

iv. Disturbance authorized under general permit 17 on a publicly owned site;

3. Disturbance exceeding 0.5 acre under general permit 6 cannot be combined with any other general permit authorization on the same site, except with an authorization under general permit 6A, in which case the total impact to wetlands, State open waters, and transition area shall not exceed one acre. For example, 0.75 acres of disturbance of wetlands or State open waters under general permit 6 can be combined with 0.25 acres of disturbance of transition area under general permit 6A;

4. The Department shall not authorize disturbance under both general permit 10A and general permit 10B for the same site; and

5. The Department shall not authorize multiple crossings of the same wetland or State open water unless:

i. There is no other location, design and/or configuration for the proposed crossing that would provide access to an otherwise developable lot that would reduce or eliminate the disturbance to a wetland or State open water; and

ii. Shared driveways are used to the maximum extent possible to access multiple lots.

(b) The Department may authorize activities under a general permit more than once on the same site, and/or at different times on the same site. However, the total disturbance authorized on a site under general permits since July 1, 1988 shall meet the criteria for use of multiple general permits set forth at (a)1 and 2 above.

(c) If a general permit is not listed at (a)2 above, any acreage disturbed under that general permit is not counted towards the one acre limit in (a)2 above, regardless of whether the general permit is used singly or in combination with other general permits, and regardless of whether the general permit is used once or repeatedly.

(d) In addition to the limits above in this section, the Department shall not authorize activities under general permit numbers 13, 15, or 18 more often than once every five years on a single site.

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Rewrote the introductory paragraph of (a); in (a)1, substituted a period for “; and” at the end of the second sentence and inserted the third through sixth sentences; in the introductory paragraph of (a)2, inserted “6A,” and “17A,”; in (a)2iv, substituted a semicolon for a period at the end; and added (a)3 through (a)5.

#### Case Notes

Initial Decision (2005 N.J. AGEN LEXIS 323) adopted, which concluded that petitioner’s application for a permit to fill 0.94 acres of additional freshwater wetlands that were present on three lots of a subdivision site was properly denied where prior applications to fill wetlands on the site had been granted to the petitioner (0.52 acres) and

its transferee (0.85 acres); as a matter of law, the filling of an additional 0.94 acre of wetlands on the subdivision site would exceed the one-acre maximum area of fill allowed under N.J.A.C. 7:7A-4.4(a)(2). *LH Wagner Realty Corp. v. N.J. Dep’t of Env’tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 8922-03, 2005 N.J. AGEN LEXIS 1304, Final Decision (August 8, 2005).

#### 7:7A-4.5 Application for authorization to act under General Permits

(a) An applicant for authorization to act under a general permit shall follow all application procedures and information requirements at N.J.A.C. 7:7A-10, Application Contents and Procedures, unless the activity is one of the following, in which case the application requirements are found in the general permit itself:

1. Maintenance of an off-stream stormwater management facility under N.J.A.C. 7:7A-5.1(d);

2. Repair or modification of a malfunctioning individual subsurface sewage disposal system under N.J.A.C. 7:7A-5.25; or

3. Minor channel or stream cleaning under N.J.A.C. 7:7A-5.26.

New Rule, R.2001 d.312, effective September 4, 2001.

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

#### 7:7A-4.6 (Reserved)

New Rule, R.2001 d.312, effective September 4, 2001.

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

Repealed by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Section was “Combined general permit authorization and flood hazard area permit”.

### SUBCHAPTER 5. ADOPTED GENERAL PERMITS

#### 7:7A-5.1 General permit 1—Maintenance and repair of existing features

(a) General permit 1 authorizes activities in freshwater wetlands and State open waters, required to carry out the repair, rehabilitation, replacement, maintenance or reconstruction of a previously authorized, currently serviceable structure, fill, roadway, utility line, active irrigation or drainage ditch, or stormwater management facility lawfully existing prior to July 1, 1988 or permitted under this chapter. General permit 1 does not cover transition areas because these activities are not regulated in transition areas under N.J.A.C. 7:7A-2.6 and thus may be performed in a transition area without Department approval under this chapter.

(b) To be authorized under general permit 1, the previously authorized structure, fill, roadway, utility, ditch or facility shall not have been and will not be put to any use other than as specified in any permit authorizing its original construction. Activities under general permit 1 shall not expand, widen or deepen the previously authorized feature, and shall

not deviate from any plans of the original activity, except that minor deviations due to changes in materials or construction techniques and which are necessary to make repairs, rehabilitation or replacements are allowed provided such changes do not result in disturbance of additional freshwater wetlands or State open waters upon completion of the activity.

(c) If the activity is the ongoing maintenance of an off-stream stormwater management facility created in uplands, including a wetland constructed in uplands for stormwater management purposes after September 4, 2001, the following shall apply:

1. The application for authorization shall be subject to the public notice requirements at N.J.A.C. 7:7A-10.8 but shall not be subject to the other application requirements in N.J.A.C. 7:7A-10;

2. The application for authorization shall include the information required by the application checklist, including information identifying and describing the site and the project, and a copy of the permit, if any, authorizing the original construction of the stormwater management facility;

3. The Department shall process the application for authorization using the procedures at (d) below; and

4. For the purposes of this subsection, maintenance includes removal of sediment and debris and mowing of vegetation, as necessary to ensure that the stormwater management facility will function as it was originally designed and/or permitted. Maintenance does not include enlargement of a stormwater management structure, excavation below the original bottom of a structure, or any other change in its design.

(d) Upon receipt of an application for authorization under (c) above, the Department shall process the application as follows:

1. Within 20 days of the Department's receipt of the application, the Department shall notify the applicant if the application is not administratively complete (that is, if it does not include all of the information required under (c) above). If the Department so notifies the applicant, the time period in (d)2 below shall not begin to run. If the Department does not so notify the applicant, the application shall be deemed administratively complete 20 days after the Department receives it; and

2. If the application is administratively complete, the Department shall have 30 days after receipt of the complete application to notify the applicant that the activities are not authorized under general permit 1, or that the activities may be authorized but require a full application review under N.J.A.C. 7:7A-10. If the Department does not so notify the applicant, the application is automatically approved, to the extent that the activity does not violate other laws then in effect.

(e) Activities under general permit 1 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

Amended by R.1989 d.373, effective July 17, 1989.  
See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.  
Amended by R.1990 d.446, effective September 4, 1990.  
See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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

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

Changes initiated to create a program that is as stringent as that of the U.S. Army Corps of Engineers under the Clean Water Act (33 U.S.C. 1251 et seq.) in order to secure the assumption of the permit jurisdiction.  
Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

Amended by R.1999 d.352, effective October 4, 1999.

See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (c)1, updated the N.J.A.C. reference; and in (e), inserted “, and 13.2, Establishing permit conditions”.

#### Case Notes

Property owner not entitled to permit sought to build residences on subdivided island lots. *McCoy v. Department of Environmental Protection*, 93 N.J.A.R.2d (EPE) 1.

Developers not authorized to fill fresh water wetlands pursuant to terms and conditions of statewide general permit. *Zaloom v. Division of Coastal Resources*, 92 N.J.A.R.2d (EPE) 50.

#### 7:7A-5.2 General permit 2—Underground utility lines

(a) General permit 2 authorizes activities in freshwater wetlands, transition areas, and/or State open waters, necessary for the construction and/or maintenance of an underground utility line.

(b) If a utility line is jacked or directionally drilled underground, so that there is no surface disturbance of any freshwater wetlands, transition areas, or State open waters and there is no draining or dewatering of freshwater wetlands, no Department approval is required under this chapter. Jacking or directional drilling is regulated under this chapter if any disturbance occurs to the ground surface in the freshwater wetlands, transition area, or State open water; for example, if the drilling is conducted from a pit located in a freshwater wetland or transition area.

(c) Activities under general permit 2 shall comply with the following limits:

1. Permanent above-ground disturbance of wetlands, transition area, and/or State open waters shall be no greater than 0.5 acre. Anything that changes the character of the existing wetland, even if only to a different wetland type, is

permanent disturbance. For example, maintained clearing over a utility line is permanent disturbance. For the purposes of this subsection, installation of a utility line in scrub shrub or emergent wetlands shall not be considered permanent disturbance;

2. Permanently maintained clearing over the utility line shall be no wider than 20 feet unless a wider area is required by law;

3. The trench into which the utility line is placed shall be no wider than necessary to comply with the United States Occupational Safety and Health Administration safety standards for excavations, set forth at 29 CFR Part 1926, Subpart P;

4. Temporary disturbance, as defined at N.J.A.C. 7:7A-1.4, such as temporary construction clearing or temporary storage of dirt or equipment, shall be the minimum size necessary for compliance with applicable laws;

5. The activities shall not cause any change in pre-construction elevation of a freshwater wetland, transition area, or State open water; and

6. Manholes and siphons for sewer lines shall be placed outside of wetlands, unless the Department's Municipal Finance and Construction Element determines under N.J.A.C. 7:22 and/or N.J.A.C. 7:14A:23 that there is no feasible alternative to placement in wetlands.

(d) In order to minimize environmental impact, a permittee shall:

1. Dispose of any excess soil or bedding material immediately upon completion of construction. This material shall be disposed of outside of freshwater wetlands, transition areas, State open waters, and areas regulated under the Department's Flood Hazard Area Control Act rules at N.J.A.C. 7:13;

2. Backfill the uppermost 18 inches of any excavation with the original topsoil material;

3. Replant the disturbed area with indigenous wetlands plants;

4. Stabilize the disturbed area in accordance with the requirements of the appropriate Soil Conservation District; and

5. Ensure that the activities do not interfere with the natural hydraulic characteristics of the wetland, such as the flow characteristics of groundwater on the site.

(e) Any pipes laid through wetlands, transition areas, or State open waters shall be:

1. Properly sealed so as to prevent leaking or infiltration;

2. Designed so as not to form or provide a conduit for groundwater to be discharged or drained from the wetland; and

3. Placed entirely beneath the pre-existing ground elevation in order to allow free passage of surface and ground water, unless the applicant shows that placing some or all of the pipe above ground would be more environmentally beneficial.

(f) Activities under general permit 2 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.

See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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

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

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

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

Amended by R.1999 d.352, effective October 4, 1999.

See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (c)1, substituted "0.5" for "one" and rewrote the last sentence; and in (f), inserted ", and 13.2, Establishing permit conditions".

#### 7:7A-5.2A (Reserved)

New Rule, R.2001 d.312, effective September 4, 2001.

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

Repealed by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Section was "Combined general permit 2 and flood hazard area permit".

#### 7:7A-5.3 General permit 3—Discharge of return water

(a) General permit 3 authorizes the discharge of return water from an upland, contained, dredged material disposal area into State open waters, and placement of a pipe above ground for the discharge through freshwater wetlands and/or transition areas. The dredging itself may also require other State and Federal permits.

(b) Activities under general permit 3 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.  
See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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

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

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

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

Amended by R.1999 d.352, effective October 4, 1999.

See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (b), inserted “, and 13.2, Establishing permit conditions”.

#### 7:7A-5.4 General permit 4—Hazardous site investigation and cleanup

(a) General permit 4 authorizes activities in freshwater wetlands, transition areas, and State open waters, which are undertaken by the Department or expressly approved in writing by the Department’s Division of Remediation Management and Response, for the investigation, cleanup or removal of:

1. Hazardous substances as defined in the Department’s rules governing hazardous substances at N.J.A.C. 7:1E, Appendix A; or

2. Pollutants, as defined in the New Jersey Water Pollution Control Act implementing rules at N.J.A.C. 7:14A.

(b) There is no acreage limit on activities under general permit 4. However, disturbance shall be the minimum that is necessary for compliance with the Department’s technical requirements for site remediation, N.J.A.C. 7:26E, and mitigation shall be performed for all disturbances of freshwater wetlands or State open waters caused by a cleanup authorized under this general permit except that mitigation is not required to compensate for disturbance of wetlands or State open waters that have formed as a direct result of the remediation activities. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.

(c) The mitigation proposal required under (b) above may be incorporated into the document by which the Department approves the cleanup and/or it may be submitted as part of the General permit application. The Department shall not issue an authorization under general permit 4 until the mitigation proposal, or an equivalent document that ensures that the requirements of N.J.A.C. 7:7A-15 are met, is approved. Mitigation shall be performed prior to or concurrently with cleanup activities.

(d) Activities under general permit 4 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that

apply to all general permits, and 13.2, Establishing permit conditions.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.

See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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

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

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

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

Amended by R.1999 d.352, effective October 4, 1999.

See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In the introductory paragraph of (a), substituted “Division of Remediation Management and Response” for “Site Remediation Program”; and in (d), inserted “, and 13.2, Establishing permit conditions”.

#### 7:7A-5.5 General permit 5—Landfill closures

(a) General permit 5 authorizes activities in freshwater wetlands, transition areas and/or State open waters that are undertaken by the Department’s Division of Solid and Hazardous Waste, or authorized through a solid waste facility closure and post-closure plan or disruption approval issued by the Department under N.J.A.C. 7:26-2A.9.

(b) General permit 5 authorizes a disturbance authorized through a closure plan, post-closure plan, or disruption approval only if:

1. The activities that will cause the disturbance are necessary to properly close the solid waste facility and to properly maintain and monitor it after closure. For example, an access road necessary for landfill closure may be authorized under general permit 5, but an access road that is not necessary for landfill closure, but that will facilitate development of the site, is not authorized under general permit 5; and

2. The amount of disturbance is the minimum necessary in order to adequately close and/or maintain the landfill. For example, a disturbance for an access road through wetlands may be necessary to properly close the landfill in accordance with (b)2 above, but the road shall be the minimum size possible.

(c) There is no acreage limit on activities under general permit 5. However, mitigation shall be performed to compensate for disturbance of freshwater wetlands and/or State open waters authorized under general permit 5, except that mitigation is not required for disturbance of wetlands located on top

of the landfill, or on the intermediate or permanent cover of the landfill. The mitigation shall meet the procedural and substantive requirements at N.J.A.C. 7:7A-15.

(d) The mitigation proposal required under (c) above may be incorporated into the closure and post-closure plan or disruption approval and/or it may be submitted as part of the general permit application.

(e) The Department shall not issue an authorization under general permit 5 until the mitigation proposal is approved. Activities under general permit 5 shall not begin until the Department has approved the mitigation proposal. Mitigation shall be performed prior to or concurrently with closure or disruption activities.

(f) Activities under general permit 5 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

New Rule, R.2001 d.312, effective September 4, 2001.

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (f), inserted “, and 13.2, Establishing permit conditions”.

#### 7:7A-5.6 General permit 6—Non-tributary wetlands

(a) General permit 6 authorizes regulated activities in freshwater wetlands and/or State open waters, if the freshwater wetlands and/or State open waters are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream.

(b) Activities under general permit 6 shall be limited as follows:

1. The activities shall disturb no more than one acre of a freshwater wetland and/or State open water, which is not a water of the United States, as defined at N.J.A.C. 7:7A-1.4; and

2. The activities shall disturb no more than one-half acre of a freshwater wetland and/or State open water, which is a water of the United States, as defined at N.J.A.C. 7:7A-1.4.

(c) Activities under general permit 6 shall not take place in any of the following:

1. An exceptional resource value wetland, as described at N.J.A.C. 7:7A-2.4;

2. A State open water that is a special aquatic site, as defined at N.J.A.C. 7:7A-1.4;

3. USEPA priority wetlands; or

4. A State open water that is larger than one acre.

(d) Activities under general permit 6 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that

apply to all general permits, and 13.2, Establishing permit conditions.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.

See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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

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

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

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

Amended by R.1999 d.352, effective October 4, 1999.

See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

Rewrote (a).

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

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

Amended by R.2002 d.320, effective October 7, 2002.

See: 33 N.J.R. 2937(a), 33 N.J.R. 3631(a), 34 N.J.R. 3518(a).

Rewrote (b); in (c), deleted 5.

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (a), deleted “, transition areas adjacent to those wetlands,” preceding the first instance of “and/or”; in (b)1, inserted “and” at the end; deleted former (b)2; recodified former (b)3 as (b)2; in the introductory paragraph of (c), deleted “, nor in a transition area adjacent to the following” preceding the colon at the end; and in (d), inserted “, and 13.2, Establishing permit conditions”.

#### Case Notes

INVALIDITY ANNOTATION: Validity of N.J.A.C. 7:7A-5.6 affected. In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478, Docket No. A-91-03 (New Jersey Supreme Court, July 26, 2004).

Initial Decision (2005 N.J. AGEN LEXIS 710) adopted, which concluded, based on the ALJ’s assessment of conflicting testimony, that DEP improperly denied petitioner’s application for a Statewide General Permit 6 (“GP6”) on the grounds that petitioner’s property contained wetlands that were part of a surface water tributary system and therefore not isolated as required for a GP6; the findings in the Initial Decision based on the ALJ’s determination of credibility were sufficiently supported by the record. *Ellis v. N.J. Dep’t of Env’tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 8925-03, 2006 N.J. AGEN LEXIS 226, Final Decision (February 27, 2006).

Where the Department contended that water flowed overland from the petitioner’s wetlands to a nearby stormwater inlet, making petitioners ineligible for a GP6 permit under N.J.A.C. 7:7A-5.6, the sand, staining, and saturated earth relied on by the Department all occurred not on the property in question but rather along Lake Avenue; it is not an unreasonable interpretation of N.J.A.C. 7:7A-1.4 to require that the evidence of scouring, erosion, or concentrated flow occur either on the property in question, or clearly establish the link between that property and the water tributary system. *Ellis v. N.J. Dep’t of Env’tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 8925-03, 2006 N.J. AGEN LEXIS 226, Final Decision (February 27, 2006).

In the absence of clear evidence of a link between petitioner’s property and the inlet, or of scouring, erosion, or a concentrated flow of water from the property, the ALJ’s determination that the preponderance of the evidence favored a conclusion that the wetlands were isolated was sufficiently supported by the record; in light of the issues with the Department’s position, the ALJ reasonably found the conclusions of

petitioner's expert more persuasive, including the results of a dye-test the expert performed on the property, which showed rainwater flowing into the property at the very point where the Department's witnesses had contended the water would exit the property (adopting 2005 N.J. AGEN LEXIS 710). *Ellis v. N.J. Dep't of Env'tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 8925-03, 2006 N.J. AGEN LEXIS 226, Final Decision (February 27, 2006).

Denial of development permit was upheld where wetlands were determined to be part of surface water tributary system. *Jedan Associates v. New Jersey Department of Environmental Protection*, 96 N.J.A.R.2d (EPE) 298.

Developer was not entitled to Freshwater Wetlands General Permit Number 6 in order to construct parking deck; however, developer could be entitled to Statewide General Permit Number 7 to refill ditch. *Mall at IV Group v. Department of Environmental Protection*, 92 N.J.A.R.2d (EPE) 195.

#### **7:7A-5.6A General permit 6A—Transition areas adjacent to non-tributary wetlands**

(a) General permit 6A authorizes regulated activities in transition areas adjacent to freshwater wetlands if the freshwater wetlands are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream.

(b) Activities under general permit 6A shall disturb no more than one-half acre of a transition area.

1. If the activity authorized under general permit 6 eliminates a wetland in its entirety, authorization under general permit 6A is not required for activities in the associated transition area;

(c) Activities under general permit 6A shall not take place in a transition area adjacent to the following:

1. An exceptional resource value wetland, as described at N.J.A.C. 7:7A-2.4; or
2. USEPA priority wetlands.

(d) Activities under general permit 6A shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

New Rule, R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

#### **7:7A-5.7 General permit 7—Human-made ditches or swales in headwaters**

(a) General permit 7 authorizes activities in freshwater wetlands that are human-made ditches or in freshwater wetlands that are swales, provided the ditch or swale is located in a headwater. In accordance with the definition of a "swale" at N.J.A.C. 7:7A-1.4, a swale may be naturally occurring or of human construction.

(b) For the purpose of this section, "headwater" means a water or wetland that is upstream of the point on a non-tidal

stream where the average annual flow is less than five cubic feet per second. The Department may estimate this point from available data by using area annual precipitation, area drainage basin maps, and the average annual runoff coefficient, or by similar means. For a stream that is dry for long periods of the year, the Department may establish the downstream boundary of the headwater as that point in the stream where water flow exceeds five cubic feet per second at least 50 percent of the time. In general, the Department considers a water body with a drainage area of less than 50 acres to be a headwater.

(c) Activities under general permit 7 shall not take place in the following:

1. A ditch or swale that is, or is located within, an exceptional resource value wetlands, as described at N.J.A.C. 7:7A-2.4; or
2. A ditch or swale that is, or is located within, a USEPA priority wetland, as defined at N.J.A.C. 7:7A-1.4.

(d) Activities under general permit 7 shall not result in either of the following:

1. The loss or substantial modification of more than one acre of freshwater wetlands; or
2. A disruption of a surface water connection, resulting in the isolation of wetlands or State open waters which were not isolated at the time of the general permit application.

(e) Activities under general permit 7 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.

See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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

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

Changes initiated to create a program that is as stringent as that of the U.S. Army Corps of Engineers under the Clean Water Act (33 U.S.C. 1251 et seq.) in order to secure the assumption of the permit jurisdiction. Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

Amended by R.1999 d.352, effective October 4, 1999.

See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (e), inserted "and 13.2, Establishing permit conditions".

**Case Notes**

Headwater wetlands not "swale"; no permit could be issued for filling wetlands. *Dykeman v. New Jersey Department of Environmental Protection*, 92 N.J.A.R.2d (EPE) 217.

Developer was not entitled to Freshwater Wetlands General Permit Number 6 in order to construct parking deck; however, developer could be entitled to Statewide General Permit Number 7 to refill ditch. *Mall at IV Group v. Department of Environmental Protection*, 92 N.J.A.R.2d (EPE) 195.

**7:7A-5.8 General permit 8—House additions**

(a) General permit 8 authorizes activities in freshwater wetlands and/or transition areas, necessary for the construction of additions or appurtenant improvements to residential dwellings lawfully existing prior to July 1, 1988, provided that the improvements or additions require less than a cumulative surface area of 750 square feet of fill and/or disturbance and will not result in new alterations to a freshwater wetlands outside of the 750 square foot area. General permit 8 does not authorize activities in State open waters.

1. If requested within five years of the destruction of a dwelling, this permit authorizes the replacement of a resi-

dential dwelling that was lawfully existing prior to July 1, 1988, within the same footprint of the previous dwelling with an increase of up to 750 square feet of fill and/or disturbance provided that:

i. The applicant provides documentation that the dwelling was habitable at the time of destruction. "Habitable" means that persons could legally occupy the dwelling and that the dwelling had utilities including a functioning septic system or legal connection to a sewer; and

ii. There is a foundation remaining or other evidence, such as a deed or plot plan, of the size and location of the overall building footprint.

(b) To be authorized under general permit 8, an addition or improvement shall be located within 100 feet of the residential dwelling.

(c) Activities under general permit 8 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that

apply to all general permits, and 13.2, Establishing permit conditions.

Amended by R.1989 d.373, effective July 17, 1989.  
See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.  
Amended by R.1990 d.446, effective September 4, 1990.  
See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.  
See: 24 N.J.R. 975(a).

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

Changes initiated to create a program that is as stringent as that of the U.S. Army Corps of Engineers under the Clean Water Act (33 U.S.C. 1251 et seq.) in order to secure the assumption of the permit jurisdiction.  
Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

Amended by R.1999 d.352, effective October 4, 1999.  
See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

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

Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Added (a)1; and in (c), inserted “, and 13.2, Establishing permit conditions”.

#### 7:7A-5.9 General permit 9—Airport sight line clearing

(a) General permit 9 authorizes the selective cutting of certain vegetation in freshwater wetlands and transition areas, at a public use aeronautical facility, as defined in the New Jersey Department of Transportation (NJDOT) rules at N.J.A.C. 16:54-1.3.

(b) General permit 9 authorizes the cutting of vegetation only as necessary to comply with the protected air space provisions for a public use aeronautical facility, mandated by the Federal Aviation Administration (FAA) and set forth in the New Jersey Department of Transportation rules at N.J.A.C. 16:54-4.2(a)1iii and 2ii.

(c) General permit 9 covers only activities necessary to enable an aeronautical facility to comply with New Jersey Department of Transportation rules. The cutting of vegetation in wetlands and/or transition areas as part of a project that increases the area of pavement or buildings at an airport is not authorized under general permit 9, and would require an individual permit under this chapter.

(d) In addition to meeting all applicable application requirements at N.J.A.C. 7:7A-10, an applicant for authorization under general permit 9 shall provide a certification from the Director of the Division of Aeronautics in the New Jersey Department of Transportation, containing:

1. A copy of the current license for the public use aeronautical facility;

2. A description of the area that must be cleared to ensure compliance with New Jersey Department of Transportation rules, including descriptions and drawings of the

required approach slopes, the airport layout, and/or other aspects of the facility, as applicable; and

3. A statement citing the applicable regulation, and an explanation of why the proposed cutting of vegetation is necessary to bring existing operations into compliance with New Jersey Department of Transportation and FAA rules, or to maintain the compliance of existing operations with those rules.

(e) The permittee shall minimize adverse environmental impacts as follows:

1. Activities shall be timed to minimize disturbance of threatened and endangered species. The Department will specify the required timing in the general permit authorization when issued;

2. The permittee shall leave all tree stumps, brush stumps, and root systems in place;

3. The permittee shall minimize disturbance of freshwater wetlands and transition areas through use of matting, equipment running on oversized tires, or other similar practices; and

4. Cut vegetation shall be disposed of in a manner that will minimize adverse environmental impacts on wetlands and transition areas, taking into consideration State Forest Fire Service requirements at N.J.S.A. 13:9-23 and/or other applicable laws.

(f) Activities under general permit 9 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

New Rule, R.2001 d.312, effective September 4, 2001.

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (f), inserted “, and 13.2, Establishing permit conditions”.

#### 7:7A-5.10A General permit 10A—Very minor road crossings

(a) General permit 10A authorizes the following activities in freshwater wetlands, transition areas, and/or State open waters:

1. Construction of one or more new road crossings, including attendant features such as shoulders, sidewalks and embankments;

2. Expansion, widening, or upgrading of one or more existing paved or unpaved roads or drives; and

3. Activities necessary to reduce horizontal curves in an existing paved road to comply with New Jersey Department of Transportation safety regulations.

(b) The Department shall issue a general permit 10A authorization only if the activities comply with the limits in one of the following scenarios:

1. Short crossing scenario:

i. The disturbance of freshwater wetlands and/or State open waters is no longer than 100 feet for each crossing, as calculated under (e) below; and

ii. The total cumulative disturbance of freshwater wetlands, transition area, and State open waters onsite under general permit 10A is one quarter acre or less; or

2. Long crossing scenario: The total cumulative disturbance of freshwater wetlands, transition area, and State open waters onsite under general permit 10A is one-eighth acre or less. Under the long crossing scenario, the length of the crossing is not limited.

(c) If a proposed road crossing skirts along the edge of a wetland or transition area or touches the wetland or transition area, without actually crossing through the wetland or transition area, the applicant shall, in addition to meeting the requirements at (b) above, demonstrate in accordance with N.J.A.C. 7:7A-5.10B(d) that there is no alternative onsite location and/or configuration for the road crossing that would provide access to the developable upland with less adverse environmental impact.

(d) Activities under general permit 10A shall minimize environmental impact as follows:

1. The applicant shall design the crossing to ensure that fish passage is unimpeded during times when the water level is at its lowest, unless the applicant demonstrates that the water body is unsuitable for habitation by fish and will remain so for the foreseeable future. The applicant shall ensure fish passage by maintaining the existing gradient and bottom contours of the water body to the extent possible, and by using arches, culverts, or other structures that will ensure fish passage;

2. The applicant shall install cross drains or other devices to ensure that the crossing does not alter the hydro-

logy of the freshwater wetlands and/or State open waters on either side of the crossing; and

3. The amount of rip-rap or other energy dissipating material used shall be the minimum necessary to prevent erosion, and shall not exceed 200 cubic yards of fill below the top of bank or high water mark, unless a larger amount is required in order to comply with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90.

(e) The length limit at (b)1 above applies to each separate road crossing on the site. The following apply to the calculation of the length of disturbance caused by a road crossing:

1. The length of the disturbance resulting from a crossing is measured along its longest dimension;

2. A crossing that connects more than two upland areas that are separated by the same wetland or State open water is considered one crossing. That is, a road that repeatedly traverses the same wetland or State open water is considered one crossing. Thus, the total length of disturbance is the sum of all the lengths of crossing that traverse that particular wetland or water. For example, if a road crosses three arms of an irregularly shaped wetland, the total length of disturbance would be the sum of the lengths of all three crossings. See Figures 2 and 3 below for an illustration of this; and

3. If the road crosses State open waters with adjacent wetlands, the total length of disturbance is the sum of the disturbances in both the State open waters and the adjacent wetlands.

(f) Activities under general permit 10A shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

are not within the cleared area to be maintained under (b)2 above, shall be allowed to revert to their natural condition.

(e) Activities under general permit 21 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.

See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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

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

Changes initiated to create a program that is as stringent as that of the U.S. Army Corps of Engineers under the Clean Water Act (33 U.S.C. 1251 et seq.) in order to secure the assumption of the permit jurisdiction. Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

Amended by R.1999 d.352, effective October 4, 1999.

See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Rewrote the introductory paragraph of (b)2; in (b)2i, substituted "0.5" for "one"; and in (c), inserted ", and 13.2, Establishing permit conditions".

#### 7:7A-5.22 (Reserved)

#### 7:7A-5.23 General permit 23—Expansion of cranberry growing operations in the Pinelands

(a) General permit 23 authorizes the expansion of certain cranberry growing operations in the Pinelands. To be eligible for authorization under the general permit, the cranberry growing operation must be a single, discrete legal entity that, prior to the date general permit 23 becomes operative under (u) below:

1. Is located in the Pinelands, as defined at N.J.A.C. 7:50-2.11;
2. Is in active cranberry production; and
3. Was reported as a cranberry growing operation to the United States Department of Agriculture Cranberry Marketing Committee under the Federal Cranberry Marketing Order (7 C.F.R. Part 929, as amended).

(b) Activities authorized under general permit 23 include, but are not limited to, the construction or expansion of a bog, reservoir, canal, ditch, dike, tail water recovery system, water quality improvement system, or other similar support type facility. General permit 23 does not authorize:

1. Construction or expansion of maintenance or storage sheds;

2. Construction or expansion of housing; or

3. Establishment of new sites for storing or stockpiling sand or other materials.

(c) The Department shall authorize activities under general permit 23 only if the activities will be conducted on the area with the lowest number ranking on the list at (d) below, which is available and has the following characteristics:

1. The area is water accessible, that is, has direct access to free drainage and can be directly served by existing sources of water, or can feasibly be connected to a water source. The Natural Resources Conservation Service can assist the applicant in determining whether an area is water accessible. To minimize environmental impact, areas which can reasonably be served by existing infrastructure are preferred; and

2. Has access to a water supply with a minimum flow rate of 227 gallons per minute per acre (that is, one acre foot of water for every bog acre in production per day).

(d) For the purposes of general permit 23, State open waters and wetland types are ranked in the order that they shall be considered for use for the expansion of a cranberry growing operation, as follows:

1. State open waters;
2. Abandoned blueberry fields;
3. Abandoned cranberry bogs;
4. Abandoned agricultural fields;
5. Freshwater wetlands dominated by emergent vegetation;
6. Freshwater wetlands dominated by scrub/shrub vegetation;
7. Forested freshwater wetlands that are not Atlantic white-cedar wetlands; and
8. Atlantic white-cedar wetlands.

(e) For the purposes of general permit 23, if a freshwater wetlands area was forested, but the trees have been harvested within the five years immediately preceding submittal of an application for authorization, the area is considered forested.

(f) The Department shall not issue more than one authorization under general permit 23 per year to a single cranberry growing operation.

(g) The Department shall not issue an authorization under general permit 23 for activities that will cause a net loss of freshwater wetlands at a single cranberry growing operation.

(h) The Department shall limit authorizations issued to any single cranberry growing operation under general permit 23 so as to ensure that the loss and/or disturbance of freshwater

wetlands and/or State open waters at that single operation meets all of the following criteria:

1. No more than 10 acres of freshwater wetlands and/or State open waters shall be lost and/or disturbed in any one year;
2. No more than 10 acres of forested freshwater wetlands shall be lost and/or disturbed over the five year term of general permit 23; and
3. No more than four of the 10 acres lost and/or disturbed under (h)2 above shall be Atlantic white-cedar wetlands.

(i) The Department shall limit authorizations issued State-wide so as to ensure that the total Statewide loss and/or disturbance of freshwater wetlands and/or State open waters under general permit 23 meets all of the following criteria:

1. No more than 60 acres of freshwater wetlands and/or State open waters shall be lost and/or disturbed in any one year that general permit 23 is operative, except that if the Department authorizes fewer than 60 acres of loss and/or disturbance in any year, up to 30 acres of unused loss or disturbance may be carried forward to a subsequent year, but in no case shall more than 90 acres of freshwater wetlands and/or State open waters be lost or disturbed in one year;
2. No more than 300 acres of freshwater wetlands and/or State open waters shall be lost and/or disturbed during the five year term of general permit 23;
3. No more than 80 of the 300 acres lost and/or disturbed under (i)2 above shall be forested freshwater wetlands; and
4. No more than 25 of the 80 acres of forested freshwater wetlands lost and/or disturbed under (i)3 above shall be Atlantic white-cedar wetlands.

(j) If an applicant proposes activities under general permit 23 that will result in the loss and/or disturbance of Atlantic white-cedar wetlands, the applicant shall, in addition to meeting all other requirements, demonstrate that there is no suitable upland area available, which is owned by the applicant, which the applicant could use in order to eliminate or minimize impacts to Atlantic white-cedar wetlands. For purposes of this subsection, a suitable upland area is an upland area which meets all of the following criteria:

1. The area is water accessible, as described at (c)1 above, and has adequate water as required at (c)2 above;
2. Soils of the area are composed of Klej, Lakehurst, Pemberton, Hammonton, Woodstown or other soil types that are somewhat poorly drained or moderately well drained, as defined in the applicable county soil survey, published by the United States Department of Agriculture's Natural Resources Conservation Service, as amended and/or supplemented;

3. The seasonal high water table is within 24 inches of the surface; and

4. All of the soil to be excavated can be used in the construction of new bogs and sanding operations, or, if the soil cannot be used for construction, a storage or disposal site is available.

(k) If an applicant proposes activities under general permit 23 in an Atlantic white-cedar wetlands that is larger than five acres, the applicant shall, in addition to meeting all other requirements of this section, submit a written statement from the Natural Resources Conservation Service that the activities will minimize, to the extent feasible, the impacts to the remaining Atlantic white-cedar wetlands.

(l) If an applicant proposes activities that will result in the loss and/or disturbance of more than one half acre of freshwater wetlands and/or State open waters, the applicant shall transfer Pinelands Development Credits (PDCs) to the Department in accordance with the following:

1. The applicant shall transfer PDCs in the following ratios to acres of loss and/or disturbance:

- i. For Atlantic white-cedar wetlands, four tenths of a PDC for every acre of loss and/or disturbance;
- ii. For forested freshwater wetlands that are not Atlantic white-cedar wetlands, fifteen one hundredths of a PDC for every acre of loss and/or disturbance;
- iii. For emergent or scrub/shrub wetlands, one tenth of a PDC for every acre of loss and/or disturbance; and
- iv. For wetlands that are abandoned blueberry, cranberry, or agricultural fields, or State open waters, zero PDCs;

2. Each portion of the site that is one quarter acre or larger shall be assigned its own PDC requirement, and these requirements shall be summed to calculate the PDC requirement for the entire site. A portion smaller than one quarter acre will be given the ranking of the area surrounding it. For example, an applicant may have three acres of State open waters, and one eighth acre of Atlantic white-cedar wetlands surrounded by eight and seven eighths acres of scrub/shrub wetlands. The disturbance of the State open waters requires no PDCs under (l)iv above. The one eighth acre of Atlantic white-cedar wetlands is smaller than one quarter acre and therefore is treated as part of the surrounding scrub/shrub wetlands. Under (l)liii above, nine tenths of a PDC are required for the disturbance of the scrub/shrub wetlands. This would be the total for the site; and

3. The total PDC requirement for the site shall be rounded up to the nearest one quarter PDC. Under the example at (l)2 above, the PDC requirement for the entire site is nine tenths of a PDC, which would then be rounded up to one PDC.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.

See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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

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

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

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

Amended by R.1999 d.352, effective October 4, 1999.

See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (f), inserted “, and 13.2, Establishing permit conditions”.

### Case Notes

Initial Decision (2006 N.J. AGEN 376) adopted, which concluded that where landowner purchased the property in question subject to an easement, right of way and access road and subject to use of the road for the farm and houses on the adjacent lot and the owner thereafter alleged that use of the road had interfered with use of his property and proposed a new access road that would be more than 100 feet long and would result in additional damage to wetlands, causing the loss of their benefits, the owner failed to submit sufficient competent and credible evidence to satisfy the standards for a General Permit; petitioner presented no evidence that use of the existing road caused the alleged damage to his house, that speed bumps, which were maintained on numerous public roadways, could not be maintained on the access road to force vehicles to move at slow speeds, that, by use of other parts of the very large 6.88-acre property in question, his family and friends could not have reasonable use of the property, and that the proposed road would have less adverse environmental impact than the existing road. *Maiello v. N.J. Dep't of Env'tl. Prot., Land Use Regulation Program, OAL Dkt. No. ESA 12134-04, 2006 N.J. AGEN LEXIS 580, Final Decision (July 20, 2006).*

Permit for construction within protected freshwater wetlands area requires proof that total length of disturbance will not exceed 100 feet. *Luchese v. Department of Environmental Protection, 96 N.J.A.R.2d (EPE) 227.*

Magnitude of wetland disturbance had to be determined on basis of total length of proposed roadway regardless of property boundaries. *Zimmer v. Department of Environmental Protection, 93 N.J.A.R.2d (EPE) 199.*

### 7:7A-5.10B General permit 10B—Minor road crossings

(a) General permit 10B authorizes the following activities in freshwater wetlands, transition areas, and/or State open waters:

1. Construction of one or more new road crossings necessary to gain access to an otherwise inaccessible, developable, upland site, including attendant features such as shoulders, sidewalks and embankments;

2. Expansion, widening, or upgrading of one or more existing paved or unpaved roads, including attendant features such as shoulders, sidewalks and embankments; and

3. Activities necessary to reduce horizontal curves in an existing paved road to comply with New Jersey Department of Transportation safety regulations.

(b) The Department shall issue a general permit 10B authorization only if all of the following criteria are met:

1. The applicant demonstrates in accordance with (d) below that there is no alternative onsite location and/or configuration for the road crossing that would provide access to the developable upland with less adverse environmental impact; and

2. The total area of freshwater wetlands, transition areas, and/or State open waters disturbed under general permit 10B shall not exceed one-quarter of an acre.

(c) Activities under general permit 10B shall minimize environmental impact as follows:

1. The applicant shall design the crossing to ensure that fish passage is unimpeded during times when the water level is at its lowest, unless the applicant demonstrates that the water body is unsuitable for habitation by fish and will remain so for the foreseeable future. The applicant shall ensure fish passage by maintaining the existing gradient and bottom contours of the water body to the extent possible, and by using arches, culverts, or other structures that will ensure fish passage;

2. The applicant shall install cross drains or other devices to ensure that the crossing does not alter the hydrology of the freshwater wetlands and/or State open waters on either side of the crossing;

3. The amount of rip-rap or other energy dissipating material used shall be the minimum necessary to prevent erosion, and shall not exceed 200 cubic yards of fill below the top of bank or high water mark, unless a larger amount is required in order to comply with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90; and

4. The cartway, shoulder, and side slopes of the roadway shall be the minimum necessary for the crossing and shall not exceed the limits in the New Jersey Department of Community Affairs' Residential Site Improvement Standards at N.J.A.C. 5:21. If the project is not a residential development, the cartway, shoulder, and side slopes of the roadway shall be the minimum necessary for safety.

(d) In evaluating whether there is an alternative onsite location and/or configuration for a road crossing under (b)1 above, the Department shall make the presumptions at (d)1 through 5 below. However, these presumptions may be rebutted based on site-specific or unusual circumstances:

1. Disturbance of a non-transition area upland would have less adverse environmental impact than disturbance of a transition area, State open water or freshwater wetland;

2. Disturbance of a transition area would have less adverse environmental impact than disturbance of a freshwater wetland or State open water;

3. Disturbance of a freshwater wetland would have less adverse environmental impact than disturbance of a State open water;

4. Expansion or upgrading of an existing and currently serviceable drive or crossing would have less adverse environmental impact than placement of a new crossing; and

5. Placement of a new crossing in an area that is already significantly disturbed would have less adverse environmental impact than disturbance of a previously undisturbed wetland and/or State open water.

(e) Activities under general permit 10B shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

New Rule, R.2001 d.312, effective September 4, 2001.

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (a)1, inserted "necessary to gain access to an otherwise inaccessible, developable, upland site"; and in (e), inserted ", and 13.2, Establishing permit conditions".

#### 7:7A-5.10C (Reserved)

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.

See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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

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

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

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

Amended by R.1999 d.352, effective October 4, 1999.

See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

Rewrote (a).

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

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

Repealed by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Section was "Combined general permit 10A and flood hazard area permit".

#### 7:7A-5.11 General permit 11—Outfalls and intake structures

(a) General permit 11 authorizes activities in freshwater wetlands, transition areas, and State open waters necessary for the construction of:

1. A stormwater outfall structure;

2. An outfall structure that discharges other than stormwater into State open waters, and which is covered by a valid NJPDES permit issued by the Department under N.J.A.C. 7:14A;

3. An intake structure located in a State open water, for which all approvals required by the Department other than this general permit authorization have been obtained;

4. A well that is part of a non-public water system, as defined under the Department's Safe Drinking Water Act rules at N.J.A.C. 7:10-1.3 (this includes certain small private portable water wells), provided that:

- i. There is no alternative onsite location for the well that would have less environmental impact;

- ii. The source of the water supply to the well does not affect the hydrology of the freshwater wetlands; and

- iii. All approvals required by the Department other than this general permit authorization have been obtained;

5. Conveyance structures, such as pipes and headwalls, associated with an outfall or intake listed in (a)1, 2, or 3 above; and

6. Energy dissipation structures, such as rip-rap, gabion baskets, and scour holes, associated with an outfall or intake listed in (a)1, 2, or 3 above.

(b) General permit 11 does not authorize the construction or placement of a detention or retention facility in freshwater wetlands, transition areas, or State open waters.

(c) Activities under general permit 11 shall comply with the following limits:

1. The activities shall disturb no more than one quarter acre of freshwater wetlands, transition areas, and/or State open waters, including both temporary and permanent disturbance;

2. The area disturbed during construction of a conveyance structure shall be no wider than is necessary to comply with the United States Occupational Safety and Health Administration safety standards for excavations, set forth at 29 CFR Part 1926, Subpart P; and

3. The amount of rip-rap or other energy dissipating material placed shall be the minimum necessary to prevent erosion, and shall not exceed 10 cubic yards of fill per outfall, unless a larger amount is required in order to comply with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90.

(d) In addition to meeting all other requirements under general permit 11, an intake structure shall:

1. Be designed and equipped so as to minimize impacts to fish and other fauna through measures including, but not limited to, the following:

- i. The structure's location and orientation;
- ii. Protective structures that prevent entrapment of fauna in the structure itself, or in a diversionary canal or embayment; and/or
- iii. Protective structures that prevent aquatic biota from being sucked up against the structure (impingement) or being sucked up into the structure (entrainment). Examples of such structures are radial wells, fish bucket screens, and wedge-wires;

2. Be designed so as to ensure that the wetlands are not drained;

3. Have an intake velocity no greater than 0.5 feet of water per second; and

4. Comply with all applicable requirements for intake structures in the Department's Safe Drinking Water Act rules at N.J.A.C. 7:10-11.8(c).

(e) All activities under general permit 11 shall comply with the specifications and requirements in the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90, including activities which are exempted from or not regulated by those Standards.

(f) For any excavated area in freshwater wetlands, transition areas, and/or State open waters, the following requirements apply:

- 1. The excavation shall be backfilled to the preexisting elevation;
- 2. The uppermost 18 inches of the excavation shall be backfilled with the original topsoil material if feasible; and
- 3. The area above the excavation shall be replanted, in accordance with applicable BMPs, with indigenous wetlands species.

(g) Any pipes laid through wetlands, transition areas, or State open waters shall be:

- 1. Properly sealed so as to prevent leaking or infiltration;
- 2. Designed so as not to form a path for groundwater to be discharged or drained from the wetland; and
- 3. Placed entirely beneath the pre-existing ground elevation unless the applicant shows that placing some or all of the pipe above ground would be more environmentally beneficial.

(h) A swale in a wetland or transition area shall not be used as a substitute for stormwater treatment. However, a swale may be used to convey stormwater through a wetland or transition area if:

- 1. Conditions on the site make it impracticable to use a buried pipe; and

2. The applicant demonstrates that the swale will not result in drainage of the wetlands or transition areas. To demonstrate this, the applicant shall provide profiles and cross-sections along the entire length of the swale, and any other information necessary to demonstrate that drainage will not occur.

(i) Activities under general permit 11 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

New Rule, R.2001 d.312, effective September 4, 2001.

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

Amended by R.2004 d.48, effective February 2, 2004.

See: 35 N.J.R. 119(a), 35 N.J.R. 1328(a), 36 N.J.R. 670(a).

Rewrote (f).

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Deleted former (f); recodified (g) through (j) as (f) through (i); and in (i), inserted “, and 13.2, Establishing permit conditions”.

**7:7A-5.11A (Reserved)**

New Rule, R.2001 d.312, effective September 4, 2001.

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

Repealed by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Section was “Combined general permit 11 and flood hazard area permit”.

**7:7A-5.12 General permit 12—Surveying and investigating**

(a) General permit 12 authorizes activities in freshwater wetlands, transition areas and State open waters necessary for surveying and investigative activities such as:

- 1. Soil borings dug by machine;
- 2. Hand dug soil borings larger than three feet in diameter or depth. A hand dug soil boring three feet or less in diameter and depth is not regulated pursuant to N.J.A.C. 7:7A-2.2(c) and thus does not require Department approval;
- 3. Cutting of vegetation by machine for a survey line that is no wider than five feet;
- 4. Cutting of vegetation by hand for a survey line larger than three feet wide. Cutting of vegetation by hand for a survey line that is three feet wide or less is not regulated pursuant to N.J.A.C. 7:7A-2.2(c) and thus does not require Department approval; and
- 5. Digging of exploratory pits and/or other temporary activities necessary for a geotechnical or archaeological investigation.

(b) Disturbance under general permit 12 shall be the minimum necessary to obtain the desired information.

(c) If activities under general permit 12 disturb soil, the soil shall be restored to its pre-existing elevation, retaining its original soil layers, unless the soil disturbance is six inches in diameter or smaller. This subsection shall not apply if other

permits which allow permanent impacts in the same location have been obtained.

(d) Activities under general permit 12 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

Amended by R.1989 d.373, effective July 17, 1989.

See: 20 N.J.R. 1327(a), 21 N.J.R. 2024(a).

Added eight new Statewide General Permits, (a)10-17.

Amended by R.1990 d.446, effective September 4, 1990.

See: 22 N.J.R. 278(a), 22 N.J.R. 2753(a).

Expedited review process provided at (a)4 for hazardous waste remediation activities.

Public Notice: Request for public comments and public hearings.

See: 24 N.J.R. 975(a).

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

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

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

Public Notice: Notice of action on adoption of statewide general permits pursuant to Freshwater Wetlands Protection Act.

See: 24 N.J.R. 2252(a).

Amended by R.1999 d.352, effective October 4, 1999.

See: 31 N.J.R. 1562(a), 31 N.J.R. 2964(a).

Rewrote (a).

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

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (d), inserted “, and 13.2, Establishing permit conditions”.

### 7:7A-5.13 General permit 13—Lake dredging

(a) General permit 13 authorizes up to one acre of dredging in palustrine emergent freshwater wetlands, as defined at N.J.A.C. 7:7A-1.4, necessary to restore or maintain a lake, pond, or reservoir, as defined at N.J.A.C. 7:7A-1.4, to its original bottom contours. General permit 13 does not authorize dredging or other disturbances in wetlands that are not palustrine emergent wetlands. General permit 13 does not authorize disturbance of transition areas except as necessary to obtain access to a dredging project pursuant to (e) below.

(b) In accordance with N.J.A.C. 7:7A-2.2(b), if a dredging project meets all of the following criteria, the project does not require Department approval under this chapter:

1. The project disturbs State open waters only, and does not disturb wetlands located in the lake, pond, or reservoir;
2. The project does not disturb wetlands or transition areas adjacent to the lake, pond, or reservoir; and
3. The project does not involve the discharge of dredged or fill material in the State open water. For example, if the project involves placement of fill in a lake bed for an access road, or involves temporary placement of dredged material on the lake bed prior to removal of the dredged material, the project would be regulated and would require Department approval.

(c) If the lake, pond or reservoir is to be lowered during dredging:

1. The permittee shall obtain a lake lowering permit from the Department’s Division of Fish and Wildlife;
2. Regulated activities shall not begin until the lake, pond or reservoir is lowered in accordance with the lake lowering permit; and
3. All regulated activities shall be discontinued before the lake, pond or reservoir is refilled.

(d) In order to minimize adverse impacts on fish and on the downstream environment, the permittee shall:

1. Take all necessary measures, including adjusting the timing of the dredging, to prevent any detrimental effect to spawning of fish in the lake, pond or reservoir or downstream; and
2. Ensure that there is a continuous flow of sediment-free water to the area downstream of the lake, pond or reservoir at all times during activities under general permit 13.

(e) The permittee may temporarily disturb wetlands (palustrine emergent or otherwise), transition areas, or State open waters, beyond those disturbed directly by the dredging, in order to obtain vehicular access for the dredging. Disturbance for access shall be limited to one eighth of an acre, unless the applicant demonstrates in accordance with the standards at N.J.A.C. 7:7A-5.10B(d) that there is no alternative onsite location and/or configuration that would provide access to the dredging with less adverse environmental impact. If such a demonstration is made, the access disturbance may be increased as necessary but shall not exceed one-quarter acre. All access disturbances under this subsection shall be restored to their pre-existing elevation and condition upon completion of dredging.

(f) The application for authorization under general permit 13 shall include:

1. Documentation, including, but not limited to, aerial photography, original construction plans, core borings, and/or other information, showing that dredging will go no deeper than the original configuration and bottom contours of the lake, and will not enlarge the lake beyond the original configuration; and
2. For a lake larger than five acres, the following information:
  - i. A USGS quad map showing all of the upstream land and water surface area which drains to the lake. The map shall be marked to identify the main land uses in that upstream drainage area;
  - ii. A list of the sources of sediment in the lake, including all stormwater pipes, outfalls, ditches and similar features that discharge directly into the lake or that

ii. The certification lists each condition in (b), (c) and/or (d) above that applies to the project, and states whether the condition has been satisfied or will be satisfied.

(f) Within 15 days of the Department's receipt of an application submitted under (e) above for a project that does not involve sediment removal, the Department shall do one of the following:

1. Notify the applicant either that the application is not administratively complete (that is, that it does not include all of the information required under (e) above), or that the application is administratively complete but that the application requires a full application review under N.J.A.C. 7:7A-10. If the application is not administratively complete, the Department shall request more information. If the reapplication requires a full application review, the Department shall provide the applicant with the reasons for this. For example, an application may require a full review because of a sighting of a threatened or endangered species which must be investigated;

2. Notify the applicant that the project does not qualify for authorization under general permit 26; or

3. Take no action. If the Department takes no action, the channel or stream cleaning project is authorized under general permit 26 to the extent that the project does not violate other laws then in effect.

(g) Within 60 days of the Department's receipt of an application submitted under (e) above for a project that does involve sediment removal, the Department shall do one of the following:

1. Notify the applicant that the application is not administratively complete (that is, that it does not include all of the information required under (e) above) and request more information;

2. Notify the applicant that the project does not qualify for authorization under general permit 26; or

3. Take no action. If the Department takes no action, the channel or stream cleaning project is authorized under general permit 26 to the extent that the project does not violate other laws then in effect.

(h) If the Department notifies the applicant under (f)2 or (g)2 above that a channel or stream cleaning, clearing, or desnagging project is not authorized under general permit 26, the Department shall provide the applicant with the technical reasons for the decision. If the Department's technical reasons are based upon the inability to determine the natural bed of the channel or stream, the Department shall, at the request of the applicant, assist in identifying the natural bed of the channel or stream.

(i) Upon completion of a project under general permit 26 that involves the removal of sediment, the permittee shall submit to the Department a written notice that the project has

been completed. The notice shall contain a certification that meets both of the following criteria:

1. The certification is signed by a licensed professional engineer who is the county or municipal engineer, or who is employed by the appropriate Soil Conservation District; and

2. The certification states each condition in (b), (c) and/or (d) above that applies to the project, and states whether the condition has been satisfied.

(j) Activities under general permit 26 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

New Rule, R.2001 d.312, effective September 4, 2001.

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

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In the introductory paragraph of (e), updated the second N.J.A.C. reference; in (e)7, updated the N.J.A.C. reference; and in (j), inserted “, and 13.2, Establishing permit conditions”.

#### **7:7A-5.26A (Reserved)**

New Rule, R.2001 d.312, effective September 4, 2001.

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

Repealed by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

Section was “Combined general permit 26 and flood hazard area permit”.

#### **7:7A-5.27 General permit 27—Redevelopment of previously disturbed areas**

(a) General permit 27 authorizes the disturbance of certain degraded freshwater wetlands, transition areas, and/or State open waters necessary for redevelopment, as defined at N.J.A.C. 7:7A-1.4, of an area previously significantly disturbed by industrial or commercial activities.

(b) General permit 27 authorizes activities only if:

1. The activities are located in wetlands that were previously disturbed or were formed as a result of previous disturbance by commercial or industrial activities;

2. The area is abandoned or underutilized;

3. The area meets at least one of the following criteria:

i. It has been identified on the inventory of brown-field sites compiled by the Brownfields Redevelopment Task Force pursuant to N.J.S.A. 58:10B-23b;

ii. It is the subject of a redevelopment agreement entered into pursuant to N.J.S.A. 58:10B-27; or

iii. It has been identified as an environmental opportunity zone pursuant to N.J.S.A. 54:4-3.150 et seq.; and

4. The freshwater wetlands, transition areas, and/or State open waters to be disturbed are significantly degraded

by human disturbance or alteration and are of little ecological value. Examples of significantly degraded wetlands are those that have formed as a result of a landfill cap, ponding of contaminated ground or surface water, or as a result of demolition of structures on a previously developed site.

(c) Activities under general permit 27 shall be limited as follows:

1. The activities shall disturb no more than one acre of a freshwater wetlands and/or State open water, which is a not a water of the United States, as defined at N.J.A.C. 7:7A-1.4;

2. The activities shall disturb no more than one acre of a transition area; and

3. The activities shall disturb no more than one-half acre of a freshwater wetland and/or State open water, which is a water of the United States, as defined at N.J.A.C. 7:7A-1.4.

(d) If activities under general permit 27 disturb more than one-half acre of freshwater wetlands or State open waters, the applicant shall perform mitigation under N.J.A.C. 7:7A-15 for all of the disturbance authorized under general permit 27.

(e) A disturbance authorized under general permit 27 does not count toward the one acre of disturbance allowed under multiple general permits under N.J.A.C. 7:7A-4.4(a)2.

(f) Activities under general permit 27 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.

New Rule, R.2001 d.312, effective September 4, 2001.

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

Amended by R.2002 d.320, effective October 7, 2002.

See: 33 N.J.R. 2937(a), 33 N.J.R. 3631(a), 34 N.J.R. 3518(a).

Rewrote (c); added a new (e) and recodified former (e) as (f).

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (f), inserted “, and 13.2, Establishing permit conditions”.

## SUBCHAPTER 6. TRANSITION AREA WAIVERS

### 7:7A-6.1 General transition area waiver provisions

(a) This section sets forth the requirements for transition area waivers. The Department issues the following types of transition area waivers:

1. An averaging plan transition area waiver, addressed at N.J.A.C. 7:7A-6.2;

2. A special activity transition area waiver for storm-water management, linear development, redevelopment, or activities eligible for an individual permit, addressed at N.J.A.C. 7:7A-6.3;

3. A matrix type width reduction transition area waiver, addressed at N.J.A.C. 7:7A-6.4;

4. A hardship transition area waiver, addressed at N.J.A.C. 7:7A-6.5;

5. A general permit transition area waiver. If a general permit authorizes disturbance of a transition area, an authorization issued under the general permit constitutes a transition area waiver for the activities covered by the general permit. This waiver is not addressed in this section, but in each general permit in N.J.A.C. 7:7A-5 that covers transition area disturbances. All general permits except for general permits 1, 6, 7, 22 and 24 authorize activities in transition areas; and

6. An access transition area waiver. Each general permit authorization, individual freshwater wetlands permit and mitigation proposal shall include a limited transition area waiver to allow access to the authorized activity. No fee or application is required for this waiver. However, an access transition area waiver will allow regulated activities only:

i. In that portion of the transition area bordering on that portion of the freshwater wetland in which the authorized activity is to take place; and

ii. For an activity that the Department determines is necessary to accomplish the permitted activity. An activity not directly required in order to obtain access to the permitted activity shall require a separate transition area waiver. If the activity authorized under the permit eliminates the wetland in its entirety, the transition area associated with that wetland may also be eliminated in its entirety without a separate transition area waiver. If the activity authorized under the permit partially eliminates the wetland, the access shall be limited to the transition area adjacent to the location of the approved wetland filling. Any additional impacts to the transition area shall require a separate transition area waiver.

(b) The Department shall include in a transition area waiver additional conditions as necessary to ensure that an activity does not result in a substantial impact on the adjacent wetlands, and does not impair the purposes and functions of transition areas as set forth in N.J.A.C. 7:7A-2.5. Such conditions shall include, but are not limited to, the following:

1. Construction activities shall be conducted in such a way that there will be no regulated activities in the transition area or the wetland except any that are authorized by a permit, as defined at N.J.A.C. 7:7A-1.4;

2. The structure is designed and shall be used in such a way that there will be no regulated activities in the transition area or the wetland except any that are authorized by a permit, as defined at N.J.A.C. 7:7A-1.4;

3. The transition area and/or wetland is fenced, using a type of fencing that protects and maintains all functions

2. The cost of purchasing property and creating freshwater wetlands of equal functions and values to those which are being lost.

(i) If land donation is the mitigation alternative, the Wetlands Mitigation Council shall determine on a case-by-case basis whether the acreage of land specified in the mitigation proposal will result in a mitigation area large enough to be a valuable component of the freshwater wetlands ecosystem. In making this determination, the Council shall consult the sources, and consider the conditions, referenced in (j) below and in N.J.A.C. 7:7A-15.22(b).

(j) A person shall carry out the full acreage amount of mitigation required under this section, unless the person demonstrates, through use of productivity models or other similar studies, that a smaller mitigation area will result in a mitigation area sufficient to comply with this section. However, under no circumstances shall a mitigation area be smaller than the disturbed area. To demonstrate that a smaller mitigation area will be sufficient to provide equal functions and values to those lost, the person shall provide current scientific literature concerning wetlands, aquatic resources, and mitigation; as well as information regarding the conditions on the site of the disturbance and on the proposed mitigation site, including soil, vegetation, any existing contamination or other degradation, water quality functions, flood storage capacity, soil erosion and sediment control, wildlife habitat, and any other relevant data.

(k) If a proposed mitigation area is affected by an easement or other encumbrance, the portion of the property affected by the encumbrance will not be considered in calculating the total amount of mitigation provided, unless the applicant demonstrates that the encumbrance will not prohibit compliance with the mitigation requirements of this chapter.

(l) If a mitigation requirement arises from a violation, the Department shall determine the amount of mitigation required on a case-by case basis, taking into consideration the size and severity of the violation and the functions and values provided by the proposed mitigation. A mitigation proposal submitted as part of a settlement of an enforcement action shall require mitigation that provides functions and values at least equal to those that would be required under this chapter as a result of a permit. This may include an increase in mitigation to compensate for the time lapse between the disturbance and the completion of mitigation, such as that required at N.J.A.C. 7:7A-15.3(b).

#### **7:7A-15.9 Requirements for upland preservation**

(a) The Department shall approve mitigation through preservation of uplands only if the uplands meet the requirements in this section.

(b) Preserved uplands shall be valuable for the protection of a freshwater wetlands ecosystem. Factors the Department shall consider in evaluating an area for upland preservation include, but are not limited to:

1. The size and configuration of the uplands in relation to freshwater wetlands and/or State open waters, and the effect the preservation of these uplands would have on the wetlands or waters;

2. The diversity of the ecological communities on the entire site;

3. Whether the uplands to be preserved are located in the same HUC 11 as the disturbance;

4. Whether the uplands to be preserved are adjacent to a freshwater wetland that:

i. Contains exceptional resource value wetlands;

ii. Contains critical habitat for flora or fauna, as defined at N.J.A.C. 7:7A-1.4;

iii. Contains wetlands or waters draining to trout maintenance waters, as defined at N.J.A.C. 7:9B, or into public drinking water sources;

iv. Is adjacent to public lands containing wetland preserves, such as Federal wildlife refuges, State wildlife management areas, State parks or forests, State, County or local wetland preservation areas, or wetland preservation areas held by non-profit conservation organizations;

v. Has unique aspects or characteristics that contribute to its ecological value, such as an unusual or regionally rare type of wetland;

5. The relationship of the proposed uplands to existing and planned development;

6. Whether the uplands have been designated for preservation in a watershed management area plan approved by the Department under the Water Quality Management Planning Act, N.J.S.A. 58:11A-1 et seq., and implementing rules at N.J.A.C. 7:15; and

7. Whether the site contains solid or hazardous waste, or contains water or soil pollution. Uplands that contain waste or pollution shall not be considered valuable for the protection of a freshwater wetlands ecosystem.

(c) The amount of uplands preserved shall be sufficient to ensure that the functions and values resulting from the preservation of the uplands will fully compensate for the loss of functions and values caused by the disturbance, in accordance with N.J.A.C. 7:7A-15.2(c). In determining if an upland preservation proposal will fully compensate for a disturbance, the Department shall consult the sources, and consider the conditions, referenced in N.J.A.C. 7:7A-15.8(j). At a minimum, the uplands preserved shall be:

1. At least five acres in size, and significantly larger than the area that would be required for any other mitigation alternative, to compensate for the fact that uplands preservation, unlike other mitigation alternatives, does not directly replace the wetland values and functions destroyed by a disturbance; and

2. If adjacent to a wetland, the uplands preserved shall include the standard transition area required for the wetlands under N.J.A.C. 7:7A-2.5, plus an additional area at least 150 feet wide, measured from the outer edge of the transition area.

(d) If mitigation is performed through upland preservation, the mitigator shall transfer the mitigation area in fee simple to a government agency or charitable conservancy, as defined at N.J.A.C. 7:7A-1.4, in accordance with N.J.A.C. 7:7A-15.17(c).

#### 7:7A-15.10 Conceptual review of a mitigation area

(a) The Department strongly recommends that an applicant obtain the Department's conceptual review of any land being considered as a potential mitigation area, prior to submittal of a mitigation proposal involving restoration, creation, enhancement, uplands preservation, or land donation.

(b) An applicant may request a conceptual review at any time prior to submittal of a mitigation proposal. However, the Department strongly recommends that an applicant obtain a Department conceptual review before buying the land for a mitigation area.

(c) To obtain the Department's conceptual review of a mitigation area, the applicant shall submit a written request, including:

1. A brief description of the area and the mitigation project being considered;
2. A map showing Department staff how to find the mitigation area;
3. A USGS quad showing the mitigation area;
4. A county soil survey showing the soils in the mitigation area and identifying all potential, suspected and/or known contamination on the site; and
5. Unconditional written consent from the owner of the proposed mitigation area allowing Department representatives to enter the property and inspect the mitigation area.

(d) Upon receipt of a complete request for a conceptual review, the Department may schedule a site inspection. At a site inspection, Department staff shall candidly discuss the apparent strengths and weaknesses of the proposed mitigation area, but all guidance provided shall be non-binding on the Department. A Department decision on a proposed mitigation area or mitigation proposal is binding only if it is incorporated into an approval obtained in accordance with this subchapter. A conceptual review does not grant any property or other rights, and does not authorize mitigation activities.

Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (c)4, inserted "and identifying all potential, suspected and/or known contamination on the site".

#### 7:7A-15.11 Basic requirements for all mitigation proposals

(a) A mitigation proposal shall be submitted within the applicable time period below:

1. For mitigation required by an individual permit, the mitigation proposal shall be submitted at least 90 days prior to the start of activities authorized by the permit. Activities authorized by the permit shall not begin until the mitigation proposal is approved and the mitigation has begun;

2. For mitigation required by a general permit authorization, the mitigation proposal shall be submitted concurrently with the application for the general permit authorization; and

3. For mitigation requirements arising from a violation, the mitigation proposal shall be submitted by the deadline set forth in the Department's enforcement document.

(b) The mitigation proposal shall provide all information necessary for the Department to determine if the requirements of this subchapter are met. The information required for each mitigation alternative is set forth in a mitigation proposal checklist, provided by the Department. To obtain the mitigation proposal checklist for a particular mitigation alternative, contact the Department at the address in N.J.A.C. 7:7A-15.2(f).

1. The applicant shall also provide notification in accordance with N.J.A.C. 7:7A-10.8(j) for all mitigation proposals that include creation, enhancement or restoration (except restoration for a temporary disturbance).

(c) In order to demonstrate that an offsite mitigation alternative is not feasible under this subchapter, an applicant shall provide to the Department a list of at least six potential areas upon which the mitigation alternative might be performed. Each of these potential areas shall:

1. Be located at a practical elevation suitable for a wetland or State open water;
2. Have an adequate water supply;
3. Be large enough for the mitigation proposed;
4. Be available for purchase; and
5. Meet the requirements of N.J.A.C. 7:7A-15.4(h) regarding contamination.

(d) A mitigation proposal submitted as part of a settlement of an enforcement action shall provide for mitigation that is at least as ecologically valuable as mitigation that would be required under this chapter as a result of a permit. This may include an increase in the amount of mitigation to compensate for the time that has elapsed between the disturbance and the completion of mitigation, such as that required at N.J.A.C. 7:7A-15.3(b).

(e) A mitigation proposal shall include as many copies of each item as required by the checklist.

Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).  
Added (b)1.

### 7:7A-15.12 Contents of a mitigation proposal

(a) The application checklist for every mitigation proposal shall require the information listed at (b)1 through 8 below. In addition, each mitigation proposal shall also require information specific to the mitigation alternative proposed, listed at (c) through (g) below.

(b) The application checklist for every mitigation proposal shall require the following:

1. Basic information regarding the applicant, the disturbance for which the mitigation is required, and the permit or other item which is the source of the mitigation requirement;

2. Information to enable the Department to determine the loss of functions and values caused by the disturbance for which the mitigation is required, including scientific information such as scientific literature, models or other studies concerning wetlands, soils, vegetation, hydrology, wildlife habitat and any other factors relevant to the functions and values of the site of the disturbance for which mitigation is required; previous Department approvals or correspondence regarding the disturbance; maps, photographs; soil or vegetation samples; delineations and/or other visual materials relating to the site of the disturbance;

3. Information demonstrating that the proposed mitigation alternative complies with N.J.A.C. 7:7A-15.5 or 15.6, as applicable, including information on the feasibility or practicability of other mitigation alternatives;

4. The names and addresses of all consultants, engineers, and other persons providing technical assistance in preparing the mitigation proposal;

5. Any letters, contracts, agreements, conservation restrictions, or other draft or executed documents necessary to ensure compliance with this subchapter;

6. Any information necessary to ensure compliance with the Federal rules governing the Department's assumption of the Federal 404 program at 40 CFR 233.30;

7. A certification of truth and accuracy; and

8. Unconditional written consent from the owner of the proposed mitigation area allowing the Department to enter the property and inspect the proposed mitigation area.

(c) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to purchase credits shall require information demonstrating that credit purchase is acceptable under N.J.A.C. 7:7A-15.5 or 15.6, and any information necessary

for the Department to determine the mitigation bank from which appropriate credits must be purchased under N.J.A.C. 7:7A-15.5 or 15.6.

(d) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to restore, create, or enhance wetlands, to preserve uplands, or to donate land shall also require the following information:

1. Basic information regarding the proposed mitigation area, including, but not limited to, its location and size, ownership, and any legal or other restrictions on the property such as easements;

2. Unconditional written consent from the owner of the proposed mitigation area, as defined at N.J.A.C. 7:7A-15.1, for Department representatives to enter the proposed mitigation area to conduct inspections;

3. Visual materials, including, but not limited to, maps, plans, surveys, diagrams, or photographs showing the proposed mitigation area, existing conditions and features on the proposed mitigation area;

4. Written narrative information and/or reports describing the proposed mitigation area, existing conditions and features on the proposed mitigation area, and the mitigation alternative proposed;

5. Information and/or certifications regarding the presence or absence of endangered or threatened species habitat, or archaeological resources, as described at N.J.A.C. 7:7A-12.2, or other features on the proposed mitigation area that are relevant to determining compliance with this chapter. Failure to provide all such information of which the applicant, its consultants, or agents is aware may result in denial or termination of the permit under N.J.A.C. 7:7A-14.5, and may subject the applicant to penalties for submittal of false information under N.J.A.C. 7:7A-16.9;

6. Information regarding whether the proposed mitigation activities, including any restriction or transfer of the mitigation area, require approval by other Federal, interstate, State and local agencies, and information on any approvals or denials received;

7. Information regarding relevant features of other properties in the vicinity of the mitigation area, such as whether they are publicly owned, contain preserved open space, contain significant natural resources, etc.;

8. Scientific information, including scientific literature, models or other studies concerning wetlands, soils, vegetation, hydrology, wildlife habitat, and any other factors relevant to the functions and values of the proposed mitigation area and mitigation activities;

9. Information to enable the Department to determine the functions and values of the proposed mitigation area, and its potential to be a successful mitigation area, including narrative information, maps, photographs, soil or

vegetation samples, delineations and/or other visual materials, describing and/or showing the mitigation area;

10. All past correspondence between the Department and the applicant or permittee, and/or the owner(s) of the proposed mitigation area, regarding the mitigation activities and the mitigation area;

11. Schedules describing in detail the sequence of mitigation activities and estimated dates for completion for each mitigation activity. For example, this might include approximate dates for completing each legal transaction involved in a land donation, or this might include site preparation and planting dates for a wetlands creation project;

12. Estimates of costs involved in performing the mitigation, and in maintaining the mitigation area after construction and/or transfer is completed;

13. Draft documents for protection and transfer of the mitigation area after successful completion of mitigation, in accordance with N.J.A.C. 7:7A-15.14, 15.17(c) and 15.19(c); and

14. If the Department determines that there is reason to suspect contamination on the proposed mitigation area, a copy of the characterization and other information obtained from the Department's Division of Remediation Management and Response, as required at N.J.A.C. 7:7A-15.4(h). In addition, in order for the Department to protect the health and safety of the employees who will inspect the potential mitigation site, the applicant shall provide the following:

- i. The applicable human health and ecological effect thresholds for each contaminant identified in the characterization as provided by the Site Remediation Program or the EPA;
- ii. The method of exposure for each contaminant listed in the characterization, for example inhalation, ingestion, dermal contact, or explosive potential;
- iii. The method of transmission of the contaminant identified in the characterization, for example through soil particles, dust particles, vapor or liquid;
- iv. The potential to transmit health risks and or known contaminants off site, for example by way of soil or liquids on footwear, clothing or skin; and
- v. The current status of the cleanup of the site with the Site Remediation Program or the EPA, the name(s) and contact number(s) of the project manager, and all applicable case or file numbers.

(e) In addition to the basic information required for all mitigation proposals under (b) above, and the information required at (c) above, an application checklist for a proposal to restore, create, or enhance wetlands shall require the following information:

1. Visual materials, including, but not limited, to maps, plans, surveys, diagrams, or photographs showing all mitigation activities proposed;
2. Written narrative information and/or reports describing in detail all mitigation activities proposed;
3. A description of post-construction activities, including but not limited to schedules for monitoring, maintenance, and reporting;
4. Contingency measures that will be followed if the mitigation project fails or shows indications of failing;
5. A letter of credit or other financial assurance meeting the requirements of N.J.A.C. 7:7A-15.13; and
6. A certification that the proposed mitigation will not adversely affect properties which are listed or are eligible for listing on the National Register of Historic Places in accordance with N.J.A.C. 7:7A-12.2. If the mitigator, before or during approved mitigation, encounters an historic property on the mitigation site that may be eligible for listing in the National Register, the mitigator shall immediately notify the Department and proceed as directed by the Department.

(f) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to make a monetary contribution shall require the following:

1. Information demonstrating to the Department that a monetary contribution is acceptable under N.J.A.C. 7:7A-15.5 or 15.6 and the requirements at either (f)1i or ii below:
  - i. For a monetary contribution to satisfy mitigation requirements for approved individual permits, cost estimates, appraisals, and other information necessary to demonstrate compliance with the requirements for monetary contribution at N.J.A.C. 7:7A-15.21; or
  - ii. For a monetary contribution to satisfy mitigation requirements for approved general permits, the calculation demonstrating compliance with N.J.A.C. 7:7A-15.21(d).

(g) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to make a land donation shall require the following:

1. Information demonstrating to the Department that a land donation is acceptable under N.J.A.C. 7:7A-15.5 or 15.6; and
2. All information necessary to demonstrate to the Wetlands Mitigation Council that the parcel of land proposed for donation meets the requirements for land donation at N.J.A.C. 7:7A-15.22.

Amended by R.2008 d.291, effective October 6, 2008.  
See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).