

(e) The Department shall designate a brownfield in accordance with the requirements at N.J.A.C. 7:38-6.6.

(f) No person shall undertake a major Highlands development without first obtaining a Highlands Preservation Area Approval (HPAA) from the Department in accordance with N.J.A.C. 7:38-6. An application for a HPAA shall include any application for waiver of a HPAA requirement under N.J.A.C. 7:38-6.4 the applicant may decide to submit.

(g) For all decisions in or affecting the planning area or the preservation area, the Department shall give great consideration and weight to the RMP, to be incorporated by reference in (l) below, when adopted by the Highlands Council, and shall apply this in accordance with (h), (i), (j) and (k) below.

(h) For the planning area, when consistent with its statutory and regulatory authority, the Department shall not issue any approval, authorization or permit that the Department determines, in consultation with the Highlands Council, to be incompatible with the resource protection goals in the RMP to be incorporated by reference in (l) below, when adopted by the Highlands Council.

(i) In its review of permits or approvals under this chapter in the preservation area, the Department shall apply the standards of this chapter and those in the RMP, to be incorporated by reference in (l) below, when adopted by the Highlands Council. Where the Department, in consultation with the Highlands Council, determines there is an inconsistency in the standards, the Department shall apply the Regional Master Plan standards insofar as they are:

1. Consistent with the purposes of the Highlands Act to sustain and maintain the overall ecological values of the ecosystem of the Highlands Region with special reference to surface and ground water quality and supply; contiguous forests and woodlands; endangered and threatened animals, plants, and biotic communities; ecological factors relating to the protection and enhancement of agricultural or horticultural production or activity; air quality; and other appropriate considerations affecting the ecological integrity of the Highlands Region; and

2. Based on, comply with, and implement the environmental standards set forth in N.J.S.A. 13:20-32.

(j) For both the planning area and preservation areas, the Department shall give great consideration and weight to the RMP, to be incorporated by reference in (l) below, in making permit decisions that:

1. Provide relief from strict compliance with the standards of the applicable permit programs, such as making a determination of public benefit or hardship waiver from certain Departmental permits; or

2. Provide relief through the issuance of an HPPA with waiver under this chapter.

(k) For both the planning area and preservation areas, the Department shall review the Highlands Council regional master plan and consider amending the appropriate areawide Water Quality Management Plans to maintain consistency with the regional master plan.

(l) The Regional Master Plan shall mean the standards established in the Regional Master Plan adopted by the Highlands Council pursuant to N.J.S.A. 13:20-8, including all goals, requirements, provisions, and any municipal master plans and development regulations or county master plans and associated regulations that have been formally approved by the Highlands Council pursuant to the Highlands Act. The Regional Master Plan shall be incorporated by reference into this chapter, when adopted by the Highlands Council pursuant to N.J.S.A. 13:20-8, provided the Department does not determine such incorporation is inconsistent with the purposes of this chapter. The incorporation by reference shall include all amendments to the Regional Master Plan subsequently adopted by the Highlands Council. The Regional Master Plan will be available on the Highlands Council's website at www.highlands.state.nj.us or may be reviewed at the Department or at the Highlands Council at the addresses at N.J.A.C. 7:38-1.2.

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

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

Rewrote (a); in (b), substituted "preservation area" for "Preservation Area"; and added (g) through (l).

Amended by R.2016 d.149, effective November 7, 2016.

See: 47 N.J.R. 2531(a), 47 N.J.R. 2695(a), 48 N.J.R. 2244(a).

In (k), deleted the second sentence.

7:38-1.2 Forms and information

(a) Forms or other information related to the Highlands permitting review program may be obtained as follows:

1. Applications, form letters for notification and information relating to exemptions and determinations of applicability of these rules to specific projects or activities may be found at the Division of Watershed Management website at www.nj.gov/dep/watershedmgt or obtained from the Division of Watershed Management at:

Division of Watershed Management
New Jersey Department of Environmental Protection
PO Box 418
401 East State Street
Trenton, New Jersey 08625-0418
(609)-984-0058

2. Applications and form letters for public notification related to HPAA's and waivers may be found on the Land Use Regulation Program's webpage at www.state.nj.us/dep/landuse or obtained from the Land Use Regulation Program at:

Land Use Regulation Program
 New Jersey Department of Environmental Protection
 PO Box 439
 Trenton, New Jersey 08625-0439
 Phone: (609) 984-0194
 Fax: (609) 292-8115

- i. Courier and other hand deliveries shall be delivered to:

Land Use Regulation Program
 New Jersey Department of Environmental Protection
 5 Station Plaza
 501 East State Street
 Trenton, New Jersey 08609

3. Information and forms relating to NJPDES permits and treatment works approvals may be found on the Division of Water Quality webpage at www.state.nj.us/dep/dwq or obtained from the Division of Water Quality at:

Division of Water Quality
 New Jersey Department of Environmental Protection
 PO Box 029
 Trenton, New Jersey 08625-0029
 Phone: (609) 292-4543
 Fax: (609) 984-7938

4. Information and forms relating to Water Allocation and Safe Drinking water may be found on the Division of Water Supply web page at www.nj.gov/dep/watersupply or obtained from the Bureau of Water Allocation or Bureau of Water Systems and Wells at:

Division of Water Supply
 New Jersey Department of Environmental Protection
 PO Box 426
 Trenton, New Jersey 08625-0426
 Phone: Bureau of Water Systems and Wells (609) 292-2957
 Phone: Bureau of Water Allocation (609) 292-2957

5. Information and forms relating to the Natural Heritage Program may be found on the Division of Parks and Forestry web page at www.nj.gov/dep/parksandforests/natural/heritage or obtained from the Office of Natural Lands Management, Natural Heritage Program at:

Division of Parks and Forestry
 New Jersey Department of Environmental Protection
 PO Box 404
 Trenton, New Jersey 08625-0404
 Phone: (609) 984-1339
 Fax: (609) 984-1427

6. For information or to contact the Highlands Water Protection and Planning Council:

New Jersey Highlands Council
 100 North Road, Route 513, Chester, New Jersey 07930
 Phone: 908-879-6737
 Fax: 908-879-4205

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

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

In (a)4, substituted references to the Bureau of Water Systems and Wells for references to the Bureau of Safe Drinking Water and changed the phone number.

7:38-1.3 Other statutes and regulations

(a) This chapter consolidates aspects of, but does not supersede, the following statutes and any rules adopted pursuant thereto:

1. The Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.;
2. The Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq.;
3. The Water Supply Management Act, N.J.S.A. 58:1A-1 et seq.;
4. The Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.;
5. The Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 et seq.;
6. The Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.;
7. The Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq.; and
8. The Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq. For the purposes of this section, the provisions of N.J.S.A. 13:1D-29 et seq. shall not apply to an application for a permit pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.

(b) This chapter shall not be construed to limit, alter or eliminate the requirements of any other applicable Federal, State or local laws, rules, regulations, codes or ordinances.

(c) If any section, part, phrase, or provision of these rules or the application thereof to any person is adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the section, part, phrase, provision or application directly involved in the controversy in which such judgment shall have been rendered and it shall not affect or impair the validity of the remainder of these rules or the application thereof to other persons.

(d) This chapter should be liberally construed to conform with the State's obligation to stringently safeguard the State's public trust resources and "should be guided, in heart, mind, and spirit, by an abiding and generously given commitment to protecting the incomparable water resources and natural beauty of the New Jersey Highlands so as to preserve them intact, in trust, forever for the pleasure, enjoyment, and use of future generations while also providing every conceivable opportunity for appropriate economic growth and development to advance the quality of life of the residents of the region and the entire State." N.J.S.A. 13:20-2

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

7:38-1.4 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Agricultural or horticultural development" means construction for the purposes of supporting common farmsite activities, including, but not limited to: the production, harvesting, storage, grading, packaging, processing, and the wholesale and retail marketing of crops, plants, animals, and other related commodities and the use and application of techniques and methods of soil preparation and management, fertilization, weed, disease, and pest control, disposal of farm waste, irrigation, drainage and water management, and grazing.

"Agricultural or horticultural use" means the use of land for common farmsite activities, including, but not limited to: the production, harvesting, storage, grading, packaging, processing, and the wholesale and retail marketing of crops, plants, animals, and other related commodities and the use and application of techniques and methods of soil preparation and management, fertilization, weed, disease, and pest control, disposal of farm waste, irrigation, drainage and water management, and grazing.

"Aquatic ecosystem" means waters of the Highlands Region, including wetlands, which serve as habitat for inter-related and interacting communities and populations of plants and animals.

"Capability class and subclass" is a numeric and alphabetic ranking system, respectively, provided in Soil Surveys that identifies limitations in soils for agricultural usage according to the following:

1. Class I soils have few limitations;
2. Class II soils have moderate limitations;
3. Class IIe soils have moderate limitations due to risk of erosion;
4. Class IIs soils have moderate limitations due to shallow, droughty or stony conditions;

5. Class IIw soils have moderate limitations due to wetness; and

6. Class III through VIII soils have various severe limitations.

"Capital improvement" or "capital project" means any facility for the provision of public services with a life expectancy of three or more years, owned and operated by or on behalf of the State or a political subdivision thereof.

"Conservation restriction" means a restriction, easement, covenant, or condition, in any deed, will or other legally binding instrument, other than a lease, that is executed by or on behalf of the owner of the land, that is appropriate to retaining land or water areas predominantly in their natural, scenic or open or wooded conditions for purposes of conservation of soil or wildlife; for outdoor recreation or park use; or for creation or maintenance of suitable habitat for fish or wildlife; that grants the Department and the Highlands Council and their staff access to the property for the purpose of determining compliance with the Highlands Act and/or the terms of any HPAA, HRAD, order, decision, agreement or settlement entered pursuant to the Highlands Act, and that forbids or limits on that land any or all:

1. Construction or placing of buildings, paved roads, signs, billboards or other advertising, or other structures on or above the ground;
2. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials;
3. Removal or destruction of trees, shrubs or other vegetation, except to replace dead or diseased mitigation plantings or as necessary to maintain the conservation restriction to accomplish the purpose for which the conservation restriction was created;
4. Excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance, except to replace dead or diseased mitigation plantings or as necessary to maintain the conservation restriction to accomplish the purpose for which the conservation restriction was created;
5. Surface use except for purposes permitting the land or water area to remain predominantly in its natural condition;
6. Activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or fish and wildlife habitat preservation; and
7. Other acts or uses detrimental to the retention of land or water areas in accordance with the Highlands Act and this chapter.

"Construction beyond site preparation" means having completed the foundation for a building or structure, and does not include the clearing, cutting, or removing of vegetation, bringing construction materials to the site, or site grading or

other earth work associated with preparing a site for construction.

“Construction materials facility” means any facility or land upon which the activities of production of ready mix concrete, bituminous concrete, or class B recycling occurs.

“Contaminated site” means, in accordance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, all portions of environmental media at a site and any location where contamination is emanating, or which has emanated, therefrom, that contain one or more contaminants at a concentration which fails to satisfy any applicable remediation standard.

“Contamination” or “contaminant” means a discharged hazardous substance as defined in N.J.S.A. 58:10-23.11b, hazardous waste as defined in N.J.S.A. 13:1E-38 and/or a pollutant as defined in N.J.S.A. 58:10A-3.

“Contiguous” means adjacent lots, even if they are separated by human-made barriers or structures or legal boundaries such as a public road or a creek.

“Department” means the Department of Environmental Protection.

“Designated planning agency” means an agency designated by the Governor to conduct areawide WQM planning pursuant to N.J.S.A. 58:11A-4.

“Development” means the same as that term is defined in the Municipal Land Use Law, N.J.S.A. 40:55D-4.

“Development regulation” means the same as that term is defined in the Municipal Land Use Law, N.J.S.A. 40:55D-4.

“Discharge” means an action or omission defined as such pursuant to the Technical Requirements for Site Remediation, at N.J.A.C. 7:26E-1.8.

“Disturbance” means the placement of impervious surface, the exposure or movement of soil or bedrock, or the clearing, cutting, or removing of vegetation.

“Ecological community” means an interacting assemblage of plants, animals and other organisms, their physical environment and the natural processes that affect them.

“Endangered species” means species included on the list of endangered species that the Department promulgates pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-13 et seq., and the Endangered Plant Species List Act, N.J.S.A. 13:1B-15.151 et seq., and any species or subspecies of wildlife appearing on any Federal endangered species list or any species or subspecies of plant designated as listed, proposed, or under review by the Federal government pursuant to the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq.

“Environmental land use or water permit” means a permit, approval, or other authorization issued by the Department of Environmental Protection pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-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, N.J.S.A. 58:12A-1 et seq., or the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.

“Facility expansion” means the expansion of the capacity of an existing capital improvement in order that the improvement may serve new development.

“Federal Act” means the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., also known as the Federal Clean Water Act, and its implementing regulations.

“Final remediation document” means a document defined as such pursuant to the Administrative Requirements for the Remediation of Contaminated Sites rules, at N.J.A.C. 7:26C-1.3.

“Forest” means a biological community as determined by the method set forth at N.J.A.C. 7:38-3.9.

“Hazardous substance” means petroleum, petroleum products, pesticides, solvents and other substances as set forth in N.J.A.C. 7:1E-1.7.

“Highlands Act” means the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq.

“Highlands Council” means the Highlands Water Protection and Planning Council established by N.J.S.A. 13:20-4.

“Highlands open waters” means all springs, streams including intermittent streams, wetlands, and bodies of surface water, whether natural or artificial, located wholly or partially within the boundaries of the Highlands Region, but shall not mean swimming pools.

“Highlands Preservation Area Approval” or “HPAA” means a permit to engage in a regulated activity in the Highlands preservation area issued pursuant to the Highlands Act and these regulations, including an HPAA that contains a waiver pursuant to N.J.S.A. 13:20-33b. “Highlands Preservation Area Approval” includes Highlands general permits issued pursuant to N.J.S.A. 13:20-33d and promulgated at N.J.A.C. 7:38-12. “HPAA,” when used in these rules, includes Highlands general permits unless explicitly excluded.

“Highlands Region” means that region so designated by N.J.S.A. 13:20-7.

“Highlands Resource Area Determination” or “HRAD” means the document issued by the Department under N.J.A.C. 7:38-4 indicating the location of any Highlands Resource Area on a site or portion of a site.

“Highlands resource areas” means those features of the Highlands that merit special protection pursuant to N.J.S.A. 13:20-32b, such as Highlands open waters; flood hazard areas; steep slopes; forested areas; rare, threatened or endangered species habitat; rare or threatened plant habitat; areas with historic or archaeological features; and unique or irreplaceable land types.

“HUC 14” means an area within which water drains to a particular receiving surface-water body, which is identified by a 14-digit number, or “hydrologic unit code.” The HUC codes were developed by the U.S. Geological Survey. In New Jersey, a HUC14 correlates to a subwatershed. There are 921 HUC 14 subwatersheds in New Jersey that range in size from 0.1 to 42 square miles. The boundaries of HUC 14 subwatersheds in New Jersey are available from the Department’s Geographic Information Systems (GIS) downloads web page, <http://www.nj.gov/dep/gis/download.htm>.

“Immediate family member” means spouse, child, parent, sibling, aunt, uncle, niece, nephew, first cousin, grandparent, grandchild, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepparent, stepchild, stepbrother, stepsister, half brother, or half sister, whether the individual is related by blood, marriage, or adoption.

“Impervious surface” means any structure, surface, or improvement that reduces or prevents absorption of stormwater into land, and includes porous paving, paver blocks, gravel, crushed stone, decks, patios, elevated structures, and other similar structures, surfaces, or improvements.

“Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife” or “Landscape Maps” means the Department’s maps delineating areas used by or necessary for endangered and threatened species and other priority wildlife to sustain themselves successfully. The maps depict areas of contiguous habitat types (forest, grassland, forested wetland, emergent wetland and beach/dune) that are ranked based upon intersection with documented occurrences of endangered and threatened and priority wildlife species. Mapped habitat areas are classified based upon the status of the wildlife species whose presence is documented. Rank 5 is assigned to areas containing one or more documented occurrences of at least one wildlife species listed as endangered or threatened on the Federal list of endangered and threatened species. Rank 4 is assigned to areas with one or more documented occurrences of at least one State endangered species. Rank 3 is assigned to areas containing one or more documented occurrences of at least one State threatened species. Rank 2 is assigned to areas containing one or more documented occurrences of at least one non-listed State priority wildlife species. The maps also delineate, as Rank 1, habitat areas that meet habitat-specific suitability requirements, such as minimum area criteria for endangered, threatened and priority wildlife species, but that do not intersect with any documented occurrences of such species. The report entitled New Jersey’s Landscape Project provides additional information on mapping methodology and is

available at the website www.nj.gov/dep/fgw/ensphome.htm or by contacting the address given below. The Department’s Landscape Maps may be updated periodically and may be obtained via file download from www.nj.gov/dep/fgw/ensphome.htm or through the Interactive ImapNJ website: www.state.nj.us/dep/gis/imapnj/imapnj.htm or by writing to the Division of Fish and Wildlife, Endangered and Nongame Species Program at:

The Landscape Project
NJ Division of Fish and Wildlife
Endangered and Nongame Species Program
PO Box 400
Trenton, NJ 08625-0400

“Licensed site remediation professional” means an individual who has been issued a license pursuant to N.J.S.A. 58:10C-1 et seq.

“Linear development” means infrastructure, utilities and the rights-of-way therefor, such as sewerage and stormwater management pipes; gas and water pipelines; electric, telephone and other transmission lines; and the rights-of-way therefor. “Infrastructure” includes access roads and drives. Linear development shall not include residential, commercial, office, or industrial buildings, improvements within a development such as utility lines or pipes, or internal circulation roads.

“Local government unit” means a municipality, county, or other political subdivision of the State, or any agency, board, commission, utilities authority or other authority, or other entity thereof.

“Lot” means a designated parcel, tract or area of land established by a plat or otherwise, as permitted by law and to be used, developed or built upon as a unit pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.

“Major Highlands development” means, except as otherwise provided pursuant to N.J.S.A. 13:20-28a:

1. Any non-residential development in the preservation area;
2. Any residential development in the preservation area that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more;
3. Any activity undertaken or engaged in the preservation area that is not a development but results in the ultimate disturbance of one-quarter acre or more of forested area or that results in a cumulative increase in impervious surface by one-quarter acre or more on a lot; or
4. Any capital or other project of a State entity or local government unit in the preservation area that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or a

cumulative increase in impervious surface by one-quarter acre or more.

Major Highlands development shall not mean an agricultural or horticultural development or agricultural or horticultural use in the preservation area.

“Mine” means any mine, whether on the surface or underground, and any mining plant, material, equipment, or explosives on the surface or underground, which may contribute to the mining or handling of ore or other metalliferous or non-metalliferous products. The term “mine” shall also include a quarry, sand pit, gravel pit, clay pit, or shale pit.

“Mine site” means the land upon which a mine, whether active or inactive, is located, for which the Commissioner of Labor and Workforce Development has granted a certificate of registration pursuant to the Mine Safety Act, N.J.S.A. 34:6-98.4, and the boundary of which includes all contiguous parcels, except as provided below, of property under common ownership or management, whether located in one or more municipalities, as such parcels are reflected by lot and block numbers or metes and bounds, including any mining plant, material, or equipment. “Contiguous parcels” as used in this definition of “mine site” shall not include parcels for which mining or quarrying is not a permitted use or for which mining or quarrying is not permitted as a prior nonconforming use under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.

“Natural Heritage Database” means the manual and computerized file maintained by the Department at <http://www.nj.gov/dep/parksandforests/natural/heritage/index.html> that includes continuously updated information on the location and status of rare plant and animal species and ecological communities in New Jersey.

“New Jersey Pollutant Discharge Elimination System” or “NJPDES” means the Department’s program for the issuance of permits pursuant to the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., as amended, and its implementing rules, N.J.A.C. 7:14A.

“Non-contiguous” means a lot or lots that do not meet the definition of “contiguous” set forth elsewhere in this section.

“Oversight document” means any document that the Department or a court issues to define the role of a person participating in the remediation of a contaminated site or area of concern, and may include, without limitation, an administrative order, administrative consent order, court order memorandum of understanding, memorandum of agreement, or remediation agreement.

“Person” means an individual, corporation, corporate official, partnership, association, the Federal government, the State, municipality, commission or political subdivision of the State or any interstate body.

“Planning area” means that portion of the Highlands Region not included within the preservation area.

“Preliminary assessment” or “PA” means the first phase in the process of identifying areas of concern pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-3.

“Preservation area” means that portion of the Highlands Region so designated by N.J.S.A. 13:20-7b.

“Property as a whole” means all lots assembled as one investment or to further one development plan. The property as a whole may include more than one municipal tax block or lot. The property as a whole may also include blocks or lots that were previously sold or developed, if those blocks or lots and the remaining unsold or undeveloped blocks or lots were part of one.

“Public community water system” means a public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents.

“Public noncommunity water system” means a public water system that is not a public community water system and is either a “public nontransient noncommunity water system” or a “public transient noncommunity water system” as defined in this section.

“Public nontransient noncommunity water system” means a public water system that is not a public community water system and that regularly serves at least 25 of the same persons for more than six months in any given calendar year.

“Public transient noncommunity water system” means a public water system that is not a public community or a public nontransient noncommunity water system and that serves at least 25 transient individuals for at least 60 days in any given calendar year.

“Public utility” means the same as that term is defined in N.J.S.A. 48:2-13. That is, the term “public utility” shall include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, their successors, heirs or assigns, that now or hereafter may own, operate, manage or control within this State any railroad, street railway, traction railway, autobus, charter bus operation, special bus operation, canal, express, subway, pipeline, gas, electricity distribution, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.

“Public water system” means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least 15 service connections or regularly serves at least 25 individuals daily for at least 60 days out of the year. Such term includes

any collection, treatment, storage and distribution facilities under control of the operator of such system and used primarily in connection with such system, and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. A public water system is either a "public community water system" or a "public noncommunity water system" as defined in this section.

"Rare species" means wildlife species that are not endangered or threatened wildlife species and considered by the Department to be species of special concern as determined by a panel of experts or that are ranked S1 (critically imperiled in New Jersey because of extreme rarity), S2 (imperiled in New Jersey because of rarity), S3 (rare in New Jersey), G1(critically imperiled globally), G2 (imperiled globally because of rarity) or G3 (globally very rare and local throughout its range or found locally in a restricted range) in the Natural Heritage Database, and Plant Species of Concern listed pursuant to N.J.A.C. 7:5C-3.1. "Species of special concern" means wildlife species that warrant special attention because of evidence of population decline or inherent vulnerability to environmental deterioration or habitat modification that would result in the species becoming threatened if conditions surrounding the species begin or continue to deteriorate. The term includes species for which there is little knowledge of current population status in the State.

"Recreation and conservation purposes" means the same as that term is defined in the Garden State Preservation and Trust Act, N.J.S.A. 13:8C-3.

"Regional master plan" means the standards established in the Highlands regional master plan or any revision thereof adopted by the Highlands Council pursuant to N.J.S.A. 13:20-8 including all goals, requirements, provisions, and any municipal master plans and development regulations or county master plans and associated regulations that are formally approved by the Highlands Council pursuant to the Highlands Act.

"Regulated activity" means an activity that is a major Highlands development, and that is regulated in any manner pursuant to the Highlands Act and/or this chapter.

"Remedial action workplan" or "RAW" means a plan for the remedial action to be undertaken a contaminated site defined as such pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-6.

"Sanitary landfill facility" means a solid waste facility at which solid waste is deposited on or in the land as fill for the purpose of permanent disposal or storage for a period exceeding six months, except that it shall not include any waste facility approved for disposal of hazardous waste.

"Site investigation" or "SI" means the collection and evaluation of data adequate to determine whether or not discharged contaminants exist at a site or have migrated or are migrating from the site at levels in excess of the applicable

remediation standards. A site investigation shall be developed based upon the information collected pursuant to the preliminary assessment. Site investigations are governed by the Department's Technical Requirements for Site Remediation, N.J.A.C. 7:26E-3.

"Soil conservation district" means the same as that term is defined in N.J.S.A. 4:24-2.

"Soil Survey" means a document published by the United States Department of Agriculture and available from the Natural Resource Conservation Service or online at www.soildatamart.nrcs.usda.gov that contains descriptions of soil series on a county by county basis.

"State entity" means any State department, agency, board, commission, or other entity, district water supply commission, independent State authority or commission, or bi-state entity.

"Steep slope" means a land area with a grade greater than 10 percent and includes, but is not limited to, natural swales, ravines and manmade areas such as those created for road grading or mining for sand, gravel or fill.

"Swimming pool" means a man-made structure that impounds water where none would under natural circumstances be collected and that is regularly maintained for recreational use. "Maintained for recreational use" means the water is chemically treated on a regular basis to protect the health of users, and the structural integrity of the pool is monitored regularly. A naturally occurring lake or pond used for swimming is not a swimming pool.

"Threatened species" means an indigenous nongame wildlife species of New Jersey designated pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-13 et seq., and its implementing rules, N.J.A.C. 7:25-4.17, as most recently amended.

"Treatment works approval" or "TWA" means an approval issued pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-6, and N.J.A.C. 7:14A-22 or 7:9A-3.9, or the former N.J.S.A. 58:12-3.

"Upland forested area" means a biological community that is a "forest" and that is not a Highlands open water.

"Waters of the Highlands" means all springs, streams including intermittent streams, and bodies of surface or ground water, whether natural or artificial, located wholly or partially within the boundaries of the Highlands Region, but shall not include swimming pools.

"WQMP" or "Water quality management plan" means a plan prepared pursuant to sections 208 and 303 of the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq., (33 U.S.C. §§ 1288 and 1313, respectively) and the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., including the Statewide

WQMP, or areawide or county WQMP as defined under N.J.A.C. 7:15.

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

Deleted definitions "Application for development", "Closed", "State Development and Redevelopment Plan" and "State Soil Conservation Committee"; in definition "Aquatic ecosystem", substituted "Region" for "region"; in definition "Capital improvement", inserted "or capital project"; in definition "Highlands Preservation Area Approval", inserted the last sentence; in definition "Preservation Area", substituted "area" for "Area"; in definition "Public utility", inserted the last sentence; in definition "Regulated activity", substituted "an" for "any", "that is a major" for "including Major" and "development, and" for "Development"; added definitions "Hazardous site remediation professional", "Preliminary assessment", and "Site investigation"; and rewrote definitions "HUC 14", "No further action letter", and "Regional master plan".
Special amendment, R.2009 d.361, effective November 4, 2009 (to expire May 4, 2011).

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

Deleted definitions "Administrative consent order", "Memorandum of agreement" and "No further action letter"; and added definitions "Final remediation document" and "Licensed site remediation professional".
Readoption of special amendment, R.2011 d.251, effective September 8, 2011.

See: 43 N.J.R. 1077(a), 43 N.J.R. 2581(b).

Provisions of R.2009 d.361, readopted without change.

7:38-1.5 Requests for adjudicatory hearings

(a) Subject to the limitations of (e) below, a person may request an adjudicatory hearing to contest any of the following decisions under this chapter:

1. A Highlands applicability determination;
2. A Highlands Resource Area Determination;
3. A Highlands Preservation Area Approval;
4. A Highlands Preservation Area Approval with waiver (including when applicable, brownfield designation); and
5. A Highlands general permit authorization.

(b) A person seeking to contest any administrative order or a notice of civil administrative penalty assessment imposed pursuant to N.J.S.A. 13:20-35 and this chapter shall do so in accordance with N.J.A.C. 7:38-13.13.

(c) A request for an adjudicatory hearing shall:

1. Be in writing on a hearing request form available from the Department and shall set forth:
 - i. The name, address and daytime telephone number of the person requesting the hearing;
 - ii. When the request is submitted by someone other than the applicant, evidence that a copy of the hearing request has been mailed to the applicant;

iii. A copy of the Department notice or decision for which a hearing is being requested;

iv. The Department file number or project number on the notice or decision;

v. A statement requesting a hearing;

vi. A specific admission, denial or explanation of each fact appearing in the Department notice or decision or a statement that the person is without knowledge thereof; and

vii. A concise statement of the facts or principles of law asserted to constitute any factual or legal defense; and

2. Be submitted to the Department as follows:

i. Submit the original request to:

Office of Legal Affairs
Attention: Adjudicatory Hearing Requests
Department of Environmental Protection
PO Box 402
Trenton, New Jersey 08625-0402.

ii. Submit a copy of the request to:

Land Use Regulation Program
Attention: Director
Department of Environmental Protection
PO Box 439
Trenton, NJ 08625-0439.

(d) If a hearing request does not include a specific admission, denial or explanation of each fact alleged, or a statement that the person is without knowledge thereof, the facts alleged in the Department notice or decision shall be deemed to have been admitted.

(e) Nothing in this section shall be construed to provide a right to an adjudicatory hearing in contravention of N.J.S.A. 52:14B-3.1 through 3.3.

(f) To contest a Department determination or decision listed at (a) above, a person shall submit a hearing request no later than 30 days after notice of the decision or determination is published in the DEP Bulletin. If a person submits the hearing request after this time, the Department shall deny the request. The DEP Bulletin is available through the Department's website at www.state.nj.us/dep.

(g) As part of a request for an adjudicatory hearing, a person may request that the Department determine whether the matter for which the adjudicatory hearing is requested is suitable for mediation by the Department's Office of Dispute

2. Water allocated in accordance with a water supply allocation to a water purveyor or other potable user shall not be used to serve new activities in the preservation area that are greater than 50 percent non-potable and greater than 50 percent consumptive.

(f) In accordance with N.J.S.A. 13:20-32d, the Department may revoke an existing unused water supply allocation approval for non-potable purposes if it determines that the permittee is not implementing demand reduction measures to the maximum extent practicable.

(g) In accordance with N.J.S.A. 13:20-32d, and pursuant to (h) below, the Department may reduce an approved water allocation to eliminate any unused portion as follows:

1. Monthly and/or annual allocations may be reduced through a Department-initiated minor permit modification, or during the review of a permit renewal or modification application, if usage is less than 80 percent of the allocation, based on records for the previous five years; or

2. If all practicable water conservation measures are not undertaken. Practicable water conservation measures include:

i. Implementation of best management practices to ensure maximum water use efficiency and reduction in water losses, including:

- (1) On-going leak detection; and
- (2) State-of-the-art (industry-specific) equipment and techniques; and

ii. A maximum limit on unaccounted-for water of 15 percent.

(h) Before reducing an allocation pursuant to (g) above, the Department shall:

1. Consider projected water demands associated with approved water main extensions, approved water supply contracts, and facility expansions planned within the next five years;

2. Provide the permittee with an opportunity for a public hearing pursuant to N.J.A.C. 7:19-2.8, prior to final permit modification; and

3. Depending on the purpose of the diversion, allow the permittee to implement a water-use practice during the term of the renewed or modified permit that will significantly improve water conservation.

(i) Any person in the preservation area who has the capability to divert more than 50,000 gallons of water per day (1.55 million gallons of water per month), but who does not currently do so, shall submit a water use registration to the Department in accordance with these rules and N.J.A.C. 7:19 to the address listed at N.J.A.C. 7:38-1.2. The "capability to divert more than 50,000 gallons of water per day" means the ability to divert more than 35 gallons of water per minute

from a single source or a combination of sources, at least one of which is located all or partly within the preservation area.

1. Any holder of a valid Water Use Registration issued under N.J.A.C. 7:19 for diversion sources in the preservation area, who was in compliance with the Water Use Registration for the period between March 29, 1999 and March 29, 2004, and whose allocation limit was established at less than 100,000 gallons per day (3.1 million gallon per month), may continue to divert water at the current diversion level under the valid Water Use Registration.

i. For purposes of this paragraph, the Department will determine the current diversion level to be the highest amount of water diverted in any one month for the March 29, 1999 to March 29, 2004 period. The current annual diversion level is the highest annual amount of water diverted for the March 29, 1999 to March 29, 2004 period. At no time will the current diversion level be established at less than 50,000 gallons of water per day.

2. The Department will modify existing Water Use Registrations for diversion sources in the preservation area to include as conditions the current source locations and the allowable diversion amount, based on the current diversion level. If after the effective date of such modification a registration holder exceeds the diversion amount or changes source locations and such change would not qualify as a minor permit modification under N.J.A.C. 7:19-1.5(a), an HPAA will be required.

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 section.

7:38-3.3 Public community water systems

(a) Construction of a new public community water system or extension of an existing public community water system to serve development in the preservation area is prohibited unless the Department determines that the development to be served:

1. Is exempt from the Highlands Act pursuant to N.J.A.C. 7:38-2.3 and consistent with the applicable area-wide WQMP;

2. Qualifies for an emergency HPAA pursuant to N.J.A.C. 7:38-7; or

3. Qualifies for an HPAA with waiver in accordance with N.J.A.C. 7:38-6.

(b) Construction of any new public water system shall comply with the Safe Drinking Water Act rules at N.J.A.C. 7:10.

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

In the introductory paragraph of (a), inserted "to serve development in the preservation area" and deleted "within the preservation area" following "prohibited"; in (a)1, deleted "in the preservation area,"

following "Is"; in (a)2, substituted "Qualifies" for "Is in the preservation area and qualifies" and inserted "or" at the end; in (a)3, substituted "Qualifies" for "Is in the preservation area and qualifies", inserted "with waiver", and substituted a period for "; or" at the end; and deleted (a)4.

7:38-3.4 NJPDES permitted discharges and wastewater facilities

(a) Any new discharge to surface water or ground water, except discharges from water supply facilities, that would require an individual or general NJPDES permit and any extension of a sewer line that requires a Treatment Works Approval is prohibited within the preservation area unless the development in the preservation area that satisfies any one of the following criteria:

1. Is exempt from the Highlands Act pursuant to N.J.A.C. 7:38-2.3, and is consistent with the applicable areawide Water Quality Management Plan;
2. Receives an HPAA in accordance with N.J.A.C. 7:38-6; or
3. Is not a major Highlands development.

(b) A new individual subsurface disposal system or aggregate of equivalent disposal units where the sanitary wastewater design flow is 2,000 gallons per day or less is permitted within the preservation area as set forth at (b)1 through 4 below. Forest under this subsection shall be identified and calculated in accordance with N.J.A.C. 7:38-3.9. For the purposes of this subsection, "equivalent disposal unit" means: for residential development, one system serving one single-family home sized in accordance with the Standards for Individual Subsurface Sewage Disposal Systems, Volume of sanitary sewage, at N.J.A.C. 7:9A-7.4; or for non-residential development or residential development comprising structures other than single-family homes, 500 gallons of wastewater per day generated for the development type, as determined in accordance with N.J.A.C. 7:9A-7.4:

1. On a lot that contains all forest, the applicant proposes no more than one individual subsurface disposal system or equivalent disposal unit for each 88 acres of the lot;
2. On a lot that does not contain forest, the applicant proposes no more than one individual subsurface disposal system or equivalent disposal unit for each 25 acres of the lot;
3. For the purposes of this subsection, the acreage of a lot shall be the total area of the lot(s) on which the proposed development is located as described by deed(s) or subdivision plat(s) on file with the municipal or county clerk.
4. For a lot containing both forest and nonforest areas, the total number of allowable individual subsurface disposal systems or equivalent disposal units permitted on the lot shall be determined by calculating the number of acres of the lot that are forest (as determined in accordance with the method at N.J.A.C. 7:38-3.9) and dividing that number

by 88; calculating the remaining number of acres of the lot that are not forest and dividing that number by 25; and then summing the results. If the sum results in a fraction, the number shall be rounded down to the nearest whole number in order to determine the number of permitted individual subsurface disposal systems or equivalent disposal units.

5. For purposes of this section, non-contiguous lots in existence as of August 10, 2004 may be aggregated such that the number of individual subsurface disposal systems or equivalent disposal units that would be permitted under this section on one or more of the aggregated lots is transferred to one or more of the aggregated lots provided:

- i. The proposed development on the lot or lots to receive the transferred individual subsurface disposal systems or equivalent disposal units complies with all Federal, State and local laws;
- ii. The proposed development on the lot or lots to receive the transferred individual subsurface disposal systems or equivalent disposal units does not require a waiver of any requirement of this chapter;
- iii. The proposed development on the lot or lots to receive the transferred individual subsurface disposal systems or equivalent disposal units is constructed in accordance with the Highlands Act and this chapter;
- iv. The lots to be aggregated under this paragraph are all located in the preservation area and within the same HUC 14; and
- v. The lot or lots from which the individual subsurface disposal systems or equivalent disposal units are to be transferred are subject to a conservation restriction against future disturbance in accordance with N.J.A.C. 7:38-6.3.

(c) In addition to the requirements at (b) above, individual subsurface sewage disposal systems or equivalent disposal units shall satisfy the Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A, without extraordinary measures, including replacement of disposal field soil with permeable material or mounding of a disposal field to achieve the required depth to groundwater or confining layer.

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 "Wastewater treatment facilities". Rewrote the section.

Case Notes

While the petitioner challenged many of the data sets chosen by the Department of Environment Protection for the model promulgating the septic density standard at N.J.A.C. 7:38-3.4, petitioner failed to prove that there was no rational basis for the data sets chosen. The regulation was supported by ample scientific evidence and was consistent with the legislative intent of the Highlands Act and the expressed authority and mandates found in N.J.S.A. 13:20-32(e). In re Highland Water Protection and Planning Act Rules, N.J.A.C. 7:38-1 et seq., OAL Dkt. No. ELU 6353-08, 2009 N.J. AGEN LEXIS 1119, Final Decision (July 13, 2009).

Department of Environment Protection’s use of multiple conservative assumptions in devising the septic density standard was not unreasonably conservative where the Legislature left the decision on the use of conservative assumptions to the Department. Indeed, the Department was compelled to take a conservative approach in light of the high protective bar set in the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq., for the septic density standard and the limited type and level of any future development contemplated in the preservation area. In re Highland Water Protection and Planning Act Rules, N.J.A.C. 7:38-1 et seq., OAL Dkt. No. ELU 6353-08, 2009 N.J. AGEN LEXIS 1119, Final Decision (July 13, 2009).

Department of Environment Protection’s method of identifying baseline water quality in forested areas for use in the dilution model was not inconsistent with the method of identifying forest areas for development applications in the Highlands regulations at N.J.A.C. 7:38-3.9(b) because the identification of pristine forested areas utilized for determining baseline water quality for use in the dilution model was a part of the regulatory basis of N.J.A.C. 7:38-3.4(b)1 and 2 and was distinct from, and not limited by, the method of identifying forest areas set out at N.J.A.C. 7:38-3.9(b). In re Highland Water Protection and Planning Act Rules, N.J.A.C. 7:38-1 et seq., OAL Dkt. No. ELU 6353-08, 2009 N.J. AGEN LEXIS 1119, Final Decision (July 13, 2009).

7:38-3.5 Impervious surfaces

(a) The Department shall not issue an HPAA if a proposed development or activity will result in impervious surface of greater than three percent of the land area of a lot. As to lots created by subdivision after August 10, 2004, calculation of this limit shall include all impervious surface existing on the entire land area of the lot which existed on August 10, 2004. For example, if a lot in existence as of August 10, 2004 currently has two percent impervious surface within its August 10, 2004 boundary, only one percent additional impervious surface will be permitted within that boundary, assuming the new impervious surface is placed in accordance with the Highlands Act and this chapter and any other applicable Federal, State and local law. Thus, if that lot is further subdivided, the newly created lot(s) could only receive an HPAA for a cumulative total of additional impervious surface equal to one percent of the area of the original lot that existed on August 10, 2004.

1. No impervious surface shall be permitted on a lot created by subdivision after August 10, 2004, if the lot of which the lot was a part as of August 10, 2004 contains three percent or more impervious surface.
2. For purposes of this subsection, non-contiguous lots in existence as of August 10, 2004, that contain less than three percent impervious surface may be aggregated such that the percentage of impervious surface that would have otherwise been permitted under this subsection on one or more of the aggregated lots is transferred to one or more of the aggregated lots, provided:
 - i. The proposed development on the lot or lots to which the percentage impervious surface is transferred complies with all Federal, State and local law;
 - ii. The proposed development on the lot or lots to which the percentage impervious surface is transferred

does not require a waiver of any requirement of this chapter;

- iii. The septic density standards of this chapter as set forth at N.J.A.C. 7:38-3.4(b) are met;
- iv. The non-contiguous lots to be aggregated under this paragraph are all located in the Highlands Preservation Area and within the same HUC 14; and
- v. The lot or lots from which the percentage impervious surface is transferred are permanently subject to a conservation restriction against future disturbance in accordance with N.J.A.C. 7:38-6.3.

(b) For purposes of this section, the calculation of the land area of a lot shall exclude Highlands open waters.

(c) An applicant for an HPAA shall calculate impervious surface area based upon the impervious surface existing on the date the HPAA application is submitted to the Department.

(d) Where impervious surface on a lot in existence as of August 10, 2004 exceeds three percent of the area of the lot, all lawfully existing impervious surface may remain but no additional impervious surface shall be permitted.

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); rewrote (a)2; deleted (d); recodified (e) as new (d); and in (d), substituted “lawfully” for “legally”.

7:38-3.6 Highlands open waters

(a) There shall be a 300-foot buffer adjacent to Highlands open waters in which no disturbance is permitted, except as provided in this chapter.

(b) All new major Highlands development is prohibited within a Highlands open water and its adjacent 300-foot buffer except for linear development, which shall be permitted provided that there is no feasible alternative for the linear development outside the Highlands open water or Highlands open water buffer.

1. In order to demonstrate “no feasible alternative for linear development” the applicant shall demonstrate that there is no other location, design and/or configuration for the proposed linear development that would reduce or eliminate the disturbance to a Highlands open water or the adjacent buffer. The additional limitations at (b)1i and ii below apply for proposed linear development that would provide access to an otherwise developable lot.

- i. The proposed linear development is the only point of access for roadways or utilities to an otherwise developable lot; and
- ii. Shared driveways are used to the maximum extent possible to access multiple lots, especially in areas containing steep slopes, Highlands open water or Highlands open water buffers.

2. For a driveway, the applicant shall, in addition to (b)1 above, demonstrate that:

i. The applicant has made a good faith effort to transfer development rights for the lot pursuant to N.J.S.A. 13:20-13, and has not obtained a commitment from the Highlands Council or a receiving zone municipality to purchase said development rights;

ii. The lot has been offered for sale at an amount no greater than the specific fair market value to all property owners within 200 feet of the lot, and to the land conservancies, environmental organizations, the Highlands Council and all other government agencies on a list provided by the Department, at an amount determined in compliance with N.J.S.A. 13:8C-26j or 13:8C-38j, as applicable by letter sent by certified mail, return receipt requested, with a copy to the Highlands Council, using the form provided by the Department, disclosing the location on the lot of all Highlands resource areas as defined in N.J.A.C. 7:38-1.4 and stating that an application to develop the lot has been filed and enclosing a copy of a fair market value appraisal, in accordance with (b)2iv(5) below, performed by a State-licensed appraiser based on the minimum beneficial economically viable use of the property allowable under local law; and

iii. No reasonable offer for the lot has been received; and

iv. Documentation for (b)2i through iii above shall include:

(1) A copy of each letter that the applicant sent under this paragraph;

(2) A copy of all responses received. Each response shall be submitted to the Department within 15 days after the applicant's receipt of the response;

(3) A list of the names and addresses of all owners of real property within 200 feet of the lot, as certified by the municipality, including owners of easements as shown on the tax duplicate;

(4) Receipts indicating the letters were sent by certified mail;

(5) For submittal to all property owners within 200 feet, a copy of the fair market value appraisal required under (b)2ii above; and

(6) A copy of a written response or a resolution from the Highlands Council demonstrating that it has considered and rejected the offer;

3. An alternative shall not be excluded from consideration under this subsection merely because it includes or requires an area not owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed linear development.

4. After consideration of the information required in (b)1 through 3 above, the Department shall not issue an HPAA under this section if an applicant has refused a fair market value offer to purchase the property for which the driveway linear development is sought or if the Department finds that there is an alternative to the proposed linear development.

(c) An applicant shall provide mitigation in accordance with N.J.A.C. 7:7A for each Department-approved linear development proposed within a Highlands open water that is also a freshwater wetland or State open water, as defined in the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4.

(d) Structures or land uses in a Highlands open water buffer existing on August 10, 2004 may remain, provided that the area of disturbance is not increased.

(e) Nothing in this section shall be construed to limit the authority of the Department to establish buffers of any size or any other protections for Category One waters designated by the Department pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., or any other law, or rule or regulation adopted pursuant thereto for major Highlands development or for other development that does not qualify as major Highlands development.

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).

7:38-3.7 Flood hazard areas

(a) A flood hazard area is any land in a flood plain as defined under the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., and its implementing rules, N.J.A.C. 7:13.

(b) A major Highlands development in a flood hazard area shall meet the requirements of either (b)1 or 2 below:

1. The proposed activities, both individually and cumulatively, displace no flood storage volume whatsoever onsite, as calculated according to (c) and (d) below, based on site conditions as of August 10, 2004; or

2. The proposed activities, both individually and cumulatively, displace no more than 20 percent of the flood storage volume onsite, as calculated according to (c) and (d) below, based on site conditions as of January 31, 1980, and an equal or greater volume of flood storage is created offsite in accordance with (e) below.

(c) The flood storage volume of a site is the volume of space outside the floodway, as defined at N.J.A.C. 7:13-1.2, between the ground surface and the flood plain elevation as determined under N.J.A.C. 7:13. Additional flood storage can be created either by excavating material from below the surface of the ground and removing the material to outside of the flood plain so that floodwaters can freely enter and exit the excavated area, and/or by removing fill or structures that

have been previously and lawfully placed within the flood plain and outside the floodway.

(d) Flood storage volume can be created onsite to compensate for regulated activities that displace flood storage provided the onsite compensation:

1. Is created within or adjacent to the flood plain of the same water as the proposed fill, or a tributary to the same water as the proposed fill if the flood plain of both waters connect on site;
2. Is not created in a floodway, as defined at N.J.A.C. 7:13-1.2;
3. Is not created within 300 feet of a Highlands open water, unless the area where the compensation will be created has been subject to previous, lawful disturbance; and
4. Would not have other significant adverse environmental consequences, that is, shall not merely substitute the adverse effects of the proposed activities with adverse impacts upon other Highlands resource areas.

(e) Flood storage volume can be created offsite to compensate for regulated activities that displace flood storage as described in (b)2 above provided the offsite compensation:

1. Is of equal or greater volume than the flood storage displaced by the regulated activities onsite;
2. Is created within or adjacent to the flood plain of the same water as the proposed fill, or a tributary to the same water as the proposed fill if the flood plain of both waters connect on site;
3. Is situated within the same HUC 14 watershed as the proposed fill;
4. Is not separated from the proposed fill by a water control structure, such as a bridge, culvert or dam, unless the applicant demonstrates that the water control structure causes no significant change in the flood plain elevation;
5. Is not created in a floodway, as defined at N.J.A.C. 7:13-1.2;
6. Is not created within 300 feet of a Highlands open water, unless the area where the compensation will be created has been subject to previous, lawful disturbance;
7. Would not have other significant adverse environmental consequences, that is, shall not merely substitute the adverse effects of the proposed activities with adverse impacts upon other Highlands resource areas;
8. Is agreed to in writing by the owners of the land on which the offsite compensation is proposed; and
9. Is proposed on land that is subject to a conservation restriction against future flood storage volume displacement in accordance with N.J.A.C. 7:38-6.3.

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

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

In (e)9, substituted "subject to a conservation restriction" for "deed restricted" and inserted "in accordance with N.J.A.C. 7:38-6.3".

7:38-3.8 Steep slopes

(a) A major Highlands development on a steep slope shall meet the requirements of this section.

(b) The percent of slope (rise in feet per horizontal distance) shall be established by measurement of distance perpendicular to the contour of the slope. The percent of slope shall be calculated for each two-foot contour interval. For example, any location on the site where there is a one-foot rise over a 10-foot horizontal run constitutes a 10 percent slope; a 1.5 foot rise over a 10-foot horizontal run constitutes a 15 percent slope; a two-foot rise over a 10-foot horizontal run constitutes a 20 percent slope.

(c) Linear development as defined at N.J.A.C. 7:38-1.4 shall be permitted on a slope with a grade of 20 percent or greater provided that there is no feasible alternative for the linear development outside the steep slope. In order to demonstrate "no feasible alternative for linear development," the applicant shall demonstrate that there is no other location, design and/or configuration for the proposed linear development that would reduce or eliminate the disturbance to a slope with a grade of 20 percent or greater. The additional limitations at (c)1 and 2 below apply for proposed linear development that would provide access to an otherwise developable lot.

1. The proposed linear development is the only point of access for roadways or utilities to an otherwise developable site;

2. Shared driveways are used to the maximum extent possible to access multiple lots, especially in areas containing steep slopes, Highlands open water or Highlands open water buffers; and

3. For a driveway, the applicant shall, in addition, demonstrate that:

- i. The applicant has made a good faith effort to transfer development rights for the lot pursuant to N.J.S.A. 13:20-13, and has not obtained a commitment from the Highlands Council or a receiving zone municipality to purchase said development rights;

- ii. The lot has been offered for sale at an amount no greater than the specific fair market value to all property owners within 200 feet of the lot, and to the land conservancies, environmental organizations, the Highlands Council and all other government agencies on a list provided by the Department, at an amount determined in compliance with N.J.S.A. 13:8C-26j or 13:8C-38j, as applicable by letter sent by certified mail, return receipt requested, with a copy to the Highlands Council, using the form provided by the Department, disclosing

the location on the lot of all Highlands resource areas as defined in N.J.A.C. 7:38-1.4 and stating that an application to develop the lot has been filed and enclosing a copy of a fair market value appraisal, performed by a State-licensed appraiser based on the minimum beneficial economically viable use of the property allowable under local law; and

iii. No reasonable offer for the lot has been received; and

iv. Documentation for (c)4i through iii above shall include:

(1) A copy of each letter that the applicant sent under this paragraph;

(2) A copy of all responses received. Each response shall be submitted to the Department within 15 days after the applicant's receipt of the response;

(3) A list of the names and addresses of all owners of real property within 200 feet of the lot, as certified by the municipality, including owners of easements as shown on the tax duplicate;

(4) Receipts indicating the letters were sent by certified mail;

(5) For submittal to all property owners within 200 feet, a copy of the fair market value appraisal required under (c)4ii above; and

(6) A copy of a written response or a resolution from the Highlands Council demonstrating that it has considered and rejected the offer;

4. An alternative shall not be excluded from consideration under this provision merely because it includes or requires an area not owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed linear development; and

5. After consideration of the information required in (c)1 through 4 above, the Department shall not issue an HPAA under this section if an applicant has refused a fair market value offer to purchase the property for which the driveway linear development is sought, or if the Department finds that there is an alternative to the proposed linear development.

(d) For a steep slope with a grade greater than 10 percent but less than 20 percent:

1. If the steep slope is a forest as defined at N.J.A.C. 7:38-1.4, linear development as defined at N.J.A.C. 7:38-1.4 shall be permitted if there is no feasible alternative for the linear development outside the steep slope;

2. If the steep slope is not a forest and the appropriate Soil Survey for the onsite soil series and percent slope

states that the soil capability class of the soil is III or higher or the soil capability class and subclass are IIe or IIs, linear development shall be permitted provided that there is no feasible alternative for the linear development outside the steep slope; or

3. If the steep slope is not a forest and the appropriate Soil Survey for the onsite soil series and percent slope states that the soil capability class is I or the soil capability class and subclass is IIw, major Highlands development shall be permitted provided:

i. The proposed development meets all other standards in this chapter; and

ii. The applicant demonstrates that there is no other location, design and/or configuration for the proposed development that would reduce or eliminate the disturbance to steep slopes and still fulfill the basic purpose of the proposed development.

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

Rewrote (c); in (d)2, inserted "the soil capability class and subclass are"; in (d)3, inserted "the soil capability class and subclass is" and "major Highlands"; in (d)3i, substituted "development" for "activity".

7:38-3.9 Upland forested areas

(a) A major Highlands development in an upland forested area shall meet the requirements of this section.

(b) The applicant shall identify on a site plan submitted to the Department all forest in existence on the lot as of August 10, 2004 as well as those forest areas that have subsequently developed.

1. The limit of the forest shall be identified using aerial photographs obtained from the Department, free of charge, at www.state.nj.us/dep/gis/; and

2. If the aerial photograph contains areas of sporadic coverage that have not been identified as forest by the applicant, the applicant shall lay a one-half acre grid system over the photograph. A standard 142 foot square grid block provided by the Department at its website shall be used. Any grid block containing 33 percent or greater forest cover, shall be considered as forest for the purposes of this chapter, unless the applicant demonstrates otherwise using the procedure established in (c) below.

(c) If the Department identifies forest areas on a lot that have not been so identified by the applicant, the Department shall require an applicant to measure the trees and determine density of the trees on the lot using the following method:

1. Select two 25-foot by 25-foot plots in every acre of the site suspected of being a forest.

i. The plots shall be located in the portion of each acre with the highest density of trees as determined by a visual inspection.