

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Deleted definitions "Administrative consent order", "Memorandum of agreement" and "No further action letter"; and added definitions "Final remediation document" and "Licensed site remediation professional".

7:38-1.5 Requests for adjudicatory hearings

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

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

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

(c) A request for an adjudicatory hearing shall:

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

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

v. A statement requesting a hearing;

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

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

2. Be submitted to the Department as follows:

i. Submit the original request to:

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

ii. Submit a copy of the request to:

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

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

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

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

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

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

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

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

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

Case Notes

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

7:38-2.4 Highlands applicability determination

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

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

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

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

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

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

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

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

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

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

- i. Create a new travel lane or increase the length of an existing travel lane by more than 2,640 linear feet, not including tapers;
- ii. Result in a cumulative increase in impervious surface of one acre or more; or

iii. Involve the ultimate disturbance of two or more acres of land;

6. Any activity that is part of an agricultural or horticultural development or agricultural or horticultural use;

7. Any activity conducted by a landowner in accordance with an approved woodland management plan issued pursuant to the Farmland Assessment Act, N.J.S.A. 54:4-23.3, or the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester;

8. The remediation of any contaminated site pursuant to N.J.S.A. 58:10B-1 et seq., provided no residential, commercial, or industrial development is undertaken concurrently with, or subsequent to, the remediation. Any concurrent or subsequent development at the site is subject to the requirements of this chapter for a Highlands applicability determination and HPAA as applicable;

9. The addition of telecommunications equipment or antennas to a telecommunication facility existing on August 10, 2004, provided the equipment is located within the existing fenced compound or on lawfully existing impervious surface so that it does not increase impervious surface; or

10. Installation of cellular equipment on a legally existing overhead utility tower and the construction of the attendant 10-foot by 20-foot pad, when located within the four footings of such tower within a right-of-way owned or controlled by a public utility, constructed with the consent of the public utility.

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

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

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

(f) If the Department determines the proposed activity is a major Highlands development subject to the permitting

requirements of the Highlands Act and consistent with the applicable areawide WQMP, the activity shall not commence until an HPAA is issued for the proposed development.

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

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

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

Section was "Applicability determination". Rewrote (a) and (b); in (c), substituted "or" for a comma following "TWA" and inserted the last sentence; and in (d), substituted "if required by" for "pursuant to". Special Amendment, R.2009 d.361, effective November 4, 2009 (to expire May 4, 2011).

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

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

Administrative correction.

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

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

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

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

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

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

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

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

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

(c) This chapter does not apply to:

1. Diversions for agricultural, aquacultural; or horticultural purposes as defined in N.J.A.C. 7:20A-1.3; or
2. Persons who make emergency diversions of water for a period of less than 31 consecutive days. An emer-

gency diversion includes taking water for the purpose of fire fighting, flood prevention, hazardous substance and/or waste spill response, or for other emergencies as determined by the Department;

3. Is designed to comply with all of the preservation area standards contained at N.J.A.C. 7:38-3 to the maximum extent feasible while still addressing the identified health and safety need; and

4. Has been designed to meet the requirements at N.J.A.C. 7:38-6.2 to the maximum extent possible.

(e) In addition to meeting the requirements at (a) through (d) above, an applicant proposing a regulated activity within a Highlands open water that is also a freshwater wetland or State open water, as defined in the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4, shall provide mitigation in accordance with N.J.A.C. 7:7A in order to compensate for impacts to a freshwater wetland or State open water resulting from the approval of a waiver under this section.

7:38-6.6 Waiver for redevelopment in certain previously developed areas in the Highlands preservation area: Department-designated Highlands Brownfields

(a) In accordance with N.J.S.A. 13:20-33b(2), the Department may, on a case by case basis, waive any of the provisions for a HPAA if such waiver is necessary for redevelopment of certain previously developed areas in the preservation area identified by the Council pursuant to N.J.S.A. 13:20-9b and N.J.S.A. 13:20-11a(6)(h). A waiver under this section shall apply only to Department-designated Highlands brownfield sites designated pursuant to (b) below, and identified as an area appropriate for redevelopment by the Council. For the purposes of this section only, "site" means a parcel designated by a block and lot, or several contiguous parcels if owned or controlled by the applicant so long as all parcels meet the criteria in (b) below.

(b) For the purposes of this section, a site that meets the criteria in one of the following three Tracks is eligible for designation by the Department as a Highlands brownfield, provided that the contamination onsite is not the result of a current or previous agricultural use:

1. Track One: A sanitary landfill facility;
2. Track Two: A former or current commercial or industrial site for which:
 - i. Prior to the issuance of a final remediation document, a remedial action report was completed confirming the presence of contamination onsite, and documenting the current or previous use as a commercial or industrial site;
 - ii. The Department or a licensed site remediation professional has issued a final remediation document for the entire site for which the brownfield designation is sought as of July 1, 1993, or later, pursuant to N.J.A.C. 7:26C-6; and

iii. No discharge of a contaminant has occurred on the site since the date of the final remediation document. Sites where a discharge of a contaminant has occurred on the site since the Department or a licensed site remediation professional has issued a final remediation document must apply for designation through Track Three; or

3. Track Three: A former or current commercial or industrial site with suspected or confirmed contamination onsite for which neither the Department nor a licensed site remediation professional has issued a final remediation document.

(c) For a Track One site, the Department may designate as a Highlands brownfield:

1. The limit of the waste; or
2. Areas legally disturbed as of August 10, 2004.

(d) For a Track Two site, the Department may designate as a Highlands brownfield only that portion of a site that meets one or both of the following:

1. Areas on which remediation has been approved by either the Department or a licensed site remediation professional and for which the Department or a licensed site remediation professional has issued a final remediation document; or
2. Areas legally disturbed as of August 10, 2004.

(e) For a Track Three site for which only a Preliminary Assessment and Site Investigation have been completed confirming the suspected existence of contamination onsite, the Department may designate as a Highlands brownfield only that portion of the site legally disturbed as of August 10, 2004.

(f) For a Track Three site for which remedial activity, in addition to a Preliminary Assessment and Site Investigation confirming the existence of contamination onsite has occurred, the Department may designate as a Highlands brownfield only that portion of a site that meets one or more of the following:

1. Areas for which a Department-approved or licensed site remediation professional-approved delineation of soil contamination has been completed, pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E;
2. Areas legally disturbed as of August 10, 2004; or
3. Areas disturbed for remediation activities, (but not new residential, commercial or industrial development), in accordance with a Department or licensed site remediation professional approved Remedial Action Workplan, pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-6.

(g) The Department shall not include a Highlands open water in a Highlands brownfield designation.

(h) A person seeking the designation of a site as a Highlands brownfield shall submit to the Department documentation that the site meets the criteria for the applicable track at (b) above, using the appropriate Department application form, accompanied by the fee set forth at N.J.A.C. 7:38-10.

(i) The Department may modify a Highlands brownfield designation to include an area identified by the Council after notice and public comment and submittal to the Department for consideration, provided the documentation and public record developed by the Council is sufficient for the Department to conclude that such modification will not result in a significant impact to any Highlands resource area.

(j) The Department may expand the area included in a Highlands brownfield designation at any time based upon new information obtained during remediation that was not available during the designation process.

(k) Once the Department designates a site as a Highlands brownfield, and the Council has identified all or part of the brownfield as appropriate for redevelopment in accordance with N.J.S.A. 13:20-9b and 13:20-11a(6)(h), an applicant shall be eligible for a HPAA with a waiver for redevelopment under this section if the applicant demonstrates that:

1. The proposed redevelopment meets the requirements at N.J.A.C. 7:38-6.2 to the maximum extent possible, taking into consideration cost and existing technology;

2. The remediation conducted onsite is in accordance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E;

3. For a Track One Highlands brownfield:

- i. As of May 9, 2005, the applicant is or was remediating or closing, or has completed remediation or closure of a landfill that ceased operation before January 1, 1982 in accordance with:

- (1) A Closure Plan approved by the Department, and issued pursuant to the Solid Waste rules, N.J.A.C. 7:26-2A.9; and

- (2) A Remedial Action Workplan approved by the Department or by a licensed site remediation professional, and pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-6; or

- ii. The applicant is currently implementing an approved Closure and Post-Closure Care Plan, or has completed an approved Closure and Post-Closure Care Plan, for a landfill that ceased operation on January 1, 1982, or later, pursuant to the Solid Waste Rules, N.J.A.C. 7:26-2A.9;

4. For a Track Two Highlands brownfield, the applicant demonstrates that no discharge of a contaminant has occurred on the site since the final remediation document was issued;

5. For a Track Three Highlands brownfield, the applicant is remediating the site pursuant to the Administrative Requirements for the Remediation of Contaminated Sites rules, N.J.A.C. 7:26C, or the Industrial Site Recovery Act rules, N.J.A.C. 7:26B, as applicable;

6. The proposed redevelopment satisfies the requirements in (c), (d), (e) or (f) above as applicable, and:

- i. If the redevelopment is located in the footprint of existing impervious surface, the existing stormwater treatment system removes 50 percent or greater total suspended solid (TSS). If the existing system removes less than 50 percent TSS or there is no existing treatment system, the existing system is upgraded to remove at least 50 percent TSS or a new stormwater treatment system that removes at least 50 percent TSS is installed; or

- ii. If the proposed redevelopment is located outside the footprint of existing impervious surface, a new stormwater treatment system that removes at least 80 percent TSS is installed;

7. The proposed redevelopment includes, wherever feasible, the removal of impervious surfaces not used for the redevelopment project and the planting of indigenous vegetation that is beneficial for the protection of water quality, and the recording of a binding conservation restriction preserving the newly revegetated area from future development; and

8. The proposed redevelopment includes mitigation in accordance with N.J.A.C. 7:7A for any activity proposed within a Highlands open water that is also a freshwater wetland or State open water, as defined in the Freshwater Wetlands Protection Act rules, N.J.A.C. 7:7A-1.4.

(l) Any waiver approved in accordance with this section shall be conditioned upon the receipt of a final remediation document, or equivalent approval for sanitary landfills issued by the Department with respect to the area of the site designated as a Highlands brownfield and identified by the Council as appropriate for redevelopment.

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

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

Section was "Waiver for redevelopment in certain previously developed areas in the Highlands Preservation Area: Department-designated Highlands Brownfields". Rewrote the section.

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

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

Rewrote (b)2 and (d)1; in (f)1 and (f)3, inserted "or licensed site remediation professional-approved"; in (k)3i(2), inserted "or by a licensed site remediation professional" and deleted "issued" preceding "pursuant"; in (k)4, substituted "final remediation document" for "NFA letter"; in (k)5, substituted "is remediating the site pursuant to the Administrative Requirements for" for "has obtained an Oversight Document pursuant to the Department Oversight of"; and in (l), substituted "a final remediation document" for "an NFA letter".

Administrative correction.

See: 42 N.J.R. 778(a).

State department, as the case may be, that describes the proposed project and its location and affirms that the proposed project is the same as that approved in the referendum;

14. For mining, quarrying, or production of ready mix concrete, bituminous concrete, or Class B recycling materials occurring or which are permitted to occur on any mine, mine site, or construction materials facility existing on June 7, 2004 pursuant to N.J.A.C. 7:38-2.3(a)14:

i. A site plan certified by a licensed New Jersey Professional Engineer showing the location of existing and proposed activity and development;

ii. Official documentation including, but not limited to, tax records, local or State permits, and bills of sale or lading demonstrating that the mine or facility was in existence and operating on June 7, 2004, and included the land on which the proposed activity or development will occur; and

iii. A copy of a Certificate of Registration issued by the Commissioner of Labor pursuant to N.J.S.A. 34:6-98.4;

15. For the remediation of any contaminated site pursuant to N.J.S.A. 58:10B-1 et seq. pursuant to N.J.A.C. 7:38-2.3(a)15:

i. A copy of a site plan certified by a licensed New Jersey Professional Engineer indicating the lot and block, municipality and county of the remediation site and the area above or below ground where contamination shall be removed or remediated;

ii. A brief description of the remediation activity to be conducted in the area described in (d)15i above; and any structures, impervious surfaces, clearing of vegetation or water diversion being proposed;

iii. A copy of a letter, application, order, memorandum of agreement or remedial action workplan approved by the Department, or any other documentation demonstrating that the remediation activities are required in accordance with N.J.S.A. 58:10B-1 et seq.; and

iv. The name of the DEP case manager or licensed site remediation professional assigned to the case, if any;

16. For any activities on lands of a Federal military installation existing on August 10, 2004 that lie within the Highlands Region pursuant to N.J.A.C. 7:38-2.3(a)16:

i. A site plan certified by a licensed New Jersey Professional Engineer showing the general location of the proposed activities as being within the borders of the Federal military installation and the activity's location with respect to Highlands Region boundaries; and

ii. A letter briefly describing the proposed activities signed by an official of the installation; and

17. For a major Highlands development, located within an area designated as of March 29, 2004 as Planning Area

1 (Metropolitan), or Planning Area 2 (Suburban) pursuant to the State Planning Act, N.J.S.A. 52:18A-196 et seq., that on or before March 29, 2004 was the subject of a settlement agreement and stipulation of dismissal filed in the Superior Court, or a builder's remedy issued by the Superior Court, to satisfy the constitutional requirement to provide for the fulfillment of the fair share obligation of the municipality in which the development is located pursuant to N.J.A.C. 7:38-2.3(a)17:

i. A copy of the settlement agreement and stipulation of dismissal filed in the Superior Court, or builder's remedy issued by the Superior Court;

ii. A copy of any site plans certified by a licensed New Jersey Professional Engineer, maps or other documentation clearly indicating the location of the fair share housing to be provided in accordance with the settlement agreement and stipulation of dismissal filed in the Superior Court, or a builder's remedy issued by the Superior Court and the location of all proposed structures, service or access roads, and infrastructure with respect to the boundaries of Planning Area I or II, as the case may be;

iii. A copy of all municipal approvals obtained for the project, or the schedule for applying and obtaining such approvals; and

iv. A proposed schedule for completion of the entire project including township approvals, site preparation, installation of utilities and roads, and construction of all buildings.

(e) In addition to the information required at (b) above, the following information shall be provided by applicants requesting a Highlands Applicability Determination for a project or activity believed to be agricultural or horticultural and unregulated by the Department pursuant to N.J.A.C. 7:38-2.2(b):

1. A copy of the applicant's tax bill showing that the site has farmland assessment tax status under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq.; and

2. A brief description of the activities for which the exemption is claimed, including:

i. The types of farming or horticulture that will be pursued;

ii. Best management practices currently employed and/or to be employed;

iii. The length of time that the area proposed for disturbance has been in use for farming or horticulture; and

iv. The square footage or acreage of the entire site, of the impervious surfaces already existing on the site, and the total amount of impervious surface on the site if the proposed activity is permitted. If the proposed activity will result in more than three percent of the site

being covered by impervious surface, applicants should contact the local soil conservation district for additional assistance.

(f) In addition to the information required at (b) through (e) above, the Department may require any information necessary to clarify information previously submitted, to ensure compliance with State and/or Federal law, or to determine whether an application meets State and/or Federal standards.

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

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

Rewrote (b)1; in (d)1i and (d)1ii, substituted "lot" for "property" throughout; in (d)2ii, deleted "and" from the end; in (d)2iii, inserted "and" at the end; added (d)2iv; in (d)7, deleted "for public lands," preceding "the normal harvesting"; in (d)7i(1), inserted "if applicable" at the end; in (d)7ii, deleted "public lands with" preceding "a forest management"; in (d)9, deleted "of 2,640 feet or more not including tapers" preceding "pursuant to N.J.A.C."; in (d)10, deleted "2,400 feet or more, not including tapers" preceding "pursuant to N.J.A.C."; rewrote (d)11iii; in (d)15iii, inserted "memorandum of agreement or remedial action workplan approved by the Department,"; and in (e), deleted "and (c)" following "required at (b)".

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

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

In the introductory paragraph of (d)15, updated the N.J.S.A. reference; and in (d)15iv, inserted "DEP" and substituted "or licensed site remediation professional assigned to the case" for "handling or supervising remediation at DEP".

Administrative correction.

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

7:38-9.3 Basic application requirements for all Highlands Resource Area Determinations, Highlands general permits and Highlands Preservation Area Approvals with or without waivers including modifications and extensions

(a) This section describes information required for every application listed in N.J.A.C. 7:38-9.1(a)2 through 6. Additional information required for each specific application is set forth below at N.J.A.C. 7:38-9.4 through 9.8.

(b) Every application listed at N.J.A.C. 7:38-9.1(a)2 through 6 shall require the following:

1. An application form, completed as directed in the instructions and/or application checklist. The application form requests basic information regarding the site, the applicant, the activities proposed, any previous or other required applications to the Department, and a truth and accuracy certification;

2. Unconditional written consent from the owner of the site, as defined at N.J.A.C. 7:38-9.1(c), for Department representatives to enter the site to conduct site inspections;

3. The appropriate application review fee, as set forth at N.J.A.C. 7:38-10, paid as follows:

- i. The fee shall be paid by personal check, certified check, attorney check, government purchase order, or money order;

- ii. The fee shall be made payable to "Treasurer, State of New Jersey"; and

- iii. Each check, purchase order, or money order must be marked with the name of the applicant;

4. Visual materials, including but not limited to maps, plans, surveys, diagrams, or photographs as necessary to accurately portray the site, existing conditions on the site, such as topography and amount of impervious cover, and any activities proposed on the site, including but not limited to, calculations of the area of proposed disturbance to Highlands Resource Areas and the amount of existing and proposed impervious cover;

5. The approximate boundaries of the project or activity site clearly delineated on a U.S.G.S. quadrangle map, including title-name of Quad, or GIS coverage and the State Plane coordinates in NAD 1983 for a point at the center of the site. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the endpoints of those projects, which are 1,999 feet or less, and for those projects that are 2,000 feet or longer, additional coordinates at each 1,000-foot interval. For assistance in determining the State plane coordinates for a site, see the iMAP webpage at nj.gov/dep/gis/depsplash.htm;

6. Two copies of a recent county road map or local street map, with the site clearly marked;

7. Two sets of original color photographs, mounted on 8½ by 11-inch paper, sufficient to show the conditions on the site, and immediately surrounding areas, as well as the area of disturbance for the proposed activities. A minimum of 10 photographs is required;

8. A copy of the municipal tax map(s) delineating the project or activity site by lot(s) and block(s);

9. The separate depiction and labeling on any plan submitted pursuant to (b)4 above, of all slopes greater than 20 percent and slopes between 10 percent and 20 percent, as calculated pursuant to N.J.A.C. 7:38-3.8(b);

10. Written narrative and/or reports that accurately describe the site, its location (including State plane coordinates), site conditions, and any planned activities, including schedules for performing regulated activities, if appropriate;

11. Documentation that the applicable public notice requirements at N.J.A.C. 7:38-9.4(b)2 or 9.5(a)3 have been met;

12. Information and/or certifications regarding the presence or absence of rare, threatened or endangered species habitat, ecological communities, historic or archaeological resources, or other features on the site relevant to determining compliance with the requirements of this chapter. This information shall include but not be limited to a letter from the Natural Heritage Program indicating the presence or absence of any rare, threatened or endangered species or

1. For a waiver based upon a designation in accordance with N.J.A.C. 7:38-6.6(b)1 for a landfill that ceased operation prior to January 1, 1982:

i. A Closure Plan approved by the Department, pursuant to the Solid Waste Rules, N.J.A.C. 7:26-2A.9; and

ii. A Remedial Action Workplan approved by the Department or a licensed site remediation professional, pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-6;

2. For a waiver based upon a designation in accordance with N.J.A.C. 7:38-6.6(b)1 for a landfill that ceased operation on January 1, 1982 or later, a Closure and Post-Closure Plan approved by the Department, pursuant to the Solid Waste Rules, N.J.A.C. 7:26-2A.9;

3. For a waiver based upon designation in accordance with N.J.A.C. 7:38-6.6(b)2, certification that no discharge of a hazardous substance has occurred on the site since the date of the final remediation document, pursuant to the Administrative Requirements for the Remediation of Contaminated Sites rules, at N.J.A.C. 7:26C-1.6;

4. For a waiver based upon a designation in accordance with N.J.A.C. 7:38-6.6(b)3, evidence documenting that remediation is being conducted pursuant to the Administrative Requirements for the Remediation of Contaminated Sites rules, N.J.A.C. 7:26C, or the Industrial Sites Recovery Act rules, N.J.A.C. 7:26B, as applicable, final remediation document pursuant to N.J.A.C. 7:26C-6.

(i) In addition to the requirements listed in (b) above, an applicant for a waiver of a requirement for an HPAA to permit redevelopment of a site comprised of 70 percent or more impervious surfaces, in accordance with N.J.A.C. 7:38-6.7, shall provide the following information:

1. A site plan certified by a licensed New Jersey Professional Land Surveyor depicting the scope of the impervious cover in relation to the proposed project;

2. Documentation from the Highlands Council confirming that the site contained 70 percent impervious coverage on August 10, 2004;

3. Documentation from the Highlands Council that the site has been designated for redevelopment;

4. A stormwater management plan in accordance with N.J.A.C. 7:8 that satisfies the requirements at N.J.A.C. 7:38-6.6(k)6;

5. A mitigation proposal that complies with N.J.A.C. 7:7A-15, to offset the impacts of the project on freshwater wetlands and/or State open waters if they comprise any or all of the Highlands open water on the site to be affected by the proposal; and

6. Compliance with the requirements at N.J.A.C. 7:38-6.6(k)7, if applicable, and a binding conservation restriction that satisfies the requirements at N.J.A.C. 7:38-6.3.

(j) In addition to the requirements listed in (b) above, an applicant for a waiver of a requirement for an HPAA to avoid taking of property without just compensation, in accordance with N.J.A.C. 7:38-6.8, shall provide the following information:

1. Document(s) showing when the property as a whole, as defined at N.J.A.C. 7:38-1.4, was acquired, the purchase price of the property as a whole and the instrument which documents the applicant's real property interest;

2. Document(s) showing the amount, nature, and date of any investments made to maintain and/or develop the property as a whole, other than the purchase price;

3. A zoning study prepared and certified by a New Jersey licensed professional including a statement that the development plan was permissible under municipal land use codes in effect at the time of purchase and those currently in effect;

4. A development plan depicting the project which the applicant claims provides a minimum beneficial economically viable use;

5. Information and/or certifications regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources, steep slopes, Highlands open waters or other features on the site relevant to determining compliance with the requirements of this chapter;

6. A proposed conservation restriction that meets the requirements of N.J.A.C. 7:38-6.3;

7. A mitigation proposal that complies with N.J.A.C. 7:7A-15, to offset the impacts of the project on freshwater wetlands and/or State open waters if they comprise any or all of the Highlands open water on the site that will be affected by the proposal;

8. Documentation that the proposed project will cause the minimum possible environmental impact to Highlands resources, while providing a minimum beneficial economically viable use of the property; and

9. Documents showing the conclusion of any appeals of the Department's HPAA decision under the rules as strictly applied including:

i. The Department decision on the HPAA application made in accordance with the rules as strictly applied;

ii. The Commissioner's Final Decision granting or denying the HPAA application following an administrative challenge to the Department finding of facts or application of the rules; and

iii. All court orders and decisions concerning the Commissioner's Final Decision including, but not limited to, orders summarily dismissing the appeal.

(k) In addition to the requirements listed in (b) above, an applicant for a waiver of a requirement for an HPAA to construct a 100 percent affordable housing development, in accordance with N.J.A.C. 7:38-6.9, shall provide a letter from the township attorney certifying that the proposed development is comprised of 100 percent affordable housing and is included in the municipality's Fair Share Plan.

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

Rewrote the section.
Special Amendment, R.2009 d.361, effective November 4, 2009 (to expire May 4, 2011).
See: 41 N.J.R. 4467(a).

In (f)2i, substituted "the final remediation document" for "a No Further Action (NFA) letter" and deleted "issued by the Department" following "site"; in (f)2ii and (h)3, substituted "final remediation document" for "NFA letter"; in (f)2iii and (h)3, substituted "Administrative Requirements for" for "Department Oversight of" and "rules" for "rule", and updated the N.J.A.C. reference; in (f)2iii, substituted "final remediation document issued" for "NFA letter"; in (h)1ii, inserted "or a licensed site remediation professional"; and rewrote (h)4.

7:38-9.7 Application requirements for modification or extension of an HPAA or HRAD

(a) An applicant may request a modification of an HPAA or the Department may modify an HPAA on its own initiative.

(b) The following changes are minor modifications to an HPAA:

1. Correction of a typographical error that does not materially affect the terms of the HPAA;

2. An increase in the frequency of monitoring or reporting by the permittee;

3. A change in ownership or operational control of a project, where no other change in the original HPAA is necessary. If any other change in the HPAA is necessary, the change shall not be a minor modification, except as in (b)4 below; and

4. A Department approved change in materials, construction techniques, or the minor relocation of an activity on a site, if the change is required by another Department, permitting program or Federal agency. However, this change is not a minor modification if the change would disturb additional Highlands Resource Areas, or increase impervious surface on the site from the amount originally approved.

(c) Any change not listed at (b) above shall constitute a major modification.

(d) In order to obtain a minor modification to an HPAA, the following information shall be submitted:

1. For a change in ownership or operational control of a permitted site or activity:

i. A certification that no other change in the original permit is necessary; and

ii. A written agreement, signed by the current and the proposed new permittees, containing a date for transfer of responsibility, coverage, and liability between the current and new permittees and a copy of any deed on which the agreement is based; and

2. For a minor modification not covered at (b)1 above, a copy of the permit condition proposed for modification, a description of the proposed modification, and information demonstrating that the modification sought is a minor modification as described in (b)2 through 4 above.

(e) An application for a minor modification does not require a fee under N.J.A.C. 7:38-10, or public notice.

(f) An application for a major modification shall meet the same substantive and procedural requirements as an application for a new HPAA, except that the application need only address the portions of the existing approval affected by the proposed modification. Portions of the existing approval that are not affected by the proposed modification are not subject to public notice, public hearing, Department review or other procedures that would apply to a new application.

(g) In addition to the basic information required for all applications under N.J.A.C. 7:38-9.3, the application for an HPAA extension shall include information reasonably necessary for the Department to evaluate whether the project or activities will comply with this chapter if extended as proposed.

(h) In addition to the basic information required for all applications under N.J.A.C. 7:38-9.3, the application for extension of an HRAD shall include any information the Department shall determine is necessary to confirm if the information in the original HRAD remains correct.

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

In (c), deleted the last two sentences; in (f), substituted "meet" for "require" and "substantive and procedural requirements" for "information", and inserted "Department review".

7:38-9.8 Application requirements for Highlands general permits

(a) In addition to the basic information required for all applications under N.J.A.C. 7:38-9.3, a person applying for a Highlands General Permit (GP) in accordance with N.J.A.C. 7:38-14 shall provide:

1. Any specific information required in the general permit if not already provided in accordance with N.J.A.C. 7:38-9.3;