

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.

Case Note

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

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

(d) A freshwater wetland of ordinary resource value, or an ordinary resource value wetland, is a freshwater wetland which does not exhibit any of the characteristics in (b) above, and which is:

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

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

- (1) Lawns;
- (2) Maintained landscaping;
- (3) Impervious surfaces;
- (4) Active railroad rights-of-way; and
- (5) Gravelled or stoned parking/storage areas and roads;

2. A drainage ditch;

3. A swale; or

4. A detention facility created by humans in an area that was upland at the time the facility was created.

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

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

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

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

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

Rewrote (c).

Public Notice: Notice of Revision and Updating of Freshwater Wetlands Technical Manual to Incorporate Version 2.0 of the Landscape Maps.

See: 36 N.J.R. 1129(a).

Case Notes

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

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

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 transition area is not required adjacent to a freshwater wetland of ordinary resource value or adjacent to a State open water.

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

(e) The standard width of a transition area adjacent to a freshwater wetland of intermediate resource value shall be 50 feet. This standard width shall only be modified through the issuance of a transition area waiver. The types of transition area waivers are listed at N.J.A.C. 7:7A-6.1(a).

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

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

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

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

At (b)2i added reference to placement of utility lines; corrected cross references in (c) and (d).

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

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

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

Case Note

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

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

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

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

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

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

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

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

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

ii. If any wetlands on nearby properties are exceptional resource value wetlands, and are within 150 feet of the site's property line, there is at least some transi-

tion area on the site arising from these wetlands. In order to determine the size and shape of the transition area, obtain a delineation of the wetlands on the nearby properties and determine the transition area for each under N.J.A.C. 7:7A-2.5(d); and

5. To avoid obtaining an LOI and/or delineating wetlands under (b)3 and 4 above, a person can ensure compliance with transition area requirements arising from wetlands on other properties by assuming that there are exceptional resource value wetlands on all adjacent properties and refraining from any regulated activities within 150 feet of the site's property line.

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

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

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

Repealed (b)5 and recodified existing 5-7 as 5 and 6; new language added at 6 regarding notification to owners of adjacent property.

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

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

Law Reviews and Journal Commentaries

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

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

(a) This section sets forth certain activities that are exempt from certain permit requirements in this chapter. However, even if an activity is exempt under this chapter, it may still require a permit from the Army Corps of Engineers under the Federal wetlands program, and/or a water quality certificate issued by the Department.

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

1. The exemptions shall not apply to any discharge of dredged or fill material into freshwater wetlands or State open water incidental to any activity which involves bringing an area of freshwater wetlands or State open waters into a use to which it was not previously subject, where the flow or circulation patterns of the freshwater wetlands or waters may be impaired, or the extent or values and functions of freshwater wetlands or State open waters is reduced;

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

3. The exemptions apply only to the portion of the property which meets all requirements for the exemption. For example, if half of a 20 acre property has been actively farmed and half has not, the half that has not been actively farmed would not be considered to be part

of an established, ongoing farming operation and would therefore not be eligible for the farming exemption;

4. Clear cutting of a non-cultivated, wooded wetland area is not covered by the exemptions unless it is part of the normal harvesting of forest products performed in accordance with a written approval from the State Forester; and

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

(c) Subject to the limitations of this section, the following activities, when part of an established, ongoing farming, ranching or silviculture operation, on properties which have received or are eligible for a farmland assessment under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq., are exempt from the requirement of a freshwater wetlands or open water fill permit, or transition area waiver:

1. Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food and fiber, or soil and water conservation practices. For the purposes of this paragraph, "minor drainage" means:

i. The discharge of material incidental to connecting upland drainage facilities to adjacent wetlands, adequate to effect the removal of excess soil moisture from upland croplands;

ii. The discharge of material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters which are in established use for such agricultural and silvicultural wetlands crop production;

iii. The discharge of material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of the Federal Act and which are in established use for the production of rice, cranberries, or other wetland crop species;

iv. The discharge of material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not properly removed, would result in damage to or loss of existing crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of formation of such blockages in order to be eligible for exemption under this paragraph; and

v. Minor drainage in wetlands is limited to drainage within areas that are part of an established farming or silvicultural operation. It includes maintenance of existing drainage tile or other drainage structures. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (for example, wetlands species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any new canal, ditch, dike or other waterway or structure. Any discharge of dredged or fill material into the wetlands or State open waters incidental to the construction of any such structure or waterway requires a freshwater wetlands or State open water permit, and will not be considered minor drainage;

2. Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches, provided that such facilities are for farming, ranching or silvicultural purposes and do not constitute a change in use. Any dredged material from pond construction or maintenance must be placed outside the freshwater wetlands unless it is needed for the structural or environmental integrity of the pond; and

3. Construction or maintenance of farm roads or forest roads constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of freshwater wetlands and State open waters are not impaired and that any adverse effect on the aquatic environment will be minimized. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. Roads constructed for forestry and silviculture purposes shall be constructed using temporary mats whenever practicable. All roads employing the placement of fill shall be removed once the land use changes from forestry to another use.

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

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

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

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

(d) Regulated activities in tidally influenced wetlands which are defined as coastal wetlands pursuant to the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq. are not subject to this chapter, but may require other State and/or Federal approvals.

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

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

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

7:7A-2.10 Exemption letters

(a) A person with a project or activity which qualifies for an exemption under this subchapter may obtain a letter from the Department certifying that an activity is exempt. The letter will be based on the information required by this section, and will be void if the information submitted is not complete and accurate, if the approval upon which it was based becomes invalid for any reason, or if the project or activity is not carried out as represented in the submittal(s) to the Department. This exemption will remain valid for the duration of the approval upon which it was based.

(b) To apply for an exemption letter for a farming, silviculture or ranching exemption under N.J.A.C. 7:7A-2.8(c), an applicant shall submit the following:

1. Certification of farmland assessment eligibility under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq. The Department will accept a

copy of the applicant's tax bill showing farmland assessment to document this requirement;

2. A description of the activities for which the exemption is requested, including the total area covered, the types of farming, silviculture, or ranching, best management practices currently employed or to be employed, the site conditions in the area in which the activity would take place, and the length of time the operation has been ongoing; and

3. The fee specified in N.J.A.C. 7:7A-11.

(c) To apply for an exemption letter for a forest products harvesting exemption pursuant to N.J.A.C. 7:7A-2.8(d), an applicant shall submit the following:

1. A copy of a forest management plan approved by the State Forester which includes the size of the site, the length of time required to complete the project, and a detailed description of the activities to take place in wetlands, transition areas, and/or State open waters, including the best management practices to be employed; and

2. The fee specified in N.J.A.C. 7:7A-11.

(d) To apply for an exemption letter for a transition area exemption pursuant to N.J.A.C. 7:7A-2.8(f), an applicant shall submit the following:

1. A folded copy of the preliminary local approval of the site plan or subdivision, including a copy of the site plan or subdivision itself and a copy of the resolution approving the site plan or subdivision;

2. A letter from a municipal official with knowledge of and authority over the approval, including the following:

i. A statement that the site plan or subdivision approval is still within the period of protection from zoning changes provided for in the Municipal Land Use Law; or if the period of protection has expired, that there have been no changes to the municipal land use ordinances since the approval that would prohibit construction of the project; and

ii. A statement that the municipal approval that forms the basis for the exemption is still valid; and

3. The fee specified in N.J.A.C. 7:7A-11.

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

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

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

Former N.J.A.C. 7:7A-2.10, Hearings and appeals, was repealed.

Case Notes

Developer failed to comply with requirements for documentation of nationwide permit allegedly granted by Army Corps of Engineers; matter remanded to allow developer to supplement its request. *M. Alfieri Co., Inc. v. State, Dept. of Environmental Protection and Energy*, 269 N.J.Super. 545, 636 A.2d 87 (A.D.1994), certification granted 136 N.J. 30, 641 A.2d 1041, affirmed 138 N.J. 642, 651 A.2d 99.

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.

SUBCHAPTER 3. LETTERS OF INTERPRETATION

7:7A-3.1 Basic LOI information

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

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

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

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

1. A presence/absence LOI, in which the Department determines whether any freshwater wetlands, transition areas, and/or State open waters exist on a site or on a portion of a site (also called a footprint of disturbance LOI). See N.J.A.C. 7:7A-3.2 for further details regarding presence/absence LOIs;
2. A line delineation LOI, in which the Department delineates the boundary lines of freshwater wetlands, transition areas, and/or State open waters for an applicant. See N.J.A.C. 7:7A-3.3 for further details regarding line delineation LOIs; and
3. A line verification LOI, in which the Department confirms or modifies a delineation proposed by the applicant. See N.J.A.C. 7:7A-3.4 for further details regarding line verification LOIs.

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

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

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

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

- iii. The depth of fill permitted;
- iv. The maximum extent to which an area may be modified; and
- v. The size and type of structure that may be constructed; and

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

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

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

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

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

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

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

(a) To use a general permit to authorize regulated activities, an applicant shall submit an application for a general permit authorization, using the application procedures for all permits and waivers set forth at N.J.A.C. 7:7A-10, except in an area under the jurisdiction of the Pinelands Commission. In such an area, the application shall be submitted to the Pinelands Commission rather than to the Department, in accordance with the Pinelands Comprehensive Management Plan (CMP). For information on freshwater wetlands and transition areas in the Pinelands, contact the Pinelands Commission at (609) 894-7300 or through its website at www.state.nj.us/pinelands.

(b) Each general permit specifies whether it covers activities in freshwater wetlands, transition areas, State open waters, or a combination thereof. An authorization issued under a general permit that covers activities in freshwater wetlands satisfies the requirement for a freshwater wetlands permit. An authorization issued under a general permit that covers activities in State open waters satisfies the require-

ment for an open water fill permit. An authorization issued under a general permit that covers activities in a transition area satisfies the requirement for a transition area waiver.

(c) Each general permit authorization shall include a limited transition area waiver to allow access to the authorized activity, in accordance with N.J.A.C. 7:7A-6.1(a)6. No fee or application is required for this waiver and the disturbance authorized under this waiver is not counted in calculating the amount of disturbance under the general permit. An access transition area waiver allows regulated activities only:

1. In that portion of the transition area bordering on that portion of the freshwater wetland in which the activity authorized by the general permit will take place; and
2. For an activity that the Department determines is necessary to accomplish the activity authorized in the wetlands under the general permit. An activity not directly required in order to obtain access to the activity authorized in the wetlands under the general permit shall require a separate transition area waiver.

(d) Usually, a general permit is the only wetlands approval required for activities in freshwater wetlands in New Jersey. However, if an activity is located in non-delegable waters, as defined at N.J.A.C. 7:7A-1.4, both a general permit authorization from the Department and a Federal 404 program approval from the ACOE may be required. In addition, if an activity is located in wetlands or transition areas in an area under the jurisdiction of the Pinelands Commission, approval may be required from the Pinelands Commission, in accordance with the Pinelands Comprehensive Management Plan (CMP). For information on freshwater wetlands and transition areas in the Pinelands, contact the Pinelands Commission at (609) 894-7300 or through its website at www.state.nj.us/pinelands.

(e) The Department shall deny an application for a general permit authorization and require an application for an individual permit if the Department finds that:

1. Additional permit conditions added under N.J.A.C. 7:7A-4.1 and/or 13.2 would not be sufficient to ensure compliance with this chapter and other applicable laws; or
2. Special circumstances make an individual permit necessary to ensure compliance with the Freshwater Wetlands Protection Act, this chapter, any permit or order issued pursuant thereto, or the Federal Act.

(f) The limits on disturbance in each general permit apply to the entire site upon which activities authorized under the general permit occur. An applicant shall not segment a project or its impacts by applying for general permit authorization for one portion of the project and applying for an individual permit for another portion of the project. Similarly, an applicant shall not segment a project or its impacts by

separately applying for general permit authorizations for different portions of the same project.

(g) Unless otherwise specified, the limits on disturbance under a general permit apply to total disturbance, including both temporary and permanent disturbance.

(h) If a regulated activity is not covered by any general permit or combination of general permits, an individual freshwater wetlands or open water fill permit must be obtained under N.J.A.C. 7:7A-7 in order to authorize the activity under this chapter. If a regulated activity in a transition area is not covered by any general permit or combination of general permits, an individual transition area waiver must be obtained under N.J.A.C. 7:7A-6 in order to authorize the activity under this chapter.

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

7:7A-4.3 Conditions that apply to all general permit authorizations

(a) A person acting under the authority of a general permit shall comply with:

1. The conditions listed under the general permit itself;
2. The standard conditions for all general permits set forth at (b) below;
3. The conditions for all permits at N.J.A.C. 7:7A-13;
4. The limits on the use of multiple general permits in N.J.A.C. 7:7A-4.4; and
5. If required under a particular general permit, mitigation pursuant to N.J.A.C. 7:7A-15.

(b) The following conditions apply to all activities conducted under the authority of a general permit:

1. Activities performed under a general permit shall be associated with a proposed project. The Department shall not authorize activities under a general permit for the purpose of eliminating a natural resource in order to avoid regulation. For the purposes of this subsection, project shall mean the use and configuration of all buildings, pavements, roadways, storage areas and structures, and all associated activities;
2. The regulated activity shall not occur in the proximity of a public water supply intake;
3. The activities shall not 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;

4. The activity will not occur in a component of either the Federal or State Wild and Scenic River System; nor in a river officially designated by Congress or the State Legislature as a "study river" for possible inclusion in either system while the river is in an official study status; except that the activity may occur in these waters if approved by the National Park Service in accordance with 40 CFR § 233;

5. The activity shall not adversely affect properties which are listed or are eligible for listing on the New Jersey or National Register of Historic Places unless the applicant demonstrates to the Department that the proposed activity avoids or minimizes impacts to the maximum extent practicable or the Department determines that any impact to the affected property would not impact the property's ability to continue to meet the criteria for listing at N.J.A.C. 7:4-2.3 or otherwise negatively impact the integrity of the property or the characteristics of the property that led to the determination of listing or eligibility. The Department shall not issue a conditional permit if it finds that the mitigation proposed is inadequate to compensate for the adverse affect. Any permit for an activity which may adversely affect a property listed or eligible for listing on the New Jersey or National Register of Historic Places shall contain conditions to ensure that any impact to the property is minimized to the maximum extent practicable and any unavoidable impact is mitigated. If the permittee, before or during the work authorized, encounters a probable historic property that may be eligible for listing in the New Jersey or National Register, the permittee shall immediately notify the Department and proceed as directed;

6. Any discharge of dredged or fill material shall consist of clean, suitable material free from toxic pollutants (see 40 CFR 401) in toxic amounts, and shall comply with all applicable Department rules regarding use of dredged or fill material;

7. Any structure or fill authorized shall be maintained as specified in the construction plans;

8. During construction activities, all excavation must be monitored for the presence of acid-producing deposits. If any such deposits are encountered, the permittee shall implement the mitigation and disposal standards in the Flood Hazard Area Control Act Rules at N.J.A.C. 7:13 and shall establish an annual post-planting monitoring program to ensure the reestablishment of vegetation in temporarily disturbed areas. The plantings shall have a minimum 85 percent plant survival and coverage rate after two complete growing seasons. If the plantings fail to achieve this survival rate, the Department will require the permittee to implement additional corrective measures;

9. The activity will not result in a violation of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 or implementing rules at N.J.A.C. 7:13;

(i) If an activity is exempt under this chapter, it shall not require authorization under general permit 16 solely by virtue of being conducted as part of a program included in (b) above. For example, if a farmer proposes a habitat enhancement project that is eligible for authorization under general permit 16, and some of the activities involved in the project meet the requirements for the farming exemption under N.J.A.C. 7:7A-2.8(c), those activities do not lose their exempt status merely by virtue of being part of a project authorized under general permit 16.

(j) Activities under general permit 16 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

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).

Case Notes

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.

7:7A-5.17 General permit 17—Trails and boardwalks

(a) General permit 17 authorizes activities in freshwater wetlands, transition areas, and/or State open waters necessary for construction of a trail and/or boardwalk for use by pedestrians, bicycles, and other non-motorized methods of transport. General permit 17 does not authorize construction of a restroom, gazebo, rain shelter, or any covered or enclosed structure. General permit 17 does not authorize construction of a roadway for use by automobiles, golf carts, motorcycles, motorized trail bikes, all-terrain vehicles, or other motor vehicles.

(b) The total area of freshwater wetlands, transition areas, and/or State open waters disturbed under general permit 17 shall not exceed one-quarter acre, except that this limit shall not apply to a site that is publicly owned.

(c) The trail or boardwalk shall be no wider than six feet, unless the applicant demonstrates that it must be wider in

order to comply with the Barrier Free Subcode of the Standard Uniform Construction Code, N.J.A.C. 5:23-7.

(d) The trail or boardwalk shall:

1. Be located and configured so as to minimize adverse environmental impact; and

2. Incorporate features designed to educate the user about the importance of freshwater wetlands, transition areas, and State open waters; for example, through signs identifying plants and animals or explaining hydrology, ecology, or other significant environmental features or phenomena.

(e) The permittee shall take all measures necessary to ensure that activities under general permit 17 do not interfere with the natural hydrology of the area, such as installation at grade or use of cross drains to allow the passage of water. The permittee shall minimize the impact of the activities on vegetation.

(f) An application for authorization under general permit 17 for a project on publicly owned land does not require an application fee under N.J.A.C. 7:7A-11.

(g) Activities under general permit 17 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

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.

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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).

7:7A-5.18 General permit 18—Dam repair

(a) General permit 18 authorizes activities in freshwater wetlands, transition areas, and State open water as necessary for the repair, rehabilitation, replacement, maintenance, reconstruction, or removal of a dam, as defined in the Department's dam safety rules at N.J.A.C. 7:20-1.2.

(b) A dam that is currently serviceable may be repaired, rehabilitated, replaced, maintained or reconstructed under general permit 18. A dam is considered currently serviceable if it meets any of the following criteria:

1. The dam is in use, that is, the dam is impounding water at a normal pool elevation for which it was designed, at the time of submittal of the general permit application;

2. The dam is not in use, and has been out of use for no more than five years prior to submittal of the general permit application; or

3. The dam is not in use, but has been out of use for up to 10 years prior to submittal of the general permit application, but the applicant documents that public funding was actively sought for repairs during the 10 years.

(c) A dam that is not currently serviceable, as defined in (b) above, may not be repaired, rehabilitated, replaced, maintained or reconstructed, but may be removed.

(d) Activities under general permit 18 are subject to the following limits:

1. All activities shall be conducted in accordance with a permit issued pursuant to N.J.A.C. 7:20 by the Department's Dam Safety Section in the Division of Engineering and Construction;

2. There shall be no more than one acre of permanent disturbance of wetlands, transition areas, and/or State open waters. Draining of a State open water or freshwater wetland by removing a dam shall not be considered permanent disturbance under this paragraph;

3. Temporary disturbance shall be the minimum necessary to comply with the dam safety permit;

4. The permittee shall minimize adverse impacts on freshwater wetlands, transition areas, and/or State open waters through the use of best management practices including, but not limited to:

i. Disposing of any excess soil, gravel, or other 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;

ii. Backfilling the uppermost 18 inches of any excavation with the original topsoil material;

iii. Replanting the disturbed area with indigenous wetlands plants;

iv. Stabilizing the disturbed area in accordance with the requirements of the appropriate Soil Conservation District;

5. A repaired, rehabilitated, replaced, maintained or reconstructed dam shall not deviate from its original structure, except for minor deviations due to changes in materials or construction techniques, or deviations required for safety reasons in accordance with the Department's Dam Safety Standards, N.J.A.C. 7:20; and

6. Activities under general permit 18 shall not increase the normal water surface elevation over the historical elevation as of the date the dam was originally completed.

(e) If a dam is removed under general permit 18, and the dam owner also owns or controls any of the property containing the lake bottom, the Department may require the owner to execute and record a conservation restriction covering the lake bottom area. The conservation restriction shall prohibit any development or regulated activity for five years from the date the dam is removed, in order to allow the stream corridor and associated wetlands in the lake bottom area to revert to their natural state. The conservation restriction shall include the land covered by the lake bottom, and all associated wetlands, as they exist at the time the dam is removed. When the conservation restriction expires, the Department's jurisdiction under this chapter shall be based on existing conditions on the site.

(f) Activities under general permit 18 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

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.

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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).

7:7A-5.19 General permit 19—Docks and piers

(a) General permit 19 authorizes:

1. Activities in freshwater wetlands and/or transition areas necessary to construct or improve a dock or pier on pilings in order to obtain access to State open waters. General permit 19 does not cover docks or piers on pilings in State open waters because the placement of pilings to support a dock or pier in State open waters is not a regulated activity pursuant to N.J.A.C. 7:7A-2.2(c)5 and therefore does not require approval under this chapter; and