

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

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;
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; and
7. Placement of any portion of a residential development project, as defined at N.J.A.C. 7:7A-1.4.

(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.

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 boundary;
4. United States Geologic Survey topographic maps;
5. Letters submitted by applicants containing site specific data;
6. Comments filed by municipal and county governments and interested citizens; and
7. Comments filed by State or Federal agencies.

(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) 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.

(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)l., 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).

Case Notes

Projects that received preliminary approval prior to July 1, 1989 were exempt from compliance with transition-area provisions of Freshwater Wetlands Protection Act. Appeal of Adoption of N.J.A.C. 7:7A-1.4 (Definition of "Documented Habitats for Threatened and Endangered

Species" and "Swale"), 7:7A-2.5(b)(2), and 7:7A-2.7(f), 118 N.J. 552, 573 A.2d 143 (1990).

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

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

7:7A-2.5 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 climatologic effects; and

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

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

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

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

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

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

(c) A transition area is required adjacent to a freshwater wetland of exceptional resource value and of intermediate resource value as classified in N.J.A.C. 7:7A-2.4. A transi-

tion 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.