

(b) For the purposes of this section, “lawfully existing” means that the dwelling or utility tower was constructed, or impervious surface placed, in accordance with all applicable State and Federal environmental land use and water permits and valid municipal approvals, including building permits, septic system approval, limitations on lot coverage and, where applicable, certificates of occupancy.

(c) Proposed development exempt from the Highlands Act shall comply with all Federal, and local statutes, regulations, development regulations or ordinances that may apply to the proposed activity and shall also comply with all other State laws including, but not limited to, the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq.; the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq.; the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.; the Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 et seq.; the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.; the Safe Drinking Water Act, P.L. 1977, c.224, N.J.S.A. 58:12A-1 et seq., the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., and all implementing rules.

Amended by R.2006 d.420, effective December 4, 2006.
See: 37 N.J.R. 4767(a), 38 N.J.R. 5011(a).

Rewrote the introductory paragraph of (a); in (a)1, substituted “a” for “an” preceding “lot owned”; in (a)2, substituted “a lot” for “an lot” and “one acre or more of land” for “more than one acre”; in (a)4, inserted “on August 10, 2004”; in the introductory paragraph of (a)5, substituted “lawfully” for “legally”; deleted (a)5i; in (a)6, inserted “or association” preceding “organized”; in (a)7, deleted “for public lands,” preceding “the normal”; added (a)11i; in (a)16, substituted “Region” for “region”; and added new (b) and recodified former (b) as (c).

Case Notes

Initial Decision (2007 N.J. AGEN LEXIS 30) adopted, which concluded that although petitioner’s proposed development received preliminary and final site plan approval prior to March 29, 2004, the proposed development needed either the water main extension permit or the treatment works approval on or before March 29, 2004, in order to fall within the Highlands Act exemption at N.J.S.A. 13:20-28 and N.J.A.C. 7:38-2.3. A letter from the Borough reserving sewer service for the proposed development was insufficient to satisfy the requirement of treatment works approval. *RSK Development v. N.J. Dep’t of Env’tl. Prot.*, OAL Dkt. No. EWR 03426-06, 2007 N.J. AGEN LEXIS 321, Final Decision (March 12, 2007).

7:38-2.4 Highlands applicability determination

(a) A Highlands Applicability and Water Quality Management Plan Consistency Determination (Highlands Applicability Determination) answers the following questions:

1. Is the proposed development or activity a major Highlands development pursuant to N.J.A.C. 7:38-2.2?
2. Is the proposed development or activity a major Highlands development that is exempt from the Highlands Act, pursuant to N.J.A.C. 7:38-2.3?
3. Regardless of the answer to (a)1 or 2 above, is the proposed development or activity consistent with the applicable areawide Water Quality Management Plan?

(b) Any person proposing to undertake any activity in the preservation area that requires any environmental land use or water permit from the Department other than, as provided at (c) below, a NJPDES permit or TWA, shall either clearly stipulate that the proposed activity is subject to the Highlands Act in an application to the Department for an HPAA, or obtain a Highlands Applicability Determination, before submitting an application for the environmental land use or water permit unless the activity is one of the following:

1. The following improvements to a lawfully existing single family dwelling in existence on August 10, 2004, provided that the lot upon which the home is situated has not been further subdivided:

- i. Driveway, garage or shed;
- ii. An addition for residential purposes attached to the home;
- iii. Deck, patio or porch;
- iv. Swimming pool; or
- v. Septic system;

2. Routine maintenance and operations, preservation, or repair of transportation systems by a State entity or local government unit provided such activity is confined to the existing footprint of development, and does not create new travel lanes or increase the length of an existing travel lane by more than 2,640 feet, not including tapers;

3. Rehabilitation or reconstruction of transportation systems by a State entity or local government unit provided such activity:

- i. Does not result in a cumulative increase in impervious surface by 0.5 acres or more;
- ii. Does not involve the ultimate disturbance of one or more acres of land; and
- iii. Does not create new travel lanes or increase the length of an existing travel lane by more than 2,640 feet, not including tapers;

4. Routine maintenance and operations, rehabilitation, preservation, reconstruction and repair of infrastructure systems by a State entity or local government unit provided such activity is confined to the existing footprint of development, and does not increase the conveyance capacity, for example, by increasing the pipe size of a sewer or water system;

5. The construction of transportation safety projects and bicycle and pedestrian facilities by a State entity or local government unit provided the activity does not:

- i. Create a new travel lane or increase the length of an existing travel lane by more than 2,640 linear feet, not including tapers;

ii. Result in a cumulative increase in impervious surface of one acre or more; or

iii. Involve the ultimate disturbance of two or more acres of land;

6. Any activity that is part of an agricultural or horticultural development or agricultural or horticultural use;

7. Any activity conducted by a landowner in accordance with an approved woodland management plan issued pursuant to the Farmland Assessment Act, N.J.S.A. 54:4-23.3, or the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester;

8. The remediation of any contaminated site pursuant to N.J.S.A. 58:10C-1 et seq., provided no residential, commercial, or industrial development is undertaken concurrently with, or subsequent to, the remediation. Any concurrent or subsequent development at the site is subject to the requirements of this chapter for a Highlands applicability determination and HPAA as applicable;

9. The addition of telecommunications equipment or antennas to a telecommunication facility existing on August 10, 2004, provided the equipment is located within the existing fenced compound or on lawfully existing impervious surface so that it does not increase impervious surface; or

10. Installation of cellular equipment on a legally existing overhead utility tower and the construction of the attendant 10-foot by 20-foot pad, when located within the four footings of such tower within a right-of-way owned or controlled by a public utility, constructed with the consent of the public utility.

(c) Following submission under N.J.A.C. 7:14A of an application for a TWA or an individual NJPDES permit, or a request for authorization (RFA) under a general NJPDES permit for an activity in the Highlands preservation area, the Department will notify the applicant whether the activity that is the subject of the application or RFA is a major Highlands development that requires a Highlands Applicability Determination under this section. This section does not apply to NJPDES Permit No. NJ0088323 (see N.J.A.C. 7:38-2.6(d)).

(d) Nothing in (b) or (c) above shall exempt any person from the obligation to obtain a formal consistency determination from the Department if required by the Water Quality Management Planning Rules at N.J.A.C. 7:15-3.

(e) If the Department determines that a proposed activity is inconsistent with the applicable areawide Water Quality Management Plan (WQMP), the Department shall not issue any permits or approvals for the activity, even if it is exempt from the Highlands Act or does not qualify as major Highlands development. The activity shall not proceed until the applicant applies for and receives an amendment to the areawide WQMP that includes the proposed activity in the

WQMP and complies with all Federal, State, county or municipal requirements applicable to the proposed project.

(f) If the Department determines the proposed activity is a major Highlands development subject to the permitting requirements of the Highlands Act and consistent with the applicable areawide WQMP, the activity shall not commence until an HPAA is issued for the proposed development.

(g) If the Department determines the proposed activity is a major Highlands development subject to the permitting requirements of the Highlands Act but is inconsistent with the applicable areawide WQMP, the applicant may apply for an HPAA as long as the application also includes an administratively complete request for an amendment to the areawide WQMP pursuant to N.J.A.C. 7:38-9.6(c).

Amended by R.2006 d.420, effective December 4, 2006.

See: 37 N.J.R. 4767(a), 38 N.J.R. 5011(a).

Section was "Applicability determination". Rewrote (a) and (b); in (c), substituted "or" for a comma following "TWA" and inserted the last sentence; and in (d), substituted "if required by" for "pursuant to". Special Amendment, R.2009 d.361, effective November 4, 2009 (to expire May 4, 2011).

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

In (b)8, substituted "58:10C-1 et seq." for "58:10B-1 et seq. conducted in accordance with a memorandum of agreement or remedial action workplan".

7:38-2.5 Applicability for purposes of public water supply systems, water allocations and water use registrations

(a) Pursuant to N.J.S.A. 58:12A-4.1, within the preservation area, the construction of any new public water system and the extension of any existing public water system to serve development in the preservation area is prohibited except to serve development that:

1. Is exempt from the Highlands Act pursuant to N.J.A.C. 7:38-2.3, and is consistent with the applicable areawide WQMP, pursuant to N.J.A.C. 7:15; or

2. Receives an HPAA with waiver pursuant to N.J.A.C. 7:38-6.

(b) Pursuant to N.J.S.A. 58:1A-5.1, this chapter applies to:

1. Any person intending to divert or proposing projects which will result in the diversion within the preservation area of more than 50,000 gallons of water per day, for any purpose, from a single source or a combination of sources;

2. Any person holding a water use registration as of March 29, 2004 for a diversion within the preservation area who diverts water in an amount that exceeds the monthly or annual limits established by the Department in that water use registration under N.J.A.C. 7:38-3.2(i)2; and

3. Any person having the capability to divert more than 50,000 gallons of water per day in the preservation area but who does not currently do so. The requirements to which such persons are subject are set forth at N.J.A.C. 7:38-3.2(i).

(c) This chapter does not apply to:

State department, as the case may be, that describes the proposed project and its location and affirms that the proposed project is the same as that approved in the referendum;

14. For mining, quarrying, or production of ready mix concrete, bituminous concrete, or Class B recycling materials occurring or which are permitted to occur on any mine, mine site, or construction materials facility existing on June 7, 2004 pursuant to N.J.A.C. 7:38-2.3(a)14:

i. A site plan certified by a licensed New Jersey Professional Engineer showing the location of existing and proposed activity and development;

ii. Official documentation including, but not limited to, tax records, local or State permits, and bills of sale or lading demonstrating that the mine or facility was in existence and operating on June 7, 2004, and included the land on which the proposed activity or development will occur; and

iii. A copy of a Certificate of Registration issued by the Commissioner of Labor pursuant to N.J.S.A. 34:6-98.4;

15. For the remediation of any contaminated site pursuant to N.J.S.A. 58:10C-1 et seq. pursuant to N.J.A.C. 7:38-2.3(a)15:

i. A copy of a site plan certified by a licensed New Jersey Professional Engineer indicating the lot and block, municipality and county of the remediation site and the area above or below ground where contamination shall be removed or remediated;

ii. A brief description of the remediation activity to be conducted in the area described in (d)15i above; and any structures, impervious surfaces, clearing of vegetation or water diversion being proposed;

iii. A copy of a letter, application, order, memorandum of agreement or remedial action workplan approved by the Department, or any other documentation demonstrating that the remediation activities are required in accordance with N.J.S.A. 58:10B-1 et seq.; and

iv. The name of the DEP case manager or licensed site remediation professional assigned to the case, if any;

16. For any activities on lands of a Federal military installation existing on August 10, 2004 that lie within the Highlands Region pursuant to N.J.A.C. 7:38-2.3(a)16:

i. A site plan certified by a licensed New Jersey Professional Engineer showing the general location of the proposed activities as being within the borders of the Federal military installation and the activity's location with respect to Highlands Region boundaries; and

ii. A letter briefly describing the proposed activities signed by an official of the installation; and

17. For a major Highlands development, located within an area designated as of March 29, 2004 as Planning Area

1 (Metropolitan), or Planning Area 2 (Suburban) pursuant to the State Planning Act, N.J.S.A. 52:18A-196 et seq., that on or before March 29, 2004 was the subject of a settlement agreement and stipulation of dismissal filed in the Superior Court, or a builder's remedy issued by the Superior Court, to satisfy the constitutional requirement to provide for the fulfillment of the fair share obligation of the municipality in which the development is located pursuant to N.J.A.C. 7:38-2.3(a)17:

i. A copy of the settlement agreement and stipulation of dismissal filed in the Superior Court, or builder's remedy issued by the Superior Court;

ii. A copy of any site plans certified by a licensed New Jersey Professional Engineer, maps or other documentation clearly indicating the location of the fair share housing to be provided in accordance with the settlement agreement and stipulation of dismissal filed in the Superior Court, or a builder's remedy issued by the Superior Court and the location of all proposed structures, service or access roads, and infrastructure with respect to the boundaries of Planning Area I or II, as the case may be;

iii. A copy of all municipal approvals obtained for the project, or the schedule for applying and obtaining such approvals; and

iv. A proposed schedule for completion of the entire project including township approvals, site preparation, installation of utilities and roads, and construction of all buildings.

(e) In addition to the information required at (b) above, the following information shall be provided by applicants requesting a Highlands Applicability Determination for a project or activity believed to be agricultural or horticultural and unregulated by the Department pursuant to N.J.A.C. 7:38-2.2(b):

1. A copy of the applicant's tax bill showing that the site has farmland assessment tax status under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq.; and

2. A brief description of the activities for which the exemption is claimed, including:

i. The types of farming or horticulture that will be pursued;

ii. Best management practices currently employed and/or to be employed;

iii. The length of time that the area proposed for disturbance has been in use for farming or horticulture; and

iv. The square footage or acreage of the entire site, of the impervious surfaces already existing on the site, and the total amount of impervious surface on the site if the proposed activity is permitted. If the proposed activity will result in more than three percent of the site

being covered by impervious surface, applicants should contact the local soil conservation district for additional assistance.

(f) In addition to the information required at (b) through (e) above, the Department may require any information necessary to clarify information previously submitted, to ensure compliance with State and/or Federal law, or to determine whether an application meets State and/or Federal standards.

Amended by R.2006 d.420, effective December 4, 2006.

See: 37 N.J.R. 4767(a), 38 N.J.R. 5011(a).

Rewrote (b)1; in (d)1i and (d)1ii, substituted "lot" for "property" throughout; in (d)2ii, deleted "and" from the end; in (d)2iii, inserted "and" at the end; added (d)2iv; in (d)7, deleted "for public lands," preceding "the normal harvesting"; in (d)7(1), inserted ", if applicable" at the end; in (d)7ii, deleted "public lands with" preceding "a forest management"; in (d)9, deleted "of 2,640 feet or more not including tapers" preceding "pursuant to N.J.A.C."; in (d)10, deleted "2,400 feet or more, not including tapers" preceding "pursuant to N.J.A.C."; rewrote (d)11iii; in (d)15iii, inserted "memorandum of agreement or remedial action workplan approved by the Department,"; and in (e), deleted "and (c)" following "required at (b)".

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 (d)15, updated the N.J.S.A. reference; and in (d)15iv, inserted "DEP" and substituted "or licensed site remediation professional assigned to the case" for "handling or supervising remediation at DEP".

7:38-9.3 Basic application requirements for all Highlands Resource Area Determinations, Highlands general permits and Highlands Preservation Area Approvals with or without waivers including modifications and extensions

(a) This section describes information required for every application listed in N.J.A.C. 7:38-9.1(a)2 through 6. Additional information required for each specific application is set forth below at N.J.A.C. 7:38-9.4 through 9.8.

(b) Every application listed at N.J.A.C. 7:38-9.1(a)2 through 6 shall require the following:

1. An application form, completed as directed in the instructions and/or application checklist. The application form requests basic information regarding the site, the applicant, the activities proposed, any previous or other required applications to the Department, and a truth and accuracy certification;

2. Unconditional written consent from the owner of the site, as defined at N.J.A.C. 7:38-9.1(c), for Department representatives to enter the site to conduct site inspections;

3. The appropriate application review fee, as set forth at N.J.A.C. 7:38-10, paid as follows:

i. The fee shall be paid by personal check, certified check, attorney check, government purchase order, or money order;

ii. The fee shall be made payable to "Treasurer, State of New Jersey"; and

iii. Each check, purchase order, or money order must be marked with the name of the applicant;

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, such as topography and amount of impervious cover, and any activities proposed on the site, including but not limited to, calculations of the area of proposed disturbance to Highlands Resource Areas and the amount of existing and proposed impervious cover;

5. The approximate boundaries of the project or activity site clearly delineated on a U.S.G.S. quadrangle map, including title-name of Quad, or GIS coverage and the State Plane coordinates in NAD 1983 for a point at the center of the site. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the endpoints of those projects, which are 1,999 feet or less, and for those projects that are 2,000 feet or longer, additional coordinates at each 1,000-foot interval. For assistance in determining the State plane coordinates for a site, see the iMAP webpage at nj.gov/dep/gis/depsplash.htm;

6. Two copies of a recent county road map or local street map, with the site clearly marked;

7. Two sets of original color photographs, mounted on 8½ by 11-inch paper, sufficient to show the conditions on the site, and immediately surrounding areas, as well as the area of disturbance for the proposed activities. A minimum of 10 photographs is required;

8. A copy of the municipal tax map(s) delineating the project or activity site by lot(s) and block(s);

9. The separate depiction and labeling on any plan submitted pursuant to (b)4 above, of all slopes greater than 20 percent and slopes between 10 percent and 20 percent, as calculated pursuant to N.J.A.C. 7:38-3.8(b);

10. Written narrative and/or reports that accurately describe the site, its location (including State plane coordinates), site conditions, and any planned activities, including schedules for performing regulated activities, if appropriate;

11. Documentation that the applicable public notice requirements at N.J.A.C. 7:38-9.4(b)2 or 9.5(a)3 have been met;

12. Information and/or certifications regarding the presence or absence of rare, threatened or endangered species habitat, ecological communities, historic or archaeological resources, or other features on the site relevant to determining compliance with the requirements of this chapter. This information shall include but not be limited to a letter from the Natural Heritage Program indicating the presence or absence of any rare, threatened or endangered species or