

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).

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.

(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.

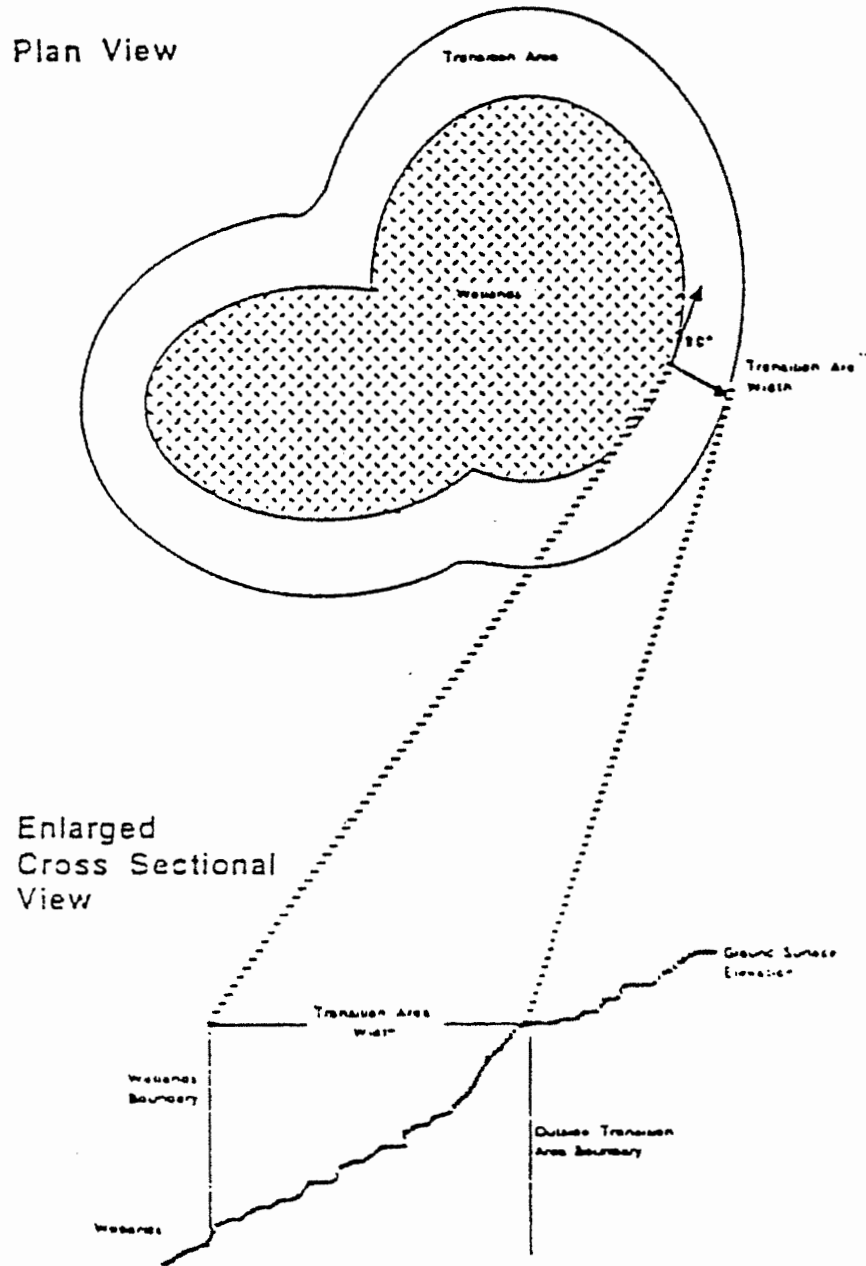
(g) When the Department receives an administrative hearing request, the Commissioner may refer the matter to the Office of Administrative Law for an administrative hearing in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 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:

Figure 1-Transition Area

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



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

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

Minor change in (b)6.

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

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

7:7A-2.6 Regulated activities in transition areas

(a) Except as provided in (b) and (c) below, the following are regulated activities when they occur in transition areas:

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

(b) Notwithstanding (a) above, the following activities are not regulated in transition areas and do not require Department approval under this chapter, provided that the activities are performed in a manner that minimizes adverse effects to the transition area and adjacent freshwater wetlands, and provided that the transition area is not contained within a conservation restriction or easement. If the transition area is contained in a conservation restriction or easement, none of the following activities are allowed unless explicitly stated in the conservation restriction or easement:

1. Normal property maintenance;
 - i. For the purposes of this paragraph, "normal property maintenance" means activities required to maintain lawfully existing artificial and natural features, landscaping and gardening. These activities include:
 - (1) Mowing of existing lawns. The conversion of a field to a lawn by planting, seeding, frequent mowing or any other means is not considered normal property maintenance and requires a transition area waiver;
 - (2) Maintenance of existing fields;
 - (3) Pruning of trees and shrubs;
 - (4) Selective cutting of trees;
 - (5) Replacement of existing non-native plants with either native or non-native species that will not significantly change the character of the existing vegetational community of the transition area;

(6) Limited supplemental planting of non-native plant species that will not significantly change the character of the existing vegetational community of the transition area. The creation of a lawn is not considered supplemental planting;

(7) Planting of native species, that is, plants naturally occurring in transition areas in the local region, (the county agricultural agent may be consulted to obtain information regarding these species);

(8) Continued cultivation of existing gardens, and the development of new gardens provided that the new garden is:

- (A) No larger than 2,500 square feet in size;
- (B) Located in a non-forested transition area; and
- (C) Located in a transition area not subject to a conservation restriction or easement; and

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

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

2. Minor and temporary disturbances of the transition area resulting from, and necessary for, normal construction activities on land adjacent to the transition area, provided the activities do not result in adverse environmental effects on the transition area or on the adjacent freshwater wetlands, and do not continue for more than six months. For the purposes of this paragraph, minor and temporary disturbances include, but are not limited to, the placement of

(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

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.