "and shall require a permit under this chapter", and inserted the second sentence; and in (g)4, inserted "or the certificate of occupancy is issued".

#### Law Review and Journal Commentaries

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

Wetlands—Environmental Law—Municipal Land Use. Judith Nallin, 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).

Where petitioner sought to use the subject property for a proposed used car sales operation in 2005, and petitioner's predecessor had only obtained in 1977 a preliminary and final subdivision approval for a divi-

sion of the land, and, assuredly, petitioner sought to develop that land into a full-scale business operation, what the local authority approved in 1977 was nothing like what petitioner now proposed; thus, it was entirely correct for the Department of Environmental Protection to identify petitioner's "project" as not the "project" that the local authority approved in 1977, but instead a different "project," and as such, petitioner had no subdivision approval under the Municipal Land Use Law that would allow any exemption from the requirements of the Freshwater Wetlands Protection Act. *Haubrich v. N.J. Dep't of Env'tl. Prot./Land Use Regulation*, OAL Dkt. No. ESA 09194-06N, 2008 N.J. AGEN LEXIS 95, Initial Decision (January 16, 2008).

Construction of a swimming pool and accessory structure clearly falls within the category of "significant change" in N.J.A.C. 7:7A-2.8(g)2 that renders inapplicable an exemption from transition area requirements as a result of preliminary site plan or subdivision approval. *Cummings v. N.J. Dep't of Env'tl. Prot., Land Use Regulation Program*, OAL Dkt. No. ESA 4466-06, 2007 N.J. AGEN LEXIS 920, Final Decision (July 2, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 262) adopted, which concluded that N.J.A.C. 7:7A-2.8(f), (g), which provide that an exempt project, such as a house and any accessory structures, is complete when the original work planned is done and that a rebuttable presumption arises that work undertaken after one year is part of a new project requiring wetlands permits, does not represent retroactive lawmaking; a goodly part of environmental regulation constrains existing options for landowners and these are typically upheld. The exemption's concern for developer investment in land use approvals is protected by allowing the entire project originally planned to proceed without meeting transition area requirements; while other work is not prohibited, it must undergo permitting. *Fiocchi v. N.J. Dep't of Env'tl. Prot., OAL Dkt. No. ESA 6788-06, 6992-04 and 12132-04, 2007 N.J. AGEN LEXIS 922, Final Decision (June 20, 2007).*

Initial Decision (2006 N.J. AGEN LEXIS 299) adopted, which concluded that a minor subdivision approval, although initially obtained in 1979, did not support an exemption from transition area requirements under N.J.S.A. 13:9B-4(d) or N.J.A.C. 7:7A-2.8(f)1 because the approval was not filed, as required by N.J.S.A. 40:55D-47. *Tucker v. N.J. Dep't of Env'tl. Prot., OAL Dkt. No. ESA 8272-05S, 2006 N.J. AGEN LEXIS 674, Final Decision (May 26, 2006).*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) An application for the discharge of dredged or fill material in areas under the jurisdiction of the Pinelands Commission shall be reviewed as follows:

1. If the discharge is subject to the Pinelands CMP and is eligible for a general permit under this chapter, the Pinelands Commission shall review the discharge under the CMP and shall also review the application for a freshwater wetlands general permit using the standards in this chapter;

2. If the discharge is subject to the Pinelands CMP and requires an individual permit under this chapter, the Pinelands Commission shall review the discharge under the CMP and the Department shall review the application for an individual freshwater wetlands permit using the standards in this chapter; and

3. If the discharge is not subject to the Pinelands CMP but requires an individual or general permit under this chapter, the Department shall review the application for an individual or general freshwater wetlands permit using the standards in this chapter.

(d) Regulated 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. are not subject to this chapter, but may require other State and/or Federal approvals.

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

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

#### Case Notes

Memorandum of agreement (MOA) entered into by the New Jersey Department of Environmental Protection (DEP) and the Pinelands Commission delegating the Commission authority to administer regulated activities in accordance with the Statewide General Permit program was a permissible delegation of authority, as N.J.S.A. 13:1D-9(q) was an explicit authorization of the type of relationship established by the MOA, and the MOA expressly provided that the DEP retained ultimate authority and oversight; the Commission had to provide to the DEP a monthly report describing all permit activity and provide copies of

3. The proposed modification, at a minimum, will result in an increased level of protection for the regulated resource, or will result in an equivalent area of resource protection that does not compromise in any way the original protected resource; and

4. The proposed modification is consistent with all current applicable Federal, State and local regulations.

(j) The Department shall not allow any de minimis modification of the boundary established in a conservation restriction or easement unless the conservation restriction or easement contains language that expressly reserves the right of the permittee to undertake de minimis modifications of the restricted area. If the restriction does not expressly reserve this right, then (h) above applies.

(k) The Department shall not allow any modification of the boundary established in a conservation restriction or easement associated with a mitigation site.

(l) If the Department approves the applicant's written request to modify the boundary established in a conservation restriction or easement, the applicant shall, within 30 days of such approval, amend the conservation restriction or easement by preparing and submitting to the Department for review and approval a revised site plan and all requirements as described in (f) and (g) above revised to show the modification.

(m) Upon the Department's written approval of the amended conservation restriction or easement, the applicant shall, within 60 days, re-record the documents in accordance with the requirements in (e) above.

New Rule, R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

### SUBCHAPTER 3. LETTERS OF INTERPRETATION

#### 7:7A-3.1 Basic LOI information

(a) A letter of interpretation (LOI) provides the Department's official determination of one or more of the following:

1. Whether there are any freshwater wetlands, transition areas, and/or State open waters present on a site or portion of a site;
2. Where the boundaries of freshwater wetlands, transition areas and/or State open waters are located on a site; and/or
3. What is the resource value classification, under N.J.A.C. 7:7A-2.4, of freshwater wetlands on a site.

(b) A letter of interpretation does not grant approval to conduct any regulated activities. The sole function of a letter of interpretation is to provide or confirm information about the presence or absence, boundaries, and/or resource value

classification of freshwater wetlands, transition areas, and/or State open waters.

1. For planning approvals, for demonstrating compliance with ordinances, or for other purposes, a municipality or county may require an applicant to obtain an LOI as a condition of application completeness or as a condition of approval.

(c) The Department issues the following three types of LOIs:

1. A presence/absence LOI, in which the Department determines whether any freshwater wetlands, transition areas, and/or State open waters exist on a site or on a portion of a site (also called a footprint of disturbance LOI). See N.J.A.C. 7:7A-3.2 for further details regarding presence/absence LOIs;

2. A line delineation LOI, in which the Department delineates the boundary lines of freshwater wetlands, transition areas, and/or State open waters for an applicant. See N.J.A.C. 7:7A-3.3 for further details regarding line delineation LOIs; and

3. A line verification LOI, in which the Department confirms or modifies a delineation proposed by the applicant. See N.J.A.C. 7:7A-3.4 for further details regarding line verification LOIs.

(d) If an area with hydric soils has been drained for farming purposes through the use of drainage structures or features such as tiles or ditches, the Department shall presume that the area has wetlands hydrology for the purpose of identifying a freshwater wetland under N.J.A.C. 7:7A-2.3. To rebut this presumption of wetlands hydrology, all drainage structures shall be removed or completely disabled and the area shall be left undisturbed for at least one normal rainfall year, after which the presence or absence of wetlands hydrology shall be determined through use of technical criteria, field indicators, and other information, in accordance with the 1989 Federal manual.

(e) Each LOI that indicates the presence of freshwater wetlands shall state the resource value classification of the wetlands under N.J.A.C. 7:7A-2.4 and will specify the width of the transition area. However, in some cases, seasonal conditions make it difficult to determine the resource value classification of a wetland. For example, if there has been a past sighting of a bog turtle (an endangered species) in the area, and an LOI application is submitted in December when the early successional habitat needed by bog turtles may be impossible to identify under snow cover, Department staff cannot determine if the habitat remains suitable for bog turtles until the snow melts. In such a case, the Department shall notify the applicant that seasonal conditions do not permit an accurate assessment of resource value, shall provide an explanation of the seasonal conditions involved, and shall give the applicant the option to accept an exceptional re-

source value classification, or to wait for the LOI until the Department can determine the resource value of the wetland.

(f) The Department shall issue an LOI within the applicable time period below. Average time periods from the Department's receipt of an application to a final decision on the application are set forth for all approvals at N.J.A.C. 7:7A-10.1(k):

1. If the Department does not request additional information regarding an LOI application under N.J.A.C. 7:7A-12.1(c)4, within 30 days after receiving the application;
2. If the Department requests additional information regarding an LOI application under N.J.A.C. 7:7A-12.1(c)4, within 45 days after receipt of information sufficient to declare the application complete;
3. If the applicant chooses to wait for a determination of resource value classification under (e) above, as soon as the Department determines that the resource classification of the wetlands can be definitively determined; and
4. If the Department conducts a site inspection, the time set forth in this subsection for issuance of the letter of interpretation shall be extended by 45 days.

(g) The Department shall issue an LOI for a portion of a site, also called a footprint of disturbance, under N.J.A.C. 7:7A-3.2(c)2 or 3.4(b)2. Special application requirements shall apply to such an LOI, in order to ensure that the portion of the site is clearly marked on the plan and on the ground. These requirements are described at N.J.A.C. 7:7A-10.3(b) and (d)4.

(h) The Department shall not issue an LOI if the Department determines that the information submitted in the application for the LOI is inaccurate. In such a case, the applicant may provide corrected information upon the Department's request, or may apply directly for a permit without obtaining an LOI. If the applicant applies for the permit without first obtaining an LOI, the permit application must include all information that would be necessary for the Department to issue an LOI for the site, in accordance with N.J.A.C. 7:7A-10.4(a)2, 10.5(a)1, or 10.6(a)3, as applicable. The Department will then review the submitted wetland delineation as part of the permit review process.

(i) In order to ensure that a delineated wetlands boundary can be located in the future after the LOI is issued, an LOI applicant shall provide the Department with a survey of the approved delineated wetlands and/or State open waters boundary line. The survey may be submitted as part of the LOI application, or if the applicant prefers, the survey may be submitted after the Department inspects the site and approves the delineation as marked on the site with flags or other markers. If the Department requires adjustments to the delineated wetlands and/or State open waters boundary after the survey is submitted, the applicant shall resurvey the de-

lined boundary after the adjustments are made and the Department has approved the boundary. The issued LOI will reference the approved and surveyed boundary line. The Department shall waive the survey requirement if the applicant demonstrates that the extent of wetlands and/or State open waters on the site can be easily determined in the future without a survey, so that the expense of a survey is not warranted. For example, the Department may waive the survey requirement if an entire site is covered completely with freshwater wetlands and/or State open waters.

(j) If an LOI covers only a portion of a site in accordance with N.J.A.C. 7:7A-3.2(c)2 or 3.4(b)2, the applicant shall provide, in addition to the survey required at (i) above, a survey of the boundaries of the portion of the site that are covered by the LOI.

(k) If a site is located in an area under the jurisdiction of the Pinelands Commission, the Department shall not issue a letter of interpretation. The lead agency in this area for determining the presence, absence, or extent of freshwater wetlands is the Pinelands Commission. However, in cases of disagreement, the Department and the Pinelands Commission retain authority to independently or jointly establish these boundaries.

Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Added (b)1; and in (i), inserted "and/or State open waters" throughout.

#### Case Notes

Initial Decision adopted, which concluded that an owner of property near the Barnegat Bay and Toms River, who admitted that freshwater wetlands were present on the property, submitted no competent and credible evidence and therefore failed to meet the burden of proof applicable to his request for a Letter of Interpretation (LOI) allowing him to clear, fill, and further develop the property; an applicant who claims that the Department should issue an LOI bears the burden of proof of facts essential to that claim, by the preponderance of the competent and credible evidence (adopting 2005 N.J. AGEN LEXIS 640 as modified on other grounds). *Rausch v. Dep't of Env'tl. Prot., Land Use Regulation Program*, OAL Dkt. No. ESA 02638-03, 2005 N.J. AGEN LEXIS 1300, Final Decision (November 28, 2005).

#### 7:7A-3.2 Presence/absence LOI

(a) A presence/absence LOI identifies whether any freshwater wetlands, State open waters or transition areas exist on a site, or on a portion of a site (footprint of disturbance). A presence/absence LOI also provides the resource value classification for any wetlands on the site.

(b) A presence/absence LOI does not identify the boundaries or location of any freshwater wetlands, transition areas, and/or State open waters found within a site or portion thereof. To obtain an LOI indicating the location or the boundaries of freshwater wetlands, transition areas, and/or State open waters, an applicant shall apply for a line delineation LOI under N.J.A.C. 7:7A-3.3, or a line verification LOI under N.J.A.C. 7:7A-3.4.

(c) The Department shall issue a presence/absence LOI for either of the following:

1. An entire site, as defined at N.J.A.C. 7:7A-1.4, regardless of its size; or
2. A portion of a site, also known as a footprint of disturbance, provided the portion is no larger than one acre.

(d) The Department shall issue a presence/absence LOI for more than one portion of a site, provided that:

1. Each portion is no larger than one acre;
2. The applicant submits a separate fee for each portion; and
3. No more than three presence/absence LOIs shall be issued for a single site under this subsection.

### 7:7A-3.3 Line delineation LOI

(a) A line delineation LOI identifies the boundaries of any freshwater wetlands, transition areas, and/or State open waters on a site or a municipal tax lot that is one acre or smaller, and identifies the resource value classification of any freshwater wetlands on the site. For a line delineation LOI, the applicant need not submit a delineation. Rather, the Department shall inspect the site and delineate the boundary lines of any freshwater wetlands, transition areas, and/or State open waters.

(b) The Department shall issue a line delineation LOI for a site, as defined at N.J.A.C. 7:7A-1.4, or for a municipal tax lot, that is one acre or smaller. The Department shall not issue a line delineation LOI for a site larger than one acre. The Department shall not issue a line delineation LOI for a portion of a site, unless the portion is a municipal tax lot.

### 7:7A-3.4 Line verification LOI

(a) A line verification LOI identifies the boundaries of any freshwater wetlands, transition areas, and/or State open waters on a site, and the resource value classification of any freshwater wetlands on the site. For a line verification LOI, the applicant shall submit a proposed delineation of wetlands, transition areas, and/or State open waters, which the Department will confirm or modify.

(b) The Department shall issue a line verification LOI for the following:

1. A site, as defined at N.J.A.C. 7:7A-1.4, regardless of its size;
2. A municipal tax lot no larger than the site; or
3. A portion of a site, if all of the following criteria are met:
  - i. The site is publicly owned;
  - ii. The site is larger than 10 acres;
  - iii. The portion is no larger than 10 percent of the overall site; and

iv. The portion is clearly marked on the plan and on the ground.

Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (b)3iii, substituted "no larger than 10 percent of the overall site" for "one acre or smaller".

### 7:7A-3.5 Application for a letter of interpretation

(a) An applicant for a letter of interpretation shall follow all application procedures and information requirements at N.J.A.C. 7:7A-10, Application contents and procedures. However, if a site is located in an area under the jurisdiction of the Pinelands Commission, the applicant shall instead apply to the Pinelands Commission for a determination regarding the presence, absence, and/or extent of wetlands on the site; and the transition area for any wetlands on site.

(b) The Department shall review an application for a letter of interpretation using the procedures at N.J.A.C. 7:7A-12, Department review of an application.

(c) The Department, in reviewing an application for an LOI, shall consider comments filed by municipal and county governments and interested citizens. Comments should be submitted to the Department in writing within 15 days after the commenter receives notice of the LOI application, to ensure adequate time for the Department to fully consider them. However, comments shall be accepted until the Department makes a decision on the application.

### 7:7A-3.6 Effect, duration, and extension of a letter of interpretation

(a) A person who is issued a letter of interpretation pursuant to this subchapter shall be entitled to rely on the determination of the Department, concerning the presence or absence, or the extent of freshwater wetlands and/or State open waters, for a period of five years from its issuance, unless the letter of interpretation is determined to have been based on inaccurate or incomplete information, in which case the Department may void the original letter of interpretation and issue a new letter of interpretation reflecting the actual conditions on the site. For example, the LOI may be revised to reflect additional wetland areas identified after LOI issuance; or if a threatened or endangered species habitat is disclosed or discovered after the LOI was issued, the Department may correct the resource value classification.

(b) The term of a letter of interpretation may be extended, provided that the information upon which the original letter was based remains valid, but shall not exceed five years from the original expiration date.

(c) Requests for extensions shall be made in writing to the Department before the letter of interpretation has expired but no more than one year before the expiration date and shall be subject to the application requirements at N.J.A.C. 7:7A-10. 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.

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.

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

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

Petition for Rulemaking.

See: 40 N.J.R. 4628(a), 5847(a), 5847(b).

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (c), inserted "but no more than one year before the expiration date".  
Petition for Rulemaking.

See: 41 N.J.R. 314(a), 3319(b), 3964(a).

## SUBCHAPTER 4. GENERAL PROVISIONS FOR GENERAL PERMITS

### 7:7A-4.1 Department issuance of general permits

(a) This section details how the Department will adopt General permits except for general permits numbers 6 and 7. To adopt a general permit, the Department will publish a draft general permit as a rule proposal pursuant to the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. In addition, the Department will send a copy of the draft general permit to USEPA, and will follow the procedures for EPA comment found at N.J.A.C. 7:7A-12.2.

(b) The Department may adopt a general permit only if all of the following conditions are met:

1. 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;

2. The Department determines that the activity will conform to the purposes of the Freshwater Wetlands Protection Act, and will not violate the Federal Act; and

3. The Department provides public notice and opportunity for a public hearing.

(c) In addition to the conditions required by this subchapter, each general permit shall contain limitations as necessary to comply with Federal regulations governing the Department's assumption of the Federal 404 program at 40 CFR § 233.21(c) as follows:

1. A description of the activities which are authorized, including limits for any single project. At a minimum, these limits 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; and

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

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

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

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

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

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

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

### Case Notes

Memorandum of agreement (MOA) entered into by the New Jersey Department of Environmental Protection (DEP) and the Pinelands Commission delegating the Commission authority to administer regulated activities in accordance with the Statewide General Permit program was a permissible delegation of authority, as N.J.S.A. 13:1D-9(q) was an explicit authorization of the type of relationship established by the MOA, and the MOA expressly provided that the DEP retained ultimate authority and oversight; the Commission had to provide to the DEP a monthly report describing all permit activity and provide copies of denials of permit authorizations. In re Third Party Appeal, 379 N.J. Super. 331, 878 A.2d 22, 2005 N.J. Super. LEXIS 239 (App.Div. 2005).

### 7:7A-4.2 Using a general permit to authorize specific activities

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

ronmentally sensitive areas. The Department may require testing of dredged material if there is reason to suspect that the material is contaminated. If any dredged material is contaminated with toxic substances, the dredged material shall be removed and disposed of in accordance with Department-approved procedures;

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

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

14. If the general permit activities are subject to the Department’s Water Quality Management Planning rules at N.J.A.C. 7:15, the activities shall be consistent with those

rules and with the applicable approved Water Quality Management Plan (208 Plan) adopted under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.;

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

16. With the exception of activities associated with general permits 1, 6, 6A and 16, activities authorized under a general permit shall not take place in a vernal habitat, as defined at N.J.A.C. 7:7A-1.4, or in a transition area adjacent to a vernal habitat.

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

Table A<sup>1</sup>

RESTRICTED TIME PERIODS FOR WATERS WITH FISHERY RESOURCES

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

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

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

1. The applicant demonstrates that the impact to the fishery resource shall be less if the regulated activities occur during the timing restriction rather than during an unrestricted period;

2. The combined effects of the timing restrictions above would restrict activities to less than 183 calendar

days per year. In such a case, the Department may allow regulated activities to occur for up to 183 calendar days if the applicant demonstrates to the Department that proper steps will be taken that will minimize the impact to the fishery resources;

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

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

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

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

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

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

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

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

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

In (b), added 16.

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

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

Rewrote (b)5.

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

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

Rewrote (b)10.

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (b)1, inserted ". In accordance with N.J.A.C. 7:7A-1.6, the Pine-lands Commission may require more stringent regulation of activities in and around freshwater wetland areas in its jurisdiction"; redesignated the last sentence of (b)5 as (b)5i; rewrote (b)5i; added (b)5ii; rewrote (b)10; and in (b)16, substituted "With the exception of activities associated with general permits 1, 6, 6A and 16, activities" for "Activities".

#### Case Note

INVALIDITY ANNOTATION: Validity of N.J.A.C. 7:7A-4.3(b)16 affected. In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478, (2004).

General Permit No. 6 was properly denied under N.J.A.C. 7:7A-4.3(b) where the human disturbance caused by the proposed subdivision would adversely impact the adjacent present habitat of the barred owl, a threatened species, and because petitioner had not carried its burden by the preponderance of the evidence that its freshwater wetlands did not remain suitable barred owl habitat on at least a seasonal basis. ZRB, LLC v. N.J. Dep't of Env'tl. Prot., Land Use Regulation, OAL Dkt. No. ESA 6180-04, 2007 N.J. AGEN LEXIS 921, Final Decision (July 2, 2007).

#### 7:7A-4.4 Use of multiple general permits

(a) If an application contains more than one activity on a single site, the Department may authorize the activities under one or more general permits, provided that:

1. The individual limits of each general permit are complied with. If activities under one general permit are conducted in more than one place on a site, the total disturbance caused by all activities at all locations onsite under that general permit shall be summed in order to determine if the limits in the general permit are met. For example, if an applicant seeks authorization for more than one outfall structure under general permit 11 (N.J.A.C. 7:7A-5.11) on a site, the impacts from all of the structures shall be summed and the total must be no greater than 0.25 acres, which is the acreage limit for that general permit (see N.J.A.C. 7:7A-5.11(c)i). In a second example, if an applicant proposes a minor road crossing under general permit 10B (N.J.A.C. 7:7A-5.10B) and two outfall structures under general permit 11 on the same site, the minor road crossing cannot exceed 0.25 acres, which is the acreage limit for that general permit (see N.J.A.C. 7:7A-10B(b)2), and the combined impact of the two outfall structures cannot exceed the 0.25-acre limit for general permit 11. Other than the combination of general permits 6 and 6A, the Department shall not authorize the combination of two different general permits, or a general permit and a transition area waiver, for a single activity. For example, if an applicant seeks authorization for a road crossing that will have an impact of 0.60 acres, an individual permit will be required because the Department will not authorize 0.25 acres under general permit 10B to be combined with 0.35 acres under general permit 6, which has a one-acre limit (see N.J.A.C. 7:7A-5.6(b)1) for a minor road crossing of 0.60 acres;

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

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

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

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

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

3. Disturbance exceeding 0.5 acre under general permit 6 cannot be combined with any other general permit authorization on the same site, except with an authorization under general permit 6A, in which case the total impact to wetlands, State open waters, and transition area shall not exceed one acre. For example, 0.75 acres of disturbance of wetlands or State open waters under general permit 6 can be combined with 0.25 acres of disturbance of transition area under general permit 6A;

4. The Department shall not authorize disturbance under both general permit 10A and general permit 10B for the same site; and

5. The Department shall not authorize multiple crossings of the same wetland or State open water unless:

i. There is no other location, design and/or configuration for the proposed crossing that would provide access to an otherwise developable lot that would reduce or eliminate the disturbance to a wetland or State open water; and

ii. Shared driveways are used to the maximum extent possible to access multiple lots.

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

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

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

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Rewrote the introductory paragraph of (a); in (a)1, substituted a period for “; and” at the end of the second sentence and inserted the third through sixth sentences; in the introductory paragraph of (a)2, inserted “6A,” and “17A.”; in (a)2iv, substituted a semicolon for a period at the end; and added (a)3 through (a)5.

#### Case Notes

Initial Decision (2005 N.J. AGEN LEXIS 323) adopted, which concluded that petitioner’s application for a permit to fill 0.94 acres of additional freshwater wetlands that were present on three lots of a subdivision site was properly denied where prior applications to fill wetlands on the site had been granted to the petitioner (0.52 acres) and

its transferee (0.85 acres); as a matter of law, the filling of an additional 0.94 acre of wetlands on the subdivision site would exceed the one-acre maximum area of fill allowed under N.J.A.C. 7:7A-4.4(a)(2). *LH Wagner Realty Corp. v. N.J. Dep’t of Env’tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 8922-03, 2005 N.J. AGEN LEXIS 1304, Final Decision (August 8, 2005).

#### 7:7A-4.5 Application for authorization to act under General Permits

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

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

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

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

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

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

#### 7:7A-4.6 (Reserved)

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

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

Repealed by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Section was “Combined general permit authorization and flood hazard area permit”.

### SUBCHAPTER 5. ADOPTED GENERAL PERMITS

#### 7:7A-5.1 General permit 1—Maintenance and repair of existing features

(a) General permit 1 authorizes activities in freshwater wetlands and State open waters, required to carry out the repair, rehabilitation, replacement, maintenance or reconstruction of a previously authorized, currently serviceable structure, fill, roadway, utility line, active irrigation or drainage ditch, or stormwater management facility lawfully existing prior to July 1, 1988 or permitted under this chapter. General permit 1 does not cover transition areas because these activities are not regulated in transition areas under N.J.A.C. 7:7A-2.6 and thus may be performed in a transition area without Department approval under this chapter.

(b) To be authorized under general permit 1, the previously authorized structure, fill, roadway, utility, ditch or facility shall not have been and will not be put to any use other than as specified in any permit authorizing its original construction. Activities under general permit 1 shall not expand, widen or deepen the previously authorized feature, and shall

not deviate from any plans of the original activity, except that 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.

(c) If the activity is the ongoing maintenance of an off-stream stormwater management facility created in uplands, including a wetland constructed in uplands for stormwater management purposes after September 4, 2001, the following shall apply:

1. The application for authorization shall be subject to the public notice requirements at N.J.A.C. 7:7A-10.8 but shall not be subject to the other application requirements in N.J.A.C. 7:7A-10;

2. The application for authorization shall include the information required by the application checklist, including information identifying and describing the site and the project, and a copy of the permit, if any, authorizing the original construction of the stormwater management facility;

3. The Department shall process the application for authorization using the procedures at (d) below; and

4. For the purposes of this subsection, maintenance includes removal of sediment and debris and mowing of vegetation, as necessary to ensure that the stormwater management facility will function as it was originally designed and/or permitted. Maintenance does not include enlargement of a stormwater management structure, excavation below the original bottom of a structure, or any other change in its design.

(d) Upon receipt of an application for authorization under (c) above, the Department shall process the application as follows:

1. Within 20 days of the Department's receipt of the application, the Department shall notify the applicant if the application is not administratively complete (that is, if it does not include all of the information required under (c) above). If the Department so notifies the applicant, the time period in (d)2 below shall not begin to run. If the Department does not so notify the applicant, the application shall be deemed administratively complete 20 days after the Department receives it; and

2. If the application is administratively complete, the Department shall have 30 days after receipt of the complete application to notify the applicant that the activities are not authorized under general permit 1, or that the activities may be authorized but require a full application review under N.J.A.C. 7:7A-10. If the Department does not so notify the applicant, the application is automatically approved, to the extent that the activity does not violate other laws then in effect.

(e) Activities under general permit 1 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

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

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

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

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

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

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

Public Notice: Request for public comments and public hearings.

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

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

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

Changes initiated to create a program that is as stringent as that of the U.S. Army Corps of Engineers under the Clean Water Act (33 U.S.C. 1251 et seq.) in order to secure the assumption of the permit jurisdiction. Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

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

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

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

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (c)1, updated the N.J.A.C. reference; and in (e), inserted “, and 13.2, Establishing permit conditions”.

#### Case Notes

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.

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-5.2 General permit 2—Underground utility lines

(a) General permit 2 authorizes activities in freshwater wetlands, transition areas, and/or State open waters, necessary for the construction and/or maintenance of an underground utility line.

(b) If a utility line is jacked or directionally drilled underground, so that there is no surface disturbance of any freshwater wetlands, transition areas, or State open waters and there is no draining or dewatering of freshwater wetlands, no Department approval is required under this chapter. Jacking or directional drilling is regulated under this chapter if any disturbance occurs to the ground surface in the freshwater wetlands, transition area, or State open water; for example, if the drilling is conducted from a pit located in a freshwater wetland or transition area.

(c) Activities under general permit 2 shall comply with the following limits:

1. Permanent above-ground disturbance of wetlands, transition area, and/or State open waters shall be no greater than 0.5 acre. Anything that changes the character of the existing wetland, even if only to a different wetland type, is

permanent disturbance. For example, maintained clearing over a utility line is permanent disturbance. For the purposes of this section, installation of a utility line in scrub shrub or emergent wetlands shall not be considered permanent disturbance;

2. Permanently maintained clearing over the utility line shall be no wider than 20 feet unless a wider area is required by law;

3. The trench into which the utility line is placed shall be no wider than necessary to comply with the United States Occupational Safety and Health Administration safety standards for excavations, set forth at 29 CFR Part 1926, Subpart P;

4. Temporary disturbance, as defined at N.J.A.C. 7:7A-1.4, such as temporary construction clearing or temporary storage of dirt or equipment, shall be the minimum size necessary for compliance with applicable laws;

5. The activities shall not cause any change in preconstruction elevation of a freshwater wetland, transition area, or State open water; and

6. Manholes and siphons for sewer lines shall be placed outside of wetlands, unless the Department's Municipal Finance and Construction Element determines under N.J.A.C. 7:22 and/or N.J.A.C. 7:14A:23 that there is no feasible alternative to placement in wetlands.

(d) In order to minimize environmental impact, a permittee shall:

1. Dispose of any excess soil or bedding material immediately upon completion of construction. This material shall be disposed of outside of freshwater wetlands, transition areas, State open waters, and areas regulated under the Department's Flood Hazard Area Control Act rules at N.J.A.C. 7:13;

2. Backfill the uppermost 18 inches of any excavation with the original topsoil material;

3. Replant the disturbed area with indigenous wetlands plants;

4. Stabilize the disturbed area in accordance with the requirements of the appropriate Soil Conservation District; and

5. Ensure that the activities do not interfere with the natural hydraulic characteristics of the wetland, such as the flow characteristics of groundwater on the site.

(e) Any pipes laid through wetlands, transition areas, or State open waters shall be:

1. Properly sealed so as to prevent leaking or infiltration;

2. Designed so as not to form or provide a conduit for groundwater to be discharged or drained from the wetland; and

3. Placed entirely beneath the pre-existing ground elevation in order to allow free passage of surface and ground water, unless the applicant shows that placing some or all of the pipe above ground would be more environmentally beneficial.

(f) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for all permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, "minimize" means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval no later than 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

(g) Activities under general permit 2 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

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

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

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

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

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

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

Public Notice: Request for public comments and public hearings.

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

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

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

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

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

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

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

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

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (c)1, substituted "0.5" for "one" and rewrote the last sentence; and in (f), inserted "and 13.2, Establishing permit conditions".

Amended by R.2009 d.330, effective November 2, 2009.

See: 40 N.J.R. 5478(a), 41 N.J.R. 4090(a).

In (c)1, substituted "section" for "subsection"; added new (f); and recodified former (f) as (g).

**7:7A-5.2A (Reserved)**

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

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

Repealed by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Section was "Combined general permit 2 and flood hazard area permit".

**7:7A-5.3 General permit 3—Discharge of return water**

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

(b) Activities under general permit 3 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

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

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

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

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

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

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

Public Notice: Request for public comments and public hearings.

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

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

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

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

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

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

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

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

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (b), inserted ", and 13.2, Establishing permit conditions".

**7:7A-5.4 General permit 4—Hazardous site investigation and cleanup**

(a) General permit 4 authorizes activities in freshwater wetlands, transition areas, and State open waters, which are undertaken by the Department or expressly approved pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, for the investigation, cleanup or removal of:

1. Hazardous substances as defined in the Department's rules governing hazardous substances at N.J.A.C. 7:1E, Appendix A; or

2. Pollutants, as defined in the New Jersey Water Pollution Control Act implementing rules at N.J.A.C. 7:14A.

(b) There is no acreage limit on activities under general permit 4. However, disturbance shall be the minimum that is necessary for compliance with the Department's Technical

Requirements for Site Remediation, N.J.A.C. 7:26E, and mitigation shall be performed for all disturbances of freshwater wetlands or State open waters caused by a cleanup authorized under this general permit except that mitigation is not required to compensate for disturbance of wetlands or State open waters that have formed as a direct result of the remediation activities. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.

(c) The mitigation proposal required under (b) above may be incorporated into the document approved pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, and/or it may be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 4 until the mitigation proposal, or an equivalent document that ensures that the requirements of N.J.A.C. 7:7A-15 are met, is approved. Mitigation shall be performed prior to or concurrently with cleanup activities.

(d) Activities under general permit 4 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

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

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

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

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

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

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

Public Notice: Request for public comments and public hearings.

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

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

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

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

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

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

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

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

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In the introductory paragraph of (a), substituted "Division of Remediation Management and Response" for "Site Remediation Program"; and in (d), inserted ", and 13.2, Establishing permit conditions".

Special amendment, R.2009 d.361, effective November 4, 2009 (to expire May 4, 2011).

See: 41 N.J.R. 4467(a).

In the introductory paragraph of (a), substituted "pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C" for "in writing by the Department's Division of Remediation Management and Response"; in (b), substituted "Technical Requirements for Site Remediation" for "technical requirements for site remediation"; and in (c), substituted "approved pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C," for "by which the Department approves the cleanup" and "general" for "General".

Readoption of special amendment, R.2011 d.251, effective September 8, 2011.

See: 43 N.J.R. 1077(a), 43 N.J.R. 2581(b).

Provisions of R.2009 d.361 readopted without change.

**7:7A-5.5 General permit 5—Landfill closures**

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

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

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

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

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

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

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

(f) Activities under general permit 5 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

New Rule, R.2001 d.312, effective September 4, 2001.  
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).  
Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (f), inserted “, and 13.2, Establishing permit conditions”.

**7:7A-5.6 General permit 6—Non-tributary wetlands**

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

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

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

2. The activities shall disturb no more than one-half acre of a freshwater wetland and/or State open water, which is a water of the United States, as defined at N.J.A.C. 7:7A-1.4. Mitigation shall be performed for all permanent loss and/or disturbance to wetlands and/or State open water that are waters of the United States in accordance with (d) below.

(c) Activities under general permit 6 shall not take place in any of the following:

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

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

3. USEPA priority wetlands; or

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

(d) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters that are also waters of the United States. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters that are also waters of the United States unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval no later than 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

(e) Activities under general permit 6 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

Amended by R.1989 d.373, effective July 17, 1989.  
See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

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

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

Public Notice: Request for public comments and public hearings.  
See: 24 N.J.R. 975(a).

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

Changes initiated to create a program that is as stringent as that of the U.S. Army Corps of Engineers under the Clean Water Act (33 U.S.C. 1251 et seq.) in order to secure the assumption of the permit jurisdiction.  
Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.  
See: 24 N.J.R. 2252(a).

Amended by R.1999 d.352, effective October 4, 1999.  
See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

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

Amended by R.2002 d.320, effective October 7, 2002.  
See: 33 N.J.R. 2937(a), 33 N.J.R. 3631(a), 34 N.J.R. 3518(a).

Rewrote (b); in (c), deleted 5.  
Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (a), deleted “, transition areas adjacent to those wetlands,” preceding the first instance of “and/or”; in (b)1, inserted “and” at the end; deleted former (b)2; recodified former (b)3 as (b)2; in the introductory paragraph of (c), deleted “, nor in a transition area adjacent to the following” preceding the colon at the end; and in (d), inserted “, and 13.2, Establishing permit conditions”.

Amended by R.2009 d.330, effective November 2, 2009.  
See: 40 N.J.R. 5478(a), 41 N.J.R. 4090(a).

In (b)2, inserted the last sentence; added new (d); and recodified former (d) as (e).

#### Case Notes

INVALIDITY ANNOTATION: Validity of N.J.A.C. 7:7A-5.6 affected. In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478, Docket No. A-91-03 (New Jersey Supreme Court, July 26, 2004).

Initial Decision (2007 N.J. AGEN LEXIS 810) adopted, which upheld the denial of an application for a Statewide General Freshwater Wetlands Permit No. 6 where wetlands were determined to be part of a surface water tributary system; there was a drainage way in the southerly portion of the site, which was associated with an outlet pipe that discharged to a creek, and surface water tributary systems included connections through such features as drainage pipes. *Phile v. Dep’t of Env’tl. Prot., Land Use Regulation, OAL Dkt. No. ELU 6219-07, Final Decision (January 22, 2008).*

Initial Decision (2005 N.J. AGEN LEXIS 710) adopted, which concluded, based on the ALJ’s assessment of conflicting testimony, that DEP improperly denied petitioner’s application for a Statewide General Permit 6 (“GP6”) on the grounds that petitioner’s property contained wetlands that were part of a surface water tributary system and therefore not isolated as required for a GP6; the findings in the Initial Decision based on the ALJ’s determination of credibility were sufficiently supported by the record. *Ellis v. N.J. Dep’t of Env’tl. Prot., Land Use Regulation, OAL Dkt. No. ESA 8925-03, 2006 N.J. AGEN LEXIS 226, Final Decision (February 27, 2006).*

Where the Department contended that water flowed overland from the petitioner’s wetlands to a nearby stormwater inlet, making petitioners

ineligible for a GP6 permit under N.J.A.C. 7:7A-5.6, the sand, staining, and saturated earth relied on by the Department all occurred not on the property in question but rather along Lake Avenue; it is not an unreasonable interpretation of N.J.A.C. 7:7A-1.4 to require that the evidence of scouring, erosion, or concentrated flow occur either on the property in question, or clearly establish the link between that property and the water tributary system. *Ellis v. N.J. Dep’t of Env’tl. Prot., Land Use Regulation, OAL Dkt. No. ESA 8925-03, 2006 N.J. AGEN LEXIS 226, Final Decision (February 27, 2006).*

In the absence of clear evidence of a link between petitioner’s property and the inlet, or of scouring, erosion, or a concentrated flow of water from the property, the ALJ’s determination that the preponderance of the evidence favored a conclusion that the wetlands were isolated was sufficiently supported by the record; in light of the issues with the Department’s position, the ALJ reasonably found the conclusions of petitioner’s expert more persuasive, including the results of a dye-test the expert performed on the property, which showed rainwater flowing into the property at the very point where the Department’s witnesses had contended the water would exit the property (adopting 2005 N.J. AGEN LEXIS 710). *Ellis v. N.J. Dep’t of Env’tl. Prot., Land Use Regulation, OAL Dkt. No. ESA 8925-03, 2006 N.J. AGEN LEXIS 226, Final Decision (February 27, 2006).*

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

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

#### 7:7A-5.6A General permit 6A—Transition areas adjacent to non-tributary wetlands

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

(b) Activities under general permit 6A shall disturb no more than one-half acre of a transition area.

1. If the activity authorized under general permit 6 eliminates a wetland in its entirety, authorization under general permit 6A is not required for activities in the associated transition area;

(c) Activities under general permit 6A shall not take place in a transition area adjacent to the following:

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

(d) Activities under general permit 6A shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

New Rule, R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

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

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

(b) For the purpose of this section, “headwater” means a water or wetland that is upstream of the point on a non-tidal stream where the average annual flow is less than five cubic feet per second. The Department may estimate this point from available data by using area annual precipitation, area drainage basin maps, and the average annual runoff coefficient, or by similar means. For a stream that is dry for long periods of

the year, the Department may establish the downstream boundary of the headwater as that point in the stream where water flow exceeds five cubic feet per second at least 50 percent of the time. In general, the Department considers a water body with a drainage area of less than 50 acres to be a headwater.

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

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

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

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

1. The loss or substantial modification of more than one acre of freshwater wetlands; or

2. A disruption of a surface water connection, resulting in the isolation of wetlands or State open waters which were not isolated at the time of the general permit application.

(e) Activities under general permit 7 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

Amended by R.1989 d.373, effective July 17, 1989.  
See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

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

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

Public Notice: Request for public comments and public hearings.  
See: 24 N.J.R. 975(a).

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

Changes initiated to create a program that is as stringent as that of the U.S. Army Corps of Engineers under the Clean Water Act (33 U.S.C. 1251 et seq.) in order to secure the assumption of the permit jurisdiction. Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

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

Amended by R.1999 d.352, effective October 4, 1999.  
See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (e), inserted “, and 13.2, Establishing permit conditions”.

#### Case Notes

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

Developer was not entitled to Freshwater Wetlands General Permit Number 6 in order to construct parking deck; however, developer could be entitled to Statewide General Permit Number 7 to refill ditch. *Mall at*

*IV Group v. Department of Environmental Protection*, 92 N.J.A.R.2d (EPE) 195.

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

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

1. If requested within five years of the destruction of a dwelling, this permit authorizes the replacement of a residential dwelling that was lawfully existing prior to July 1, 1988, within the same footprint of the previous dwelling with an increase of up to 750 square feet of fill and/or disturbance provided that:

i. The applicant provides documentation that the dwelling was habitable at the time of destruction. “Habitable” means that persons could legally occupy the dwelling and that the dwelling had utilities including a functioning septic system or legal connection to a sewer; and

ii. There is a foundation remaining or other evidence, such as a deed or plot plan, of the size and location of the overall building footprint.

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

(c) Activities under general permit 8 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

Amended by R.1989 d.373, effective July 17, 1989.  
See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

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

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

Public Notice: Request for public comments and public hearings.  
See: 24 N.J.R. 975(a).

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

Changes initiated to create a program that is as stringent as that of the U.S. Army Corps of Engineers under the Clean Water Act (33 U.S.C. 1251 et seq.) in order to secure the assumption of the permit jurisdiction. Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

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

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

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

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Added (a)1; and in (c), inserted “, and 13.2, Establishing permit conditions”.

### 7:7A-5.9 General permit 9—Airport sight line clearing

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

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

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

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

1. A copy of the current license for the public use aeronautical facility;
2. A description of the area that must be cleared to ensure compliance with New Jersey Department of Transportation rules, including descriptions and drawings of the required approach slopes, the airport layout, and/or other aspects of the facility, as applicable; and
3. A statement citing the applicable regulation, and an explanation of why the proposed cutting of vegetation is necessary to bring existing operations into compliance with New Jersey Department of Transportation and FAA rules, or to maintain the compliance of existing operations with those rules.

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

1. Activities shall be timed to minimize disturbance of threatened and endangered species. The Department will specify the required timing in the general permit authorization when issued;
2. The permittee shall leave all tree stumps, brush stumps, and root systems in place;
3. The permittee shall minimize disturbance of freshwater wetlands and transition areas through use of matting,

equipment running on oversized tires, or other similar practices; and

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

(f) Activities under general permit 9 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (f), inserted “, and 13.2, Establishing permit conditions”.

### 7:7A-5.10A General permit 10A—Very minor road crossings

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

1. Construction of one or more new road crossings, including attendant features such as shoulders, sidewalks and embankments;
2. Expansion, widening, or upgrading of one or more existing paved or unpaved roads or drives; and
3. Activities necessary to reduce horizontal curves in an existing paved road to comply with New Jersey Department of Transportation safety regulations.

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

1. Short crossing scenario:
  - i. The disturbance of freshwater wetlands and/or State open waters is no longer than 100 feet for each crossing, as calculated under (e) below; and
  - ii. The total cumulative disturbance of freshwater wetlands, transition area, and State open waters onsite under general permit 10A is one quarter acre or less; or
2. Long crossing scenario: The total cumulative disturbance of freshwater wetlands, transition area, and State open waters onsite under general permit 10A is one-eighth acre or less. Under the long crossing scenario, the length of the crossing is not limited.

(c) If a proposed road crossing skirts along the edge of a wetland or transition area or touches the wetland or transition area, without actually crossing through the wetland or transition area, the applicant shall, in addition to meeting the requirements at (b) above, demonstrate in accordance with N.J.A.C. 7:7A-5.10B(d) that there is no alternative onsite

location and/or configuration for the road crossing that would provide access to the developable upland with less adverse environmental impact.

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

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

2. The applicant shall install cross drains or other devices to ensure that the crossing does not alter the hydrology of the freshwater wetlands and/or State open waters on either side of the crossing; and

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

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

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

2. A crossing that connects more than two upland areas that are separated by the same wetland or State open water is considered one crossing. That is, a road that repeatedly traverses the same wetland or State open water is con-

sidered one crossing. Thus, the total length of disturbance is the sum of all the lengths of crossing that traverse that particular wetland or water. For example, if a road crosses three arms of an irregularly shaped wetland, the total length of disturbance would be the sum of the lengths of all three crossings. See Figures 2 and 3 below for an illustration of this; and

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

(f) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, "minimize" means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval no later than 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

(g) Activities under general permit 10A shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

(b) General permit 11 does not authorize the construction or placement of a detention or retention facility in freshwater wetlands, transition areas, or State open waters.

(c) Activities under general permit 11 shall comply with the following limits:

1. The activities shall disturb no more than one quarter acre of freshwater wetlands, transition areas, and/or State open waters, including both temporary and permanent disturbance;

2. The area disturbed during construction of a conveyance structure shall be no wider than is necessary to comply with the United States Occupational Safety and Health Administration safety standards for excavations, set forth at 29 CFR Part 1926, Subpart P; and

3. The amount of rip-rap or other energy dissipating material placed shall be the minimum necessary to prevent erosion, and shall not exceed 10 cubic yards of fill per outfall, unless a larger amount is required in order to comply with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90.

(d) In addition to meeting all other requirements under general permit 11, an intake structure shall:

1. Be designed and equipped so as to minimize impacts to fish and other fauna through measures including, but not limited to, the following:

i. The structure's location and orientation;

ii. Protective structures that prevent entrapment of fauna in the structure itself, or in a diversionary canal or embayment; and/or

iii. Protective structures that prevent aquatic biota from being sucked up against the structure (impingement) or being sucked up into the structure (entrainment). Examples of such structures are radial wells, fish bucket screens, and wedge-wires;

2. Be designed so as to ensure that the wetlands are not drained;

3. Have an intake velocity no greater than 0.5 feet of water per second; and

4. Comply with all applicable requirements for intake structures in the Department's Safe Drinking Water Act rules at N.J.A.C. 7:10-11.8(c).

(e) All activities under general permit 11 shall comply with the specifications and requirements in the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90, including activities which are exempted from or not regulated by those Standards.

(f) For any excavated area in freshwater wetlands, transition areas, and/or State open waters, the following requirements apply:

1. The excavation shall be backfilled to the preexisting elevation;

2. The uppermost 18 inches of the excavation shall be backfilled with the original topsoil material if feasible; and

3. The area above the excavation shall be replanted, in accordance with applicable BMPs, with indigenous wetlands species.

(g) Any pipes laid through wetlands, transition areas, or State open waters shall be:

1. Properly sealed so as to prevent leaking or infiltration;

2. Designed so as not to form a path for groundwater to be discharged or drained from the wetland; and

3. Placed entirely beneath the pre-existing ground elevation unless the applicant shows that placing some or all of the pipe above ground would be more environmentally beneficial.

(h) A swale in a wetland or transition area shall not be used as a substitute for stormwater treatment. However, a swale may be used to convey stormwater through a wetland or transition area if:

1. Conditions on the site make it impracticable to use a buried pipe; and

2. The applicant demonstrates that the swale will not result in drainage of the wetlands or transition areas. To demonstrate this, the applicant shall provide profiles and cross-sections along the entire length of the swale, and any other information necessary to demonstrate that drainage will not occur.

(i) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, "minimize" means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval no later than 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

(j) Activities under general permit 11 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

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

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

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

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

Rewrote (f).

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Deleted former (f); recodified (g) through (j) as (f) through (i); and in (i), inserted “; and 13.2, Establishing permit conditions”.

Amended by R.2009 d.330, effective November 2, 2009.

See: 40 N.J.R. 5478(a), 41 N.J.R. 4090(a).

Added new (i); and recodified former (i) as (j).

#### 7:7A-5.11A (Reserved)

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

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

Repealed by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Section was “Combined general permit 11 and flood hazard area permit”.

#### 7:7A-5.12 General permit 12—Surveying and investigating

(a) General permit 12 authorizes activities in freshwater wetlands, transition areas and State open waters necessary for surveying and investigative activities such as:

1. Soil borings dug by machine;
2. Hand dug soil borings larger than three feet in diameter or depth. A hand dug soil boring three feet or less in diameter and depth is not regulated pursuant to N.J.A.C. 7:7A-2.2(c) and thus does not require Department approval;
3. Cutting of vegetation by machine for a survey line that is no wider than five feet;
4. Cutting of vegetation by hand for a survey line larger than three feet wide. Cutting of vegetation by hand for a survey line that is three feet wide or less is not regulated pursuant to N.J.A.C. 7:7A-2.2(c) and thus does not require Department approval; and
5. Digging of exploratory pits and/or other temporary activities necessary for a geotechnical or archaeological investigation.

(b) Disturbance under general permit 12 shall be the minimum necessary to obtain the desired information.

(c) If activities under general permit 12 disturb soil, the soil shall be restored to its pre-existing elevation, retaining its original soil layers, unless the soil disturbance is six inches in diameter or smaller. This subsection shall not apply if other permits which allow permanent impacts in the same location have been obtained.

(d) Activities under general permit 12 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

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

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

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

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

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

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

Public Notice: Request for public comments and public hearings.

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

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

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

Changes initiated to create a program that is as stringent as that of the U.S. Army Corps of Engineers under the Clean Water Act (33 U.S.C. 1251 et seq.) in order to secure the assumption of the permit jurisdiction. Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

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

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

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

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (d), inserted “; and 13.2, Establishing permit conditions”.

#### 7:7A-5.13 General permit 13—Lake dredging

(a) General permit 13 authorizes up to one acre of dredging in palustrine emergent freshwater wetlands, as defined at N.J.A.C. 7:7A-1.4, necessary to restore or maintain a lake, pond, or reservoir, as defined at N.J.A.C. 7:7A-1.4, to its original bottom contours. General permit 13 does not authorize dredging or other disturbances in wetlands that are not palustrine emergent wetlands. General permit 13 does not authorize disturbance of transition areas except as necessary to obtain access to a dredging project pursuant to (e) below.

(b) In accordance with N.J.A.C. 7:7A-2.2(b), if a dredging project meets all of the following criteria, the project does not require Department approval under this chapter:

1. The project disturbs State open waters only, and does not disturb wetlands located in the lake, pond, or reservoir;
2. The project does not disturb wetlands or transition areas adjacent to the lake, pond, or reservoir; and
3. The project does not involve the discharge of dredged or fill material in the State open water. For example, if the project involves placement of fill in a lake bed for an access road, or involves temporary placement of dredged material on the lake bed prior to removal of the dredged material, the project would be regulated and would require Department approval.

(c) If the lake, pond or reservoir is to be lowered during dredging:

1. The permittee shall obtain a lake lowering permit from the Department's Division of Fish and Wildlife;

2. Regulated activities shall not begin until the lake, pond or reservoir is lowered in accordance with the lake lowering permit; and

3. All regulated activities shall be discontinued before the lake, pond or reservoir is refilled.

(d) In order to minimize adverse impacts on fish and on the downstream environment, the permittee shall:

1. Take all necessary measures, including adjusting the timing of the dredging, to prevent any detrimental effect to spawning of fish in the lake, pond or reservoir or downstream; and

2. Ensure that there is a continuous flow of sediment-free water to the area downstream of the lake, pond or reservoir at all times during activities under general permit 13.

(e) The permittee may temporarily disturb wetlands (palustrine emergent or otherwise), transition areas, or State open waters, beyond those disturbed directly by the dredging, in order to obtain vehicular access for the dredging. Disturbance for access shall be limited to one eighth of an acre, unless the applicant demonstrates in accordance with the standards at N.J.A.C. 7:7A-5.10B(d) that there is no alternative

onsite location and/or configuration that would provide access to the dredging with less adverse environmental impact. If such a demonstration is made, the access disturbance may be increased as necessary but shall not exceed one-quarter acre. All access disturbances under this subsection shall be restored to their pre-existing elevation and condition upon completion of dredging.

(f) The application for authorization under general permit 13 shall include:

1. Documentation, including, but not limited to, aerial photography, original construction plans, core borings, and/or other information, showing that dredging will go no deeper than the original configuration and bottom contours of the lake, and will not enlarge the lake beyond the original configuration; and

2. For a lake larger than five acres, the following information:

i. A USGS quad map showing all of the upstream land and water surface area which drains to the lake. The map shall be marked to identify the main land uses in that upstream drainage area;

ii. A list of the sources of sediment in the lake, including all stormwater pipes, outfalls, ditches and similar features that discharge directly into the lake or that

ii. The certification lists each condition in (b), (c) and/or (d) above that applies to the project, and states whether the condition has been satisfied or will be satisfied.

(f) Within 15 days of the Department's receipt of an application submitted under (e) above for a project that does not involve sediment removal, the Department shall do one of the following:

1. Notify the applicant either that the application is not administratively complete (that is, that it does not include all of the information required under (e) above), or that the application is administratively complete but that the application requires a full application review under N.J.A.C. 7:7A-10. If the application is not administratively complete, the Department shall request more information. If the reapplication requires a full application review, the Department shall provide the applicant with the reasons for this. For example, an application may require a full review because of a sighting of a threatened or endangered species which must be investigated;

2. Notify the applicant that the project does not qualify for authorization under general permit 26; or

3. Take no action. If the Department takes no action, the channel or stream cleaning project is authorized under general permit 26 to the extent that the project does not violate other laws then in effect.

(g) Within 60 days of the Department's receipt of an application submitted under (e) above for a project that does involve sediment removal, the Department shall do one of the following:

1. Notify the applicant that the application is not administratively complete (that is, that it does not include all of the information required under (e) above) and request more information;

2. Notify the applicant that the project does not qualify for authorization under general permit 26; or

3. Take no action. If the Department takes no action, the channel or stream cleaning project is authorized under general permit 26 to the extent that the project does not violate other laws then in effect.

(h) If the Department notifies the applicant under (f)2 or (g)2 above that a channel or stream cleaning, clearing, or desnagging project is not authorized under general permit 26, the Department shall provide the applicant with the technical reasons for the decision. If the Department's technical reasons are based upon the inability to determine the natural bed of the channel or stream, the Department shall, at the request of the applicant, assist in identifying the natural bed of the channel or stream.

(i) Upon completion of a project under general permit 26 that involves the removal of sediment, the permittee shall submit to the Department a written notice that the project has

been completed. The notice shall contain a certification that meets both of the following criteria:

1. The certification is signed by a licensed professional engineer who is the county or municipal engineer, or who is employed by the appropriate Soil Conservation District; and

2. The certification states each condition in (b), (c) and/or (d) above that applies to the project, and states whether the condition has been satisfied.

(j) Activities under general permit 26 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In the introductory paragraph of (e), updated the second N.J.A.C. reference; in (e)7, updated the N.J.A.C. reference; and in (j), inserted ", and 13.2, Establishing permit conditions".

#### **7:7A-5.26A (Reserved)**

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

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

Repealed by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Section was "Combined general permit 26 and flood hazard area permit".

#### **7:7A-5.27 General permit 27—Redevelopment of previously disturbed areas**

(a) General permit 27 authorizes the disturbance of certain degraded freshwater wetlands, transition areas, and/or State open waters necessary for redevelopment, as defined at N.J.A.C. 7:7A-1.4, of an area previously significantly disturbed by industrial or commercial activities.

(b) General permit 27 authorizes activities only if:

1. The activities are located in wetlands that were previously disturbed or were formed as a result of previous disturbance by commercial or industrial activities;

2. The area is abandoned or underutilized;

3. The area meets at least one of the following criteria:

i. It has been identified on the inventory of brown-field sites compiled by the Brownfields Redevelopment Task Force pursuant to N.J.S.A. 58:10B-23b;

ii. It is the subject of a redevelopment agreement entered into pursuant to N.J.S.A. 58:10B-27; or

iii. It has been identified as an environmental opportunity zone pursuant to N.J.S.A. 54:4-3.150 et seq.; and

4. The freshwater wetlands, transition areas, and/or State open waters to be disturbed are significantly degraded

by human disturbance or alteration and are of little ecological value. Examples of significantly degraded wetlands are those that have formed as a result of a landfill cap, ponding of contaminated ground or surface water, or as a result of demolition of structures on a previously developed site.

(c) Activities under general permit 27 shall be limited as follows:

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

(d) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, "minimize" means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval no later than 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

(e) A disturbance authorized under general permit 27 does not count toward the one acre of disturbance allowed under multiple general permits under N.J.A.C. 7:7A-4.4(a)2.

(f) Activities under general permit 27 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

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

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

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

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

Rewrote (c); added a new (e) and recodified former (e) as (f).

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (f), inserted ", and 13.2, Establishing permit conditions".

Amended by R.2009 d.330, effective November 2, 2009.

See: 40 N.J.R. 5478(a), 41 N.J.R. 4090(a).

Rewrote (d).

## SUBCHAPTER 6. TRANSITION AREA WAIVERS

### 7:7A-6.1 General transition area waiver provisions

(a) This section sets forth the requirements for transition area waivers. The Department issues the following types of transition area waivers:

1. An averaging plan transition area waiver, addressed at N.J.A.C. 7:7A-6.2;
2. A special activity transition area waiver for storm-water management, linear development, redevelopment, or activities eligible for an individual permit, addressed at N.J.A.C. 7:7A-6.3;
3. A matrix type width reduction transition area waiver, addressed at N.J.A.C. 7:7A-6.4;
4. A hardship transition area waiver, addressed at N.J.A.C. 7:7A-6.5;
5. A general permit transition area waiver. If a general permit authorizes disturbance of a transition area, an authorization issued under the general permit constitutes a transition area waiver for the activities covered by the general permit. This waiver is not addressed in this section, but in each general permit in N.J.A.C. 7:7A-5 that covers transition area disturbances. All general permits except for general permits 1, 6, 7, 22 and 24 authorize activities in transition areas; and

6. An access transition area waiver. Each general permit authorization, individual freshwater wetlands permit and mitigation proposal shall include a limited transition area waiver to allow access to the authorized activity. No fee or application is required for this waiver. However, an access transition area waiver will allow regulated activities only:

i. In that portion of the transition area bordering on that portion of the freshwater wetland in which the authorized activity is to take place; and

ii. For an activity that the Department determines is necessary to accomplish the permitted activity. An activity not directly required in order to obtain access to the permitted activity shall require a separate transition area waiver. If the activity authorized under the permit eliminates the wetland in its entirety, the transition area associated with that wetland may also be eliminated in its entirety without a separate transition area waiver. If the activity authorized under the permit partially eliminates the wetland, the access shall be limited to the transition area adjacent to the location of the approved wetland filling. Any additional impacts to the transition area shall require a separate transition area waiver.

(b) The Department shall include in a transition area waiver additional conditions as necessary to ensure that an activity does not result in a substantial impact on the adjacent wetlands, and does not impair the purposes and functions of

transition areas as set forth in N.J.A.C. 7:7A-2.5. Such conditions shall include, but are not limited to, the following:

1. Construction activities shall be conducted in such a way that there will be no regulated activities in the transition area or the wetland except any that are authorized by a permit, as defined at N.J.A.C. 7:7A-1.4;

2. The structure is designed and shall be used in such a way that there will be no regulated activities in the transition area or the wetland except any that are authorized by a permit, as defined at N.J.A.C. 7:7A-1.4;

3. The transition area and/or wetland is fenced, using a type of fencing that protects and maintains all functions

and values of the resources, prior to construction of the structure (including site preparation), and the fence is permanently maintained, so as to clearly delineate its boundary and to prevent people from entering and/or disturbing the transition area and/or wetland;

4. The permittee shall execute and record a conservation restriction or easement, in accordance with the procedures at N.J.A.C. 7:7A-2.12, which prohibits any regulated activities in the transition area and wetlands as appropriate; and

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

(c) If a site has more than one freshwater wetland, the Department shall treat each wetland and its associated transition area separately for purposes of transition area waivers. To determine whether a freshwater wetland area is all one wetland or is made up of multiple separate wetlands, the Department shall consider the following factors:

1. The proximity of the wetland areas to each other; and
2. Whether the wetland areas are hydrologically connected.

(d) An applicant whose application does not meet the requirements for any of the transition area waivers listed in (a) above may obtain a transition area waiver through scientifically documenting that a proposed activity will have no substantial impact on the adjacent wetlands. This documentation may include, but is not limited to, nutrient or sediment transport models, buffer models, or wildlife habitat suitability studies. An application submitted under this subsection shall address the following, as they relate to the adjacent wetlands:

1. Sediment, nutrient, and pollutant transport and removal;
2. Impacts on sensitive species; and
3. Surface water quality impacts.

(e) With the exception of a waiver for redevelopment for which it is not practicable, in accordance with N.J.A.C. 7:7A-6.3(f)4, or access, all transition area waivers shall be conditioned on the recording of a Department-approved conservation restriction or easement, as defined at N.J.A.C. 7:7A-1.4, and in accordance with the requirements at N.J.A.C. 7:7A-

2.12, restricting future activities in the entire transition area and adjacent wetlands on the site.

1. If the permittee does not conduct regulated activities before the transition area waiver expires, the following apply with regard to the transition area:

i. If no activities have been conducted, regardless of whether or not the conservation restriction or easement was recorded, the permittee shall obtain a new transition area waiver to conduct regulated activities in the transition area; or

ii. If no activities have been conducted and the conservation restriction or easement was properly recorded, but the permittee wants to reconfigure the project to use portions of the property contained within the restriction or easement, the permittee shall apply for a new transition area waiver, together with a request for a modification of the conservation restriction or easement in accordance with the procedures at N.J.A.C. 7:7A-2.12(i).

2. In the case of a subdivision for which a transition area waiver was approved, if one or more lots remain undeveloped when the transition area waiver expires, the following shall apply with regard to the transition area:

i. If no activities have been conducted on a lot which was part of a larger subdivision, regardless of whether or not the conservation restriction or easement was recorded, the permittee shall apply for a new transition area waiver for the lot, using the same plan that was used to obtain the transition area waiver for the subdivision as a whole. That is, if a transition area waiver averaging plan was obtained for the subdivision as a whole and that transition area waiver averaging plan expires, the individual lot owner shall apply for a transition area averaging plan for the individual lot using the original averaging plan for the subdivision as a whole. The Department shall consider proposed changes to the originally approved plan only if the conservation easement or restriction was recorded and the changes meet the standards for a de minimis modification at N.J.A.C. 7:7A-2.12(i).

3. If the permittee does not properly record the required conservation restriction or easement, he or she shall be in violation of the Freshwater Wetlands Protection Act and this chapter.

(f) The process at N.J.A.C. 7:7A-17 is also available to applicants for a transition area waiver.

(g) A transition area waiver allowing the reduction of the transition area adjacent to an exceptional resource value wetland shall be conditioned on a transition area averaging plan which provides an average transition area width of at least 100 feet.

(h) With the exception of a transition area waiver for access in accordance with N.J.A.C. 7:7A-6.1(a)6 and a spe-

cial activity waiver for redevelopment in accordance with N.J.A.C. 7:7A-6.3(f), the Department shall not issue a transition area waiver under this section and a general permit authorization for the same site and for the same activity, if the combined effect of the transition area waiver and general permit authorization would be to expand the general permit activity beyond the limits set forth in the general permit. For example, if an applicant proposes one road crossing on a site, the Department will not permit the combination of a general permit 10 authorization with an averaging plan for the same road crossing because to do so would cause the crossing to exceed the 0.25 acre limit of general permit 10.

(i) With the exception of an transition area waiver for access approved in accordance with (a)6 above or a transition area waiver meeting the requirements for an individual permit at N.J.A.C. 7:7A-6.3(g), transition area waiver shall not be approved to allow encroachment within 75 feet of an exceptional resource value wetland.

Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (a)5, inserted "6,"; in (a)6ii, inserted the third through fifth sentences; deleted former (b) through (d); recodified (e) through (k) as (b) through (h); in the introductory paragraph of (b), inserted "Such conditions shall include, but are not limited to, the following:"; added (b)1 through (b)5; in the introductory paragraph of (d), deleted "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" following "buffer models"; rewrote the introductory paragraph of (e); rewrote (e)1 and (e)2; added (e)3; rewrote (f) and (h); and added (i).

#### 7:7A-6.2 Transition area averaging plan waiver

(a) A transition area averaging plan waiver modifies the overall shape of a transition area without reducing its total square footage. The Department may approve a transition area averaging plan waiver for activities adjacent to an intermediate or exceptional resource value freshwater wetlands. A diagram of an example transition area averaging plan is shown in N.J.A.C. 7:7A-6, Appendix A.

(b) The Department shall issue a transition area averaging plan waiver only if the transition area, as modified, will continue to serve the purposes of a transition area set forth in N.J.A.C. 7:7A-2.5. The Department shall presume that the following will result in a transition area that will not serve the purposes set forth in N.J.A.C. 7:7A-2.5, and shall not issue a transition area averaging plan waiver, unless the applicant demonstrates otherwise under N.J.A.C. 7:7A-6.1(d):

1. The portion of the existing, pre-activity transition area that will be reduced has a slope greater than 25 percent, as calculated under N.J.A.C. 7:7A-6.4(g);
2. A new individual subsurface sewage disposal (septic) system that discharges onsite will be placed within the existing, pre-activity transition area;
3. An outfall structure that will discharge unfiltered or untreated stormwater into wetlands will be placed within the existing, pre-activity transition area; or

4. The proposed averaging compensation area is separated from the wetland by an intervening structure.

(c) In addition to the presumptions at (b) above, the Department shall also presume that, for a transition area adjacent to an intermediate resource value wetland, the following will result in a substantial impact on the adjacent freshwater wetlands, and the Department shall not issue a transition area averaging plan waiver unless the applicant demonstrates otherwise under N.J.A.C. 7:7A-6.1(d):

1. A structure, impervious surface, or stormwater management facility, as defined at N.J.A.C. 7:7A-1.4, will be placed within 20 feet of freshwater wetlands; or
2. The transition area averaging plan proposes to:
  - i. Reduce any portion of the transition area to less than 10 feet wide;
  - ii. Reduce a transition area to less than 25 feet wide in an area containing critical habitat for fauna or flora, as defined at N.J.A.C. 7:7A-1.4;
  - iii. Reduce a transition area to 10 feet wide for a continuous distance of 100 linear feet or more along the freshwater wetlands boundary;
  - iv. Reduce a transition area to less than 25 feet wide within the watershed of a current or proposed National Wildlife Refuge;
  - v. Compensate for a decrease in a transition area by increasing the width of any portion of the transition area to more than 75 feet; or
  - vi. Result in an average transition area width that is less than 25 feet.

(d) In addition to the presumptions at (b) and (c) above, the Department shall also presume that, for a transition area adjacent to an exceptional resource value wetland, the following will result in a substantial impact on the adjacent freshwater wetlands, and the Department shall not issue a transition area averaging plan waiver unless the applicant demonstrates that the activity would qualify for an individual permit under this chapter:

1. The freshwater wetland adjacent to the transition area is a breeding or nesting habitat for a threatened or endangered species as defined a N.J.A.C. 7:7A-1.4;
2. The freshwater wetland adjacent to the transition area discharges directly to a trout production water or a tributary thereof, except that a transition area averaging plan waiver shall not be disallowed under this subsection if:
  - i. The freshwater wetlands and transition area remaining adjacent to the trout production water after the averaging is at least 150 feet wide, measured from the top of the bank of the trout production water; or

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

## SUBCHAPTER 10. APPLICATION CONTENTS AND PROCEDURE

**7:7A-10.1 Basic application information**

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

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

1. A letter of interpretation, including an extension or modification of a letter of interpretation;
2. Authorization to act under a general permit, except that the following activities are subject to application requirements in the general permits listed below, and are not subject to any of the application requirements in this subchapter except for the public notice requirements at N.J.A.C. 7:7A-10.8:
  - i. The ongoing maintenance of an off-stream stormwater management facility created in uplands under general permit 1;
  - ii. The repair or modification of an individual sub-surface disposal system (septic system) under general permit 25; and
  - iii. Minor channel or stream cleaning performed by a local government agency under general permit 26;
3. A transition area waiver;
4. An individual open water fill permit;
5. An individual freshwater wetlands permit; and
6. A minor modification, major modification, or extension of a permit, including a transition area waiver or general permit authorization.

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

1. An exemption letter. Application requirements for an exemption letter are found at N.J.A.C. 7:7A-2.10; or
2. A mitigation proposal. Application requirements for a mitigation proposal are found at N.J.A.C. 7:7A-15.12.

(d) An application shall be submitted by the owner of the site which is the subject of the application, or by a person who has the legal authority to perform the activities proposed in the application on the site, and to carry out all requirements of this chapter. Others may assist the owner in preparing an application, and may submit reports or other information in accordance with N.J.A.C. 7:7A-10.9.

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

(f) Failure to provide complete and accurate information required in this subchapter of which the applicant, its consultants, engineers, surveyors or agents are, or reasonably should have been, aware may result in denial or termination of the permit under N.J.A.C. 7:7A-14.5, and may subject the applicant, its consultants, engineers, surveyors and/or agents to penalties for submittal of false information under N.J.A.C. 7:7A-16.9.

(g) For each application, the applicant shall provide all information necessary for the Department to determine if the requirements of this chapter are met. The Department will provide an application checklist setting forth the information required for an administratively complete application. Each application checklist will require different information depending on the type of approval sought.

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

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

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

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

1. For a letter of interpretation, approximately 69 calendar days;
2. For an authorization under a general permit, approximately 65 calendar days;

3. For an individual transition area waiver, approximately 71 calendar days; and

4. For an individual permit, approximately 161 calendar days.

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

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

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

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

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

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

(q) When a survey is required, it shall be conducted and the documentation provided in accordance with the requirements at N.J.A.C. 7:36 Appendix 2, specifically scope of work: property surveys at 3.4.2; corner markers at 3.5.2.10.1, deed description at 3.5.4, metes and bound description and reduced survey plan at 3.6.6, and digital files at 3.6.7.

New Rule, R.2001 d.312, effective September 4, 2001.  
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).  
Amended by R.2007 d.243, effective August 20, 2007.  
See: 38 N.J.R. 2913(a), 39 N.J.R. 3524(a).

In (f), deleted "all required" following "provide", inserted "required in this subchapter", "engineers, surveyors" and "its consultants, engineers, surveyors and/or agents", and substituted "are, or reasonably should have been," for "is".

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In the introductory paragraph of (b)2 and in (d), updated the N.J.A.C. references; deleted former (b)3; recodified former (b)4 through (b)7 as (b)3 through (b)6; in (b)3, substituted "A" for "An individual"; in (h), substituted "the Division of Land Use Regulation" for the first occurrence of "Land Use Regulation Program" and "Division of Land Use Regulation" for the second occurrence of "Land Use Regulation Program"; in the introductory paragraph of (m) and in (m)3, substituted "Division of Land Use Regulation" for "Land Use Regulation Program" throughout; and added (q).

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

(a) This section includes basic information required for every approval covered by this subchapter (see N.J.A.C. 7:7A-10.1(b)). Each application checklist will require this information and in addition will require information specific to the type of approval sought. The additional information required for each specific approval is set forth below at N.J.A.C. 7:7A-10.3 through 10.7.

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

1. An application form, including a certification of truth and accuracy that meets the requirements at N.J.A.C. 7:7A-10.9, completed as directed in the instructions and/or application checklist. The application form will include basic information regarding the site, the applicant, and the activities proposed;
2. Unconditional written consent from the owner of the site, as defined at N.J.A.C. 7:7A-1.4, for Department representatives to enter the site to conduct site inspections;
3. The appropriate fee, set forth at N.J.A.C. 7:7A-11;
4. Visual materials, including, but not limited to, maps, plans, surveys, diagrams, or photographs as necessary to accurately portray the site, existing conditions on the site, all areas of Department land use regulatory jurisdiction, and any activities proposed on the site;
5. Written narrative information and/or reports as necessary to accurately describe the site, its location (including State plane coordinates), site conditions including areas of Department land use regulatory jurisdiction, and any planned activities, including schedules for performing regulated activities, if appropriate;
6. Documentation that the applicable requirements at N.J.A.C. 7:7A-10.8, Public notice requirements for applications, have been met;
7. Information and certifications regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources or other features on the

mation at (g)1 through 3 above must be included in the notice of application.

(i) An applicant for an individual permit or for an open water fill permit shall comply with (c) through (g) above, as applicable, and, in addition, shall:

1. Publish a display advertisement at least four column inches in size in the newspaper of record for each municipality in which the site is located; and
2. If the proposed project involves more than ten acres of fill, publish a display advertisement in a newspaper with regional circulation in the region in which the site is located.

(j) An applicant proposing to create, enhance or restore wetlands to satisfy a mitigation requirement in accordance with N.J.A.C. 7:7A-15.11 shall comply with (c), (d), (e) and (g) above except that the notice required in accordance with (e) above shall be sent to municipal and county officials and all owners of land within 200 feet of the proposed mitigation project site.

(k) If an applicant amends an application during the application review process, the applicant shall comply with the notice requirements at N.J.A.C. 7:7A-12.6(f).

(l) Upon request, the Department shall provide the applicant with copies of any comments submitted to the Department on the application.

New Rule, R.2001 d.312, effective September 4, 2001.  
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).  
Recodified from N.J.A.C. 7:7A-10.9 and amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).  
In (c), inserted "or through other courier or mail delivery service that provides written proof of delivery of letters or packages"; added new (j); and recodified former (j) and (k) as (k) and (l).  
Former N.J.A.C. 7:7A-10.8, Additional application requirements for a modification or extension, recodified to N.J.A.C. 7:7A-10.7.

### 7:7A-10.9 Signatories to permit applications and reports

(a) A permit application shall be signed by the person or persons specified below:

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 entity, by either a principal executive officer or ranking elected official; or
4. For an entity not covered at (a)1 through 3 above, by all 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 overall responsibility for the construction and/or completion of the regulated project or activity, such as the position of contractor, construction site supervisor, 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 overall responsibility for the construction and/or completion of the regulated facility or activity, 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) If an application, report, survey, environmental impact statement, or other document required under this chapter is prepared for an applicant by a professional such as a consultant, engineer, architect, surveyor, attorney, or scientist, the document shall include the certification required under (e) below, signed by the professional responsible for preparing the document. This certification shall be in addition to the certification signed by the applicant.

(e) 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 and preparing 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."

(f) Any survey submitted under this chapter shall be performed by a surveyor licensed in New Jersey. In addition, the Department may in some cases require that other documents be submitted, signed, sealed, and/or certified by a person with relevant qualifications such as a license or certification.

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

Recodified from N.J.A.C. 7:7A-10.10 by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Former N.J.A.C. 7:7A-10.9, Public notice requirements for applications, recodified to N.J.A.C. 7:7A-10.8.

### 7:7A-10.10 Confidentiality

(a) Any information submitted to the Department under this chapter 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).

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

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

Recodified from N.J.A.C. 7:7A-10.11 by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Former N.J.A.C. 7:7A-10.10, Signatories to permit applications and reports, recodified to N.J.A.C. 7:7A-10.9.

### 7:7A-10.11 (Reserved)

Recodified to N.J.A.C. 7:7A-10.10 by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Section was "Confidentiality".

## SUBCHAPTER 11. FEES

### 7:7A-11.1 General fee provisions

(a) Each application submitted to the Department under this chapter shall include a fee, except as provided at (b) below. An application that does not include the fee required under this subchapter shall be considered administratively incomplete, and shall be handled accordingly under N.J.A.C. 7:7A-12.1. The fees for each application are set forth in the fee tables below.

(b) The following applications shall not require an application fee:

1. An application submitted by an agency of the State under N.J.A.C. 7:7A-2.1(b);
2. An application for authorization under general permit 16 or general permit 25, found at N.J.A.C. 7:7A-5.16 and 5.25, respectively; and
3. An application for authorization of activities on public land under general permit 17, found at N.J.A.C. 7:7A-5.17.

(c) All fees shall be paid by personal check, certified check, attorney check, government purchase order, or money order, in accordance with the applicable application checklist.

(d) If proposed activities require approval under this chapter and in addition require one or more other Division of Land Use Regulation permits (such as a CAFRA permit, waterfront development permit, coastal wetlands permit, or flood hazard area permit), the application fee shall be the sum of the following:

1. The highest single application fee of all the permits required for the project; and
2. Seventy-five percent of the application fee for each additional approval required. *Example:* if an applicant has a two acre site and is applying for a freshwater wetlands letter of interpretation line verification (\$600.00 + \$84.00/acre = \$768.00), general permit (\$600.00), and a transition area waiver (\$600.00 + \$48.00/acre = \$696.00), together with a Flood Hazard Area Control Act permit (major = \$4,000) and two Waterfront Development general permits (\$600.00 each), the combined fee shall be determined as follows:

Freshwater wetlands fee: \$768.00+\$600.00+\$696.00  
= \$2,064

Flood Hazard Area Control Act fee: \$4,000

Waterfront: \$600.00x2 = \$1,200

Total Fee = \$4,000 (the highest fee) + (75 percent of 2,064) + (75 percent of \$1,200) = \$4,000+\$1,548+\$900.00 = \$6,448.

(e) Any fee required under this chapter that is subject to N.J.A.C. 7:1L shall be payable in installments in accordance with N.J.A.C. 7:1L.

(f) An application fee is refundable if the Department returns the application as administratively incomplete under N.J.A.C. 7:7A-12.1(b). An application fee is not refundable once the application has been declared administratively complete under N.J.A.C. 7:7A-12.1. However, if the Department denies an application, or if the applicant withdraws the application under N.J.A.C. 7:7A-12.6, the Department shall credit the fee towards a new application for a revised project on the same site, if the new application is submitted within one year of the denial or withdrawal.

(g) In some cases, an applicant’s act or omission makes it necessary for Department staff to perform more than one site visit during the review of an application. In such a case, the Department shall assess an additional fee of up to \$1,000 for each additional site visit. No permit, waiver, or letter of interpretation shall be issued until this fee has been paid.

FEE TABLES

Application fees for LOIs (N.J.A.C. 7:7A-3):

Type of LOI	Fee
Presence/absence LOI—whole site	\$240.00
Presence/absence LOI under N.J.A.C. 7:7A-3.2 – portion of a site or footprint of disturbance	\$480.00
Line delineation LOI under N.J.A.C. 7:7A-3.3 – site smaller than one acre	\$600.00
Line verification LOI under N.J.A.C. 7:7A-3.4 – site smaller than one acre	\$600.00
Line verification LOI under N.J.A.C. 7:7A-3.4 – site one acre or larger	\$600.00 plus \$84.00 per acre <sup>1</sup> , up to \$60,000
LOI extension under N.J.A.C. 7:7A-3.6	\$240.00, or 25 percent of original fee, whichever is greater
LOI (any type) and a transition area waiver, (any type) if the site is one acre or smaller.	\$840.00 Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application.
LOI (any type) and a transition area waiver, (any type) if the site is larger than one acre.	\$1,080.00, plus \$96.00 per acre <sup>1</sup> Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application.
LOI (any type) and a general permit authorization	Sum of applicable LOI and general permit authorization fees
LOI (any type) and an individual permit	Applicable individual permit fee

Application fees for general permit authorizations (N.J.A.C. 7:7A-5):

Type of general permit	Fee
Any general permit authorization, except:	\$600.00
1. General permit 16 (wildlife management);	
2. General permit 25 (septic repair); or	
3. General permit 17 (trail/boardwalk) on public land.	
Authorization under any of the following:	None
1. General permit 16 (wildlife management);	
2. General permit 25 (septic repair); or	
3. General permit 17 (trail/boardwalk) on public land.	
Multiple general permit authorizations for one site	\$600.00 plus \$240.00 for each additional general permit
General permit authorization extension	\$240.00

Application fees for transition area waivers (N.J.A.C. 7:7A-6):

Type of transition area waiver	Fee
Any transition area waiver, if:	\$240.00
1. The entire site is covered by a valid line delineation or line verification LOI; and	
2. The site is one acre or smaller.	
Any transition area waiver, if:	\$600.00 plus \$48.00 per acre affected <sup>2</sup>
1. The affected portion of the site is covered by valid line delineation or line verification LOI; and	
2. The site is over one acre.	
Any transition area waiver, if:	\$840.00
1. The site is not covered by a valid LOI, nor has a presence/absence LOI only; and	Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application.
2. The site is one acre or less.	
Any transition area waiver if:	\$1,080 plus \$96.00 per acre
1. The site is not covered by a valid LOI, or has a presence/absence LOI only; and	Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application.
2. The site is larger than one acre.	
Multiple transition area waivers (unless all are special activity transition area waivers)	Sum of all fees for all of the applicable transition area waivers

<u>Type of transition area waiver</u>	<u>Fee</u>	<u>Qualifier</u>	<u>Area of Impact</u>	<u>Fee</u>
Multiple special activity transition area waivers for a single site	\$600.00 plus \$240.00 for each additional special activity waiver	groundwater recharge calculations (pursuant to N.J.A.C. 7:8-5.4(a)2) per area of land disturbed by the project	More than three acres and up to 10 acres More than 10 acres and up to 100 acres More than 100 acres	\$1,000 \$2,000 \$4,000
Transition area waiver (any type) and an individual freshwater wetlands or open water fill permit	Either the applicable transition area waiver fee or the individual permit fee, whichever is higher			
Transition area waiver (any type) and one or more general permit authorizations	The applicable transition area waiver fee, plus \$600.00 for the first general permit authorization, and \$240.00 for each additional general permit authorization	Additional fee for the review of runoff quantity calculations (pursuant to N.J.A.C. 7:8-5.4(a)3) per area of land disturbed by the project	Up to three acres More than three acres and up to 10 acres More than 10 acres and up to 100 acres More than 100 acres	\$500 \$1,000 \$2,000 \$4,000
Transition area waiver extension	\$240.00			
Application fees for exemption letters (N.J.A.C. 7:7A-2.10):				
<u>Type of approval</u>	<u>Fee</u>			
Exemption letter	\$240.00	Additional fee for the review of water quality calculations (pursuant to N.J.A.C. 7:8-5.5) per area of impervious surface under review	Up to one acre More than one acre and up to three acres More than three acres and up to 10 acres More than 10 acres	\$500 \$1,000 \$2,000 \$4,000
Application fees for individual permits (N.J.A.C. 7:7A-7):				
<u>Type of approval</u>	<u>Fee</u>			
Individual freshwater wetlands or open water fill permit	\$2,400 plus \$240.00 per 1/10 acre affected <sup>4</sup>	Additional fee if any vegetation is removed within a Special Water Resource Protection Area (pursuant to N.J.A.C. 7:8-5.5(h))	Any size project	\$2,000
Individual permit extension	\$1,200			
Application fees for modifications (N.J.A.C. 7:7A-14)				
<u>Type of approval</u>	<u>Fee</u>			
Minor modification	\$240.00			
General permit authorization modification	\$240.00			
Major modification	25 percent of the application fee originally charged for the approval that is being modified, or \$240.00, whichever is higher.			
Application fees for Water Quality Certifications (N.J.A.C. 7:7A-2.1(d)):				
<u>Type of approval</u>	<u>Fee</u>			
Water Quality Certificate	\$2,400 plus \$240.00 per 1/10 acre affected			
Water Quality Certificate extension	\$1,200			
Additional Fees for Major Developments pursuant to N.J.A.C. 7:8-1.2 (N.J.A.C. 7:7A-4.3(b)10, 5.11 and 7.2):				
<u>Qualifier</u>	<u>Area of Impact</u>	<u>Fee</u>		
Base fee for any major development	Any size project	\$2,000		
Additional fee for the review of	Up to three acres	\$500		

- <sup>1</sup> When these fee tables refer to a cost "per acre," this means the cost is per acre or fraction thereof. For example, an area of one and one third acres would have the same fee as an area of two acres. When these fee tables refer to a cost "per 1/10 acre," this means the cost is per tenth of an acre or fraction thereof, such that an area of 0.12 acres would have the same fee as an area of 0.2 acres. When these fee tables refer to an "acre affected," this means an acre of freshwater wetlands, State open waters, or transition area that will be affected by a regulated or prohibited activity.
- <sup>2</sup> See note 1 above.
- <sup>3</sup> See note 1 above.
- <sup>4</sup> See note 1 above.

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).

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

Former N.J.A.C. 7:7A-11.1, Application contents for Individual Freshwater Wetlands and Open Water Fill Permits, was repealed.

Amended by R.2003 d.298, effective July 21, 2003.  
See: 35 N.J.R. 928(a), 35 N.J.R. 3354(a).

Amended the fee tables.

Amended by R.2006 d.349, effective October 2, 2006.  
See: 37 N.J.R. 3125(a), 38 N.J.R. 4209(a).

Amended fee tables.

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (b)2, inserted "and" at the end; in (b)3, substituted a period for "and" at the end; deleted (b)4; in the introductory paragraph of (d), substituted "Division of Land Use Regulation" for "Land Use Regulation Program"; in (d)2, inserted the "Example"; in the "Application fees for general permit authorizations (N.J.A.C. 7:7A-5)" section of the fee tables in (g), deleted entries for "Combined general permit 2 authorization and flood hazard area Permit", "General permit 10A, 11, or 20 authorization combined with a major flood hazard area permit", "General permit 10A, 11 or 20 combined with a minor flood hazard area permit" and "Combined general permit 26 authorization and flood hazard area Permit"; in the "Fee" column of the "Application fees for transition area waivers (N.J.A.C. 7:7A-6)" section of the fee tables in (g), deleted "affected" following "\$1,080 plus \$96.00 per acre"; and in the "Fee" column of the "Application fees for modifications (N.J.A.C. 7:7A-14)" section, substituted "\$240.00" for "None" in the entry for "Minor modification".

### 7:7A-11.2 (Reserved)

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

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

Section was "Recordkeeping".

### 7:7A-11.3 through 7:7A-11.4 (Reserved)

## SUBCHAPTER 12. DEPARTMENT REVIEW OF APPLICATIONS

### 7:7A-12.1 Completeness review

(a) Within 20 working days, as defined at N.J.A.C. 7:7A-1.4, after receiving an application, the Department shall review the application as follows:

1. If all items required by the application checklist are included, the Department shall declare the application administratively complete. However, if an included item is clearly deficient, the item shall not be considered to be included and the Department shall declare the application administratively incomplete; and

2. If each application item is adequate to allow the Department to determine if the proposed project complies with this chapter, the Department shall declare the application technically complete.

(b) If the application is not administratively complete under (a)1 above, the Department shall return the application to the applicant with a list of the missing items. The applicant may resubmit the application at any time. If the application is resubmitted within one year, the original application fee shall be credited to the fee for the resubmitted application. If the application is not resubmitted, the applicant may obtain a fee refund upon request.

(c) If the application is administratively complete under (a)1 above, the Department shall:

1. Notify the applicant that the application is administratively complete;

2. Transmit a copy of the application to other agencies if required under this chapter. For example, an application for an individual permit for a major discharge must be transmitted to EPA for comment under N.J.A.C. 7:7A-12.2;

3. Publish notice of the application in the DEP Bulletin; and

4. If the application is not technically complete under (a)2 above, request any additional information necessary for technical completeness.

(d) If the Department requests additional information under (c)4 above, the applicant shall provide copies of the additional information to the persons who received a copy of the initial application under N.J.A.C. 7:7A-10.8, and to the reviewing agencies who received a copy under (c)2 above.

(e) If an application is returned for incompleteness under (b) above, the applicant may submit a new application without repeating the public notice requirements of N.J.A.C. 7:7A-10.8 if the new application:

1. Is submitted within 60 days after the date the Department returned the original submittal; and

2. Is sufficiently similar to the original submittal that the original public notice would provide reasonable notice of the characteristics of the new submittal to potential interested parties.

(f) If a person submits an application and does not receive a response from the Department within the deadlines imposed in this subchapter, the person shall not be entitled to assume that the application is approved, except if the application is for authorization of the following activities and complies with the applicable general permit:

1. Maintenance of a stormwater management facility under general permit 1;

2. Repair of a malfunctioning individual subsurface sewage disposal system under general permit 25; or

3. Minor channel or stream cleaning activities under general permit 26.

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

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

Section was "Initial Department action for Individual Freshwater Wetlands and Open Water Fill Permits".

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (d) and the introductory paragraph of (e), updated the N.J.A.C. references.

### 7:7A-12.2 USEPA review

(a) Because the Department has assumed responsibility for the Federal 404 program in most freshwater wetlands and State open waters in New Jersey, the Federal Act requires that the USEPA oversee the State's administration of the program set forth in this chapter. 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. In areas where the Department has assumed the Federal 404 program, the Department's freshwater wetlands or open water fill permit constitutes the permit required under this chapter as well as the Federal 404 permit, unless the permit specifies otherwise.

(b) The Department shall transmit the following items to USEPA for review:

1. Each new proposed draft general permit. In general, an application for authorization to act under an adopted general permit will not require USEPA review, unless the activity proposed under the general permit itself constitutes a major discharge;
2. Each application involving a major discharge, as defined at N.J.A.C. 7:7A-1.4;
3. Any permit application, or category of permit applications, that the Department determines is appropriate for USEPA review;
4. Any permit application that USEPA requests to review;
5. Any additions or changes made to an application listed at (b)2 through 4 above after the application has been submitted to USEPA, as a result of a contested case proceeding in the Office of Administrative Law; and
6. For informational purposes, an initial decision issued by an administrative law judge in a contested case proceeding which involves an application listed at (b)2 through 4 above.

(c) For an item that requires USEPA review under (b) above, the Department shall promptly transmit to the Regional Administrator:

1. A complete copy of the item;
2. Notice of every significant action taken by the Department related to the consideration of the permit application or other item; and
3. A copy of any decision on the application or other item.

(d) If USEPA intends to comment upon, object to, or make recommendations with respect to an item, or with respect to the Department'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 Department of this intent within 30 days of receipt of the permit application or other item. If the Department has been so notified, the permit or other item shall not be issued until after the receipt of such comments or within 90 days of the USEPA's receipt of the application or other item, or the Department response, whichever comes first. The USEPA may notify the Department 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 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. However, the Department may issue a freshwater wetlands permit. Such a permit shall satisfy only the requirements of the New Jersey Freshwater Wetlands Protection Act and the permit shall not constitute a 404 permit. In such a case, the applicant would be responsible for obtaining any necessary 404 program approvals from the ACOE.

(f) Within 90 days after receiving an objection or requirement for a permit condition by the USEPA, the Department or any interested person may request that the USEPA hold a public hearing on the objection or requirement. USEPA shall conduct a public hearing if requested by the Department, or if warranted by significant public interest based on requests received.

(g) If USEPA holds a public hearing under (f) above, USEPA shall, following that hearing, reaffirm, modify or withdraw the objection or requirement for a permit condition. USEPA shall notify the Department of this decision.

(h) If USEPA holds a public hearing, the Department shall have 30 days after USEPA gives the Department notice of its decision under (g) above to take either of the actions at (i)1 or 2 below. If USEPA does not hold a public hearing, the Department shall have 90 days after receiving USEPA's original objection or requirement for a permit condition to take either of the actions at (i)1 or 2 below.

(i) The Department shall take one of the following actions within the applicable deadline in (g) or (h) above:

1. If the USEPA has withdrawn the objection or requirement for a permit condition, the State may issue the Federal 404 permit; or
2. If the USEPA has not withdrawn the objection or requirement for a permit condition, the Department must do one of the following:
  - i. Issue a revised permit satisfying the USEPA's objection or including the required permit condition;
  - ii. Notify USEPA of its intent to deny the permit. If the Department intends to deny the permit it shall notify EPA of this intent within 30 days after receiving USEPA's notification; or
  - iii. Issue a State freshwater wetlands permit that does not constitute a Federal 404 permit and require the applicant to apply to the appropriate Federal agency for a permit under the Federal 404 program.

“Watershed Management Area” means an aggregation of HUC 11s, as defined at N.J.A.C. 7:7A-1.4, designated by the Department as a watershed management area and shown on the map entitled “New Jersey’s Watersheds, Watershed Management Areas, and Water Regions,” dated April 2000, as amended and supplemented. The map of watershed management areas may be obtained from the Department’s Division of Watershed Management at (609) 984-0058, or may be viewed on the internet at <http://www.state.nj.us/dep/gis>.

“Wetlands Mitigation Council” or “Council” means the body established under N.J.S.A. 13:9B-14 to perform the functions enumerated at N.J.S.A. 13:9B-15. The Wetlands Mitigation Council administers the Wetlands Mitigation Fund.

“Wetlands Mitigation Fund” means the repository for monetary contributions made for mitigation purposes, established at N.J.S.A. 13:9B-14a as the “Wetlands Mitigation Bank.”

Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In definition “Enhancement”, inserted “nor does the removal of trash or debris”; added definition “Mitigation banking instrument”; and in definition “Upland preservation”, inserted “or easement”.

**Case Notes**

Administrative Law Judge correctly concluded that no settlement existed, particularly in light of the undisputed fact that respondents failed to submit a restoration plan which was required by regulation for any settlement. N.J. Dep’t. of Env’tl. Prot. v. Huger, OAL Dkt. No. ESA 0505-04, 2008 N.J. AGEN LEXIS 1245, Final Decision (July 30, 2008).

**7:7A-15.2 General mitigation requirements**

(a) The Department shall not consider a mitigation proposal in determining whether to approve a permit for a project.

(b) The Department may require mitigation in accordance with this chapter in order to compensate for impacts to a freshwater wetland, State open water and/or transition areas resulting from the following:

1. Regulated activities authorized under an individual or general freshwater wetlands or open water fill permit;
2. Certain violations of the Freshwater Wetlands Protection Act and/or this chapter; and
3. Regulated activities approved in accordance with a special activity transition area waiver at N.J.A.C. 7:7A-6.3(g).

(c) Mitigation shall, at a minimum, fully compensate for the loss of ecological value caused by a disturbance, by replacing any freshwater wetlands and/or State open waters values and functions lost or disturbed with equal values and functions. To do this, mitigation shall meet all of the following criteria:

1. The mitigation alternative and the location of the mitigation shall comply with N.J.A.C. 7:7A-15.5 or 15.6, whichever applies;

2. If the mitigation is restoration, creation, or enhancement:

- i. The acreage amount of mitigation shall be that required under N.J.A.C. 7:7A-15.8; and
- ii. The mitigation shall be in-kind mitigation, as defined at N.J.A.C. 7:7A-15.1, unless the Department determines that, because of special circumstances, out-of-kind mitigation would be more likely to provide equal functions and values;

3. If the mitigation is credit purchase, the credits purchased shall be appropriate to the type of disturbance and the purchase shall comply with this chapter and the Council’s authorization of the mitigation bank. For example, if credits were awarded by the Council for use as mitigation for disturbances of wetlands within a certain service area, the credits shall not be considered appropriate as mitigation for a disturbance outside of the service area. The amount of credits shall be determined under N.J.A.C. 7:7A-15.8(f);

4. If the mitigation is uplands preservation, the mitigation shall meet the requirements of N.J.A.C. 7:7A-15.9;

5. If the mitigation is a monetary contribution, the amount of the monetary contribution shall be approved by the Council in accordance with N.J.A.C. 7:7A-15.21; and

6. If the mitigation is land donation, the land to be donated shall be approved by the Council in accordance with N.J.A.C. 7:7A-15.22.

(d) To be approved under this subchapter, mitigation must have a high probability of long term success. At a minimum, this requires the following:

1. Adequate financial and other resources must be dedicated to the project;
2. The project must be designed to take advantage of and work within the existing conditions in the proposed mitigation area to the extent possible;
3. The hydrology in and around the mitigation area must be adequate to support wetland conditions year round and indefinitely into the future. The hydrology for a proposed wetland mitigation site shall not include discharged stormwater;
4. The soils (and hydrology) in the mitigation area must be adequate to support wetland conditions; and
5. The responsibility for long term maintenance of the mitigation area must be clearly assigned to an entity that has the resources to ensure long term maintenance of the mitigation area. For upland preservation or land donation, a maintenance fund shall be created in accordance with N.J.A.C. 7:7A-15.17(c) or 15.19(c), respectively.

(e) Mitigation under this subchapter requires prior Department approval. In addition, if the mitigation shall be through a monetary contribution or a land donation, the amount of money or the particular parcel of land must also be approved by the Wetlands Mitigation Council.

(f) All correspondence with the Department and/or the Mitigation Council, including requests for application forms and checklists, and applications for Council approval or funding, shall be addressed to:

Mitigation Staff  
 NJDEP Division of Land Use Regulation  
 P.O. Box 439  
 Trenton, New Jersey, 08625  
 (609) 984-0194  
[lurweb@dep.state.nj.us](mailto:lurweb@dep.state.nj.us)

(g) When the Department requires mitigation, the permit, approval or enforcement document under which the mitigation is required shall authorize any regulated or prohibited activities, as defined at N.J.A.C. 7:7A-1.4, necessary to accomplish the mitigation. When mitigation is required for a disturbance that is not subject to a Department-issued permit, for example, when mitigation is required by the ACOE, the mitigation itself must be authorized through a permit or enforcement document issued by the Department under this chapter. In some cases, mitigation also involves activities that require approval through one or more other Division of Land Use Regulation permits, such as a flood hazard area, CAFRA, or Waterfront Development permit; or through other State or Federal permits. In such a case, mitigation shall not begin without these approvals.

(h) If a mitigation requirement arises from a violation rather than a permit, the Department shall determine the mitigation alternative required on a case-by case basis, taking into consideration the size and severity of the violation and the functions and values provided by the proposed mitigation. A mitigation proposal submitted as part of a settlement of an enforcement action shall provide for mitigation that is at least as ecologically valuable as mitigation that would be required under this chapter as a result of a permit. This may include an increase in mitigation to compensate for the time lapse between the disturbance and the completion of mitigation, such as that required at N.J.A.C. 7:7A-15.3(b).

(i) A mitigation area shall be permanently protected from future development in accordance with N.J.A.C. 7:7A-15.14 and in accordance with N.J.A.C. 7:7A-2.12.

(j) If mitigation is performed through uplands preservation or land donation, the mitigator shall transfer all rights in the mitigation area to a government agency or charitable conservancy in accordance with N.J.A.C. 7:7A-15.17(c) or 15.19(c), respectively. A mitigation banker shall also transfer a mitigation bank to a government agency or charitable conservancy after the bank is successfully completed, in accordance with N.J.A.C. 7:7A-15.23(i).

(k) Upon approval by the Department, a permittee may aggregate the mitigation for multiple disturbances, so as to perform mitigation for more than one disturbance with a single mitigation project. Such an aggregated mitigation project shall be used only as mitigation for disturbances performed

by the permittee, unless the permittee obtains Council approval of the project as a mitigation bank under this subchapter.

(l) An activity that is required in order to satisfy Federal, State, or local government requirements, other than those imposed under this chapter, shall not qualify as mitigation under this subchapter. For example, if land is required by a county to be preserved as open space, the Department shall only approve the parcel for a land donation if the applicant also performs wetlands restoration or enhancement in accordance with this subchapter.

(m) A permittee may use one mitigation alternative or a combination of mitigation alternatives to compensate for a permitted disturbance.

(n) Upon approval of the Department, a permittee may aggregate onto one site the mitigation for multiple small (less than 0.5 acre in size), wetland disturbances resulting from the same project but that span several Watershed Management Areas.

Amended by R.2008 d.291, effective October 6, 2008.  
 See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In the introductory paragraph of (b), substituted a comma for "and/or" following "wetland" and inserted "and/or transition areas"; in (b)1, deleted "and" from the end; in (b)2, substituted "; and" for a period at the end; added (b)3; in (d)3, inserted ". The hydrology for a proposed wetland mitigation site shall not include discharged stormwater"; in the second line of the address in (f) and in (g), substituted "Division of Land Use Regulation" for "Land Use Regulation Program"; in (i), inserted "and in accordance with N.J.A.C. 7:7A-2.12"; and added (n).

### 7:7A-15.3 Timing of mitigation

(a) Mitigation shall be performed within the applicable time period below:

1. Mitigation for a disturbance authorized by a permit, other than a temporary disturbance, as defined at N.J.A.C. 7:7A-1.4, shall be performed prior to or concurrently with the permitted activity except that no regulated activities shall occur before the Department has approved a mitigation proposal, and shall be continued to completion according to the schedule in the approved mitigation proposal;
2. Mitigation for a temporary disturbance authorized by a permit shall be started immediately following completion of the activity that caused the disturbance, and shall be continued to completion within six months after the end of the activity that caused the disturbance; and
3. Mitigation required as part of an enforcement action shall be performed in accordance with a schedule in the enforcement document.

(b) If a permittee fails to perform mitigation within the applicable time period in (a) above, the acreage of mitigation required shall be increased by 20 percent each year after the date mitigation was to begin. This shall compensate for the absence of the functions and values that were to be provided by the mitigation project during the delay. For example, a

2. The cost of purchasing property and creating freshwater wetlands of equal functions and values to those which are being lost.

(i) If land donation is the mitigation alternative, the Wetlands Mitigation Council shall determine on a case-by-case basis whether the acreage of land specified in the mitigation proposal will result in a mitigation area large enough to be a valuable component of the freshwater wetlands ecosystem. In making this determination, the Council shall consult the sources, and consider the conditions, referenced in (j) below and in N.J.A.C. 7:7A-15.22(b).

(j) A person shall carry out the full acreage amount of mitigation required under this section, unless the person demonstrates, through use of productivity models or other similar studies, that a smaller mitigation area will result in a mitigation area sufficient to comply with this section. However, under no circumstances shall a mitigation area be smaller than the disturbed area. To demonstrate that a smaller mitigation area will be sufficient to provide equal functions and values to those lost, the person shall provide current scientific literature concerning wetlands, aquatic resources, and mitigation; as well as information regarding the conditions on the site of the disturbance and on the proposed mitigation site, including soil, vegetation, any existing contamination or other degradation, water quality functions, flood storage capacity, soil erosion and sediment control, wildlife habitat, and any other relevant data.

(k) If a proposed mitigation area is affected by an easement or other encumbrance, the portion of the property affected by the encumbrance will not be considered in calculating the total amount of mitigation provided, unless the applicant demonstrates that the encumbrance will not prohibit compliance with the mitigation requirements of this chapter.

(l) If a mitigation requirement arises from a violation, the Department shall determine the amount of mitigation required on a case-by case basis, taking into consideration the size and severity of the violation and the functions and values provided by the proposed mitigation. A mitigation proposal submitted as part of a settlement of an enforcement action shall require mitigation that provides functions and values at least equal to those that would be required under this chapter as a result of a permit. This may include an increase in mitigation to compensate for the time lapse between the disturbance and the completion of mitigation, such as that required at N.J.A.C. 7:7A-15.3(b).

#### Case Notes

Although the Department of Environmental Protection was clearly vested with the power to order restoration or monetary penalties or both in the face of a violation of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., it had to do so on a case-by-case basis, taking into consideration the circumstances of a particular violation as well as the potential impact of remediation. N.J. Dep't. of Env'tl. Prot. v. Huger, OAL Dkt. No. ESA 0505-04, 2008 N.J. AGEN LEXIS 1245, Final Decision (July 30, 2008).

#### 7:7A-15.9 Requirements for upland preservation

(a) The Department shall approve mitigation through preservation of uplands only if the uplands meet the requirements in this section.

(b) Preserved uplands shall be valuable for the protection of a freshwater wetlands ecosystem. Factors the Department shall consider in evaluating an area for upland preservation include, but are not limited to:

1. The size and configuration of the uplands in relation to freshwater wetlands and/or State open waters, and the effect the preservation of these uplands would have on the wetlands or waters;

2. The diversity of the ecological communities on the entire site;

3. Whether the uplands to be preserved are located in the same HUC 11 as the disturbance;

4. Whether the uplands to be preserved are adjacent to a freshwater wetland that:

i. Contains exceptional resource value wetlands;

ii. Contains critical habitat for flora or fauna, as defined at N.J.A.C. 7:7A-1.4;

iii. Contains wetlands or waters draining to trout maintenance waters, as defined at N.J.A.C. 7:9B, or into public drinking water sources;

iv. Is adjacent to public lands containing wetland preserves, such as Federal wildlife refuges, State wildlife management areas, State parks or forests, State, County or local wetland preservation areas, or wetland preservation areas held by non-profit conservation organizations;

v. Has unique aspects or characteristics that contribute to its ecological value, such as an unusual or regionally rare type of wetland;

5. The relationship of the proposed uplands to existing and planned development;

6. Whether the uplands have been designated for preservation in a watershed management area plan approved by the Department under the Water Quality Management Planning Act, N.J.S.A. 58:11A-1 et seq., and implementing rules at N.J.A.C. 7:15; and

7. Whether the site contains solid or hazardous waste, or contains water or soil pollution. Uplands that contain waste or pollution shall not be considered valuable for the protection of a freshwater wetlands ecosystem.

(c) The amount of uplands preserved shall be sufficient to ensure that the functions and values resulting from the preservation of the uplands will fully compensate for the loss of functions and values caused by the disturbance, in accordance with N.J.A.C. 7:7A-15.2(c). In determining if an upland preservation proposal will fully compensate for a

disturbance, the Department shall consult the sources, and consider the conditions, referenced in N.J.A.C. 7:7A-15.8(j). At a minimum, the uplands preserved shall be:

1. At least five acres in size, and significantly larger than the area that would be required for any other mitigation alternative, to compensate for the fact that uplands preservation, unlike other mitigation alternatives, does not directly replace the wetland values and functions destroyed by a disturbance; and

2. If adjacent to a wetland, the uplands preserved shall include the standard transition area required for the wetlands under N.J.A.C. 7:7A-2.5, plus an additional area at least 150 feet wide, measured from the outer edge of the transition area.

(d) If mitigation is performed through upland preservation, the mitigator shall transfer the mitigation area in fee simple to a government agency or charitable conservancy, as defined at N.J.A.C. 7:7A-1.4, in accordance with N.J.A.C. 7:7A-15.17(c).

#### 7:7A-15.10 Conceptual review of a mitigation area

(a) The Department strongly recommends that an applicant obtain the Department's conceptual review of any land being considered as a potential mitigation area, prior to submittal of a mitigation proposal involving restoration, creation, enhancement, uplands preservation, or land donation.

(b) An applicant may request a conceptual review at any time prior to submittal of a mitigation proposal. However, the Department strongly recommends that an applicant obtain a Department conceptual review before buying the land for a mitigation area.

(c) To obtain the Department's conceptual review of a mitigation area, the applicant shall submit a written request, including:

1. A brief description of the area and the mitigation project being considered;
2. A map showing Department staff how to find the mitigation area;
3. A USGS quad showing the mitigation area;
4. A county soil survey showing the soils in the mitigation area and identifying all potential, suspected and/or known contamination on the site; and
5. Unconditional written consent from the owner of the proposed mitigation area allowing Department representatives to enter the property and inspect the mitigation area.

(d) Upon receipt of a complete request for a conceptual review, the Department may schedule a site inspection. At a site inspection, Department staff shall candidly discuss the apparent strengths and weaknesses of the proposed mitigation area, but all guidance provided shall be non-binding on the

Department. A Department decision on a proposed mitigation area or mitigation proposal is binding only if it is incorporated into an approval obtained in accordance with this subchapter. A conceptual review does not grant any property or other rights, and does not authorize mitigation activities.

Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (c)4, inserted "and identifying all potential, suspected and/or known contamination on the site".

#### 7:7A-15.11 Basic requirements for all mitigation proposals

(a) A mitigation proposal shall be submitted within the applicable time period below:

1. For mitigation required by an individual permit, the mitigation proposal shall be submitted at least 90 days prior to the start of activities authorized by the permit. Activities authorized by the permit shall not begin until the mitigation proposal is approved and the mitigation has begun;

2. For mitigation required by a general permit authorization, the mitigation proposal shall be submitted no later than 120 days prior to the initiation of regulated activities authorized by the general permit; and

3. For mitigation requirements arising from a violation, the mitigation proposal shall be submitted by the deadline set forth in the Department's enforcement document.

(b) The mitigation proposal shall provide all information necessary for the Department to determine if the requirements of this subchapter are met. The information required for each mitigation alternative is set forth in a mitigation proposal checklist, provided by the Department. To obtain the mitigation proposal checklist for a particular mitigation alternative, contact the Department at the address in N.J.A.C. 7:7A-15.2(f).

1. The applicant shall also provide notification in accordance with N.J.A.C. 7:7A-10.8(j) for all mitigation proposals that include creation, enhancement or restoration (except restoration for a temporary disturbance).

(c) In order to demonstrate that an offsite mitigation alternative is not feasible under this subchapter, an applicant shall provide to the Department a list of at least six potential areas upon which the mitigation alternative might be performed. Each of these potential areas shall:

1. Be located at a practical elevation suitable for a wetland or State open water;
2. Have an adequate water supply;
3. Be large enough for the mitigation proposed;
4. Be available for purchase; and
5. Meet the requirements of N.J.A.C. 7:7A-15.4(h) regarding contamination.

(d) A mitigation proposal submitted as part of a settlement of an enforcement action shall provide for mitigation that is at least as ecologically valuable as mitigation that would be required under this chapter as a result of a permit. This may

include an increase in the amount of mitigation to compensate for the time that has elapsed between the disturbance and the completion of mitigation, such as that required at N.J.A.C. 7:7A-15.3(b).

each. For example, alternative sites, grading plans, or hydrologic manipulations;

xiii. Financial assurances meeting the requirements of N.J.A.C. 7:7A-15.13;

xiv. Proposed compensation ratios, that is, the number of credits the bank operator proposes to generate and sell, based on the type and amount of mitigation performed at the bank; and

xv. Provisions for long-term management and maintenance of the mitigation bank site;

5. Site plans, cost estimates and schedules for construction, completion, and transfer of the mitigation bank;

6. Draft legal instruments necessary to meet the requirements of this chapter, including a conservation restriction or easement, financial assurance, property transfer, or agreement with a charitable conservancy to maintain the site; and

7. Identification of the persons who will construct, operate (debit and credit) and maintain the mitigation bank and mitigation bank site.

(c) An application for approval of a mitigation bank shall be submitted to Department staff at the address in N.J.A.C. 7:7A-15.2(f). Department staff shall notify the applicant of any additional information required to make the application complete. The applicant shall then submit five copies of the complete application to the Department staff.

(d) Each Department approval shall incorporate conditions as necessary to ensure that the requirements of this chapter are met.

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Section was "Application for Wetlands Mitigation Council approval of a mitigation bank". Substituted "Department" for "Council" throughout; in the introductory paragraph of (a), substituted "A" for "The Department recommends that a", inserted the first occurrence of "shall" and inserted the fifth and sixth sentences; in the introductory paragraph of (a)2, inserted ", identified in accordance with 7:7A-12.2"; added (a)2i and (a)2ii; in (a)7, deleted "Council and" preceding "Department"; in (b)2, deleted "and/or the Council" following "Department"; in (b)4v, added the last sentence; added (b)4v(1) through (b)4v(3); in (b)6, inserted "or easement"; and in (c), substituted "five" for "10" and deleted the final sentence.

**7:7A-15.26 Mitigation for transition area impacts in accordance with N.J.A.C. 7:7A-6.3(g) (special activity transition area waivers based upon individual permit criteria)**

(a) This section governs the mitigation alternative required and the location of mitigation in relation to the disturbance for a transition area impact in accordance with N.J.A.C. 7:7A-6.3(g) (special activity transition area waivers based upon individual permit criteria). Mitigation for a transition area disturbance shall be performed through restoration or

enhancement of transition areas carried out on the site of the disturbance to the maximum extent feasible.

(b) If onsite transition area restoration or enhancement is not feasible, mitigation shall be performed through any of the following, at the applicant's option:

1. The purchase of credits from a mitigation bank located in the same HUC 11 as the disturbance or in an adjacent HUC 11 within the same watershed management area;

2. The purchase of credits from a mitigation bank approved by the Wetlands Mitigation Council prior to January 1, 1999, which includes the disturbance site in its bank service area; or

3. Offsite restoration or enhancement in the same HUC 11 or in an adjacent HUC 11 within the same watershed management area as the disturbance.

(c) If transition area mitigation under (b) above is not feasible, transition area mitigation shall be performed through either of the following, at the applicant's option:

1. The purchase of credits from a mitigation bank in the same watershed management area as the disturbance; or

2. Restoration, enhancement, or upland preservation in the same watershed management area as the disturbance.

(d) If transition area mitigation is not feasible under (b) or (c) above, mitigation shall be performed through:

1. The purchase of credits from a mitigation bank which includes the disturbance site in its bank service area; or

2. Restoration or enhancement in the same drainage basin.

(e) If transition area mitigation is not feasible under (b), (c) or (d) above, mitigation shall be performed through:

1. A monetary contribution in accordance with N.J.A.C. 7:7A-15.21;

2. Upland preservation, in accordance with N.J.A.C. 7:7A-15.9; or

3. A land donation approved by the Wetland Mitigation Council in accordance with N.J.A.C. 7:7A-15.22.

New Rule, R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

**SUBCHAPTER 16. ENFORCEMENT**

**7:7A-16.1 General provisions**

(a) For the purposes of this subchapter (N.J.A.C. 7:7A-16), the term "applicable law and/or condition" means one or more applicable provisions or conditions of the Freshwater

Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.; and/or any letter of interpretation, permit, agreement, transition area waiver, order, settlement, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto.

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

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

1. Issue an administrative order under N.J.A.C. 7:7A-16.3;
2. Bring a civil action under N.J.A.C. 7:7A-16.4;
3. Assess a civil administrative penalty under N.J.A.C. 7:7A-16.5 through 16.13, and in accordance with the grace period requirements set forth at N.J.A.C. 7:7A-16.20;
4. Bring an action for a civil penalty under N.J.A.C. 7:7A-16.14; and/or
5. Bring a criminal action under N.J.A.C. 7:7A-16.15.

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

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

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

(g) Each applicant and/or permittee shall provide, upon the request of the Department, any information the Department requires to determine compliance with any applicable law and/or condition.

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

Stylistic changes only.  
Amended by R.2001 d.312, effective September 4, 2001.  
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).  
Amended by R.2007 d.243, effective August 20, 2007.  
See: 38 N.J.R. 2913(a), 39 N.J.R. 3524(a).

In (c)3, inserted “, and in accordance with the grace period requirements set forth at N.J.A.C. 7:7A-16.19”.  
Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (a), updated the second N.J.S.A. reference.  
Amended by R.2009 d.264, effective August 17, 2009.  
See: 40 N.J.R. 4657(a), 41 N.J.R. 3066(a).

In (a), updated the N.J.S.A. reference, inserted “letter of interpretation,” “agreement, transition area” and “settlement,”; in (c)3 through (c)5, updated the N.J.A.C. references; in (d), substituted “each violation under this chapter” for “all violations under this subchapter”; and added (g).

#### Case Notes

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

#### 7:7A-16.2 USEPA review

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

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

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

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

Amended by R.2009 d.264, effective August 17, 2009.  
See: 40 N.J.R. 4657(a), 41 N.J.R. 3066(a).

Substituted “enforcement” for “implementation”.

#### 7:7A-16.3 Administrative order

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

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

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

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

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

(b) A request for an adjudicatory hearing under this subchapter shall be submitted as follows:

1. Submit the original request to:

Office of Legal Affairs  
ATTENTION: Adjudicatory Hearing Requests  
Department of Environmental Protection  
401 East State Street, 4th Floor  
P.O. Box 402  
Trenton, New Jersey 08625-0402

2. Submit a copy of the request to:

Bureau of Coastal and Land Use Compliance and Enforcement  
Department of Environmental Protection  
401 East State Street, 4th Floor  
P.O. Box 422  
Trenton, New Jersey 08625-0422

(c) If the Department does not receive the hearing request within 35 days after the violator receives the notice of civil administrative penalty assessment and/or the administrative order which is being contested, the Department shall deny the hearing request.

(d) If the violator fails to include all the information required by (a) above, the Department may deny the hearing request.

(e) Any adjudicatory hearing shall be conducted 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).

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

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

Former N.J.A.C. 7:7A-16.7, Fees for the review and processing of requests for permit modifications, was repealed.

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (b), substituted "08625-0402" for "08625-402" in the address.

Amended by R.2009 d.264, effective August 17, 2009.

See: 40 N.J.R. 4657(a), 41 N.J.R. 3066(a).

In the introductory paragraph of (a), substituted "addresses" for "address"; rewrote (b); and in (c), substituted "35" for "20".

**7:7A-16.8 Civil administrative penalty amount for failure to obtain a permit prior to conducting regulated activities**

(a) When the Department assesses a civil administrative penalty for the failure to obtain a permit prior to conducting regulated activities, the Department shall use the procedures in this section to determine the amount of the penalty if the violation pertains to freshwater wetlands and/or freshwater wetland transition areas, except if the violation type is listed at N.J.A.C. 7:7A-16.9, 16.10, 16.11, or 16.12, in which case the penalty amount shall be determined under whichever of those sections applies. For the purposes of this section, permit shall have the meaning set forth at N.J.A.C. 7:7A-1.4.

(b) If a violation of this chapter pertains to State open waters, the Department shall not determine the amount of the civil administrative penalty under this subchapter, but shall determine the penalty under the Department's rules implementing the enforcement provisions of the Water Pollution Control Act at N.J.A.C. 7:14-8.

(c) The Department shall use the two factors described at (c)1 and 2 below, conduct and seriousness, to determine the amount of the base daily civil administrative penalty under this section. Using the standards below, the Department assigns each violation a point value for each factor. The total number of points is used in Table D at (d) below to determine the base penalty amount per day for each violation. The factors, and the point values assigned to them, are as follows:

1. The conduct factor of the violation shall be classified as major, moderate or minor and assigned points as follows:

i. Major conduct shall include an intentional, deliberate, purposeful, knowing or willful act or omission by the violator and is assigned five points;

ii. Moderate conduct shall include any unintentional but foreseeable act or omission by the violator and is assigned two points; and

iii. Minor conduct shall include any conduct not identified in (c)1i or ii above and is assigned one point.

2. The seriousness factor of the violation is assigned points as provided in (c)2i and ii below based on the acreage of wetlands and/or transition areas impacted and the resource value of the freshwater wetlands.

i. The acreage of wetlands and/or transition areas impacted shall be assigned points in accordance with (c)2i(1) through (7) below:

(1) A violation impacting greater than seven acres of wetlands and/or transition areas is assigned seven points;

(2) A violation impacting greater than four acres up to and including seven acres of wetlands and/or transition areas is assigned six points;

(3) A violation impacting greater than two acres up to and including four acres of wetlands and/or transition areas is assigned five points;

(4) A violation impacting greater than one acre up to and including two acres of wetlands and/or transition areas is assigned four points;

(5) A violation impacting greater than 0.5 acre up to and including one acre of wetlands and/or transition areas is assigned three points;

(6) A violation impacting greater than 0.25 acre up to and including 0.5 acre of wetlands and/or transition areas is assigned two points; and

(7) A violation impacting up to and including 0.25 acre of wetlands and/or transition areas is assigned one point; and

ii. The resource value classification shall be assigned points in accordance with (c)2ii(1) through (5) below. If the site of a violation contains regulated areas of more than one resource value classification, the points assigned to a violation for the highest resource classification on the site shall apply for the entire site:

- (1) A violation impacting exceptional resource classification wetlands is assigned five points;
- (2) A violation impacting intermediate resource classification wetlands is assigned four points;
- (3) A violation impacting ordinary resource classification wetlands is assigned three points;
- (4) A violation impacting only exceptional resource classification transition areas is assigned two points; and
- (5) A violation impacting only intermediate resource classification transition areas is assigned one point.

(d) The Department shall sum the total points assigned according to the two factors in (c) above, and shall determine the base penalty amount per day using the following table:

Table D  
Base penalty points table

Total Points	Base Penalty Amount
	Per Day
17	\$25,000
16	23,000
15	21,000
14	19,000
13	17,000
12	15,000
11	13,000
10	11,000
9	10,000
8	9,000
7	8,000
6	6,000
5	5,000
4	4,000
3	3,000

(e) The Department shall subtract from the daily base penalty determined pursuant to (d) above a penalty mitigation amount calculated by multiplying the daily base penalty times the penalty mitigating factor multiplier pursuant to (e)1 or 2 below, if applicable.

1. Where the nature, timing and effectiveness of any measures taken by the violator to correct the violation and restore the site to its pre-disturbance condition results in compliance within 30 days of receipt of the notice of

violation from the Department, the mitigating factor multiplier is 0.50; or

2. Where a complete application for a general permit or an individual permit is submitted within 60 days of receipt of the notice of violation from the Department and an authorization under a general permit or an individual permit is subsequently obtained for the unauthorized regulated activity cited in the notice of violation without the need for any changes to the regulated activity for which the notice of violation was issued, the mitigating factor multiplier is 0.25.

(f) The total civil administrative penalty shall be the daily civil administrative penalty determined as provided under (c) through (e) above, multiplied by the number of days during which each violation continued.

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.

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

Former N.J.A.C. 7:7A-16.8, Fee refunds, was repealed.  
Amended by R.2009 d.264, effective August 17, 2009.  
See: 40 N.J.R. 4657(a), 41 N.J.R. 3066(a).

Section was "Civil administrative penalty amount". Rewrote (a) and (c); in the introductory paragraph of (d), substituted "two" for "three" and inserted "base"; rewrote Table D; and added (e) and (f).

Case Notes

Where respondent performed work and construction on his property in violation of N.J.A.C. 7:7A-2.2(a) and 7:7A-2.6(a), failed to obtain permits to perform this work, ignored more than one Notice of Violation, and did not present plans to implement a program to restore the property to its pre-disturbance state, the Department properly assessed at \$6,000 per day penalty; the Department was within its right to assign three violation points based on the conduct of property owner, two points based on the number of violations issued and additional violations after the NOV and one point based on the size of the disturbance, which was under one acre, for a total of six points (adopting with modification 2009 N.J. AGEN LEXIS 585). N.J. Dep't of Env'tl. Prot. v. Huhn, OAL Dkt. No. ESA 09276-06, 2009 N.J. AGEN LEXIS 754, Final Decision (October 7, 2009).

Civil penalty of \$15,000 for an owner's violations of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., was upheld where the owner did not take exception to administrative law judge's findings. The owner's ignorance of the law was no defense; likewise, ability to pay was not a consideration in assessing environmental penalties. N.J. Dep't. of Env'tl. Prot., Coastal and Land Use Compliance and Enforcement v. Flynn, OAL Dkt. No. ESA 6694-04, 2009 N.J. AGEN LEXIS 657, Final Decision (July 17, 2009).

Initial Decision (2007 N.J. AGEN LEXIS 262) adopted, which concluded that a \$12,000 penalty for violating the Freshwater Wetlands Protection Act, by filling, bulkheading, and erecting certain structures, was well within the reasonable penalty range; the fine was \$6,000 per day for 2 days in an effort to moderate sanctions against an individual homeowner. Fiocchi v. N.J. Dep't of Env'tl. Prot., OAL Dkt. No. ESA 6788-04, 6992-04 and 12132-04, 2007 N.J. AGEN LEXIS 922, Final Decision (June 20, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 176) adopted, which concluded that where respondent knowingly engaged in the unauthorized ditching and disruption of wetlands, a penalty of \$6,000 was warranted since the wetlands were of intermediate resource value (two points), the total disturbance was under an acre (one point), and the violation was intentional (three points). N.J. Dep't of Env'tl. Prot. v. Wagner, OAL

Dkt. No. ESA 04815-04, 2006 N.J. AGEN LEXIS 579, Final Decision (April 21, 2006).

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

Engaging in regulated 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.