

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

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

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

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

Case Notes

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

7:38-2.4 Highlands applicability determination

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

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

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

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

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

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

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

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

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

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

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

- ii. Result in a cumulative increase in impervious surface of one acre or more; or
 - iii. Involve the ultimate disturbance of two or more acres of land;
6. Any activity that is part of an agricultural or horticultural development or agricultural or horticultural use;
7. Any activity conducted by a landowner in accordance with an approved woodland management plan issued pursuant to the Farmland Assessment Act, N.J.S.A. 54:4-23.3, or the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester;
8. The remediation of any contaminated site pursuant to N.J.S.A. 58:10B-1 et seq., provided no residential, commercial, or industrial development is undertaken concurrently with, or subsequent to, the remediation. Any concurrent or subsequent development at the site is subject to the requirements of this chapter for a Highlands applicability determination and HPAA as applicable;
9. The addition of telecommunications equipment or antennas to a telecommunication facility existing on August 10, 2004, provided the equipment is located within the existing fenced compound or on lawfully existing impervious surface so that it does not increase impervious surface; or
10. Installation of cellular equipment on a legally existing overhead utility tower and the construction of the attendant 10-foot by 20-foot pad, when located within the four footings of such tower within a right-of-way owned or controlled by a public utility, constructed with the consent of the public utility.

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

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

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

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

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

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

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

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

Section was "Applicability determination". Rewrote (a) and (b); in (c), substituted "or" for a comma following "TWA" and inserted the last sentence; and in (d), substituted "if required by" for "pursuant to".

Special amendment, R.2009 d.361, effective November 4, 2009 (to expire May 4, 2011).

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

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

Administrative correction.

See: 42 N.J.R. 1862(a).

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 with changes incorporated at 42 N.J.R. 1862(a).

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

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

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

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

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

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

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

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

2. Persons who make emergency diversions of water for a period of less than 31 consecutive days. An emergency diversion includes taking water for the purpose of fire fighting, flood prevention, hazardous substance and/or waste spill response, or for other emergencies as determined by the Department;

(c) This chapter does not apply to:

1. Diversions for agricultural, aquacultural; or horticultural purposes as defined in N.J.A.C. 7:20A-1.3; or

i. In all cases of emergency diversion, the person responsible for the diversion shall contact the Department within 48 hours of initiation of the emergency diversion. If the emergency diversion is expected to continue for more than 31 days, the person responsible for the emergency diversion shall apply for a water supply diversion permit pursuant to N.J.A.C. 7:19 within 30 days after initiating the emergency diversion.

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), substituted "preservation area" for "Preservation Area"; in (a)2, substituted "an" for "a" and inserted "with waiver"; deleted (b)2; recodified (b)3 and (b)4 as (b)2 and (b)3; in (b)2, inserted "as of March 29, 2004 for a diversion within the preservation area who diverts water in an amount" and "under N.J.A.C. 7:38-3.2(i)2"; in (b)3, inserted "in the preservation area" and updated N.J.A.C. reference.

7:38-2.6 Applicability for purposes of NJPDES-permitted discharges and wastewater facilities

(a) Pursuant to N.J.S.A. 58:11A-7.1, within the preservation area, designated sewer service areas for which wastewater collection systems have not been installed as of August 10, 2004, were revoked effective August 10, 2004, and any associated treatment works approvals in the impacted areas expired on August 10, 2004 except for sewer service areas and any associated treatment works approvals necessary to serve:

1. Development that is exempt from the Highlands Act pursuant to N.J.A.C. 7:38-2.3; or
2. Major Highlands development that is approved in accordance with an HPAA with a waiver in accordance with N.J.A.C. 7:38-6.

(b) Except as provided in (d) below, any application for an individual NJPDES permit, request for authorization under a general NJPDES permit, or application for treatment works approval under N.J.A.C. 7:14A for an activity in the preservation area shall be submitted to the Division of Water Quality at the address in N.J.A.C. 7:38-1.2(a)3. If the Department determines the proposed activity for which the application is submitted constitutes major Highlands development, the activity will require a Highlands Applicability Determination that the activity is exempt from the Highlands Act and consistent with the WQMP, exempt from the Highlands Act and not addressed under a WQMP, or has received an HPAA prior to the application being declared administratively complete for review under N.J.A.C. 7:14A.

(c) For a major Highlands development not exempt from this chapter, the permits, authorizations, approvals and certifications listed below shall not be approved unless an HPAA is first obtained in accordance with N.J.A.C. 7:38-6. For applications and forms, please contact the Division of Water Quality at the address in N.J.A.C. 7:38-1.2(a)3:

1. An individual NJPDES permit or an authorization under a general NJPDES permit;

2. A treatment works approval issued under N.J.A.C. 7:14A or 7:9A for building, installing, modifying, or operating any treatment works; and

3. A certification issued pursuant to N.J.S.A. 58:11-25.1 (for 50 or more realty improvements) for any sewerage facility.

(d) A request for authorization (RFA) under NJPDES Permit No. NJ0088323 (category 5G3 "construction activity" stormwater general permit) shall be submitted to the Department. Notwithstanding N.J.A.C. 7:38-2.4(b) and (c), requests for authorization shall not be considered complete for review under N.J.A.C. 7:14A unless accompanied by a HPAA or a Highlands Applicability Determination that the proposed activity is exempt from the Highlands Act and consistent with a WQMP, or exempt from the Highlands Act and not addressed by a WQMP.

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

Section was "Applicability for purposes of wastewater discharges and treatment systems". In (a)2, substituted "an HPAA with a waiver in accordance with N.J.A.C. 7:38-6" for "N.J.A.C. 7:38-6.4"; in (b), inserted "NJPDES" twice"; in the introductory paragraph of (c), substituted "a major Highlands development" for "an activity"; and in (d), inserted "(RFA)", substituted "RFA forms" for "applications" and "Notwithstanding N.J.A.C. 7:38-2.4(b) and (c), requests" for "Except as provided at N.J.A.C. 7:38-2.4(b), a request".

Administrative change.
See: 41 N.J.R. 2789(a).

SUBCHAPTER 3. PRESERVATION AREA STANDARDS

7:38-3.1 Scope and applicability

(a) In accordance with the Highlands Act at N.J.S.A. 13:20-32, the Department shall issue an HPAA only if the proposed development or activity satisfies all the requirements in this subchapter and N.J.A.C. 7:38-6.2.

(b) An applicant is subject to the standards in this subchapter if any of the environmental resources described in this subchapter existed on a lot on August 10, 2004. If a resource appears on photographs from the Department's 2002 aerial overflight of the State, the Department shall assume the resource existed on the lot on August 10, 2004. An applicant may rebut this presumption by providing the Department credible proof that the resource was lawfully disturbed before August 10, 2004.

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

In (b), substituted "disturbed" for "removed from the lot".

7:38-3.2 Standards for water supply diversion sources

(a) Any person applying for a new or modified water supply allocation or an increased diversion under an existing water use registration as established under (i) below where at least one of the diversion sources is located within the

preservation area shall obtain an HPAA including compliance with the standards and requirements in the Water Supply Allocation Permit Rules, N.J.A.C. 7:19.

(b) The Department shall not approve as part of an HPAA any new or increased diversion within the preservation area resulting in a total permitted diversion of greater than 50,000 gallons of water per day unless:

1. Individual and cumulative impacts of multiple diversions are fully assessed;
2. Existing stream base flows are maintained;
3. Depletive use within the sub-drainage basin is minimized. For the purposes of this section, sub-drainage area is defined as the HUC 14;
4. Existing water quality is maintained; and
5. Ecological uses are protected.

(c) Any water allocation approved as part of an HPAA for a diversion located within the preservation area that impacts or has the potential to impact any Highlands open water that is a surface water body, shall include a passing flow for the affected portion of the surface water body. In establishing the passing flow, the Department shall take into account the needs of existing downstream users holding a valid water allocation permit or HPAA, aquatic and water-dependent ecological requirements, use and classification of the water body, natural seasonal flow regimes of the affected water body, and impacts to the safe yield of existing water supply systems.

1. The Department may use passing flow assessment methods to ensure that the ecological integrity of water bodies in the preservation area is protected as mandated by the Highlands Act.

(d) The Department shall not approve as part of an HPAA any new or increased diversion within the preservation area unless water conservation measures are implemented to the maximum extent practicable. Such measures include those identified at (g)2 below.

(e) The Department shall not approve as part of an HPAA any new or increased diversion that results in a diversion of greater than 50,000 gallons of water per day for a non-potable use that is greater than 50 percent consumptive unless the applicant submits documentation that the diversion will not result in a net increase in this type of use within the sub-drainage area. The Department shall approve a diversion for this type of use provided:

1. The applicant documents that, within the same sub-drainage area, there is an equivalent reduction in a non-potable use that is greater than 50 percent consumptive that is achieved by:
 - i. Groundwater recharge of storm water;
 - ii. Beneficial reuse of reclaimed water; or

iii. The permanent termination of an equivalent non-potable use that is greater than 50 percent consumptive; and

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