

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”.

#### 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).

permit may authorize a disturbance, and require 10 acres of creation to compensate for that disturbance. If the disturbance is begun on January 1, 2001, but the mitigation is not performed prior to or concurrently with the disturbance and continued according to the approved schedule as required under (a)1 above, the acreage of creation required increases to 12 acres on January 1, 2002, in order to compensate for the absence of wetlands functions and values from the ecosystem during the time between the disturbance and the creation.

(c) In order to ensure compliance with (a) above, if mitigation is required for a publicly funded project, all work necessary to complete the mitigation shall be included in the contract awarded for the project, unless the applicant demonstrates that the mitigation will be performed by the applicant's staff and will not be awarded through a contract.

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)1, inserted "except that no regulated activities shall occur before the Department has approved a mitigation proposal".

#### **7:7A-15.4 Property suitable for mitigation and the criteria for addressing contaminated sites**

(a) Any offsite restoration, creation, enhancement, land donation, or upland preservation shall be carried out on private property, except that a government agency, as defined at N.J.A.C. 7:7A-1.4, may create, restore, or enhance on public land in accordance with this subchapter, as mitigation for a project funded solely with public monies, if the land was not acquired with Green Acres funding, as defined at N.J.A.C. 7:36-2.1, and any one of the following criteria is met:

1. The land is obtained or held by the government agency for mitigation;
2. The land is obtained by the government agency by default or operation of law, through a tax lien or other similar circumstance; or
3. The land obtained or held by the government agency is, or was formerly a wetland and the government agency is proposing to restore and/or enhance the wetland for mitigation.

(b) An improvement to a public facility which is intended for human use, such as a ball field, nature trail, or boardwalk, does not constitute mitigation.

(c) A person seeking property for a mitigation project under this subchapter shall review the applicable watershed management area plan, if any, 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 to determine if suitable properties are listed, and shall also review the applicable county mitigation inventory, if any, prepared in accordance with N.J.S.A. 13:9C-1 et seq.

(d) The Department shall not approve mitigation through creation, restoration, or enhancement in an area that is already highly ecologically valuable, for example if the area contains

a mature, well developed, ecologically desirable natural community; a State open water that supports fish; a forested habitat; or significant cultural or historic resources, as identified in accordance with N.J.A.C. 7:7A-12.2.

(e) The Department shall approve mitigation through creation, restoration, or enhancement only on property that is owned in fee simple and under the full legal control of the person responsible for performing the mitigation, or the person responsible for performing the mitigation shall demonstrate that the person has legal rights to the property sufficient to enable compliance with all requirements of his chapter. If a property is affected by an easement or other encumbrance, the person responsible for performing the mitigation shall ensure that the encumbrance is extinguished.

(f) The Department shall require a habitat assessment if the Department deems such an assessment necessary to determine if an area is suitable for mitigation through enhancement. Any habitat assessment shall be performed in accordance with a scientific protocol approved by the Department.

(g) The Department shall not approve mitigation that would destroy, jeopardize, or adversely modify a present or documented habitat for threatened or endangered species; and shall not jeopardize the continued existence of any local population of a threatened or endangered species.

(h) The Department shall not approve mitigation in an area that contains contamination until all potential contaminated areas have been identified, and all remediation of the area(s) is completed so that there is no potential for the mitigation activities to result in the reintroduction of contamination to ecological communities or exposure of humans to contamination, and there is no potential for the mitigation site to be contaminated by the belated discovery of new areas of contamination requiring remediation. The Department will determine on a case by case basis whether it is feasible on a site containing contamination to conduct onsite mitigation.

1. If the Department determines that there is reason to suspect contamination on the proposed mitigation area, the site must be properly characterized and assessed to ensure there is no ecological risk associated with the proposal. To obtain this characterization, the mitigator shall remediate the site pursuant to the Administrative Requirements for the Remediation of Contaminated Sites rules at N.J.A.C. 7:26C-2.4.

2. The applicant shall not submit a proposed mitigation bank containing known or suspected contamination to the Department for conceptual approval in accordance with N.J.A.C. 7:7A-15.25(a) until the site has been fully characterized in accordance with (h)1 above.

(i) Stormwater management facilities designed to treat stormwater shall not constitute mitigation.

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 "Property suitable for mitigation". In the introductory paragraph of (a), substituted "any one" for "either"; in (a)1, deleted "or" from the end; in (a)2, substituted "; or" for a period at the end; added (a)3; in (d), inserted ", as identified in accordance with N.J.A.C. 7:7A-12.2"; in (e), deleted "or shall demonstrate that the encumbrance will not inhibit compliance with the mitigation requirements of this chapter" from the end; rewrote the introductory paragraph of (h); and added (h)1, (h)2 and (i).

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

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

In (h)1, substituted "remediate the site pursuant to the Administrative Requirements for the Remediation of Contaminated Sites rules at N.J.A.C. 7:26C-2.4" for "establish a memorandum of agreement with the Department's Division of Remediation Management and Response in accordance with N.J.A.C. 7:26C in order to obtain a review of the submitted data".

### 7:7A-15.5 Mitigation for a smaller disturbance

(a) This section governs, for a smaller disturbance, the mitigation alternative required and the location of mitigation in relation to the disturbance. (See Figure 4 below for an illustration of the information in this section.) However, if a smaller disturbance is a temporary disturbance, as defined at N.J.A.C. 7:7A-1.4, it is governed by N.J.A.C. 7:7A-15.7. The acreage amount of mitigation required for both smaller and larger disturbances is determined under N.J.A.C. 7:7A-15.8.

(b) A smaller disturbance is:

1. A disturbance of 1.5 acres or less of freshwater wetlands or State open water; or
2. A disturbance affecting only ordinary resource value wetlands.

(c) The Department presumes that onsite mitigation for a smaller disturbance is not feasible. Therefore, mitigation for a smaller disturbance shall be performed through credit purchase in accordance with (d) below, unless the applicant demonstrates under (e) below that one of the following will be more environmentally beneficial:

1. Onsite restoration, creation or enhancement; or
2. Offsite restoration, creation, or enhancement, which is performed in the same HUC 11, as defined at N.J.A.C. 7:7A-1.4, as the disturbance, or performed in an adjacent HUC 11 within the same watershed management area as the disturbance.

(d) Mitigation through credit purchase shall be performed as follows:

1. Through the purchase of credits from either of the following:
  - i. A mitigation bank located in the same HUC 11 as the disturbance; or
  - ii. A mitigation bank approved by the Wetlands Mitigation Council prior to January 1, 1999, which in-

cludes the disturbance site in its bank service area. The service area for each mitigation bank is set forth in the Wetlands Mitigation Council approval for the bank;

2. If no credits are available from a bank listed in (d)1 above, through the purchase of credits from a mitigation bank located in a HUC 11 that is both adjacent to the HUC 11 in which the disturbance is located and within the same watershed management area, as defined at N.J.A.C. 7:7A-15.1, as the disturbance;

3. If no credits are available from a bank listed in (d)1 or 2 above, through the purchase of credits from a mitigation bank located anywhere in the same watershed management area as the disturbance; or

4. If no credits are available from a mitigation bank located in (d)1, 2, or 3 above, through the purchase of credits from a mitigation bank which includes the disturbance site in its bank service area.

(e) In determining if onsite or offsite mitigation for a smaller disturbance would be environmentally beneficial for the purposes of (c) above, the Department shall consider the following factors and any other relevant factors specific to the site or project:

1. Size. Generally, the larger a mitigation area, the greater its potential environmental benefit. A mitigation area that is associated with a large existing wetland complex is more likely to be environmentally beneficial for the purpose of (c) above;

2. Location in relation to other preserved open space. A mitigation area adjacent to public land or other preserved areas is more likely to be environmentally beneficial;

3. Habitat value. A mitigation area that will provide valuable habitat for critical wildlife species or threatened or endangered species is more likely to be environmentally beneficial; and

4. Interaction with nearby resources. A mitigation project is more likely to be environmentally beneficial if it complements existing nearby resources. For example, a mitigation project that adds riparian wetlands habitat adjacent to an existing stream enhances the environmental value of both the riparian area and the stream.

(f) If credit purchase under (d) above, and onsite or offsite mitigation under (c) above, are not feasible, mitigation shall be performed through a monetary contribution in accordance with N.J.A.C. 7:7A-15.21 or, if the Department determines that no other mitigation alternative is practicable or feasible, mitigation shall be performed through upland preservation, in accordance with N.J.A.C. 7:7A-15.9, or a land donation approved by the Wetlands Mitigation Council, in accordance with N.J.A.C. 7:7A-15.22.