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EDUCATIONAL DEPARTMENT OF
OFFICE OF LEGISLATIVE SERVICES
CN 068 INTER-OFFICE
TRENTON NJ 08625

MOST RECENT UPDATE TO NEW JERSEY ADMINISTRATIVE CODE: JANUARY 21, 1992
See the Register Index for Subsequent Rulemaking Activity.

NEXT UPDATE: SUPPLEMENT FEBRUARY 18, 1992

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On occasion, a proposing agency may extend the 30-day comment period to accommodate public hearings or to elicit greater public response to a proposed new rule or amendment. An extended comment deadline will be noted in the heading of a proposal or appear in a subsequent notice in the Register.

At the close of the period for comments, the proposing agency may thereafter adopt a proposal, without change, or with changes not in violation of the rulemaking procedures at N.J.A.C. 1:30-4.3. The adoption becomes effective upon publication in the Register of a notice of adoption, unless otherwise indicated in the adoption notice. Promulgation in the New Jersey Register establishes a new or amended rule as an official part of the New Jersey Administrative Code.

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NEW JERSEY REGISTER

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EXECUTIVE ORDERS

(a)

OFFICE OF THE GOVERNOR
Governor Jim Florio
Executive Order No. 54(1992)
New Jersey Council on Job Opportunities

Issued: February 6, 1992.
Effective: February 6, 1992.
Expiration: Indefinite.

WHEREAS, the public interest of the citizens of the State of New Jersey would be enhanced by the development of strategies to increase economic growth and to create job opportunities; and

WHEREAS, the business community of New Jersey has expressed its interest in establishing a collaborative relationship with New Jersey State government to develop strategies to maximize the State's economic growth and create job opportunities for the citizens of New Jersey; and

WHEREAS, the goal of economic growth is critical for assuring all citizens of New Jersey the opportunity to achieve a high quality of life; and

WHEREAS, the development and coordination of economic growth policies necessitates consultation and collaboration among New Jersey State government, the private business sector and labor and education, among others; and

WHEREAS, it is declared to be the public policy of this State to encourage economic growth, to promote full employment, to encourage business development and expansion and to coordinate and utilize the State government's policies, plans, functions and resources.

NOW, THEREFORE, I, JAMES J. FLORIO, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. There is hereby established the New Jersey Council on Job Opportunities (hereinafter "the Council") which shall be composed of individuals appointed by the Governor and shall be representative of citizens and groups in the State having an interest in economic growth and the creation of job opportunities.

2. The Council shall make assessments of government policy and advise the Governor on economic policy matters including, but not limited to, the following areas: a) business retention and attraction; b) work force quality; c) government regulations; d) capital investment/infrastructure; e) international trade; f) financing strategies for economic development; g) small business initiatives; h) manufacturing; and i) high technology and research development.

3. Additionally, the Council shall:

a. Evaluate the impact of international and federal economic policies in terms of their effect on the economy of the State;

b. Evaluate the State's economic condition;

c. Analyze and assess the impact of the State budget on the economy of the State;

d. Recommend policies and programs to promote economic growth and job opportunities; and

e. Gather and serve as a clearinghouse for timely and authoritative information concerning the economic growth and development of the State.

4. The Council shall be composed of 15 individuals appointed by the Governor who are representative of the State's business, education and labor communities and individuals who are knowledgeable in the field of economics. The Chair of the Council shall be designated by the Governor and shall serve at his pleasure.

5. The Council shall annually file a written report to the Governor and more frequently if so determined by the Governor or the Council.

6. Council members shall serve for three years, except that, of the initial members appointed pursuant to this Executive Order, five shall serve for terms of one year, five shall serve for terms of two years and five shall serve for terms of three years. Any individual appointed to fill an unexpired term shall serve for the unexpired portion of that term.

7. The Council shall coordinate its work with the existing advisory groups including, but not limited to, the following: the State Employment and Training Commission, the Commission on Science and Technology, the State Planning Commission and the Transportation Executive Council.

8. The Council is authorized to call upon any department, office, division or agency of this State to supply it with data and any other information, personnel or assistance it deems necessary to discharge its duties under this Order. Each department, office, division or agency of this State is hereby required, to the extent not inconsistent with law, to cooperate with the Council and furnish it with such assistance as is necessary to accomplish the purpose of this Order. The Council may seek to recruit experts to serve on the staff on a loaned executive basis. These loaned executives may come from State government, the private sector, labor and education. The Attorney General shall act as legal counsel to the Council.

9. The Council is authorized to establish task forces or workgroups to address specific issues as they arise and develop policy recommendations pertaining to those issues.

10. This Order shall take effect immediately.

(b)

OFFICE OF THE GOVERNOR
Governor Jim Florio
Executive Order No. 55(1992)
Termination of Limited State of Emergency in Atlantic, Cape May, Cumberland, Monmouth and Ocean Counties

Issued: February 7, 1992.
Effective: February 7, 1992.
Expiration: Indefinite.

WHEREAS, Executive Order No. 50, issued on January 4, 1992 declared a limited State of Emergency in Atlantic, Cape May, Monmouth, and Ocean Counties and Executive Order No. 51, issued on January 10, 1992, which memorialized the verbal declaration of a Limited State of Emergency in Cumberland County on January 4, 1992, in response to a storm which caused severe weather conditions which threatened the health, safety and resources of residents; and

WHEREAS, the immediate threat posed by this storm has passed and ceased to endanger the health, safety or resources of residents on or before January 10, 1992;

NOW, THEREFORE, I, JAMES J. FLORIO, Governor of the State of New Jersey, declare that the limited State of Emergency is hereby terminated effective 12:00 midnight on January 10, 1992 and that Executive Orders No. 50 and 51 are rescinded.

I wish to express my gratitude to the people of the affected areas for the manner in which they cooperated during the limited State of Emergency, and to law enforcement, military and emergency response personnel for their untiring efforts.

This ORDER shall take effect immediately.

(c)

OFFICE OF THE GOVERNOR
Governor Jim Florio
Executive Order No. 56(1992)
Ethnic Advisory Council Increase in Membership

Issued: February 11, 1992.
Effective: February 11, 1992.
Expiration: Indefinite.

WHEREAS, on July 23, 1982, Executive Order No. 11 created an Ethnic Advisory Council to advise the Governor regarding the needs of the ethnic communities in New Jersey; and

WHEREAS, the Council membership was subsequently increased by Executive Order No. 99 on May 7, 1985; and Executive Order No. 206 on April 25, 1989; and

WHEREAS, the continued influx of new ethnic groups into New Jersey has precipitated the need to increase our awareness, appreciation and understanding of each of these new ethnic groups; and

WHEREAS, increasing the membership of the Ethnic Advisory Council to include representatives from these new groups will allow for a better understanding of their contributions and needs;

NOW, THEREFORE, I, JAMES J. FLORIO, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. Section 2(a) and 2(b) of Executive Order 11 are hereby amended as follows:

"2(a). The Council shall consist of 46 members appointed by the Governor. At least 38 of these appointees shall be representatives of ethnic communities within the State of New Jersey. In selecting the Council membership, consideration shall be given to appointing as broad a representative sample as possible of New Jersey's ethnic communities. All new members of the Ethnic Advisory Council who are appointed upon the effective date of this Order shall serve a full two-year term from the date of this Order."

"2(b). The Commissioners of the Departments of Community Affairs and Education, the Secretary of State, the Chancellor of Higher Education, the Chairman of the State Council on the Arts, the Chairman of the New Jersey Historical Commission, the Director of the Division on Civil Rights, or their designees, and the Ethnics Community Liaison, appointed by the Governor shall serve on the Council in an ex-officio capacity."

2. This Order shall take effect immediately.

RULE PROPOSALS

AGRICULTURE

(a)

DIVISION OF DAIRY INDUSTRY

Producers of Milk

Proposed Readoption with Amendment: N.J.A.C. 2:50

Authorized By: Arthur R. Brown, Jr., Secretary, N.J. Department of Agriculture

Authority: N.J.S.A. 4:12A-1 et seq., specifically 4:12A-20 and 4:12-41.15, and 4:1-24.

Proposal Number: PRN 1992-116.

Submit comments by April 15, 1992 to:

Vin G. Samuel, Economist
Division of Dairy Industry
Department of Agriculture
CN 332
Trenton, New Jersey 08625
Telephone: (609) 984-2511

The agency proposal follows:

Summary

Pursuant to Executive Order No. 66(1978), N.J.A.C. 2:50, Producers, is due to expire on May 1, 1992. The Department of Agriculture hereby proposes to readopt the provisions of Chapter 50 to maintain regulatory continuity and because, upon review, the rules have been found to be appropriate, reasonable and suited to the purpose for which they were originally promulgated.

N.J.A.C. 2:50-1.1 provides that a dairy farmer must notify the dealer to whom he sells milk at least 28 days prior to his intent to discontinue the sale of milk to the dealer.

N.J.A.C. 2:50-2.1 assures that dairy farmers will not suddenly find themselves without a market for their milk. The rules state that a dealer-buyer may not arbitrarily discontinue buying milk, but must provide the farmer with a 28 day notice to find another market. Milk is highly perishable and bulky and must be harvested at least twice daily to maintain its wholesome qualities and marketability. Thus, it is necessary to provide time for a dairy farmer to locate another market and the rule assures this protection.

N.J.A.C. 2:50-2.2 requires a milk dealer to send notice to the Dairy Division of any new dairy farmers the dealer buys milk from or the discontinuation of purchases from a dairy farmer.

Dairy farmers milk payments are based on the pounds of skim milk and the butterfat content of the milk determined by the taking of samples for the butterfat test and the weighing of the milk at the farm. Both functions must be performed accurately in order to insure the accuracy of payments to the farmer. The samples must also be properly maintained. N.J.A.C. 2:50-3.1 through 3.4 provide for the continuation of accurate weighing, sampling, and testing procedures. N.J.A.C. 2:50-3.2(a)3 recognizes industry practices of using a single sample for more than one use and the industry wide adoption of fresh milk samples for determining butterfat content while preserving the option of using composite samples.

One minor text change for clarity occurs at N.J.A.C. 2:50-3.2 but this change does not alter the rules in anyway.

Social Impact

The readoption of the rules will continue to provide the economic protection which the producers of perishable milk must have in order to maintain a viable dairy industry for the benefit of New Jersey residents. These rules insure that New Jersey consumers will have adequate supplies of fresh wholesome milk.

Economic Impact

The readoption of these rules provides for the continuation of protection of dairy farmers from potential economic harm in case of abrupt dismissal of farmers by milk dealers. The rules assure the farmers that their milk will be properly weighed, and tested to determine the butterfat content.

Regulatory Flexibility Analysis

N.J.A.C. 2:50 applies to approximately 200 dairy farmers who are considered small businesses as defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. There is no professional assistance required nor initial capital outlays or annual cost to the farmer for compliance. The rules are a necessary adjunct to a system of reporting by dealers and farmers which protects the interest of the dairy farmers (small businesses). Specific provision is made to prevent adverse impact on the dairy farmers by exempting any dairy farmer from notice requirements if he fails to receive proper payments.

The buyers of dairy farmers' milk (dealers) are not small businesses, except for approximately three companies buying milk from cooperative associations. Pursuant to the Milk Control Act (N.J.S.A. 4:12A-1.1 et seq. and 4:12-1.1 et seq.) dealers buying milk from cooperative associations are exempt from the reporting requirements since the cooperative pays the farmer for the milk and the milk purchased would not be traceable by the dealer to one source or farmer for reporting pruposes.

The rules in N.J.A.C. 2:50-3 apply to persons seeking certification in order to perform weighing, testing, and sampling of farmers milk. These persons are often employees of companies that are not considered small businesses. It is felt that N.J.A.C. 2:50 is not so burdensome as to merit differing standards based on business size and the standards are important to insure proper weighing, sampling, and testing procedures essential for insuring accurate payments for milk sold.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 2:50.

Full text of the proposed amendment follows (addition indicated in boldface **thus**):

2:50-3.2 Milk weighing, measuring and sampling procedures

(a) Weighing, measuring and sampling milk should be performed pursuant to the procedures as set forth in the current "Standard Methods for Examination of Dairy Products," published by the American Public Health Association, Inc., and as a minimum shall include the following:

1. (No change.)

2. Agitate for not less than five minutes and longer if necessary to disperse the butterfat uniformly throughout the tank:

i. The person holding the weigher and sampler certificate issued by the Division of Dairy Industry shall be responsible for ascertaining that the milk is agitated for not less than five minutes and should periodically check the tank time to determine whether it may be used as a guide; **and**

ii. It is suggested that each truck carry a timing device which may be used for timing the agitation;

3. (No change.)

(b) (No change.)

(b)

STATE AGRICULTURE DEVELOPMENT COMMITTEE

Acquisition of Development Easements

Proposed Amendments: N.J.A.C. 2:76-3.12 and 4.11.

Authorized By: State Agriculture Development Committee, Arthur R. Brown, Jr., Chairman.

Authority: N.J.S.A. 4:1C-5f.

Proposal Number: PRN 1992-118.

Submit comments by April 15, 1992 to:

Donald D. Applegate
Executive Director
State Agriculture Development Committee
CN 330
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendments to N.J.A.C. 2:76-3.12 and 4.11 amend the deed restrictions placed on lands enrolled in a Farmland Preservation Program or Municipally Approved Farmland Preservation Program pursuant to the Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 et seq., P.L. 1983, c.32, as amended.

The proposed amendments clarify the status of pre-existing nonagricultural uses or structures occurring on the premises at the time the landowner petitions the county agriculture development board to enter into an eight-year program. Furthermore, the amendments permit the continuance of the nonagricultural uses in existence at the time the landowner petitions the board. The amendments permit the repair or restoration of nonagricultural structures only in the event of partial destruction of the structures. They prohibit additional new structures or the expansion of existing structures for nonagricultural use.

The proposed amendments also prohibit expansion of or changes in the pre-existing nonagricultural use. Moreover, they provide that in the event that the landowner abandons the nonagricultural use, the continuation of the use is extinguished.

Additionally, the amendments provide for a section to ascertain the nature and extent of the pre-existing nonagricultural use and states again that any additional nonagricultural uses are prohibited except as provided for in the Agreement.

The Committee added clarification to the deed restriction which permits the landowner's use of the premises to derive income from certain recreational activities such as hunting, fishing, cross country skiing and ecological tours only if such activities do not interfere with the actual use of the land for agricultural production and that the activities only utilize the premises in its existing condition. The amendments expressly prohibit other recreational activities from which income is derived and which alter the premises, such as golf courses and athletic fields.

The amendments provide for the establishment of base-line information concerning the number of existing single family residential building(s) on the premises and residential buildings used for agricultural labor purposes.

Although the current rules do not limit the landowner from residing in the residence constructed for agricultural labor employed on the premises, generally, the Committee's approval of any new agricultural labor units to be constructed on the premises is conditioned on the landowner placing a restriction in the deed which prohibits the Grantor from living in the unit. The proposed amendments now incorporate the restriction to prohibit the Grantor from residing in the agricultural labor unit and further prohibits Grantor's spouse, Grantor's parents, Grantor's lineal descendants adopted or natural, Grantor's spouse's parents, and Grantor's spouse's lineal descendants, adopted or natural from residing in a new agricultural labor unit approved by the board and Committee. The Committee's intent is to ensure that the residential unit will provide housing for agricultural labor employed on the premises and not serve as a primary residence for the owner or a family member.

The deed restriction which mandates that the Committee has the first right and option to purchase the premises in fee simple title has been amended to conform with the statutory amendments contained in P.L. 1989, c.310.

The proposed rule amendments also incorporate other technical changes for the purpose of maintaining consistency in terminology throughout the deed restrictions and to ensure that general reference to the landowner is gender neutral.

Social Impact

The proposed amendments affect farmland owners who are participants and applicants in a Farmland Preservation Program or Municipally Approved Farmland Preservation Program.

The proposed amendments will have a positive impact by ensuring that the premises will be retained in agricultural use and production for the required eight year period.

Economic Impact

The proposed amendments will have little or no economic impact upon participants or applicants to a Farmland Preservation Program or Municipally Approved Farmland Preservation Program. Participants in the program are permitted to continue nonagricultural activities existing on the premises at the time of petitioning the board for enrollment in an eight year program within certain constraints.

The amendments to the restrictions placed on the Grantor's use of the premises to derive income from certain recreational activities were incorporated for clarification purposes and did not impose any additional limitations.

The proposed rule amendment which prevents the Grantor, Grantor's spouse, Grantor's parents, Grantor's lineal descendants adopted or natural, Grantor's spouse's parents, and Grantor's spouse's lineal descendants, adopted or natural from residing in housing for agricultural labor only pertains to any new construction requiring the Committee's and board's approval. Moreover, the Committee intended that residual dwelling site opportunities be the sole housing opportunity for family members.

At the time of enrolling the premises in an eight year program, the landowner voluntarily agrees to the loss of any rights as limited by the deed restrictions in exchange for the eligibility for certain benefits.

Regulatory Flexibility Statement

The majority of the land potentially subject to enrollment in an eight year program is owned by small businesses, as the term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

The proposed amendments impose compliance requirements regarding the nonagricultural use of land and buildings, limited recreational use of land and restrictions on the uses of housing for agricultural labor. Reporting requirements include the base-line information regarding the existence of residential and agricultural labor buildings on a potential participant property and the need for written notice by certified mail, to the grantee, that a contract has been executed in the event of a potential sale of a participating property. Differing standards of compliance based on business size are not an option since these type of restrictions form the very basis of the program which is designed in the public interest to protect farmland in the State. Further, a farmland owner's decision to participate in the program is voluntary subject to meeting the necessary requirements.

Full text of the proposal follows (additions indicated in boldface **thus;** deletions indicated in brackets [thus]):

2:76-3.12 Deed restrictions

(a) The following deed restrictions shall be agreed to by the board and the landowner(s) when a farmland preservation program is adopted and shall run with the land:

"Grantor promises that the Premises shall at all times for the term of the agreement be owned, used and conveyed subject to:

"1. (No change.)

"2. Grantor certifies that at the time of petitioning the Grantee to enter into a farmland preservation program the nonagricultural uses indicated on attached Schedule (C) existed on the Premises. All other nonagricultural uses are prohibited except as expressly provided in this agreement.

"3. All nonagricultural uses existing on the Premises at the time of the landowner's petition to the Grantee as set forth in Section 2 above may be continued and any structure may be restored or repaired in the event of partial destruction thereof, subject to the following:

i. No new structures or the expansion of pre-existing structures for nonagricultural use are permitted;

ii. No change in the pre-existing nonagricultural use is permitted;

iii. No expansion of the pre-existing nonagricultural use is permitted; and

iv. In the event that the Grantor abandons the pre-existing nonagricultural use, the right of the Grantor to continue the use is extinguished.

Recodify 2. and 3. as **4.** and **5.** (No change in text.)

"[4.]**6.** No sand, gravel, loam, rock, or other minerals shall be deposited on or removed from the Premises excepting only those materials required for the agricultural purpose for which the land is being used. Grantor retains and reserves [for himself] all oil, gas, and other mineral rights in the land underlying the Premises, provided that any prospective drilling and/or mining will be done by slant from adjacent property or in any other manner which will not materially affect the agricultural operation.

Recodify 5. and 6. as **7.** and **8.** (No change in text.)

"[7.]**9.** Grantor may use the Premises to derive income from **certain** recreational activities **such as hunting, fishing, cross country**

skiing and ecological tours, [so long as] **only if** such activities do not interfere with the actual use of the land for agricultural production **and that the activities only utilize the Premises in its existing condition. Other recreational activities from which income is derived and which alter the Premises, such as golf courses and athletic fields, are prohibited.**

Recodify 8. and 9. as **10.** and **11.** (No change in text.)

"[10.]**12. At the time of this conveyance, Grantor has (_____) existing single family residential building(s) on the Premises and (_____) residential buildings used for agricultural labor purposes.** Grantor may use, maintain, and improve existing buildings on the Premises for agricultural, residential and recreational uses subject to the following conditions:

i.-iii. (No change.)

"[11.]**13.** Grantor may construct any new buildings for agricultural purposes. The construction of any new buildings which shall serve as a residential use, regardless of its purpose, shall be prohibited except as follows:

i.-iii. (No change.)

iv. The above exceptions shall not be permitted unless jointly approved in writing by the Grantee and the Committee. Approval for such exceptions shall only be granted upon the determination that the proposed construction would have a positive impact on the continued use of the Premises for agricultural production. **If Grantee and the Committee grant approval for the construction of agricultural labor housing, such housing shall not be used as a residence for Grantor, Grantor's spouse, Grantor's parents, Grantor's lineal descendants adopted or natural, Grantor's spouse's parents, Grantor's spouse's lineal descendants, adopted or natural.**

Recodify 12.-14. as **14.-16.** (No change in text.)

"[15.]**17.** Grantor, [his] **Grantor's** heirs, executors, administrators, personal or legal representatives, successors and assigns [grant] **grants** the Committee the first right and option to purchase the [premises] **Premises** in fee simple absolute in accordance with the provisions of N.J.S.A. 4:1C-1 et seq., as amended by P.L. 1989, c.28 **and P.L. 1989, c.310.** Grantor, [his] **Grantor's** heirs, executors, administrators, personal or legal representatives, successors and assigns, agree to give the Committee [at least sixty days notice prior to contracting to sell and/or selling the premises.] **written notice, by certified mail, that a contract of sale has been executed for the property.** The notice shall **set forth the terms and conditions of the executed contract of sale and shall have attached a copy of that contract.** [include a copy of the proposed offer indicating the price which the proposed purchaser has agreed to pay for the premises and] **The notice of executed contract of sale shall also include** any other information required by the Committee by regulation. The Committee may exercise its first right and option to purchase the [premises] **Premises** in fee simple absolute by complying with the provisions of N.J.S.A. 4:1C-1 et seq., as amended by P.L. 1989, c.28 **and P.L. 1989, c.310.**

Recodify 16.-19. as **18.-21.** (No change in text.)

(b) (No change.)

(c) The deed restrictions contained in (a) above shall be liberally construed to effectuate the purpose and intent of the Farmland Preservation Bond Act, P.L. 1981, c.276, **as amended by P.L. 1987, c.240, the Open Space Preservation Bond Act of 1989, P.L. 1989, c.183** and the Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 et seq., P.L. 1983, c.32, **as amended.**

2:76-4.11 Deed restrictions

(a) The following deed restrictions shall be agreed to by the board and the landowner(s) when a municipally approved farmland preservation program is adopted and shall run with the land:

"Grantor promises that the Premises shall at all times for the term of the agreement be owned, used and conveyed subject to:

"1. (No change.)

"2. Grantor certifies that at the time of petitioning the Grantee to enter into a farmland preservation program the nonagricultural uses indicated on attached Schedule (C) existed on the Premises. All other nonagricultural uses are prohibited except as expressly provided in this agreement.

"3. All nonagricultural uses existing on the Premises at the time of the landowner's petition to the Grantee as set forth in Section 2 above may be continued and any structure may be restored or repaired in the event of partial destruction thereof, subject to the following:

i. No new structures or the expansion of pre-existing structures for nonagricultural use are permitted;

ii. No change in the pre-existing nonagricultural use is permitted;

iii. No expansion of the pre-existing nonagricultural use is permitted; and

iv. In the event that the Grantor abandons the pre-existing nonagricultural use, the right of the Grantor to continue the use is extinguished.

Recodify 2. and 3. as **4.** and **5.** (No change in text.)

"[4.]**6.** No sand, gravel, loam, rock, or other minerals shall be deposited on or removed from the Premises excepting only those materials required for the agricultural purpose for which the land is being used. Grantor retains and reserves [for himself] all oil, gas, and other mineral rights in the land underlying the Premises, provided that any prospective drilling and/or mining will be done by slant from adjacent property or in any other manner which will not materially affect the agricultural operation.

Recodify 5. and 6. as **7.** and **8.** (No change in text.)

"[7.]**9.** Grantor may use the Premises to derive income from **certain** recreational activities **such as hunting, fishing, cross country skiing and ecological tours,** [so long as] **only if** such activities do not interfere with the actual use of the land for agricultural production **and that the activities only utilize the Premises in its existing condition. Other recreational activities from which income is derived and which alter the Premises, such as golf courses and athletic fields, are prohibited.**

Recodify 8. and 9. as **10.** and **11.** (No change in text.)

"[10.]**12. At the time of this conveyance, Grantor has (_____) existing single family residential building(s) on the Premises and (_____) residential buildings used for agricultural labor purposes.** Grantor may use, maintain, and improve existing buildings on the Premises for agricultural, residential and recreational uses subject to the following conditions:

i.-iii. (No change.)

"[11.]**13.** Grantor may construct any new buildings for agricultural purposes. The construction of any new building which shall serve as a residential use, regardless of its purpose, shall be prohibited except as follows:

i.-iii. (No change.)

iv. The above exceptions shall not be permitted unless jointly approved in writing by the Grantee and the Committee. Approval for such exceptions shall only be granted upon the determination that the proposed construction would have a positive impact on the continued use of the Premises for agricultural production. **If Grantee and the Committee grant approval for the construction of agricultural labor housing, such housing shall not be used as a residence for Grantor, Grantor's spouse, Grantor's parents, Grantor's lineal descendants adopted or natural, Grantor's spouse's parents, Grantor's spouse's lineal descendants, adopted or natural.**

Recodify 12.-14. as **14.-16.** (No change in text.)

"[15.]**17.** Grantor, [his] **Grantor's** heirs, executors, administrators, personal or legal representatives, successors and assigns [grant] **grants** the Committee the first right and option to purchase the [premises] **Premises** in fee simple absolute in accordance with the provisions of N.J.S.A. 4:1C-1 et seq., as amended by P.L. 1989, c.28 **and P.L. 1989, c.310.** Grantor, [his] **Grantor's** heirs, executors, administrators, personal or legal representatives, successors and assigns, agree to give the Committee [at least sixty days notice prior to contracting to sell and/or selling the premises.] **written notice, by certified mail, that a contract of sale has been executed for the property.** The notice shall **set forth the terms and conditions of the executed contract of sale and shall have attached a copy of that contract.** [include a copy of the proposed offer indicating the price which the proposed purchaser has agreed to pay for the premises and] **The notice of executed contract of sale shall also include** any other information required by the Committee by regulation. The

Committee may exercise its first right and option to purchase the [premises] **Premises** in fee simple absolute by complying with the provisions of N.J.S.A. 4:1C-1 et seq., as amended by P.L. 1989, c.28 **and P.L. 1989, c.310.**

Recodify 16.-19. as **18.-21.** (No change in text.)

(b) (No change.)

(c) The deed restrictions contained in (a) above shall be liberally construed to effectuate the purpose and intent of the Farmland Preservation Bond Act, P.L. 1981, c.276, **as amended by P.L. 1987, c.240, the Open Space Preservation Bond Act of 1989, P.L. 1989,** c.183 and the Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 et seq., P.L. 1983, c.32, **as amended.**

(a)

STATE AGRICULTURE DEVELOPMENT COMMITTEE

Acquisition of Development Easements

Proposed Amendment: N.J.A.C. 2:76-6.15

Authorized By: State Agriculture Development Committee, Arthur R. Brown, Jr., Chairman.

Authority: N.J.S.A. 4:1C-5f.

Proposal Number: PRN 1992-117.

Submit comments by April 15, 1992 to:

Donald D. Applegate
Executive Director
State Agriculture Development Committee
CN 330
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendment to N.J.A.C. 2:76-6.15(a) amends the deed restrictions placed on lands permanently deed restricted under the Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 et seq., P.L.1983, c.32, as amended.

The proposed amendment clarifies the status of pre-existing nonagricultural uses or structures occurring on farmland permanently deed restricted. Furthermore, the amendment includes language in the permanent deed of easement permitting the continuance of nonagricultural uses in existence at the time of the landowner's application to the county agriculture development board. The amendment permits the repair or restoration of nonagricultural structures only in the event of partial destruction of the structures. It prohibits additional new structures or the expansion of existing structures for nonagricultural use.

The proposed amendment also prohibits expansion of or changes in the pre-existing nonagricultural use. Moreover, it provides that in the event that the landowner abandons the nonagricultural use, the continuation of the use is extinguished.

Additionally, the amendment provides for a section to ascertain the nature and extent of the pre-existing nonagricultural use and states again that any additional nonagricultural uses are prohibited except as provided for in the Deed of Easement.

The Committee clarified the deed restriction which permits the landowner's use of the premises to derive income from certain recreational activities such as hunting, fishing, cross country skiing and ecological tours only if such activities do not interfere with the actual use of the land for agricultural production and that the activities only utilize the premises in its existing condition. The amendment expressly prohibits other recreational activities from which income is derived and which alter the premises, such as golf courses and athletic fields.

The current rule specifies if the board and the Committee grant approval for the construction of agricultural labor housing on the premises, such housing shall not be used as a residence for Grantor. The proposed rule amendment further prohibits Grantor's spouse, Grantor's parents, Grantor's lineal descendants adopted or natural, Grantor's spouse's parents, and Grantor's spouse's lineal descendants, adopted or natural from residing in a new agricultural labor unit approved by the board and Committee. The Committee's intent is to ensure that the residential unit will provide housing for agricultural labor employed on the premises and not serve as a primary residence for a family member.

The proposed rule amendment also incorporates other technical changes for the purpose of maintaining consistency in terminology throughout the deed restrictions and to ensure that general reference to the landowner is gender neutral.

Social Impact

The proposed amendment affects farmland owners who are participants and applicants in the Agriculture Retention and Development Program by clarifying the statutory standard contained in N.J.S.A. 4:1C-32, which states that "any development for nonagricultural purposes is expressly prohibited."

The proposed amendment will have a positive impact by ensuring that the premises will be retained for agricultural use and production.

Economic Impact

The proposed amendment will have little or no economic impact upon participants or applicants to the Agriculture Retention and Development Program. Participants in the program are permitted to continue nonagricultural activities existing on the premises at the time of application within certain constraints.

The amendment to the restrictions placed on the Grantor's use of the premises to derive income from certain recreational activities were incorporated for clarification purposes and did not impose any additional limitations.

The proposed rule amendment which prevents the Grantor's spouse, Grantor's parents, Grantor's lineal descendants adopted or natural, Grantor's spouse's parents, and Grantor's spouse's lineal descendents, adopted or natural from residing in housing for agricultural labor only pertains to any new construction requiring the Committee's and board's approval. Moreover, the Committee intended that residual dwelling site opportunities be the sole housing opportunity for family members.

At the time of acquiring a development easement on the premises, the landowner is compensated for the loss of any rights as limited by the deed restrictions. The proposed amended rule merely reiterates that nonagricultural development on the premises is prohibited.

Regulatory Flexibility Statement

The majority of the land potentially subject to permanent development easement purchase is owned by small businesses, as the term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendments impose compliance requirements regarding the prohibition of non-agricultural uses of farmland and include a clarification of what constitutes acceptable recreational uses. Differing standards of compliance based on business size are not an option since these types of restrictions form the very basis of the program which is designed in the public interest to protect farmland in the State. Further, a farmland owner's offer to sell a development easement is voluntary, as is the acceptance of any State offer.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

2:76-6.15 Deed restrictions

(a) The following statement shall be attached to and recorded with the deed of the land and shall run with the land: "Grantor promises that the Premises shall be owned, used and conveyed subject to:

"1. Any development of the Premises for [non-agricultural] **non-agricultural** purposes is expressly prohibited.

"2. The Premises shall be retained for agricultural use and production in compliance with N.J.S.A. 4:1C-11 et seq., P.L.1983, c.32, and all other rules promulgated by the State Agriculture Development Committee, (hereinafter Committee). Agricultural use shall mean the use of [land] **the Premises** for common farmsite activities including, but not limited to production, harvesting, storage, grading, packaging, processing and the wholesale and retail marketing of crops, plants, animals and other related commodities and the use and application of techniques and methods of soil preparation and management, fertilization, weed, disease and pest control, disposal of farm waste, irrigation, drainage and water management, and grazing.

"3. Grantor certifies that at the time of the application to sell the development easement to the Grantee the nonagricultural uses indicated on attached Schedule (B) existed on the Premises. All other nonagricultural uses are prohibited except as expressly provided in this Deed of Easement.

"4. All nonagricultural uses, if any, existing on the Premises at the time of the landowner's application to the Grantee as set forth in Section 3. above may be continued and any structure may be restored or repaired in the event of partial destruction thereof, subject to the following:

i. No new structures or the expansion of pre-existing structures for nonagricultural use are permitted;

ii. No change in the pre-existing nonagricultural use is permitted.

iii. No expansion of the pre-existing nonagricultural use is permitted; and

iv. In the event that the Grantor abandons the pre-existing nonagricultural use, the right of the Grantor to continue the use is extinguished.

"[3.]**5.** No sand, gravel, loam, rock, or other minerals shall be deposited on or removed from the Premises excepting only those materials required for the agricultural purpose for which the land is being used. Grantor retains and reserves [for himself] all oil, gas, and other mineral rights in the land underlying the Premises, provided that any prospective drilling and/or mining will be done by slant from adjacent property or in any other manner which will not materially affect the agricultural operation.

"[4.]**6.** (No change in text.)

"[5.]**7.** No activity shall be permitted on the Premises which would be detrimental to drainage, flood control, water conservation, erosion control, or soil conservation, nor shall any other activity be permitted which would be detrimental to the continued agricultural use of the [land] **Premises**.

"[6.]**8.** Grantee and [its] **Committee and their** agents shall be permitted access to, and to enter upon, the Premises at all reasonable times, but solely for the purpose of inspection in order to enforce and assure compliance with the terms and conditions of this [easement] **Deed of Easement**. Grantee agrees to give Grantor, at least 24 hours advance notice of its intention to enter the Premises, and further, to limit such times of entry to the daylight hours on regular business days of the week.

"[7.]**9.** Grantor may use the Premises to derive income from **certain** recreational activities **such as hunting, fishing, cross country skiing and ecological tours**, [so long as] **only if** such activities do not interfere with the actual use of the land for agricultural production **and that the activities only utilize the Premises in its existing condition. Other recreational activities from which income is derived and which alter the Premises, such as golf courses and athletic fields, are prohibited.**

"[8.]**10.** Nothing shall be construed to convey a right to the public of access to or use of the Premises except as stated in this [easement] **Deed of Easement** or as otherwise provided by law.

"[9.]**11.** Nothing shall impose upon the Grantor any duty to maintain the Premises in any particular state, or condition, except as provided for in this [easement] **Deed of Easement**.

"[10.]**12.** Nothing in this [easement] **Deed of Easement** shall be deemed to restrict the right of Grantor to maintain all roads and trails existing upon the Premises as of the date of this [easement] **Deed of Easement**. Grantor shall be permitted to construct, improve or reconstruct any roadway necessary to service crops, bogs, agricultural buildings, or reservoirs as may be necessary.

"[11.]**13.** (No change in text.)

"[12.]**14.** Grantor may construct any new buildings for agricultural purposes. The construction of any new buildings for residential use, regardless of its purpose, shall be prohibited except as follows:

i. To provide structures for housing of agricultural labor employed on the Premises but only with the approval of the Grantee and the Committee. If Grantee and the Committee grant approval for the construction of agricultural labor housing, such housing shall not be used as a residence for Grantor, **Grantor's spouse, Grantor's parents, Grantor's lineal descendants adopted or natural, Grantor's spouse's parents, Grantor's spouse's lineal descendants, adopted or natural**; and

ii. To construct a single family residential building anywhere on the Premises in order to replace any single family residential building in existence at the time of **conveyance of** this [easement] **Deed of Easement** but only with the approval of the Grantee and Committee.

"[13.]**15.** The land and its buildings which are affected may be sold collectively or individually for continued agricultural [uses] **use as** defined in Section 2 of this [easement] **Deed of Easement**. However, no subdivision of the land shall be permitted without the joint approval in writing of the Grantee and the Committee. In order **for the Grantor** to [give] **receive** approval, the Grantee and Committee must find that the subdivision shall be for an agricultural purpose and result in agriculturally viable parcels. Subdivision means any division of the Premises, for any purpose, subsequent to the effective date of this [easement] **Deed of Easement**.

"[14.]**16.** In the event of any violation of the terms and conditions of this [easement] **Deed of Easement**, Grantee or the Committee may institute, in the name of the State of New Jersey, any proceedings to enforce these terms and conditions including the institution of suit to enjoin such violations and to require restoration of the Premises to its prior condition. Grantee or the Committee do not waive or forfeit the right to take any other legal action necessary to insure compliance with the terms, conditions, and purpose of this [easement] **Deed of Easement** by a prior failure to act.

"[15.]**17.** This [easement] **Deed of Easement** imposes no obligation or restriction on the Grantor's use of the Premises except as specifically set forth in this [easement] **Deed of Easement.**

"[16.]**18.** This [easement] **Deed of Easement** is binding upon the Grantor, [his] **the Grantor's** heirs, executors, administrators, personal or legal representatives, successors and assigns and the Grantee; it shall be construed as a restriction running with the land and shall be binding upon any person to whom title to the Premises is transferred as well as upon the heirs, executors, administrators, personal or legal representatives, successors, and assigns of all such persons.

"[17.]**19.** Throughout this [easement] **Deed of Easement**, the singular shall include the plural, and the masculine shall include the feminine, unless the text indicates otherwise.

"[18.]**20.** The word 'Grantor' shall mean any and all persons who lawfully succeed to the rights and responsibilities of the Grantor, including but not limited to [his] **the Grantor's** heirs, executors, administrators, personal or legal representatives, successors and assigns.

"[19.]**21.** Wherever in this [easement] **Deed of Easement** any party shall be designated or referred to by name or general reference, such designation shall have the same effect as if the words, 'heirs, executors, administrators, personal or legal representatives, successors and assigns' have been inserted after each and every designation.

"[20.]**22.** Grantor, [his] **Grantor's** heirs, executors, administrators, personal or legal representatives, successors and assigns further transfers and conveys to Grantee all of the [non-agricultural] **nonagricultural** development rights and development credits appurtenant to the lands and Premises described herein. Nothing contained herein shall preclude the conveyance or retention of said rights by the Grantee as may be permitted by the laws of the State of New Jersey in the future. In the event that the law permits the conveyance of said development rights, Grantee agrees to reimburse the Committee (_____) percent of the value of the development rights as determined at the time of the subsequent conveyance."

(b)-(d) (No change.)

EDUCATION

(a)

STATE BOARD OF EDUCATION

Pupil Transportation

School Bus and Small Vehicle Specifications

Proposed New Rules: N.J.A.C. 6:21-6, 6A, 6B and 6C; 9.2 and 9.13

Proposed Amendments: N.J.A.C. 6:21-5, 8 and 9

Authorized By: State Board of Education, John Ellis, Secretary, State Board of Education and Commissioner, Department of Education.

Authority: N.J.S.A. 19A:1-1, 4-15, 39-21, 7D-18 and 39:3B-5.

Proposal Number: PRN 1992-121.

Submit written comments by April 15, 1992 to:

Irene Nigro, Rules Analyst
N.J. Department of Education
225 West State Street, CN 500
Trenton, New Jersey 08625

The agency proposal follows:

Summary

Pursuant to N.J.S.A. 18A:39-21 and 24, and N.J.S.A 39:3B-5, the State Board of Education must adopt rules that govern the use and safety standards of school buses to ensure the safe travel of students riding to and from schools in New Jersey. The New Jersey Division of Motor Vehicle Services inspects all buses and vehicles based on these standards.

In 1932, the State Board of Education first adopted rules governing school bus specifications. These rules were amended to cover any new developments or safety features on the average of every five years.

For the first time in New Jersey, in 1983, as part of the "sunset" revisions to N.J.A.C. 6:21 pursuant to Executive Order No. 66(1978), the State Board adopted by reference the National Minimum Standards for School Buses, 1980 revised edition with enhancements. The 1980 edition was the result of the Ninth National Conference on School Transportation. This conference, which has been conducted every five years since 1939, is made up of official representatives of State Departments of Education, local school district personnel and contract operators. Consultants from the manufacturing industry, the National Highway Traffic Safety Administration, and the National Transportation Safety Board were also participants. The existing regulations will remain operative in subchapter 5 as they still apply to all vehicles manufactured in accordance with those rules and will continue to apply to said buses and vehicles until their retirement.

The proposed new rules update the current vehicle specifications in new subchapters and include additional requirements that further enhance the safety of students, for example, stop arms, push-out windows and roof safety hatches. These new rules apply to buses manufactured 200 days from the date of adoption until the buses retire. They incorporate the 1990 recommendations of the National Standards for School Buses and Operations Conference as they are applicable to New Jersey. These recommendations were not incorporated by reference with enhancements as they were in 1983 because experience has shown that it is confusing for the manufacturer to use two separate documents when referring to these rules.

A school bus is generally manufactured in two sections—the chassis and the body. Therefore, the vehicle standards have been divided into two subchapters—Body and Chassis—to clearly identify the responsibilities of each manufacturer.

Subchapter 6—Standards for Buses Used for Pupil Transportation

This subchapter contains the scope and purpose of these standards and includes the definitions of all relevant terms.

Subchapter 6A—Chassis Standards

Establishes standards for the equipment provided by chassis suppliers for the manufacture of school buses.

Subchapter 6B—Body Standards

Establishes standards for the equipment provided by the bus body suppliers for the manufacture of school buses.

Subchapter 6C—Specially Equipped School Bus Standards

Regulates modifications to buses designed for transporting students with special transportation needs. These standards are supplementary to the chassis and body standards.

Subchapter 8—Use of Vehicles as School Buses Under the Jurisdiction of the Department of Transportation

These amendments remove obsolete code references and specify the application of the rule.

Subchapter 9—Small Vehicle Standards

This subchapter, which regulates vehicles with a capacity of less than 10 passengers used for the transportation of students to and from school, has been revised to clarify the application of the rules and to enhance student safety. Vehicles with a gross vehicle weight rating of less than 3,000 pounds can no longer be used for pupil transportation after September 1, 1992.

Social Impact

These new rules and amendments will have a positive social impact upon school bus transportation in New Jersey. The sole purpose of this proposal is to ensure the safety of the students and drivers. These rules impact upon all transporting school districts, manufacturers, and contractors. The only anticipated objection to this proposal may be from the vendors who manufacture equipment that does not conform to these standards. However, they will be given 200 days from adoption to comply with these safety standards. Advancements in equipment design and new equipment available warrant these new rules and amendments.

Economic Impact

These new rules and amendments will have an economic impact on all transporting districts in New Jersey, vehicle manufacturers and transportation contractors. The new rules will increase the cost of purchasing a school bus approximately $2,000, but this is minimal considering the additional safety features provided for the passengers and driver. The school district budget will be slightly affected because of this increased cost. The Division of Motor Vehicle Services and Department of Transportation will not be affected. Pursuant to the Quality Education Act, the Department will study all transportation costs every two years and make recommendations to the Governor on the transportation weights used to calculate state aid. If increased vehicle costs result in an overall increase in transportation costs, this may result in some slight economic impact on the State budget amount for transportation aid.

Regulatory Flexibility Analysis

These proposed new rules and amendments will impact on certain small businesses, as defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., which manufacture vehicle equipment or contract with public school districts to provide pupil transportation services. All buses used to transport students to and from school under the jurisdiction of a local board of education must meet the compliance requirements established in this proposal. There is no recordkeeping required. The vendors certification statement (N.J.A.C. 6:21-6.3) is the only reporting requirement. Exceptions or differing standards to these new rules and amendments cannot be established for the small businesses because they are necessary for the safety and welfare of the driver and passengers of buses used for the transportation of students to and from school and school-related activities. The additional costs will be minimal and 200 days from the adoption have been allotted to allow time for compliance.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 5. STANDARDS FOR SCHOOL BUSES **MANUFACTURED BETWEEN** (Upon adoption, dates will be inserted.)

6:21-5.1-5.24 (No change.)

SUBCHAPTER 6. [(RESERVED)] **STANDARDS FOR BUSES USED FOR PUPIL TRANSPORTATION**

6:21-6.1 Scope and purpose

(a) To ensure the safety of students, buses originally designed to carry 10 or more passengers used in the transportation of public school students to and from school and school related activities shall comply with the rules established in N.J.A.C. 6:21-6, 6A, 6B, 6C and all applicable Federal Motor Vehicle Safety Standards.

(b) The rules established in N.J.A.C. 6:21-6, 6A, 6B and 6C also apply to buses used for the transportation of nonpublic school students when services are provided by a district board of education.

(c) The rules established in N.J.A.C. 6:21-6, 6A, 6B and 6C do not apply to buses approved for school use under the jurisdiction of the Department of Transportation unless otherwise noted.

(d) The rules established in N.J.A.C. 6:21-6, 6A, 6B and 6C shall apply to buses manufactured after (200 days from the adoption of this rule). Buses manufactured prior to this date shall comply with the rules in effect when the bus was manufactured or converted.

6:21-6.2 Words and phrases defined

The following words and phrases, when used in N.J.A.C. 6:21-6 through 6C shall have the following meanings unless the context clearly indicates otherwise. Any reference to direction is relative to the driver in a seated position.

"Completed vehicle" means a vehicle that requires no further manufacturing operation to perform its intended function.

"Curb weight" means the weight of a school bus or vehicle including a maximum capacity of all fluids.

"Driver" means the authorized licensed operator of the vehicle.

"Emergency brake" means the mechanism designed to stop a school bus or vehicle in case of service brake failure.

"FMVSS" means Federal Motor Vehicle Safety Standards.

"FMCSR" means Federal Motor Carrier Safety Regulations.

"GVW" means Gross Vehicle Weight. GVW is the total weight of a single vehicle plus its load.

"GVWR" means Gross Vehicle Weight Rating. GVWR is the value specified by the manufacturer as the maximum loaded weight of a single vehicle.

"Kph" mean kilometers per hour.

"Mph" means miles per hour.

"NSFSB" means National Standards for School Buses.

"Parking brake" means a mechanism designed to prevent the movement of a stationary vehicle.

"Passenger" means any person riding in a school bus or vehicle other than the driver.

"Passenger seat" means a seat other than the driver's seat.

"SAE" means Society of Automotive Engineers, Inc.

"SBMI" means School Bus Manufacturers Institute.

"School bus" or "bus" when used in this subchapter shall refer to Types A, B, C and D buses and shall be classified in the following manner:

1. A Type "A" school bus is a conversion or body constructed upon a van-type compact truck or a front-section vehicle, with a GVWR of 10,000 pounds or less, designed for carrying 10 to 16 passengers;

2. A Type "B" school bus is a conversion or body constructed and installed upon a van or front-section vehicle chassis, or stripped chassis, with a GVWR of more than 10,000 pounds, designed for carrying 10 to 25 passengers. Part of the engine is beneath and/or behind the windshield and beside the driver's seat. The entrance door is behind the front wheels;

3. A Type "C" school bus is a body installed upon a flat back cowl chassis with a GVWR of more than 10,000 pounds, designed for carrying 10 to 54 passengers. The engine is in front of the windshield, or part of the engine is beneath and/or behind the windshield and beside the driver's seat. The entrance door is behind the front wheels;

4. A Type "D" school bus is a body installed upon a chassis, with the engine mounted in the front, midship, or rear, with a GVWR of more than 10,000 pounds, designed for carrying 10 to 54 passengers. The engine may be behind the windshield and beside the driver's seat; it may be at the rear of the bus, behind the rear wheels, or midship between the front and rear axles. The entrance door is ahead of the front wheels;

5. A Type "I" school bus is any vehicle with a seating capacity of 17 or more passengers used for the transportation of students to and from school or school related activities. This identification regulates the type of vehicle registration required by the New Jersey Division of Motor Vehicles; and

6. A Type "II" school bus is any vehicle with a seating capacity of 16 passengers or less used for the transportation of students to and from school or school related activities. This identification regulates the type of vehicle registration required by the New Jersey Division of Motor Vehicles.

"School bus warning lamps" are eight alternately flashing red or amber lamps mounted horizontally both front and rear, intended to identify a vehicle as a school bus and to inform other users of the highway that the vehicle is stopped or about to stop.

"Service brake" means the primary mechanism designed to stop a motor vehicle.

"Strobe school bus warning lamps" means a school bus warning lamp system utilizing eight electronic sealed beam flash tubes.

"Webbed belt" means a narrow fabric belt woven with continuous filling yarns and finished salvages.

6:21-6.3 Certification

(a) The chassis and/or body manufacturer and any manufacturer of school bus equipment required by this subchapter shall, upon request, provide evidence and/or certify to the Department of Education, Bureau of Pupil Transportation and the user that their product meets the minimum standards of this subchapter and all applicable FMVSS.

(b) Any person who alters, converts, or modifies a certified "completed vehicle" used to transport students shall certify to the New Jersey Department of Education, Bureau of Pupil Transportation and the user that all modifications conform to applicable design, construction, testing, and performance standards contained in this chapter.

(c) School bus vendors who sell or lease buses for student transportation shall issue a "Vendor Certification Statement", to the buyer or leasee, signed by an authorized agent or officer of the company certifying that the bus meets all State and Federal requirements.

SUBCHAPTER 6A. CHASSIS STANDARDS

6:21-6A.1 Air cleaner

(a) The engine intake air cleaner system shall be furnished and properly installed by the chassis manufacturer to meet engine manufacturer's specifications.

(b) The intake air system for diesel engines may have an air cleaner restriction indicator properly installed by the chassis manufacturer to meet engine specifications.

6:21-6A.2 Axles

The front axle and rear differential, including suspension assemblies, shall have a gross axle weight rating at ground at least equal to that portion of the load as would be imposed by the chassis manufacturer's maximum gross vehicle weight rating.

6:21-6A.3 Brakes

(a) A braking system, including service brake and parking brake, shall be provided.

(b) Buses using air or vacuum in the operation of the brake system shall be equipped with warning signals, readily audible and visible to the driver, that will give a continuous warning when the air pressure available in the system for braking is 60 pounds per square inch or less or the vacuum in the system available for braking is eight inches of mercury or less. The audible warning signal shall be capable of alerting the driver while the bus is being operated in traffic. An illuminated gauge shall be provided that will indicate to the driver the air pressure in pounds per square inch or the inches of mercury vacuum available.

1. Vacuum-assist brake systems shall have a reservoir used exclusively for brakes that shall be adequate to ensure loss in vacuum at full stroke application of not more than 30 percent when the engine is not running. The brake system on gas-powered engines shall include suitable and convenient connections for the installation of a separate vacuum reservoir.

2. The brake system dry reservoir shall be safeguarded by a check valve or equivalent device, that in the event of failure or leakage in its connection to the source of compressed air or vacuum, the stored dry air or vacuum shall not be depleted by the leakage or failure.

(c) Buses using a hydraulic assist-brake system shall be equipped with warning signals, readily audible and visible to the driver, that will provide continuous warning in the event of a loss of fluid flow from the primary source or loss of the electric source powering the backup system.

(d) The brake lines and booster assist lines shall be protected from excessive heat and vibration and shall be installed to prevent chafing.

(e) The brake system shall be designed to permit visual inspection of brake lining wear without removal of any chassis components.

(f) The parking brake shall hold the vehicle stationary, or to a limit of traction of the braked wheels, on a 20 percent grade under any condition of legal loading and on a surface free from snow, ice and loose material.

(g) When applied, the parking brake shall remain in an applied position with the capacity set forth in (f) above despite exhaustion of the source of energy used for the application or leakage of any kind.

(h) A parking brake lever shall be mounted to the right of the driver in a position that is easily accessible.

1. On Types A and B buses, the parking brake lever may be mounted in accordance with the chassis manufacturer's standards.

(i) The parking brake shall be equipped with a warning device visible to the driver which will indicate that the parking brake is on.

6:21-6A.4 Bumper, front

(a) The front bumper shall be furnished by the chassis manufacturer as part of the chassis.

1. The Type D bus front bumper may be furnished by the body or chassis manufacturer.

(b) The front bumper shall be of pressed steel channel or equivalent material at least 3/16 inch thick and not less than eight inches high and shall extend beyond the forward-most part of the body, grille, hood, and fenders and shall extend to outer edges of the fenders at the bumper top line.

(c) The front bumper, except breakaway bumper ends, shall be of sufficient strength to permit pushing a vehicle of equal gross vehicle weight without permanent distortion to bumper, chassis, or body.

(d) An energy absorbing front bumper, which conforms to current FMVSS test requirements, may be used. Its design shall incorporate a self-restoring energy absorbing system of sufficient strength to:

1. Push another vehicle of similar GVW without permanent distortion to the bumper, chassis, or body; and

2. Withstand repeated impacts without damage to the bumper, chassis or body according to current NSFSB.

(e) Tow eyes or hooks shall be furnished and attached so as not to project beyond the front bumper. Tow eyes or hooks attached to the chassis frame, shall be furnished by the chassis manufacturer. This installation shall be in accordance with the chassis manufacturer's standards.

6:21-6A.5 Clutch

The clutch torque capacity shall be equal to or greater than the engine torque output.

6:21-6A.6 Color

The chassis, including front bumper, shall be black. The cowl, fenders and hood shall be National School Bus Yellow. The hood may be painted non-reflective National School Bus Yellow. Wheels and rims shall be black, gray, or silver. The grille shall be chrome or National School Bus Yellow.

6:21-6A.7 Drive shaft

Each segment of the drive shaft shall be equipped with a metal guard or guards around its circumference to prevent the drive shaft from whipping through the floor or dropping to the ground if broken.

6:21-6A.8 Electrical system

(a) Buses shall be equipped with a battery or batteries as specified by the manufacturer.

1. The storage battery shall have a minimum cold cranking capacity rating equal to the cranking current required for 30 seconds at 0 degrees Fahrenheit (-17.8°c) and a minimum reserve capacity rating of 120 minutes at 25 amps. Higher capacities may be required depending upon optional equipment and local environmental conditions.

2. When a battery or batteries are to be mounted by the body manufacturer on a sliding tray rather than the standard installation provided by the chassis manufacturer, the battery(s) shall be temporarily mounted on the chassis frame by the chassis manufacturer. In this case, the final location of the battery(s) and the appropriate cable lengths shall be according to current SBMI design objectives.

(b) Buses shall be equipped with an alternator.

1. A Type A bus shall have a minimum 60 ampere per hour alternator.

2. A Type B bus shall have a minimum 80 ampere per hour alternator.

3. Types C and D buses shall have an alternator with a minimum output rating of at least 100 amperes capable of producing a minimum of 50 percent of its maximum rated output at manufacturer's recommended engine idle speed.

4. Buses equipped with an electrical power lift, shall have a minimum 100 amps per hour alternator.

5. A direct-drive alternator is permissible in lieu of belt drive. Belt drive shall be capable of handling the rated capacity of the alternator with no detrimental effect on the other driven components.

6. Estimating the required alternator capacity shall be according to current SBMI design objectives.

(c) Wiring shall use a standard color and number coding and conform to current SAE standards.

1. The chassis shall be delivered to the user with a wiring diagram that coincides with the wiring of the chassis.

2. The chassis manufacturer shall install a readily accessible terminal strip or plug on the body side of the cowl, or at an accessible location in the engine compartment of buses designed without a cowl, that shall contain the following terminals for the body connections:

i. Main 100 amps. body circuit;
ii. Tail lamps;
iii. Right turn signal;
iv. Left turn signal;
v. Stop lamps;
vi. Back up lamps; and
vii. Instrument panel lights which are rheostat controlled by the headlamp switch.

6:21-6A.9 Engine fire extinguishers

Gasoline powered buses may be equipped with a fire extinguisher system for the engine compartment.

6:21-6A.10 Exhaust system

(a) The exhaust pipe, muffler, and tailpipe shall be outside the bus body compartment and attached to the chassis.

(b) The exhaust system components shall not be located where their location would likely result in burning, charring, or damaging the electrical wiring, the fuel supply, or any combustible part of the bus.

1. The exhaust system on a gas-powered chassis shall be properly insulated from fuel tank connections by a securely attached metal shield at any point where it is 12 inches or less from fuel tank or tank connections.

i. When a metal shield is required, the metal shield shall provide a minimum of two inches clearance between the exhaust system components, the fuel system, and/or combustible components.

(c) The tailpipe diameter from muffler to the end shall comply with the chassis manufacturer's standard and shall be constructed of a corrosion resistant tubing material at least equal in strength and durability to 16-gauge steel tubing.

1. The exhaust system tailpipe shall terminate to the rear of all doors and windows designed to be opened for ventilation.

2. The exhaust sysem shall not discharge to the atmosphere immediately below an emergency exit, fuel tank or fuel tank fill pipe.

3. The exhaust system tailpipe of a bus powered by a gasoline engine shall extend to the rear bumper or to the left or right perimeter sides of the bus body and discharge to the atmosphere either:

i. At or within six inches forward of the rearmost part of the bus on either side; or

ii. Beyond the rear bus bumper up to a maximum of two inches.

4. The exhaust system tailpipe of a bus using fuel other than gasoline shall extend to the rear bumper or to the perimeter of the sides of the bus body and discharge to the atmosphere either:

i. At or within 15 inches forward of the rearmost part of the bus on the sides; or

ii. Beyond the rear bus bumper up to a maximum of two inches.

(d) The muffler shall be constructed of corrosion-resistant material.

6:21-6A.11 Fenders, front, Type C buses

(a) The total spread of the outer edges of the front fenders, measured at the fender line, shall exceed the total spread of front tires when front wheels are in straight-ahead position.

(b) Front fenders shall be properly braced and free from any body attachments.

6:21-6A.12 Frame

(a) The frame or its equivalent shall be of such design and strength characteristics to correspond with the standard practice for trucks of the same general load characteristics.

(b) Any frame modification shall not be for the purpose of extending the wheelbase.

(c) Holes in the top or bottom flanges, or side units of the frame, shall not be permitted except as provided in the original chassis frame. Welding to the frame shall be by the chassis manufacturer or as approved by the chassis manufacturer.

(d) Frame lengths shall be provided in accordance with current SBMI design objectives.

6:21-6A.13 Fuel tank

(a) The fuel tank or tanks of minimum 30 gallon capacity shall have a 25 gallon actual draw. If a fuel tank size, larger than 30 gallons is supplied, the actual draw shall be 83 percent of the tank capacity. The fuel tank(s) shall be filled and vented to the outside of the body, the location of which shall ensure that accidental fuel spillage will not drip or drain on any part of the exhaust system.

(b) No portion of the fuel system which is located to the rear of the engine compartment, except the filler tube, shall extend above the top of the chassis frame rail. Fuel lines shall be mounted to obtain maximum possible protection from the chassis frame.

(c) A fuel filter with replaceable element shall be installed between the fuel tank and the engine.

(d) The fuel tank installation shall be in accordance with current SBMI design objectives.

(e) An auxiliary tank may be added in accordance with current SBMI design objectives.

(f) A bus constructed with a power lift unit may have the fuel tank mounted on the left chassis frame rail or behind the rear wheels.

6:21-6A.14 Governor

(a) An engine governor may be installed.

(b) When an engine is mounted in the midship or rear of a bus, a governor shall be installed to limit engine speed to the maximum revolutions per minute recommended by the engine manufacturer, or a tachometer shall be installed so the engine speed may be known to the driver.

(c) A road-speed governor may be installed to limit road speed.

6:21-6A.15 Heating system

The chassis engine shall have plugged openings for the purpose of supplying hot water for the bus heating system. The opening shall be suitable for attaching a ¾ inch pipe thread/hose connector. The engine shall be capable of supplying water having a temperature of at least 170 degrees Fahrenheit at a flow rate of 50 pounds per minute at the return end of 30 feet of one inch inside diameter automotive hot water heater hose.

6:21-6A.16 Horn

Buses shall be equipped with dual horns of a standard make. Each horn shall be capable of producing a complex sound in a band of audio frequencies between 250 and 2,000 cycles per second.

6:21-6A.17 Instruments and instrument panel

(a) The chassis shall be equipped with the following instruments and gauges. Lights in lieu of gauges are not acceptable except as noted:

1. Speedometer;

2. Odometer which will give accrued mileage to seven digits including tenths of miles;

3. Voltmeter;

i. An ammeter with graduated charge and discharge with ammeter and its wiring compatible with generating capacities is permitted in lieu of a voltmeter;

4. Oil-pressure gauge;

5. Water temperature gauge;

6. Fuel gauge;

7. Upper beam headlight indicator;

8. Vacuum or air brake indicator gauge;

i. A light indicator in lieu of a gauge is permitted on buses equipped with a hydraulic-over-hydraulic brake system;

9. Turn signal indicator; and

10. Glow-plug indicator light, where appropriate.

(b) All instruments shall be easily accessible for maintenance and repair.

(c) Above instruments and gauges shall be mounted on an instrument panel in such a manner that each is clearly visible to the driver while in normal seated-belted position in accordance with current SBMI design objectives.

(d) The instrument panel shall have lamps of sufficient candlepower to illuminate all instruments, gauges and the shift selector indicator for an automatic transmission.

(e) All gauges and instruments must be appropriately identified.

6:21-6A.18 Oil filter

An oil filter with replaceable element shall be provided and shall be connected by flexible oil lines if it is not of built-in or engine mounted design. The oil filter shall have a minimum capacity of one quart.

6:21-6A.19 Openings

All openings in the floorboard or firewall between chassis and passenger compartment, such as for gearshift selector/lever and parking brake lever, shall be sealed.

6:21-6A.20 Passenger load

(a) The gross vehicle weight (GVW) is the sum of the chassis weight, plus the body weight, plus the driver's weight, plus total seated pupil weight.

1. For purposes of calculation:

i. The driver's weight is 150 pounds; and

ii. The pupil weight is 120 pounds per pupil.

(b) The GVW shall not exceed the chassis manufacturer's GVWR for the chassis.

(c) Buses with a GVWR in excess of 26,001 pounds shall display the GVWR on the sides of the bus as required by the Division of Motor Vehicles.

6:21-6A.21 Power and gradeability

The GVW shall not exceed 185 pounds per published net horsepower of the engine at the manufacturer's recommended maximum number of revolutions per minute.

6:21-6A.22 Retarder system

A retarder system may be used which shall maintain the speed of the fully loaded school bus at 19.0 mph or 30 kph on a seven percent grade for 3.6 miles or six km.

6:21-6A.23 Shock absorbers

Buses shall be equipped with front and rear double-action shock absorbers compatible with manufacturer's rated axle capacity at each wheel location.

6:21-6A.24 Springs

(a) The capacity of the springs or suspension assemblies shall be commensurate with the chassis manufacturer's GVWR.

(b) If leaf type rear springs are used, they shall be of a progressive type.

6:21-6A.25 Steering gear

(a) The steering gear shall be approved by the chassis manufacturer and designed to assure safe and accurate performance when a vehicle is operated with maximum load and at maximum speed.

(b) The steering mechanism shall be accessible for external adjustment.

(c) No changes shall be made in the steering apparatus which are not approved by the chassis manufacturer.

(d) There shall be a clearance of at least two inches between the steering wheel and the cowl, instrument panel, windshield, or any other surface.

(e) Power steering is required and shall be of the integral type with integral valves.

(f) The steering system shall be designed to provide a means of lubrication for all wear points, if wear points are not permanently lubricated.

6:21-6A.26 Tires and rims

(a) Tires and rims of proper size and tires with load rating commensurate with chassis manufacturer's GVWR shall be provided.

(b) Tubeless tires mounted on one-piece drop center rims may be used.

(c) All tires shall be of the same size, construction and load rating. The load rating shall meet or exceed the GAWR in accordance with current applicable FMVSS.

1. Tires on Types C and D buses may be of more than one type construction provided all tires on the same axle are the same type of construction.

(d) If a bus is equipped with a spare tire and rim assembly, it shall be of the same size as those mounted on the bus.

(e) If a bus is equipped with a tire carrier, it shall be suitably mounted in an accessible location outside passenger compartment.

(f) The tire tread depth shall at no time be less than 4/32 of an inch on the front tires and 2/32 of an inch on the rear tires as measured on two adjacent treads by a Dill gauge or its equivalent.

(g) Regrooved or recapped tires shall not be used on the front wheels of a bus.

(h) Dual rear tires shall be provided on Types B, C, and D buses.

(i) Tire chains, snow tires or all weather tires shall be used for the drive wheels to enhance the safe operation of the bus in areas of snow and ice.

6:21-6A.27 Transmission

(a) When an automatic transmission is used, it shall provide for not less than three forward speeds and one reverse speed.

(b) When a manual transmission is used, second gear and higher shall be synchronized except when incompatible with engine power. A minimum of three forward speeds and one reverse speed shall be provided.

(c) A diagram of the shifting control pattern shall be located in a position easily visible to the driver.

(d) There shall be a detent on the automatic transmission shift lever to insure that the transmission cannot accidentally move from neutral to a drive gear without driver effort.

(e) Buses which are not equipped with a park position on the shift control selector for automatic transmissions shall be equipped with a heavy duty parking brake.

(f) The transmission shift control lever/mechanism shall be mounted to the right of the steering column.

6:21-6A.28 Turning radius

(a) A chassis with a wheel base of 264 inches or less shall have a right and left turning radius of not more than 42½ feet, curb to curb measurement.

(b) A chassis with a wheelbase of 265 inches or more shall have a right and left turning radius of not more than 44½ feet, curb to curb measurement.

6:21-6A.29 Undercoating

The undersides of steel or metallic-constructed front fenders shall be coated with rust-proofing compound.

6:21-6A.30 Weight distribution

The weight distribution of a fully loaded bus on a level surface shall not exceed the manufacturer's front and rear GAWR.

SUBCHAPTER 6B. BODY STANDARDS

6:21-6B.1 Aisle

(a) The minimum clearance of all aisles shall be 12 inches.

1. The aisle leading to an exit door or a rear emergency exit shall be a minimum width of 12 inches.

2. The aisle leading from the center aisle to a side emergency door shall be a minimum width of 24 inches.

3. The aisle leading to an emergency or lift door from a wheelchair position shall be a minimum width of 30 inches.

(b) Aisles shall be unobstructed at all times by any type barrier, seat, or other object.

(c) The seat backs shall be slanted sufficiently to give aisle clearance of 15 inches at the tops of seat backs.

(d) This rule also applies to buses under the jurisdiction of the Department of Transportation, approved for school use, contracted by a local board of education for transportation to and from school.

6:21-6B.2 Back up warning alarm

An automatic audible alarm may be installed behind the rear axle of the bus and shall comply with current applicable SAE standards for rubber tired vehicles.

6:21-6B.3 Battery

(a) A battery is to be furnished by the chassis manufacturer.

(b) When the battery is mounted as described in the chassis standards of N.J.A.C. 6:21-6A.8(a), the body manufacturer shall securely attach battery on a slide-out or swing-out tray in a closed, vented compartment in the body skirt, so that the battery may be exposed to the outside for convenient servicing. The battery compartment door or cover shall be hinged at the front or top and secured by an adequate and conveniently operated fastening device.

6:21-6B.4 Bumpers

(a) The front bumper shall be provided by the chassis manufacturer.

1. The bumper on a Type D bus may be furnished by the body or chassis manufacturer.

2. A front safety shield attached directly under the bus front bumper may be used. It shall be constructed of rigid plastic, fiberglass, steel or equivalent material designed to withstand abnormal vibration, severe atmosphere conditions and removable to permit towing. The shield's overall width shall not exceed maximum front tire width, when bus wheels are in a straight ahead position and shall terminate 12 to 14 inches above the road surface. Front surface may be either solid, perforated or louvered and shall be black.

(b) A rear bumper shall be provided which is constructed of pressed steel channel or equivalent material at least 3/16 inch thick.

1. The bumper on a Type A bus shall be a minimum of eight inches high.

2. The bumper on Types B, C, and D buses shall be a minimum of 9½ inches high.

(c) The bumpers shall be of sufficient strength to permit pushing by another vehicle without permanent distortion.

(d) The rear bumper shall be wrapped around the back corners of the bus. It shall extend forward at least 12 inches, measured from the rear-most point of the body at the floor line.

(e) The rear bumper shall be attached to the chassis frame in such a manner that it may be easily removed. It shall be braced to withstand rear or side impact, and shall be attached to discourage hitching of rides.

(f) The rear bumper shall extend at least one inch beyond the rear-most part of the body surface measured at the floor line.

1. A Type A bus may conform to chassis manufacturer's specifications.

(g) Energy-absorbing bumpers which conform to current applicable FMVSS test requirements may be used. Its design shall incorporate a self-restoring energy absorbing bumper system so attached to discourage the hitching of rides and of sufficient strength to:

1. Permit pushing by another vehicle without permanent distortion to the bumper, chassis, or body; and

2. Withstand repeated impacts without damage to the bumper, chassis, or body according to current NSFSB.

6:21-6B.5 Color

(a) The school bus body shall be painted National School Bus Yellow.

(b) The body exterior paint trim, bumper, lamp hoods, emergency door arrow, exterior mirror assembly and support brackets shall be black.

1. The words "EMERGENCY DOOR" shall be applied both inside and outside the door in red lettering at least two inches high and at least 3/16 inch wide.

(c) Reflective material may be applied to the bus. The material used shall be automotive engineering grade or better, meeting initial reflectance values as specified by NSFSB and retaining at least 50 percent of those values for a minimum of six years. Reflective materials and markings, if used, may include any or all of the following:

1. The bumpers may be marked diagonally 45 degrees down to the centerline of the pavement with stripes evenly spaced of National School Bus Yellow or non-contrasting reflective material two inches wide.

2. The rear of bus body may be marked with a strip of reflective National School Bus Yellow material no greater than two inches in width to be applied to the back of the bus, extending from the left lower corner of the "SCHOOL BUS" lettering, across to left side of the bus, then vertically down to the top of the bumper, across the bus on a line immediately above the bumper to the right side, then vertically up to a point even with the strip placement on the left side, and concluding with a horizontal strip terminating at the right lower corner of the "SCHOOL BUS" lettering.

3. The sides of the bus body may be marked with reflective National School Bus Yellow material at least six inches but not more than 12 inches in width, extending the length of the bus body and located (vertically) as close as practicable to the beltline.

4. The "SCHOOL BUS" signs may be marked with reflective National School Bus Yellow material comprising background for lettering of the front and/or rear "SCHOOL BUS" signs.

6:21-6B.6 Communications

(a) School buses may be equipped with an electronic voice communication system, preferably not citizen band equipment.

(b) A public address sound system with interior speakers and exterior horn may be installed.

6:21-6B-7 Construction

(a) The bus construction shall be of prime commercial quality steel or other metal or material with strength at least equivalent to all-steel as certified by the body manufacturer.

(b) The construction shall provide a reasonably dustproof and water-tight unit and the exterior shall be designed to discourage the hitching of rides.

(c) The bus body joints shall conform to current applicable FMVSS. This does not include the body joints created when body components are attached to components furnished by the chassis manufacturer.

(d) Restraining barriers shall conform to current applicable FMVSS requirements for buses with a GVWR of more than 10,000 pounds.

(e) Buses may be equipped with steel side panel skirts between the front and rear axles of the bus and shall extend to the bottom-most evaluation of any chassis component located within the center section of a wheel base measurement apportioned into three equal sections. The side panel skirt shall terminate no less than twelve inches above a level road surface. Beyond the rear axle, the bottom of the side panel skirts shall taper upward to the bottom-most part of the rear bumper.

(f) Buses shall not be equipped with stanchions, an interior luggage rack, a roof luggage rack, or luggage access ladder.

1. This rule also applies to buses under the jurisdiction of the Department of Transportation, approved for school use, contracted by a local board of education for transportation to and from school.

6:21-6B.8 Defrosters

(a) Defrosting and degfogging equipment shall direct a sufficient flow of heated air onto the windshield, the window to the left of the driver and the glass in the viewing area directly to the right of the driver to eliminate frost, fog and snow. The defroster unit shall have a separate blower motor in addition to the heater motors.

1. A Type A bus shall be equipped with defogging and defrosting equipment which will direct a sufficient flow of heated air onto the windshield to eliminate frost, fog, and snow.

(b) The defrosting system shall conform to SAE standards.

(c) The defroster and defogging system shall be capable of furnishing heated outside ambient air except that part of the system furnishing additional air to the windshield, entrance door, and stepwell which may be of the recirculating air type.

(d) Auxiliary fans are not to be considered as a defrosting and defogging system.

(e) Portable heaters shall not be used.

6:21-6B.9 Doors, entrance

(a) The entrance door shall be under control of driver, and designed to afford easy release and prevent accidental opening. When a hand lever is used, no part shall come together so as to shear or crush fingers.

(b) The entrance door shall be located on the right side of the bus opposite the driver and within direct view of the driver.

(c) The entrance door on Types B, C, and D buses shall have a minimum horizontal opening of 24 inches and a minimum vertical opening of 68 inches. The entrance door on a Type A bus shall have a minimum opening of 1,200 square inches.

(d) The entrance door shall be of split-type, sedan-type, or jackknife type. A split-type door includes any sectioned door which divides and opens inward or outward. If one section of split-type door opens inward and the other opens outward, the front section shall open outward.

(e) Door panels shall be of approved safety glass. The bottom of each lower glass panel shall not be more than 10 inches from the top surface of the bottom step. The top of the upper glass panel shall not be more than six inches from top of door.

1. A Type A bus which is not equipped with a split-type door shall have an upper panel window of safety glass with an area of at least 350 square inches.

(f) The vertical closing edges on a split-type door shall be equipped with a flexible material to protect children's fingers.

1. A Type A bus which is not equipped with a split-type door may conform to the chassis manufacturer's specifications.

(g) There shall be no entrance door to the left of the driver on Types C and D buses. Type A and B buses may conform to chassis manufacturer's specifications.

(h) All doors shall be equipped with a padding at the top edge of each door opening. Pad shall be at least three inches wide and one inch thick and extend the full width of the door opening.

(i) When a bus is equipped with air doors or other air operated assemblies, excluding windshield wipers, an additional air tank is needed for the operation of those assemblies.

6:21-6B.10 Doors, emergency

(a) The emergency door shall be hinged on the right side if in rear end of the bus and on the front side if on either side of the bus. All emergency doors shall open outward and be equipped with a device to hold the door open during emergencies and school bus evacuation drills.

1. A Type A bus equipped with double emergency doors shall be hinged on the outside edge and have a three point fastening device.

(b) The emergency door shall be labeled inside and outside to indicate how it is to be opened.

(c) The upper portion of emergency door shall be equipped with approved safety glazing, exposed area of which shall be not less than 400 square inches.

1. A rear view wide angle lens may be attached to one rear bus window. The lens shall not cover more than one third of the glass area.

(d) The lower portion of the rear emergency door on Types B, C, and D buses shall be equipped with a minimum of 350 square inches of approved safety glazing.

(e) There shall be no steps leading to emergency door.

(f) The words "EMERGENCY DOOR" shall be applied to the emergency door both inside and outside in red letters at least two inches high and 3/16 inch wide, shall be placed at top of or directly above the emergency door or on the door in the metal panel above the top glass.

(g) The emergency door shall be designed to be opened from the inside and outside of the bus and shall be equipped with a quick release fastening device designed to prevent accidental release. Control of the fastening device from the driver's seat shall not be permitted.

(h) The emergency door and the rear emergency window fastening device shall be equipped with a buzzer located in the driver's compartment which will indicate to the driver that the slide bar has moved and the emergency door is about to open. The switch which operates the buzzer shall be enclosed in a metal case and the wires leading from the switch shall be concealed in the bus body.

(i) The emergency door may be equipped with a locking system which incorporates an interlocking electrical circuit that will prevent the bus from being started while the emergency door is locked.

(j) The emergency door windows shall not be covered by any metal bars or screening.

(k) The emergency door shall be equipped with padding at least three inches wide and one inch thick, at top edge of each door opening, which shall extend the full width of the door opening.

(l) There shall be no obstruction higher than ¼ inch high across the bottom of any emergency door opening.

6:21-6B.11 Emergency exits

(a) Buses shall be equipped with emergency push-out split sash side windows which are vertically hinged on the forward side of the bus and roof safety hatches as follows:

1. One emergency push-out exit window per side.

i. Push-out windows shall not be placed directly opposite each other.

ii. Each emergency push-out side exit window shall be equipped with a warning buzzer, located in the driver's compartment to alert the driver when the latch for the emergency push-out window is released.

2. A roof safety hatch shall be installed in the forward half of the bus roof.

i. The roof safety hatch shall be constructed of metal, fiberglass or equivalent and equipped with an interior and exterior latch release. Each roof safety hatch shall provide a minimum opening of 20 inches by 20 inches.

ii. Each roof safety hatch shall be equipped with a warning buzzer, located in the driver's compartment to alert the driver when the latch for the roof safety hatch is released.

(b) Additional push-out windows and roof safety hatches may be used.

(c) An additional roof safety hatch may be installed in the rear half of the bus roof on Types C and D buses.

6:21-6B.12 Emergency equipment

(a) A pry bar at least 24 inches in length shall be securely mounted in the bus in a location readily accessible to the driver.

(b) Each school bus shall contain at least three reflectorized triangle road warning devices in compliance with FMVSS and be mounted in an accessible place in the driver's compartment.

1. The mounting location in a Type A bus is optional.

(c) Buses may be equipped with an identified body fluid clean-up kit that is removable, moisture proof and mounted in an accessible place in driver's compartment.

6:21-6B.13 Fire extinguishers

(a) The bus shall be equipped with at least one pressurized, dry chemical type fire extinguisher, complete with hose, mounted in a bracket located in the driver's compartment and readily accessible to the driver and passengers. A pressure gauge shall be mounted on the extinguisher which can be easily read without removing the extinguisher from its mounted position.

(b) The fire extinguisher shall be approved by the Underwriters Laboratories, Inc. with a total rating of 2 A-10 BC or greater. The operating mechanism shall be sealed with a type of seal which will not interfere with the use of the fire extinguisher.

6:21-6B.14 First aid kit

(a) A removable first aid kit shall be provided. It should be moisture and dust proof and be mounted in an accessible place within the driver's compartment. When the first aid kit is stored in a storage compartment, the location of the kit shall be identified by the words "First Aid" in red letters two inches high and $^{3}/_{16}$ inch wide.

(b) The kit shall contain, but is not limited to, the following items:

1. Two, one inch × 2½ yards adhesive tape rolls;
2. Twenty-four sterile gauze pads three inches × three inches;
3. One hundred ¾ inch × three inches adhesive bandages;
4. Eight, two inch bandage compresses;
5. Ten, three inch bandage compresses;
6. Two, two inch × six yards sterile gauze roller bandages;
7. Two nonsterile triangular bandages approximately 40 inches × 54 inches with two safety pins;
8. Three sterile gauze pads 36 inches × 36 inches;
9. Three sterile eye pads;
10. One pair latex gloves;
11. One pair rounded end scissors;
12. One mouth to mouth airway;
13. One sharpened pencil; and
14. One small writing pad.

6:21-6B.15 Floor

(a) The floor in the underseat area, including tops of the wheelhousing, drivers compartment, and the toe board, shall be covered with rubber floor covering or equivalent having minimum overall thickness of .125 inch.

1. The toe board floor covering on Types A and B buses may be the chassis manufacturer's standard.

(b) The floor covering in the aisle shall be rubber or equivalent, wear-resistant, and ribbed. Minimum overall thickness shall be .187 inch measured from the tops of the ribs.

(c) The floor covering must be permanently bonded to the floor and shall not crack when subjected to sudden changes in temperature. The bonding or adhesive material shall be waterproof and shall be the type recommended by the manufacturer of floor covering material. All seams must be sealed with waterproof sealer.

(d) A secured insulated screw-down plate to access the fuel tank sending unit shall be provided.

6:21-6B.16 Heaters

(a) Heaters shall be of hot water type and/or combustion type.

(b) If only one heater is used, it shall be of fresh air or combination fresh air and recirculating type.

(c) If more than one heater is used, additional heaters may be of the recirculating air type.

(d) The heating system shall be capable of maintaining a temperature of not less than 40 degrees Fahrenheit throughout the bus at average minimum January temperature as established by the U.S. Department of Commerce, Weather Bureau, for the area in which the bus is to be operated.

(e) All heaters installed by the body manufacturers shall bear a name plate that indicates the heater rating is in accordance with SBMI standards. The plate shall be affixed by the heater manufacturer which will constitute certification that the heater performance is as shown on the plate.

(f) Heater hoses shall be adequately supported to guard against excessive wear due to vibration. The hoses shall not dangle or rub against the chassis or sharp edges and shall not interfere with or restrict the operation of any engine function. Heater hose shall conform to SAE standards. Heater lines on the interior of the bus shall be shielded to prevent scalding of the driver or passengers.

(g) Each hot water heater system installed by the body manufacturer shall include one shut-off valve in the pressure line and one shut-off valve in the return line with both valves at or near the engine in an accessible location. There shall also be a water flow regulating valve installed in the pressure line for convenient operation by the driver while seated.

1. The hot water heater system in a Type A bus may conform to the chassis manufacturer's standard.

(h) Combustion type heaters shall comply with current applicable FMCSR.

(i) Accessible bleeder valves shall be installed in an appropriate place in the return lines of body company-installed heaters to remove air from the heater lines.

(j) Access panels shall be provided to make heater motors, cores, and fans readily accessible for service. Outside access panel may be provided for the driver's heater.

(k) A rear engine bus shall be equipped with a hot water heater booster pump.

6:21-6B.17 Identification

(a) The words "SCHOOL BUS" shall be applied to the bus body in black letters at least eight inches high on both the front and rear of the bus between the warning lamp signals or on signs attached thereto. Lettering shall be placed as high as possible without impairment of its visibility. Lettering shall conform to Series "B" of standard alphabets for highway signs.

1. An illuminated front and rear destination sign with "SCHOOL BUS" in eight inch black letters on background of National School Bus Yellow may be used.

(b) When attached signs are used, they shall comply with the following:

1. The sign on the front of the bus shall have the words "SCHOOL BUS" printed in black letters not less than eight inches on a background of National School Bus Yellow;

2. The sign on the rear of the bus shall be at least 10 square feet in size and shall be painted National School Bus Yellow and have the words "SCHOOL BUS" printed in black letters not less than eight inches high; and

3. Attached signs shall be removed or covered whenever the bus is not being used for to and from school transportation.

(c) The standards in (a) and (b) above also apply to buses under the jurisdiction of the Department of Transportation, approved for school use, contracted by a local board of education for transportation to and from school.

(d) There shall be no lettering on the front or rear of the bus unless specified in this subchapter.

(e) Only signs and lettering limited to the name of owner or operator and any marking necessary for identification shall appear on the sides of the bus.

1. The owning or operating organization shall be conspicuously identified in letters at least three inches high, located on each longitudinal side of the exterior of the bus. The identification shall be below the window line, completely horizontal and shall be black or National School Bus Yellow.

2. Identification letters or numbers, up to a maximum height of six inches, shall be in prominent locations on the front and rear of the bus below the window line. The color of the letters or numbers shall be either white, black or National School Bus Yellow.

(f) No advertisement of any kind shall be exhibited either on the interior or exterior of the bus, except for the manufacturer's and vendor's trade names which may be exhibited on the bus.

6:21-6B.18 Inside height

(a) The inside body height shall be 72 inches or more, measured from the ceiling to the floor metal, at any point on longitudinal center line from front vertical bow to rear vertical bow.

1. A Type A bus shall have a minimum of 62 inches inside body height.

6:21-6B.19 Insulation

(a) The ceiling and walls shall be insulated with adequate material to deaden sound and to reduce vibration to a minimum. If thermal insulation is specified, it shall be of fire-resistant material approved by the Underwriters Laboratories, Inc.

(b) Floor insulation may be used and shall be either five ply $^{19}/_{32}$ inch thick plywood, or a material of equal or greater strength with an insulation R value and shall be equal or exceed properties of exterior-type softwood plywood, C-D Grade as specified in standards issued by U.S. Department of Commerce. When plywood is used, all exposed edges shall be sealed.

1. Type A bus shall be insulated with a minimum of one-half inch exterior grade plywood securely fastened to the steel floor of the bus in the passenger compartment.

6:21-6B.20 Interior

(a) The interior of the bus shall be free of all unnecessary projections, such as luggage racks, which may cause injury. This standard requires inner lining on ceilings and walls. If ceiling is constructed with lapped joints, the forward panel shall be lapped by the rear panel and the exposed edges shall be beaded, hemmed, flanged, or otherwise treated to minimize sharp edges.

(b) The driver's area forward of the foremost padded barriers shall permit the mounting of required safety equipment and vehicle operation equipment.

(c) Every school bus shall be constructed so that the noise level taken at the ear of the occupant nearest to the primary vehicle noise source shall not exceed 85 dBA when tested according to NSFSB.

6:21-6B.21 Lamps and signals

(a) The lamps on the exterior of the bus shall conform to current applicable FMVSS.

1. Each clearance, marker, or identification lamp shall be of the two bulb design and shall automatically be activated, whenever the headlights or parking lamps are activated, in a steady burning state.

2. Two parking lamps shall designate the front of the bus.

3. Two backup lamps shall be installed on the rear of Types B, C, and D buses. These lamps shall be illuminated when either the shift control lever for the transmission is placed into reverse gear or the rear emergency door is unlatched.

4. An armored marker-type amber lamp connected to the turn signals shall be installed on each side of the bus body immediately behind the entrance door on the right and symmetrically opposite on the left side of all Type C and D buses.

(b) Interior lamps shall be provided which adequately illuminate aisle and stepwell. Stepwell light shall be illuminated by the service door operated switch, which will illuminate only when headlights and clearance lights are on and the service door is open.

(c) Body instrument panel lights shall be controlled by an independent rheostat switch.

(d) A telltale light, plainly visible to the driver, shall be installed to give a positive indication of the operation of the stop lights.

(e) Alternately flashing signal lamps shall be provided as follows:

1. Red signal lamps are alternately flashing lamps mounted horizontally both front and rear, intended to identify a vehicle as a school bus and to inform other users of the highway that the bus is stopped to take on or discharge school children.

i. Buses shall be equipped with two front and two rear red lamps located approximately six inches below the top of the bus, as near the sides as is possible, and equidistant from the center.

2. Amber signal lamps are alternately flashing lamps mounted horizontally both front and rear, intended to identify a vehicle as a school bus and to inform other users of the highway that the bus is about to stop on the highway to take on or discharge school children.

i. In addition to the four red lamps described in (e)1 above, four amber lamps shall be installed with one amber lamp located near each red signal lamp, at same level, but closer to vertical centerline of bus.

ii. The amber lamps shall be activated, approximately 300 feet prior to each school bus stop, either by a hand button that is identified and easily accessible to the belted bus driver or by a foot switch located on the floor board directly in front of where a clutch pedal normally would be located.

3. The system of red and amber signal lamps shall be wired so that amber lamps are energized manually, and red lamps are automatically energized (with amber lamps being automatically de-energized) when stop signal arm is extended or when bus service door is opened.

4. All flashers for alternately flashing red and amber signal lamps shall be enclosed in the body in a readily accessible location.

5. Each school bus shall be equipped with a system which monitors the front and rear alternately flashing signal lamps and the monitor shall be mounted in full view of the driver. If the full circuit current passes through the monitor, each circuit shall be protected by a fuse or circuit breaker.

6. The area around the lens and extending outward approximately three inches from each alternately flashing signal lamp shall be black in color. In those installations where there is no flat vertical portion of the body immediately surrounding the entire lens of lamp, a circular or square band approximately three inches wide, immediately below and to both sides of the lens, shall be black in color on the body or roof area against which the signal lamp is seen from a distance of 500 feet along axis of vehicle.

7. Visors or hoods, black in color, with a minimum depth of four inches shall be provided.

8. If strobe alternately flashing signal lamps are utilized, the front and rear signal lamps shall be equipped with eight seven inch sealed beam electronic strobe lamps, four red and four amber, working in an automatic integrated system. The exterior surface of lens shall be smooth and meet SAE color requirements. Strobe alternately flashing signal lamps are only permitted on Type C and D buses.

i. The solid-state strobe power supply shall provide the electrical power to energize the sealed beam flash tubes. The power supply shall energize the lamps at a combined alternating flash rate of 120-128 flashes per minute. The power supply shall be fully enclosed in a metal container, with a minimum metal wall thickness of .060 inches, and mounted within the front or rear bulkheads.

(f) The requirements in (e) above also apply to buses under the jurisdiction of the Department of Transportation, approved for school use, contracted by a local board of education for transportation to and from school.

(g) The bus body shall be equipped with rear turn signal lamps that are at least seven inches in diameter or if a shape other than round, a minimum 38 square inches of illuminated area and meet SAE standards. These signals must be connected to the chassis hazard wiring switch to cause simultaneous flashing of turn signal lamps when needed as vehicular traffic hazard warning. Turn signal lamps are to be placed as wide apart as practical and their centerline shall be approximately eight inches below the rear window.

1. On Type A buses, the lamps must be at least 21 square inches in lens area.

(h) Buses shall be equipped with four combination red stop/tail lamps as follows:

1. Two combination lamps with a minimum diameter of seven inches, or if a shape other than round, a minimum 38 square inches of illuminated area shall be mounted on the rear of the bus just inside the turn signals.

2. Two combination lamps with a minimum diameter of four inches, or if a shape other than round, a minimum 12 square inches of illuminated area shall be placed on the rear of the body between the beltline and the floor line. Rear license plate lamp may be combined with one lower tail lamp. Stop lamps shall be activated by the service brakes and shall emit a steady light when illuminated.

3. Type A buses may conform to the chassis manufacturer's standard.

6:21-6B.22 Metal treatment

(a) All metal used in construction of bus body shall be zinc coated or aluminum coated or treated by equivalent process before bus is constructed. Included are such items as structural members, inside and outside panels, door panels, and floor sills; excluded are such items as door handles, grab handles, interior decorative parts, and other interior plated parts.

(b) All metal parts that will be painted shall be chemically cleaned, etched, zinc-phosphate coated, and zinc-chromate or epoxy primed or conditioned by equivalent process.

(c) In providing for these requirements, particular attention shall be given lapped surfaces, welded connections of structural members, cut edges, punched or drilled hole areas in sheet metal, closed or box sections, unvented or undrained areas, and surfaces subjected to abrasion during vehicle operation.

(d) As evidenced that the above requirements have been met, samples of materials and sections used in the construction of the bus body shall not lose more than 10 percent of material by weight when subjected to 1,000 hour salt spray test as provided for in the NSFSB.

6:21-6B.23 Mirrors

(a) An interior mirror shall be provided which is either clear view laminated glass or clear view glass bonded to a backing which retains the glass in the event of breakage. Mirror shall be a minimum of six inches by 30 inches. The mirror shall have rounded corners and protected edges.

1. On a Type A bus, the mirror shall be a minimum of six inches by 16 inches.

(b) Buses shall be equipped with a system of exterior mirrors which conform to current applicable FMVSS as follows:

1. A rear vision mirror system which shall be capable of providing a view along the left and right sides of the vehicle which will provide the driver with a view of the rear tires at ground level, a minimum distance of 200 feet to the rear of the bus and at least 12 feet perpendicular to the side of the bus at the rear axle line; and

2. A crossview mirror system which shall provide the driver with indirect vision of an area at ground level from the front bumper forward and the entire width of the bus to a point where the driver can see by direct vision. The crossview system shall also provide the driver with indirect vision of the area at ground level around the left and right front corners of the bus to include the tires and entrance door on all types of buses to a point where it overlaps with the rear vision mirror system.

i. No portion of the crossview mirror assembly shall project more than six inches forward or laterally from the outer-most limits of the vehicle at point of installation.

ii. No portion of the crossview mirror assembly shall unduly obstruct the light emitted from any required lamp or the driver's view of vehicular traffic.

3. Stick-on convex mirrors shall not be attached to any mirror surface.

6:21-6B.24 Mounting

(a) The chassis frame shall support the rear body cross member. The bus body shall be attached to the chassis frame at each main floor sill, except where chassis components interfere, in such manner as to prevent shifting or separation of body from chassis under severe operation conditions.

1. The distance between the fasteners which secure the body to the chassis shall not exceed 42 inches.

2. The fasteners shall be located directly opposite each other along the longitudinal length of the chassis frame.

(b) Insulation material shall be placed at all contact points between the body and the chassis frame on body on chassis type buses, and shall be attached to the chassis frame or body so that it will not move under severe operating conditions.

6:21-6B.25 Overall length

Overall length of bus shall not exceed 40 feet.

6:21-6B.26 Overall width

Overall width of bus shall not exceed 96 inches excluding accessories.

6:21-6B.27 Reflectors

(a) Reflectors are required on buses which comply with current applicable FMVSS as follows:

1. On the rear: Two red reflectors, equally spaced as far from the center as practical and at the same height.

2. On each side: Two reflectors on each side, one amber, at or near the front and one red at or near the rear.

3. One amber reflector on each side of the bus body as near the center as practical shall be provided on buses 30 feet or more in length.

6:21-6B.28 Rub rails

(a) There shall be one rub rail located on each side of bus approximately at seat level which shall extend from rear side of entrance door completely around bus body (except emergency door) to point of curvature near outside cowl on left side.

(b) There shall be one rub rail located approximately at floor line which shall cover same longitudinal area as upper rub rail, except at wheelhousing, and shall extend only to radii of right and left rear corners.

(c) Each rub rail shall be attached at each body post, and all other upright structural members.

(d) Each rub rail, in their finished form, shall be four inches or more in width. They shall be of 16 gauge steel or suitable material of equivalent strength, and shall be constructed in corrugated or ribbed fashion.

(e) Both rub rails shall be applied outside body or outside body posts. Pressed-in or snap-on rub rails do not satisfy this requirement.

(f) On Type A and B buses with a chassis manufacturer's body, or Type C and D buses with a rear luggage or a rear engine compartment, rub rails are not required to extend around rear corners.

6:21-6B.29 Sanders and traction device

(a) When used, sanders shall:

1. Be a hopper cartridge-valve type;

2. Have a metal hopper with all interior surfaces treated to prevent condensation of moisture;

3. Be of at least 100 pound (grit) capacity;

4. Have a cover on the filler opening of the hopper, which screws into place, sealing unit airtight;

5. Have discharge tubes extending to front of each rear wheel under fender;

6. Have no-clogging discharge tubes with slush-proof, non-freezing rubber nozzles;

7. Be operated by an electric switch with a telltale pilot light mounted on the instrument panel;

8. Be exclusively driver-controlled; and

9. Have a gauge to indicate that hoppers need refilling when they are down to one-quarter full.

(b) Automatic traction chains may be used.

6:21-6B.30 Seat belt for driver

(a) A type 2 lap belt/shoulder seat belt shall be provided for the driver. The assembly shall be equipped with an emergency locking retractor for the continuous belt system. The lap portion of the belt shall be guided or anchored where practical to prevent the driver from sliding sideways under it.

(b) The seat belt shall have a button type latch and the floor anchored belt section shall be booted to keep the buckle within driver's reach.

6:21-6B.31 Seats and crash barriers

(a) All seats shall have minimum depth of 15 inches.

(b) Seat backs shall be a minimum of 24 inches high and a minimum 20 inches above the seating reference point.

(c) Seat, seat back cushion and crash barrier shall be covered with a material having 42-ounce finished weight, 54 inches width, and finished vinyl coating of 1.06 broken twill, or other material with equal tensile strength, tear strength, seam strength, adhesion strength, resistance to abrasion, resistance to cold, and flex separation, and meets the criteria contained in the NSFSB Fire Block Test for school bus seat upholstery.

1. Damaged or vandalized covers of seat cushions, seat backs, and crash barriers equipped with flame-retardant materials shall be repaired in a manner to maintain the original flame-retardant protection.

(d) All seats shall be forward facing.

(e) Each seat leg shall be secured to the floor by a minimum of two bolts, washers, and nuts.

(f) All seat frames attached to the seat rail shall be fastened with two bolts, washers and nuts or flange-headed nuts.

(g) The driver's seat shall be of the highback type with a minimum seat back adjustment of 15 degrees and with a head restraint to accommodate a 95 percentile adult male. The driver's seat shall be secured with nuts, bolts, and washers or flange-headed nuts.

1. The space between the back of the driver's seat, in the rearmost position, and the front surface of the restraining barrier located directly behind the driver shall comply with FMVSS for barrier deflection.

6:21-6B.32 Spray suppressant and mud flaps

Spray suppressants or mud flaps are required when an angle found by a level road surface and a line projected from the point of contact of the rearmost tire with the ground and the bottom edge of the rear bumper exceeds an angle of 22½ degrees.

6:21-6B.33 Steps

(a) First step at the entrance door shall not be less than 10 inches and not more than 14 inches from the ground, based on standard chassis specifications.

1. Type D buses shall have the first step at the entrance door 12 to 16 inches from the ground.

(b) Step risers shall not exceed a height of 10 inches. When plywood is used on the steel floor or step, the riser height may be increased by thickness of the plywood used.

(c) Steps shall be enclosed to prevent accumulation of ice and snow.

(d) Steps shall not protrude beyond side body line.

(e) A grab handle not less than 20 inches in length shall be provided in unobstructed location inside the doorway.

6:21-6B.34 Step treads

(a) All steps, including floor line platform area, shall be covered with 3/16 inch rubber floor covering or other materials equal in wear resistance and abrasion resistance to top grade rubber.

(b) The rubber step treads shall be permanently bonded to the step well metal, minimum 24 gauge cold roll steel, and the ribbed rubber grooved design shall run at 90-degree angles to long dimension of the step tread.

(c) Three-sixteenth inch ribbed step tread shall have a 1½ inch white nosing integral piece without any joint.

(d) The rubber portion of step treads shall have the following characteristics:

1. Special compounding for good abrasion resistance and high coefficient of friction;

2. Flexibility so that it can be bent around a one-half inch mandrel both at 130 degrees Fahrenheit and 20 degrees Fahrenheit without breaking, cracking, or crazing; and

3. Show a durometer hardness of 85 to 95.

6:21-6B.35 Stirrup steps

There shall be at least one folding stirrup step or recessed foothold and suitably located handles on each side of the front of

the bus body for easy accessibility for cleaning the windshield and lamps except when windshield and lamps are easily accessible from the ground. A step, in lieu of the stirrup steps, is permitted in or on the front bumper.

6:21-6B.36 Stop signal arm

A stop signal arm shall be provided on the left side of the body which meets the applicable requirements of FMVSS. The stop arm shall be an octagonal shape with white letters and border on a red background. The flashing lamps in stop arm shall be connected to the alternately red flashing signal lamp circuits. Vacuum, electric or air operation of the stop signal arm is optional.

6:21-6B.37 Storage compartment

If tools, tire chains and/or tow chains are carried on the bus, a container of adequate strength and capacity may be provided. Such storage container may be located either inside or outside the passenger compartment but, if inside, it shall have a cover (seat cushion may not serve as this purpose) capable of being securely latched and be fastened to the floor convenient to either the entrance or emergency door.

6:21-6B.38 Sun shield

(a) Interior adjustable transparent sun shield not less than six inches by 30 inches with a finished edge shall be installed in a position convenient for use by driver.

1. A Type A bus may be equipped with a sun shield not less than six inches by 16 inches.

6:21-6B.39 Tailpipe

(a) The tailpipe diameter from muffler to the end shall comply with the chassis manufacturer's standard and shall be constructed of a corrosion resistant tubing material at least equal in strength and durability to 16-gauge steel tubing.

(b) The tailpipe shall terminate to the rear of all doors and windows designed to be opened for ventilation.

(c) The tailpipe shall not terminate immediately below an emergency exit, fuel tank, or fuel tank fill pipe.

(d) The tailpipe of a bus powered by a gasoline engine shall extend to the rear bumper or to the left or right perimeter sides of the bus body and discharge to the atmosphere either:

1. At or within six inches forward of the rearmost part of the bus on the left or right side; or

2. Beyond the rear bus bumper up to a maximum of two inches.

(e) The tailpipe of a bus using fuel other than gasoline shall extend to the rear bumper or to the left or right perimeter sides of the bus body and discharge to the atmosphere either:

1. At or within 15 inches forward of the rearmost part of the bus on the left or right side; or

2. At or beyond rear bus bumper up to a maximum of two inches.

(f) Tailpipe(s) which terminate at either the left or right side of the bus shall extend to but not beyond the perimeter of the bus body side.

6:21-6B.40 Tow eyes or hooks

Tow eyes or hooks may be furnished on the rear and attached so they do not project beyond the rear bumper. Tow eyes or hooks attached to the chassis frame shall be furnished by either the chassis or body manufacturer. The installation shall be in accordance with the chassis manufacturer's specifications.

6:21-6B.41 Undercoating

(a) The entire underside of the bus body, including floor sections, cross member, and below floor line side panels, shall be coated with rust-proofing compound for which the compound manufacturer has issued a notarized certification of compliance to the bus body builder that the compound meets or exceeds all performance and qualitative requirements of applicable Federal specifications.

(b) Undercoating compound shall be applied with suitable airless or conventional spray equipment to recommended film thickness and shall show no evidence of voids in cured film.

6:21-6B.42 Ventilation

(a) The body shall be equipped with a suitable, controlled ventilating system of sufficient capacity to maintain proper quantity of air under operating conditions without opening of windows except in extremely warm weather.

(b) A static-type nonclosable exhaust vent shall be installed in the low-pressure area of roof.

(c) One six inch diameter, two speed auxiliary fan with protective cage shall be installed on each side of the driver position on Types C and D school buses. Each fan shall be controlled by a separate switch.

1. If an auxiliary fan is used on Types A and B buses, it shall be a nominal six inch diameter fan with the blades covered with a protective cage. Each fan shall be controlled by a separate switch.

6:21-6B.43 Walking control arm

(a) A walking control arm may be installed on buses. The construction and design of this equipment shall offer a safe and trouble free operation. The control unit shall be installed on the right side of the front bumper. Equipment shall not obstruct the view of any sign or license plate on the bus. The open crossing gate shall extend forward on the front bumper at least 60 inches up to a maximum of 96 inches.

1. The walking control arm shall be powered by either vacuum, air pressure, or electric. No manual operation of the arm is permitted.

2. The walking control arm shall be activated automatically to the fully extended position when the red school bus warning lights are in operation. It shall be maintained in operating condition at all times or removed.

6:21-6B.44 Wheelhousing

(a) The wheelhousing opening shall allow for easy tire removal and service.

(b) Wheelhousing shall be attached to floor sheets in such a manner to prevent any dust, water, or fumes from entering the body. Wheelhousing shall be constructed of at least 16 gauge steel, or other material of equal strength.

(c) The inside height of the wheelhousing above the floor line shall not exceed 12 inches.

(d) If tire chains are used, the wheelhousing shall provide clearance for installation and use of tire chains on single and dual power driving wheels.

(e) No part of a raised wheelhousing shall extend into the emergency door opening.

6:21-6B.45 Windows and windshield

(a) Each full side window shall provide an unobstructed emergency opening at least nine inches high and 22 inches wide, obtained by lowering window.

1. Push-out type, split-sash windows may be used.

(b) Push out windows shall be provided in accordance with the emergency exit requirements of this subchapter.

(c) Glass in all side and rear windows shall be of AS-2 or better grade. Equivalent plastic AS-4 or better shall only be used in side windows of the bus behind the driver.

(d) The windshield shall have a horizontal gradient tinted band starting slightly above the line of a driver's vision and gradually decreasing in light transmission to 20 percent or less at the top of the windshield. Glass in the windshield shall be of AS-1 grade.

1. Glass in the windshield shall be heat-absorbent, laminated plate. The windshield shall be large enough to permit the driver to see the roadway clearly, shall be slanted to reduce glare, and shall be installed between the front corner posts that are so designed and placed as to afford minimum obstruction to the driver's view of the roadway.

(e) All glass in the windshield, windows and doors shall be approved safety glass, so mounted that a permanent mark is visible, and of sufficient quality to prevent distortion of the view in any direction.

(f) All exposed edges of glass shall be banded.

(g) The windows in the rear of the bus shall be stationary.

(h) Windows shall be free of window guards or bars both inside and outside.

6:21-6B.46 Windshield washers

A windshield washer system shall be provided.

6:21-6B.47 Windshield wipers

(a) A windshield wiping system, two-speed or more, shall be provided.

(b) The wipers shall be operated by one or more air or electric motors of sufficient power to operate wipers. If one motor is used, the wipers shall work in tandem to give full sweep of windshield.

6:21-6B.48 Wiring

(a) All wiring shall conform to current applicable SAE standards.

(b) Wiring shall be arranged in circuits as required with each circuit protected by a fuse or circuit breaker. Two extra fuses for each size fuse which is used on the bus shall be conveniently located in the fuse area unless the bus is equipped with circuit breakers. A system of color and number coding shall be used.

1. The following body interconnecting circuits shall be color coded as follows:

FUNCTION	COLOR
Left Rear Directional Light	Yellow
Right Rear Directional Light	Dark Green
Stoplights	Red
Back-Up Lights	Blue
Taillights	Brown
Ground	White
Ignition Feed, Primary Feed	Black

2. The color of the cables shall correspond to current applicable SAE standards.

3. Wiring shall be arranged in at least six regular circuits, as follows:

i. Head, tail, stop (brake), and instrument panel lamps;

ii. Clearance and step-well lamps (step-well lamp shall be actuated when entrance door is opened);

iii. Dome lamp;

iv. Ignition and emergency door signal;

v. Turn signal lamps; and

vi. Alternately flashing signal lamps.

4. Any of above combination circuits may be subdivided into additional independent circuits;

5. Whenever heaters and defrosters are used, at least one additional circuit shall be installed;

6. Whenever possible, all other electrical functions (such as sanders and electric-type windshield wipers) shall be provided with independent and properly protected circuits.

7. Each body circuit shall be coded by number or letter on a diagram of circuits and shall be attached to the body in readily accessible location.

(c) The entire electrical system of the body shall be designed for the same voltage as the chassis on which the body is mounted.

(d) All wiring shall have an amperage capacity equal to or exceeding the designed load. All wiring splices shall be in an accessible location and noted as splices on the wiring diagram.

(e) An easily readable body wiring diagram shall be furnished with each bus body or affixed in an area convenient to the electrical accessory control panel.

(f) The main power supply to the body shall be attached to a terminal on the chassis.

(g) Wires passing through metal openings shall be protected by a grommet.

(h) Wires not enclosed within the body shall be fastened securely at intervals of not more than 18 inches. All joints shall be soldered or joined by equally effective connectors.

(i) A heavy duty solenoid switch shall be installed in main electric power supply line to body circuits on Types B, C and D buses. The solenoid switch shall be energized by the bus ignition switch. Hazard and directional signal lamp circuits shall operate independently of the ignition switch.

SUBCHAPTER 6C. SPECIALLY EQUIPPED SCHOOL BUS STANDARDS

6:21-6C.1 Scope

(a) The following standards address modifications to buses designed for transporting students with special transportation needs. These standards are supplementary to the chassis and body standards established in N.J.A.C. 6:21-6A and 6B.

(b) Specially equipped buses shall meet the body and chassis standards of N.J.A.C. 6:21-6A and 6B prior to any modifications made for mobile seating device positions or special equipment such as a power lift.

(c) A bus used for the transportation of children confined to a wheelchair or other mobile positioning device, or who require life support equipment which prohibits the use of the entrance door, shall be equipped with a power lift.

6:21-6C.2 Aisle

The aisle leading to an emergency or power lift door from a wheelchair position shall be a minimum width of 30 inches.

6:21-6C.3 Communications

Buses shall be equipped with an electronic voice communication system, preferably not citizen band equipment.

6:21-6C.4 Doors

(a) Buses with a power lift shall be equipped with a special entrance door to accommodate the power lift.

1. The door shall be located on the right side of the bus and designed so as not to obstruct the regular entrance door.

2. The opening may extend below the floor through the bottom of the body skirt. If such an opening is used, reinforcements shall be installed at the front and rear of the floor opening to support the floor. This opening shall be the same strength as other floor openings.

3. A drip molding shall be installed above the door opening to divert water from the entrance.

4. The door posts and headers shall be reinforced to provide support and strength equivalent to the sides of the bus.

5. A single door or double doors may be used.

6. The doors shall have fastening devices to hold the doors open.

7. The doors shall be weather sealed.

8. When manually operated dual doors are provided, the rear door shall have at least a one point fastening device to the header. The forward mounted door shall have at least three point fastening devices; one to the header, one to the floor line of the body, and one into the rear door.

i. The door and hinge mechanism strength shall be equivalent or greater than the strength of the emergency exit door.

9. The door material, panels and structural strength shall be equivalent to the entrance and emergency doors. The rub rail extensions, lettering and other exterior features shall match adjacent sections of the body.

10. The door shall have windows set in rubber compatible within one inch of the lower line of the adjacent sash.

11. Doors shall be equipped with a device that will actuate an audible or flashing visible signal, located in the driver's compartment, when the doors are not securely closed and the ignition is in the "on" position.

12. A switch shall be installed so that the lifting mechanism will not operate when the lift platform door is closed.

13. Doors shall be equipped with padding at the top edge of the door opening. The padding shall be at least three inches wide and one inch thick. It shall extend the full width of the door opening.

6:21-6C.5 Glass

(a) Tinted safety glass or tinted plastic may be installed in side windows of the bus to the rear of the driver which complies with applicable Division of Motor Vehicle requirements.

(b) Tinted safety glass shall be AS-3 or better grade.

6:21-6C.6 Identification

(a) A bus equipped with a power lift shall display at least one universal handicapped symbol on the back of the bus and below the windowline.

1. The symbol shall not exceed 12 inches in size, be white on a blue background, and be of a high intensity reflectorized material as specified in NSFSB.

6:21-6C.7 Lights

Lights shall be placed inside the bus to sufficiently illuminate the lift door area.

6:21-6C.8 Power Lift

(a) The power lift with a skid resistant platform shall be located on the right side of the bus body and confined within the bus body when not extended.

(b) The lifting mechanism and platform shall be capable of lifting a minimum weight of 800 pounds. The lift platform shall have a minimum of 30 inches clear width unobstructed by the required handrail. The minimum clear length of the platform between the outer edge barrier and inner edge shall be 40 inches.

(c) When the platform is stored, it shall be securely fastened.

(d) Controls shall be provided that enable the operator to activate the lift mechanism from either inside or outside of the bus.

(e) The lift platform shall be designed to prevent the platform from falling while in operation due to a power failure or a single component mechanical failure.

(f) The power lift shall be equipped with a manual back-up system for use in the event of a power failure.

(g) The lift shall be designed to allow the lift platform to rest securely on the ground.

(h) The outboard platform edge and sides shall be designed to restrain a wheelchair or other mobile seating device from slipping or rolling off the platform. The platform outer edge barrier shall be designed to be automatically or manually lowered when the platform is at ground level, but shall not be equipped with any type of latch which could result in a lowered barrier when the platform is above ground level.

(i) The platform shall be equipped with at least one handrail. The handrail shall be approximately 25 to 34 inches in height and a minimum of 18 inches in length and designed to fold when it is in a stored position.

(j) A self-adjusting, skid resistant plate shall be installed on the outer edge of the platform to minimize the incline from the lift platform to the ground level. This plate, if so designed, may also serve as the restraining device described in (h) above.

(k) A circuit breaker shall be installed between the power source and lift motor if electrical power is used.

(l) The lift design shall prevent excessive pressure that could damage the lift system when the platform is fully lowered or raised.

(m) The lift mechanism shall be designed to prevent the lift platform from being folded or stored when occupied.

(n) An interlock shall be provided to prevent the operation of the bus while the lift or ramp is not in its fully stored and locked position.

6:21-6C.9 Ramp

(a) When a power lift system is not adequate to load and unload students with a special needs, a ramp device may be used.

1. When a ramp is used, it shall be of sufficient strength and rigidity to support the mobile device, occupant, and attendant(s). It shall be equipped with a protective flange on each longitudinal side to keep the mobile device on the ramp.

2. The ramp floor shall be of non-skid construction.

3. The ramp shall be equipped with handles and of a weight and design that enables one person to lift or move the ramp.

4. The ramp shall have at least three feet of length for each foot of incline.

6:21-6C.10 Restraining devices

Seat frames may be equipped with attachments or devices to which belts, restraining harnesses or other devices may be attached. Attachment framework or anchorage devices, if installed, shall conform with FMVSS.

6:21-6C.11 Seating arrangements

Flexibility in seat spacing to accommodate special devices shall be permitted to meet passenger requirements. All seating shall be forward facing.

6:21-6C.12 Securement system for mobile seating device and occupant

(a) The body shall be designed for positioning and securement of mobile seating devices and occupants in a forward facing position. Securement system hardware and attachment points for the forward facing system shall be provided.

(b) The mobile seating device securement system shall utilize four-point tie downs, with a minimum of two body floor attachment points located at the rear and a minimum of two body floor attachment points at the front of the space designated for the mobile seating device.

(c) A type 2 occupant securement system shall be provided for securement of the occupant's pelvic lap area and upper torso area.

(d) The mobile seating device and occupant securement system shall be designed to withstand a sled-test at a minimum impact speed/force of 30 mph/20 G's. The dynamic test shall be performed using system components and hardware (including attachment hardware) which are identical to the final installation in type, configuration, and positioning. The body structure at the attachment points may be simulated for the purpose of the sled test, but the simulated structure used to pass the sled test may not exceed the strength of the attachment structure to be used in the final body installation. The mobile seating device used for test purposes shall be a 150 pound powered wheelchair and the occupant shall be a 50th percentile male test dummy as specified in FMVSS. Measurements shall be made on the test dummy during the test for head acceleration, upper thorax acceleration, and upper leg compressive force. These measurements shall not exceed the upper limits established in applicable FMVSS. The test dummy shall be retained within the securement system throughout the test and forward excursion shall be such that no portion of the test dummy's head or knee pivot points passes through a vertical transverse plane intersecting the forward-most point of the floor space designed for the mobile seating device. All hardware shall remain positively attached throughout the test and there shall be no failure of any component. Each mobile seating device belt assembly including attachments, hardware and anchorages shall be capable of withstanding a force of not less than 2,500 pounds. This will provide equal mobile seating device securement when subjected to forces generated by forward, rear or side impact.

(e) The belt material at each space designated for the mobile seating device and the occupant restraint system shall be similar in size and fabric.

(f) The floor track or anchorage system shall be recessed into the floor with the top of the track or anchorage level with the floor surface or be surface mounted. If surface mounted, the maximum track or anchorage height above the floor surface shall not exceed 3/4 inch and be ramped on all sides with a ramp run/rise ratio not less than three to one.

(g) The occupant securement belt assemblies and anchorages shall meet the requirements of applicable FMVSS.

(h) The occupant securement system shall be designed to be attached to the bus body either directly or in combination with the mobile seating device securement system, by a method which prohibits the transfer of weight or force from the mobile seating device to the occupant in the event of an impact.

(i) Securement system attachments or coupling hardware not permanently attached shall be designed to prohibit it from being accidentally disconnected.

1. The following fasteners shall not be used for any occupant restraint or equipment securement:

i. T-bar or T-hook fasteners; or

ii. Touch fasteners, vinyl lap and shoulder belts.

(h) All attachment or coupling systems shall be accessible and operable without the use of tools or other mechanical assistance.

(i) All securement system hardware and components shall be free of sharp or jagged areas and shall be of a non-corrosive material or treated to resist corrosion.

(j) The occupant securement system shall be made of materials which do not stain, soil, or damage an occupant's clothing.

(k) The mobile seating device or securement system hardware shall not block the access to the lift door.

(l) The following information shall be provided with each bus equipped with a securement system:

1. Detailed instuctions regarding installation and use of the system, including a parts list; and

2. Detailed instructions, including a diagram, regarding the proper placement and positioning of the system, including correct belt angles.

6:21-6C.13 Steps

(a) The first step at the entrance door shall be not less than 10 inches and not more than 14 inches from the ground, based on standard chassis specifications.

1. The first step on a Type D bus at the entrance door shall be 12 to 16 inches from the ground.

(b) Step risers shall not exceed a height of 10 inches. When plywood is used on a steel floor or step, the riser height may be increased by the thickness of the plywood.

(c) On buses equipped with a power lift, the steps shall be the full width of the stepwell, excluding the thickness of the doors in an open position.

(d) The steps shall be enclosed to prevent the accumulation of ice and snow.

(e) The steps shall not protrude beyond the sides of the body line.

(f) Grab handles, not less than 20 inches in length, shall be provided inside the doorway on both sides in unobstructed locations.

6:21-6C.14 Support equipment and accessories

(a) Portable student support equipment or special accessory items (crutches, walkers, oxygen bottles, ventilators) shall be securely fastened at a mounting location able to withstand a pulling force of five times the weight of the item, or shall be retained in an enclosed, latched compartment.

1. The bus shall contain a belt cutter for use in emergencies, including evacuations. The belt cutter shall be designed to prevent injuries during use and secured in a safe location.

6:21-6C.15 Wheelchair and other mobile seating device requirements

(a) A wheelchair or other mobile seating device shall be equipped with an occupant restraint belt and hand brake which is furnished and maintained by the owner.

(b) An electric powered wheelchair shall be equipped with gelcel (non-liquid electrolyte) battery. Batteries with liquid electrolyte are not permitted in the passenger compartment of the bus.

SUBCHAPTER 8. USE OF [P.U.C.] VEHICLES AS SCHOOL BUSES **UNDER THE JURISDICTION OF THE DEPARTMENT OF TRANSPORTATION**

6:21-8.1 Scope of exceptions and exemptions

The exceptions and exemptions hereinafter provided in this [Subchapter] **subchapter** shall apply only to buses approved **for school use** by the [Board of Public Utility Commissioners] **Department of Transportation prior to (insert date of adoption of these amendments)**.

6:21-8.2 Exceptions and exemptions

(a) (No change.)

(b) [N.J.A.C. 6:21-6.30 (Seats)] **The seat requirements pursuant to N.J.A.C. 6:21-5.1 and 5.23** shall not apply to longitudinal seats seating not more than four pupils.

(c) The entrance door and the emergency door with aisles leading to each shall be accepted as meeting the requirement for doors [under N.J.A.C. 6:21-6.12 (Service door) and N.J.A.C. 6:21-6.13 (Emergency door and emergency window)] **pursuant to N.J.A.C. 6:21-5.1 and 5.6.**

(d) [Buses shall not be required] **The requirement pursuant to N.J.A.C. 6:21-5.1 and 5.6** to have **the words "Emergency Door"** printed on the outside of the ["Emergency Door"] **emergency door** [unless so prescribed by the Board of Public Utility Commissioners] **shall not apply**.

(e) In lieu of the lettering [required by N.J.A.C. 6:21-6.20 (Identification)], Type I school vehicles that are operated by a privately or publicly owned local transit system and used for regular common carrier transit route service as well as special school route service, shall meet all the requirements of [this standard] **N.J.A.C. 6:21-5.1 and 5.7**, except as follows:

1. (No change.)

(f) The **requirements for the** main aisles and the aisle to the emergency door, [if approved by the Board of Public Utility Commissioners, shall be held to meet the requirements of N.J.A.C. 6:21-6.1] **pursuant to N.J.A.C. 6:21-5.1 and 5.12 shall not apply.**

(g) [Bumpers which are approved by the Board of Public Utility Commissioner shall be held to meet the requirement of N.J.A.C. 6:21-5.8 (Bumpers) and N.J.A.C. 6:21-6.6 (Bumper, rear); provided, they are so constructed that children may not ride on them] **The requirement pursuant to N.J.A.C. 6:21-5.1 for bumpers shall not apply.**

(h) Window requirements [under N.J.A.C. 6:21-6.42 (Windshield and windows)] **pursuant to N.J.A.C. 6:21-5.1 and 5.11** shall not apply.

(i) The color requirements [under N.J.A.C. 6:21-6.9 (Color)] **pursuant to N.J.A.C. 6:21-5.1, 5.14 and 5.15** shall not apply.

6:21-8.3 Certificate of inspection

(a) No autobus under jurisdiction of the [Board of Public Utility] **Department of Transportation** shall be used for school pupil transportation services, as defined in N.J.S.A. 18A:39-1 and under contract with a local board of education **for transportation to and from school**, unless such autobus is authorized on the certificate of inspection issued by the [Public Utility Commission] **Department of Transportation.**

(b) Owners or operators of buses approved by the [Board of Public Utility Commissioner] **Department of Transportation** shall submit evidence of such approval to the county superintendent at such times as [he] may [deem] **be deemed** necessary.

6:21-8.4 Inspection by county superintendent

(a) The county superintendent may inspect any bus approved by the [Board of Public Utility Commissioners] **Department of Transportation** for any item not covered by the approval of that [board] **department** and from which they are not specifically exempted by these rules.

(b) (No change.)

SUBCHAPTER 9. SMALL VEHICLE [AND EQUIPMENT SPECIFICATIONS] **STANDARDS**

6:21-9.1 Definition

[All vehicles transporting pupils, under the jurisdiction of a local board of education, having a capacity less than 17 pupils, shall be considered a small vehicle. Where 17 pupils or more are transported the conveyance must be considered a school bus and comply with all the specifications prescribed for a school bus by the State Board of Education.] **A small vehicle is defined as any vehicle with a capacity of less than 10 passengers.**

6:21-9.2 Scope

(a) These standards apply to a small vehicle used for the transportation of public school pupils to and from school and school related activities.

(b) These standards also apply to small vehicles used to transport nonpublic school pupils to and from school when services are provided by a district board of education.

(c) Small vehicles which have a gross vehicle weight rating (GVWR) of less than 3,000 pounds shall not be used after September

1, 1992. The GVWR is the value specified by the manufacturer as the maximum loaded weight of the vehicle.

6:21-[9.2]**9.3** Capacity

(a) The **maximum** number of pupils [allowed] **who may be transported** in each vehicle shall be determined by the seat measurement. Fifteen inches of seat length shall be [allowed] **provided** for each pupil.

(b) (No change.)

6:21-[9.3]**9.4** Chains or snow tires

The drive wheels of the vehicle shall be equipped with tire [Chains] **chains, all weather tires,** or snow tires [shall be provided] and [must be] used for safe operation in areas of snow and/or ice.

6:21-[9.4]**9.5** Fire extinguisher

A **fully charged dry chemical** fire extinguisher [properly filled] **with a pressure guage approved by the Underwriters Laboratories, Inc.** with the minimum Underwriters rating of [B-2, C-2 (or 1/2 B.C.) must] **10 B.C. shall** be provided. **The extinguisher shall be mounted in a bracket in a convenient location.**

6:21-[9.5]**9.6** First aid kit

(a) **A removable** first aid kit **shall be provided.** [which is a] **It should be a moisture and** dust proof [metal unit] **container** without a lock, with the words FIRST AID printed on the cover. [must be provided with the] **The** contents **shall be** maintained as follows:

1. Six single unit sterile **gauze** pads, three inches x three inches;
2. Two one-inch × [ten] **10** yards **gauze** bandages;
3. One one-inch × 2½ yards adhesive **tape rolls**;
4. 12 bandaid plastic strips;
5. One triangular bandage **approximately 40 inches by 54 inches with a safety pin;** and

[6. Two paper cups;]

[7.]**6.** One **pair rounded end** scissors[;].

[8. One first aid guide book.]

6:21-[9.6]**9.7** Floor covering

A **securely attached nonskid material** floor covering [which must be a nonskid material and which is securely attached must] **shall** be provided.

6:21-[9.7]**9.8** Heater capacity

The heater [capacity must have the ability to bring] **shall be capable of bringing** the interior temperature of the vehicle up to and maintain a minimum of 50 degrees Fahrenheit.

6:21-[9.8]**9.9** Minimum emergency equipment

Minimum emergency equipment consisting of a **trunk compartment mounted** spare tire, jack, and [at least] three red [reflector] **reflectorized triangle** warning devices [must] **shall** be provided.

6:21-[9.9]**9.10** Rear-view mirrors

Approved rear-view mirrors [must] **shall** be provided inside and outside the vehicle. [The outside mirror must] **Outside mirrors shall** be mounted on [the driver's side] **both sides** of the vehicle.

6:21-[9.10]**9.11** Seats and back rests

(a) Securely fastened seats and back rests [must] **shall** be provided which are forward facing and spring or foam rubber upholstered.

(b) [(No) **A** "jump type" or folding seat [will be approved.)] **is not permitted.**

(c) The exit from any seat in the vehicle [must] **shall** be clear of all obstructions.

(d) [No] **A** vehicle [will be approved] **shall not be used** where the exit requires the folding of any seat ahead.

(e) A seat belt shall be provided for the driver and all passengers. Belts shall be properly maintained.

6:21-[9.11]**9.12** Sun visor

An adjustable sun visor [must] **shall** be provided.

6:21-9.13 Rear window

The rear window shall be nonventilating.

6:21-[9.12]**9.14** Windshield wipers

Dual windshield wipers [must] **shall** be provided.

ENVIRONMENTAL PROTECTION AND ENERGY

(a)

ENVIRONMENTAL REGULATION—LAND USE REGULATION ELEMENT

Waiver of Executive Order No. 66(1978) Freshwater Wetlands Protection Act Rules N.J.A.C. 7:7A

Take notice that Governor Jim Florio has been informed by the Department of Environmental Protection and Energy that the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A, are due to expire June 6, 1993, pursuant to Executive Order No. 66(1978). These rules implement the wetland and water protection provisions of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.

The Department of Environmental Protection and Energy initially adopted these rules on May 16, 1988, with an effective date of June 6, 1988 but operative on July 1, 1988. Subsequent to the initial promulgation, the Department amended these rules on July 3, 1989, July 17, 1989 and September 4, 1990.

On February 19, 1991, the Department proposed substantial amendments to essentially the entire chapter of rules found at N.J.A.C. 7:7A (23 N.J.R. 338(a)). Following the receipt and consideration of extensive public comments, including three public hearings on the proposal, the Department is poised to act on an adoption of this proposal. The Department also anticipates conducting further public hearings concerning these rules which, based on comments received, may require additional rulemaking amendments.

Given the active regulatory history of the wetlands rules, and having just completed substantial revisions to the chapter in this most recent rulemaking and in light of further rulemaking activity in the form of public hearings, Governor Florio has determined that the Department has met the spirit and intent of Executive Order No. 66(1978) by continually ensuring that the wetlands rules remain necessary, adequate and responsive for the purpose for which they were promulgated.

Therefore, by the authority vested in him by Executive Order No. 66(1978), Governor Florio, on February 11, 1992, directed that the five-year sunset provision of Executive Order No. 66(1978) is waived for N.J.A.C. 7:7A, and the expiration date for the rules is extended for a period from June 6, 1993 to March 16, 1997.

(b)

ENVIRONMENTAL REGULATION—LAND USE REGULATION ELEMENT

Freshwater Wetlands Protection Act Rules Projects; Hearings and Appeal on Letters of Interpretation

Proposed Amendments: N.J.A.C. 7:7A-1.4 and 2.7 Proposed New Rule: N.J.A.C. 7:7A-8.10

Authorized By: Scott A. Weiner, Commissioner, Department of Environmental Protection and Energy.
Authority: N.J.S.A. 13:9B-1 et seq. (P.L. 1987, c.156).
DEPE Docket Number: 06-92-02.
Proposal Number: PRN 1992-125.

A **public hearing** concerning these proposed amendments will be held on:

Friday, April 3, 1992 at 10:00 A.M.
Department of Transportation
Multi-Purpose Room
1035 Parkway Avenue
Trenton, New Jersey 08625

Submit written comments by April 15, 1992 to:

Sam Wolfe, Esq.
Office of Legal Affairs
401 East State Street
CN 402
Trenton, New Jersey 08625

The agency proposal follows:

Summary

On February 14, 1992, the New Jersey Department of Environmental Protection and Energy (Department) adopted amendments to its rules implementing the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq. (Act) (published elsewhere in this New Jersey Register). In response to public comments on the proposal of those amendments, the Department determined that further amendments to N.J.A.C. 7:7A were necessary. These amendments are discussed below.

N.J.A.C. 7:7A-2.7(d)1 and 2 exempt certain projects from the permit requirements of N.J.A.C. 7:7A. The exemptions are based upon an application or approval of a site plan or subdivision for the project from local authorities. To clarify the rule, the Department has determined that it is necessary to define the term "project." With regard to exemptions based on subdivision application or approval, the proposed amendments define "project" as the proposed economic development for which preliminary subdivision approval was sought or granted. The project is limited to development on portions of a tract of land that are the focus of the qualifying subdivision application or approval. Development of other portions of the parcel, or on adjacent property under common ownership, is not considered part of the "project" under this definition. The definition also describes the bases for the Department's determination of what portion of a parcel is included in the project, and provides examples of how the definition would be applied in a variety of circumstances. With regard to exemptions based on site plan applications or approvals, the proposed amendments define "project" generally as all land use activities documented on approved site plans.

Based upon advice provided by the Attorney General in Formal Opinion No. 3(1990), and Formal Opinion No. 3: Reprise (1991), the Department has also proposed amendments to N.J.A.C. 7:7A-2.7(d), to clarify which projects qualify for an exemption from permit requirements. The proposed amendments clarify the existing rules to make them consistent with the Attorney General's advice.

N.J.A.C. 7:7A-2.7(d)1 sets forth the statutory exemption for projects for which preliminary site plan or subdivision applications have received formal preliminary approvals from local authorities prior to July 1, 1988. The proposed amendments to that provision make it clear that a project is eligible for the exemption only if it has received preliminary approval of a major subdivision or site plan. Anything short of this type of approval, such as sketch plat approval, a classification determination, minor subdivision approval, minor site plan approval, or any other types of approvals referred to in the Municipal Land Use Law (for example, building permits, variances or conditional use approval) is not sufficient to make the project eligible for the exemption.

N.J.A.C. 7:7A-2.7(d)2 sets forth the statutory exemption for projects for which preliminary site plan or subdivision applications have been submitted to the local authorities prior to June 8, 1987 and subsequently approved. The proposed amendments to that provision make it clear that a project is eligible for the exemption only if the application was in fact complete before June 8, 1987. Specifically, the application for preliminary approval must have been in proper form, and must have been accompanied by all plans, data and information called for by the local land use ordinance and by statute for either a major subdivision or site plan, as the case may be. An application for sketch plat approval, classification determination, minor subdivision approval, minor site plan approval, or any of the other types of approvals referred to in the Municipal Land Use Law (for example, building permits, variances or conditional use approval) is not sufficient to make the project eligible for this exemption.

The proposed amendments to N.J.A.C. 7:7A-2.7(i) provide that the Department will not require permits or waivers otherwise required by the Act in order to complete buildings, structures or other improvements which are in "advanced stages of construction" prior to the date on which the Department assumes the permit jurisdiction exercised by the United States Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. 1251 et seq. For purposes of clarity, the proposed amendments define the term "advanced stages of construction." The term includes completion of the foundations for buildings or structures, of the subsurface improvements for roadways, or of the necessary excavation and installation of bedding materials for utility lines. The completion of site preparation work such as clearing of vegetation, bringing construction materials to the site, grading or other earth work is not sufficient to establish that "advanced stages of construction" have been reached. The definition also describes the type of documentation needed to support a finding that "advanced stages of construction" have been reached prior to the date of assumption.

Several persons commenting on the recently adopted amendments recommended that the Department provide for adjudicatory hearings to contest decisions on letters of interpretation issued under N.J.A.C. 7:7A-8. In response to these comments, the Department has proposed new rules at N.J.A.C. 7:7A-8.10 to establish a procedure for requesting such hearings.

Social Impact

The proposed revisions are intended to have a positive social impact by providing the desired clarity to the exemption provisions of the rules, and by establishing criteria to allow the completion of buildings, structures or other improvements which are already in advanced stages of construction prior to the date of assumption. In addition, the hearings and appeal provisions will provide an additional mechanism for an applicant or other affected party to resolve contested letters of interpretation.

Economic Impact

The proposed definition of "project" will have a positive economic impact on persons who are interested in pursuing an exemption from the Act. Clarifying the criteria on which an exemption is based will allow applicants to make an informed decision about whether to apply, thus saving time and money in those cases where an exemption will obviously not be granted.

The proposed definition of "advanced stages of construction" will also have a positive economic impact. While exemptions become void upon the date of assumption, this provision establishes criteria to identify those buildings, structures or other improvements that the Department will allow to be completed without requiring permits or waivers pursuant to the Act.

The Department does not expect the proposed amendments to the exemption provisions at N.J.A.C. 7:7A-2.7(d), which clarify the application requirements necessary to qualify a project for an exemption, to have any economic impact, because these amendments do nothing more than expressly state what is already implicit in the existing rules and required by the Act, consistent with the Attorney General's advice.

Finally, the proposed provision for hearings and appeal of contested letters of interpretation will have a positive economic impact because it will allow an applicant or affected party to resolve disputes regarding the jurisdiction of the Act and/or resource value classification of wetlands prior to the application for a permit or waiver.

Environmental Impact

The proposed definition of "project" and the provision for hearings and appeal on contested letters of interpretation will have no significant environmental impacts because they reflect a clarification in language and administrative procedures and are not of a substantive nature.

The proposed definition of "advanced stages of construction," and the proposed provision at N.J.A.C. 7:7A-2.7(i) which allows the completion of improvements already in "advanced stages of construction" prior to the date of assumption without requiring permits or waivers pursuant to the Act, will not result in any significant adverse impacts to the environment since the environmental impacts will have already occurred at that stage of construction.

The Department does not expect the proposed amendments to the exemption provisions at N.J.A.C. 7:7A-2.7(d), which clarify the application requirements necessary to qualify a project for an exemption, to have any environmental impact, because these amendments do nothing more than expressly state what is already implicit in the existing rules and required by the Act, consistent with the Attorney General's advice.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that of the 500 applicants for exemptions per year who are affected by the proposed amendments, approximately 450 will be small businesses as defined therein, including small developers and contractors of single family residences. The proposed clarification will better allow potential applicants to determine whether it is financially beneficial to expend time and money to submit applications for exemptions. No additional capital costs or professional services would be required.

In addition, small business will benefit from the proposed definition of "advanced stages of construction" and the proposed provision at N.J.A.C. 7:7A-2.7(i) since these provisions would allow the completion

of improvements in the "advanced stages of construction" without requiring permits or waivers pursuant to the Act.

Finally, the provision for hearings and appeals will benefit small businesses since this may allow for the resolution of contested letters of interpretation through adjudicatory hearings before expending resources on permit or waiver applications. As discussed in the economic impact statement above, the cost of proceeding through an adjudicatory hearing will vary depending upon the nature and complexity of the issues arising in the hearing, and upon the choices of the applicant or affected party in obtaining professional services to assist in the hearing.

In developing the amendments relating to exemptions, the Department is implementing the exemption provisions of the Act. As there are no additional exceptions for small businesses under the Act, the regulations do not provide any further exceptions for small businesses.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

7:7A-1.4 Definitions

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

. . .

"Advanced stages of construction" means having completed the foundations for buildings or structures, the subsurface improvements for roadways, or the necessary excavation and installation of bedding materials for utility lines. To determine whether a project or part of a project is in "advanced stages of construction," the Department shall evaluate such proofs as may be provided by the applicant, including, but not limited to, possession of a valid building permit (where legally applicable), evidence of a valid ACOE permit for those activities regulated under the 404 program, and evidence documenting completion of construction activities before the date of assumption. This evidence may include, but is not limited to, the following: documentation that the local construction official has completed the inspection listed at N.J.A.C. 5:23-2.18(b)1i(2) or 2.18(b)1i(3) for foundations of structures; reports from the municipal engineer documenting inspections of road bed construction; or billing receipts documenting the completion of the above construction activities. "Advanced stages of construction" does not include clearing vegetation, bringing construction materials to the site, site grading or other earth work associated with preparing a site for construction.

. . .

"Project" means the following:

1. For an exemption under N.J.A.C. 7:7A-2.7(d) based on the application for or the grant of preliminary site plan approval, "project" means all buildings, structures, pavements, and other improvements specifically depicted on the site plans referenced in the resolution approving the site plan.

2. For an exemption under N.J.A.C. 7:7A-2.7(d) based on the application for or the grant of preliminary subdivision approval, "project" means the proposed economic development for which preliminary subdivision was granted or sought. Although "project" is not limited to specific structures, it is limited to development on portions of a tract of land that are the focus of the qualifying subdivision application or approval. Thus, development on other lands, such as development on the remainder of a larger tract or on a contiguous property in common ownership, are not included within a "project." The "project" exempted on the basis of a preliminary subdivision application or approval, therefore, means the economic development, whether commercial, industrial or residential, intended to be constructed on that portion of a tract of land that is the focus of the qualifying approval.

In order to determine which portion of a tract was the focus of the subdivision approval or application, the Department may examine the resolution granting approval and any documentation submitted with the application, including, but not limited to, drainage, engineering, utility, landscaping, soil and environmental plans and reports as well as the subdivision plan.

The following are examples of how the Department will determine the "project" exempted on the basis of the application for or grant of preliminary subdivision approval:

i. Where a project was to be developed in three sections but a final and accepted application for preliminary approval was submitted for only one section, only the development planned for that section is exempt and the development envisioned for section 2 and 3 is not exempt. This is not altered by the fact that some depiction of that future development on the remainder of the parcel might be required by a local planning board in concept or sketch form.

ii. Where a entire parcel is subdivided into five conforming residential lots, the residential development planned on all five lots is exempt. However, where the focus of the subdivision application and approval is on less than the entire tract of land, which lesser portion is divided into five single family house lots, and the remainder of the tract is left as a bulk parcel for further subdivision or other planning board approval, only development on the five lots is exempt. It is irrelevant that the configuration of the remainder lot has been changed by the subdivision or that the remainder lot has been renumbered.

iii. As a further example, if the land to be divided for a commercial industrial park straddled two townships and the developer received approval to subdivide the land in township A and sold the unsubdivided portion in township B to another developer, only the development on the land in township A could be considered the subject of township A's subdivision approval. Therefore, only the development on the land in township A is exempt. It is irrelevant that the original developer had, from the start, contemplated a commercial industrial park for the property in both townships or that the office building contemplated on the land in township B did not require further subdivision.

iv. A final example relates to the situation where land is divided for the sole purpose of bequeathing it sometime in the future to one's children to be developed as they wish. In this example, no economic development was contemplated when the application was made or approval granted. After the land passes to the children and one of them decides to build, that development is not exempt. The purpose of the exemption is to protect that degree of investment in planning and development that the preliminary site plan or subdivision application normally represents. Where the subdivision is merely a division of land and no investment was made in planning or development, there can be no exempted project.

For all development determined to be exempt by the Department, it should be noted that once the development is constructed, the exempted "project" has been built. If, for example, the owner of a commercial building decides afterwards that it is necessary to construct an addition, and goes back to the municipal authority for a new or amended site plan or subdivision approval, the exemption has been "used up" and the addition is subject to the permitting requirements of the Act. Similarly, for residential approvals, once the houses and any accessory structures planned along with the house (for example, detached garages, barns, storage sheds, pools) are constructed, the exemption has been exhausted and any later additions or structural improvements are subject to the permitting requirements of the Act. Note that if there is an interruption of construction on an accessory structure claimed to have been planned along with the house for more than one year, that structure will be considered a later addition and will require a permit. See also N.J.A.C. 7:7A-2.7(e)1 and 2 for changes that void exemptions for projects still in the local approval process.

. . .

7:7A-2.7 Activities exempted from permit requirement

(a)-(c) (No change.)

(d) Subject to the limitations of this section, the following are exempt from the requirements of the Act until the State assumes the Federal 404 program. These activities may need Federal 404 permits and/or a WQC:

1. Projects **(as defined in N.J.A.C. 7:7A-1.4)** for which preliminary site plan or subdivision applications have received formal preliminary approvals from local authorities pursuant to the "Municipal Land Use Law," N.J.S.A. 40:55D-1 et seq., prior to July 1, 1988 provided those approvals remain valid under the Municipal Land Use Law. This excludes approvals which were given prior to the August 1, 1976 effective date of the Municipal Land Use Law. **To qualify for**

an exemption under this paragraph, a project must have received preliminary approval (as defined in N.J.S.A. 40:55D-6) of a major subdivision or site plan. Sketch plat approval, a classification determination, minor subdivision approval, minor site plan approval or any other types of approvals referred to in the Municipal Land Use Law (for example, building permits, variances or conditional use approval) is not sufficient to make the project eligible for an exemption under this paragraph;

2. Projects (as defined in N.J.A.C. 7:7A-1.4) for which preliminary site plan or subdivision applications (as [defined] the term is used in N.J.S.A. 40:55D-1 et seq.) have been submitted to the local authorities prior to June 8, 1987 and subsequently approved. If a project meets all criteria under this subsection to qualify for an exemption, except that the project has not yet received municipal approval, the Department will issue a letter certifying that the qualifying application was filed prior to June 8, 1987 and the project will receive an exemption upon receipt of preliminary approval from the municipality. To qualify for an exemption under this paragraph, an application for preliminary approval must have been in proper form, must have been accompanied by all plans, data and information called for by the local land use ordinance and by statute for either a major subdivision or site plan, as the case may be, and thus must have been in fact complete prior to June 8, 1987. An application for sketch plat approval, classification determination, minor subdivision approval, minor site plan approval, or any of the other types of approvals refered to in the Municipal Land Use Law (for example, building permits, variances or conditional use approval) is not sufficient to make the project eligible for an exemption under this paragraph;

3. (No change.)

(e)-(h) (No change.)

(i) If the USEPA's regulations providing for the delegation to the State of the Federal wetlands program conducted pursuant to section 404 of the Federal Act require a permit for any of the activities exempted by this section, the Department shall require a permit for those activities so identified by the USEPA upon assumption of the Federal program. The exemptions in (d)1 and 2 and (f) above shall be void as of the date of assumption by the Department of the Federal 404 program unless all requisite permits or concurrences with Federal permits were received from the United States Army Corps of Engineers prior to July 1, 1988 and remain valid, in which case the exemption will still be valid. Upon expiration of a permit issued pursuant to the Federal Act any application for renewal shall be made to the appropriate regulatory agency. The Department shall not require the establishment of a transition area as a condition of any renewal of a permit issued pursuant to the Federal Act prior to July 1, 1988.

1. The Department will not require a permit or waiver pursuant to the Act to allow the completion of individual buildings, structures or other improvements, which are already in "advanced stages of construction," as defined in N.J.A.C. 7:7A-1.4, prior to the date of assumption. In addition to the completion of buildings, structures or other improvements, the Department will allow the completion of their appurtenant improvements. An applicant seeking to complete improvements which are in "advanced stages of construction" prior to the date of assumption shall submit the following documentation to the Department: a valid building permit (where legally applicable), and/or a valid ACOE permit for those activities regulated under the 404 program. In addition, the applicant shall submit one or more of the following proofs: documentation that the local construction official has completed the inspection listed at N.J.A.C. 5:23-2.18(b)1i(2) or (b)1i(3) for foundations of structures; reports from the municipal engineer documenting inspections of road bed construction; billing receipts documenting the completion of the above construction activities; or any other evidence documenting construction activities prior to the date of assumption.

7:7A-8.10 Hearings and appeal

(a) An applicant or other affected party may request an adjudicatory hearing to contest a decision on a letter of interpretation pursuant to this subchapter, by complying with the procedures set forth in (b), (c) and (d) below.

(b) Before requesting an adjudicatory hearing, the applicant or other affected party shall make a good faith effort to resolve any dispute arising during the letter of interpretation process with the project review officer.

(c) If the good faith efforts provided in (b) above do not resolve the dispute, the applicant or other affected party may submit a request for an adjudicatory hearing to the Department in writing at the following address:

Office of Legal Affairs
Attention: Adjudicatory Hearing Request
Department of Environmental Protection
and Energy
CN 402
Trenton, New Jersey 08625-0402

(d) The applicant or other affected party shall submit the written request under (c) above within 30 days of the Department's decision. Failure to submit the written request within the allotted time shall operate as a waiver of any right to an adjudicatory hearing.

1. Upon receipt of such a request, the Commissioner may refer the matter to the Office of Administrative Law, which shall assign an administrative law judge to conduct a hearing on the matter in the form of a contested case hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

2. Within 45 days of receipt of the administrative law judge's decision, the Commissioner shall affirm, reject, or modify the decision.

3. The Commissioner's action shall be considered final agency action for the purposes of the Administrative Procedure Act, and shall be subject only to judicial review as provided in the Rules of Court.

HEALTH

(a)

EPIDEMIOLOGY AND COMMUNICABLE DISEASE CONTROL

Sanitation in Retail Food Establishments and Food and Beverage Vending Machines

Eggs

Community Residences for the Developmentally Disabled

Proposed Amendments: N.J.A.C. 8:24-1.3, 2.5, 3.3 and 13.2

Authorized By: Public Health Council, Louise C. Chut, Ph.D., M.P.H., Chairwoman.

Authority: N.J.S.A. 26:1A-7.

Proposal Number: PRN 1992-120.

A **public hearing** concerning this proposal will be held on:
Monday, April 13, 1992 at 1:00 P.M.
Health-Agriculture Building
Room 106
John Fitch Plaza, Trenton, N.J.

Submit written comments by April 15, 1992 to:
William N. Manley
Coordinator Health Projects
Retail Food Project
New Jersey State Department of Health
CN 364
Trenton, NJ 08625-0364

The agency proposal follows:

Summary

In order to allow an individual to choose how eggs should be prepared when ordered in a restaurant and other retail food establishments, amendments to N.J.A.C. 8:24-2.5 and 3.3 are proposed.

These amendments are put forth in response to the public's complaint that the enacted rules deny consumer choice. The proposed amendments

will exempt a restaurant or retail food establishment from certain requirements if a customer is served a raw, undercooked or lightly cooked egg(s) following the customer's order. Eggs or egg dishes ordered by an individual to be eaten by the individual, may include, but not be limited to, fried, soft boiled, poached, sunnyside up, over easy, scrambled eggs, and Caesar salad.

The Department of Health recognizes the need for eggs to be classified as "potentially hazardous foods" and to be handled in such a manner to reduce and minimize the likelihood that eggs will cause illness. This requires that raw eggs be kept refrigerated at 45 degrees Fahrenheit or below at retail establishments (grocery stores and restaurants). When eggs are prepared for other than a consumer's individual choice, the eggs shall be cooked to the temperature of 140 degrees Fahrenheit or above and shell eggs shall only be cracked and pooled when used for immediate cooking. These precautions are based on the record of human illness caused by the bacteria, *Salmonella enteritidis* (SE). This bacteria was found to be epidemiologically linked to eating raw and lightly cooked eggs. On August 22, 1990, after years of monitoring and studying the issue, the United States Food and Drug Administration (FDA) recommended that eggs be treated as "potentially hazardous foods". This conclusion was made after the United States Department of Agriculture (USDA) documented that egg contamination was occurring due to Salmonella infected hens; that poultry flock infections continue; and that current farm control measures to ensure Salmonella-free eggs are not effective.

The Department of Human Services requested that Community Residences for the Developmentally Disabled and Mentally Ill licensed under N.J.S.A. 30:11B-1 et seq. be deleted from the definition of "community residence" contained in N.J.A.C. 8:24. This request was based on the fact that Community Residences for the Developmentally Disabled and Mentally Ill are recognized as a distinct type of living arrangement under N.J.S.A. 30:11B-1 et seq. These homes are not considered to be rooming or boarding houses, nor are they residential health care facilities.

Community Residences for the Developmentally Disabled and Mentally Ill allow persons with developmental disabilities and mental illnesses to live in normal home environments. These residences, in most cases, house six or fewer persons, are the permanent domicile of persons living in them, and do not serve food to the public. Residents are assisted and trained by staff in the purchase of food stuffs and in the preparation of meals for their own consumption.

Community Residences for the Developmentally Disabled are currently regulated by N.J.A.C. 10:44A and Community Residences for the Mentally Ill are regulated by N.J.A.C. 10:39. Specific rules addressing kitchen facilities, food storage, and preparation are included in subchapter 7 and subchapter 5 respectively of those chapters.

The following summarizes the provisions of the rules which are being amended:

Under N.J.A.C. 8:24-1.3, the definition of "community residence" is being amended to remove from the purview of these rules Community Residences for the Developmentally Disabled and Mentally Ill licensed under N.J.S.A. 30:11B-1 et seq.

N.J.A.C. 8:24-2.5 is being amended by adding subsection (d) to explicitly state that raw shell eggs shall not be used as an ingredient or as a major component in the preparation of uncooked or undercooked ready-to-eat foods. This amendment will also, however, allow shell eggs to be served raw, lightly cooked, or undercooked, if so desired by the consumer, if the eggs are prepared for individual service at the time of customer order, and served immediately for consumption.

N.J.A.C. 8:24-3.3 is being amended by adding N.J.A.C. 8:24-3.3(d)4, which establishes a formal exemption of the minimum product temperature cooking requirement of 140 degrees Fahrenheit for eggs, when the eggs are prepared for individual service at the time of customer order and provided immediately for consumption, if so desired by the consumer. This will allow the consumer to be served various menu items prepared to their preference (for example, loose or runny sunnyside up, over easy, or scrambled eggs.)

N.J.A.C. 8:24-13.2 is being amended to include Community Residences for the Developmentally Disabled and Mentally Ill in the list of facilities excluded from regulation by this chapter.

Social Impact

The revisions to N.J.A.C. 8:24-2.5 and 3.3 will have a positive social impact in that they will provide greater flexibility on the part of the retail food service operator to respond to the consumers' preference of preparation of a variety of egg-containing menu items.

The Department of Human Services has requested that Community Residences for the Developmentally Disabled and Mentally Ill be excluded from the definition of Community Residence contained in N.J.A.C. 8:24. These homes are considered to be the permanent domicile of persons who live in them. Persons who receive services from the Department of Human Services are entitled by law to services in the least restrictive settings. Living in these homes is considered to be the most normalized setting for them. Placement of persons into homes located in communities has been a national trend in services to developmentally disabled or mentally ill persons for the last 15 years. This trend has greatly reduced the number of persons who live in large public institutions, and increased the number of such persons who live in normalized community settings. The exclusion of these settings from the requirements of this chapter will aid in the provision of a more homelike atmosphere.

Economic Impact

Based on recent anecdotal information provided to the Department, it has been reported that some consumers currently are opting not to order and purchase specific egg menu items since those items cannot, at present, be served raw or undercooked, even if desired by the customer. The proposed amendments will now provide the retail food service operator with greater flexibility to respond to the issue of consumer choice, under certain conditions, which is presumed to have a beneficial economic impact on the retail food and egg distribution industries in this State.

The exclusion of Community Residences for the Developmentally Disabled and Mentally Ill will avoid duplication of regulatory inspections by two State agencies and local health departments. These small homes, which are essentially private residences, in keeping with the concept of normalization, will be evaluated in accordance with rules specifically designed for these homelike settings and administered by the Department of Human Services.

Regulatory Flexibility Analysis

A large number of retail food establishments operating in the State are considered small businesses under the terms of N.J.S.A. 52:14B-16 et seq., the Regulatory Flexibility Act. The proposed rule revisions place no additional reporting and recordkeeping requirements and relax the requirements for food preparation specific to the individual preparation and service of eggs under N.J.A.C. 8:24-3.3. The exclusion of Community Residences for the Developmentally Disabled and Mentally Ill will have a beneficial impact on the service providers, many of whom could be considered small businesses, as defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The exclusion of such residences from the requirements of this chapter makes clear to service providers that they are regulated by the Department of Human Services.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

8:24-1.3 Definitions

For the purpose of this chapter, the following words, phrases, names and terms shall have the following meanings, unless the context clearly indicates otherwise:

...

"Community residence" means any community residential facility regulated by [N.J.A.C. 10:44A, Standards for Licensed Community Residences for the Developmentally Disabled and] N.J.S.A. 55:13B-1 et seq., Rooming and Boarding House Act of 1979; provided that, shelter and food for 16 or fewer residents exclusive of the owner and his or her family and the operator and employees are provided in a family style setting; and, provided further, that food prepared or served is not offered to the public. Community Residences include, but are not limited to, licensed or regulated group homes, halfway houses, rooming houses, boarding houses, and similar residences. Licensed or regulated foster homes, skill development homes, family care homes, respite care homes, **facilities licensed under N.J.S.A. 30:11B-1 et seq., Community Residences for the Developmentally Disabled and Mentally Ill (N.J.A.C. 10:44A; 10:39)** and similar private residences are not considered community residences under this definition.

...

8:24-2.5 Eggs

(a)-(c) (No change.)

(d) Raw eggs shall not be used as an ingredient or as a major component in the preparation of uncooked or undercooked (not prepared in accordance with the cooking temperature requirement as set forth in N.J.A.C. 8:24-3.3(d)) ready-to-eat foods, except as provided for in N.J.A.C. 8:24-3.3(d)4.

8:24-3.3 Food prepration

(a)-(c) (No change.)

(d) Potentially hazardous foods requiring cooking or smoking shall be cooked to heat all parts of the food to a temperature of at least 140 degrees Fahrenheit except that:

1.-2. (No change.)

3. Rare whole roast beef shall be cooked to an internal temperature of at least 130 degrees Fahrenheit, or, if cooked in a microwave oven, to at least 145 degrees Fahrenheit. Rare beef steak shall be cooked to a temperature of 130 degrees Fahrenheit unless otherwise ordered by the immediate consumer[.]**; and**

4. Eggs prepared for individual service at the time of customer order and provided immediately for consumption may be served raw or cooked to a product temperature of less than 140 degrees Fahrenheit.

(e)-(g) (No change.)

8:24-13.2 General provisions

When, in the opinion of the Department or health authority, no imminent hazard to the public health will result, community residences and bed and breakfast establishments which do not fully meet the requirements of N.J.A.C. 8:24-2 through N.J.A.C. 8:24-7 may be permitted to operate when food preparation and service are restricted and alternatives to full compliance are provided for by the additional or modified requirements, as set forth in this subchapter. Bed and breakfast establishments serving only commercially prepared non-potentially hazardous foods are excluded from the requirements of N.J.A.C. 8:24. In addition, other private residences regulated under N.J.S.A. 55:13B-1 et seq., Rooming and Boarding House Act of 1979, such as licensed or regulated foster homes, skill development homes, family care homes, respite care homes**, and facilities licensed under N.J.S.A. 30:11B-1 et seq., Community Residences for the Developmentally Disabled and Mentally Ill,** and similar private residences, are also excluded from the requirements of N.J.A.C. 8:24. However, residential health care facilities shall fully meet the requirements of N.J.A.C. 8:24.

HUMAN SERVICES

(a)

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Manual for Hospital Services; Manual for Special Hospital Services

Reimbursement for Outpatient Laboratory Services

Publication of N.J.A.C. 10:61-3, HCFA Common Procedure Coding System (HCPCS) for Independent Laboratory Services

Proposed Amendment: N.J.A.C. 10:52-1.6 and 10:53-1.5

Authorized By: Alan J. Gibbs, Commissioner, Department of Human Services.

Authority: N.J.S.A. 30:4D-6a(2), 7, 7a, b and c; 30:4D-12.

Agency Control Number: 91-P-26.

Proposal Number: PRN 1992-15.

Submit comments by April 15, 1992 to:
Henry W. Hardy, Esq.
Administrative Practice Officer
Division of Medical Assistance
and Health Services
CN 712
Trenton, N.J. 08625

A copy of the proposed amendment is available for public review at any of the 17 Medicaid District Offices or at the 21 county welfare agencies.

The agency proposal follows:

Summary

These proposed amendments concern a change in reimbursement for most laboratory services performed in an outpatient hospital setting.

These amendments apply to acute care general hospitals, to Special Hospitals A and B including rehabilitation hospitals, and to private phychiatric hospitals. The term "hospitals" will apply to all of these facilities for purposes of this proposal.

For purposes of this proposal, the term "Independent Clinical Laboratory Services," when capitalized, refers to the body of the rules set forth in the New Jersey Administrative Code at N.J.A.C. 10:61.

The term "independent clinical laboratory services," when lower-cased, refers to those providers that actually render the laboratory services as defined in N.J.A.C. 10:61-1.2.

The term "HCPCS" refers to the Health Care Financing Administration Common Procedure Coding System which is a reimbursement methodology for certain Medicaid providers.

Under the current policy, most hospitals are reimbursed for outpatient laboratory services on a fee-for-service basis which uses the Medicare A file. This reimbursement methodology is being repealed with this proposal.

The proposed amendments would base reimbursement on the Medicaid laboratory HCPCS procedure codes as contained in the Division's Procedure Code Manual for Independent Clinical Laboratory Services. The laboratory services affected are described generally in N.J.A.C. 10:52-1.6(c)1 and 10:53-1.5 below. From a procedural standpoint, providers will continue to enter the HCPCS codes on the claim form. However, the basis of Medicaid reimbursement will now be the fee schedule associated with that currently in use for laboratory services contained in the Independent Clinical Laboratory Services Manual, codified at N.J.A.C. 10:61-3. With this rulemaking, the Division is reproducing the HCPCS codes at N.J.A.C. 10:61-3, with no changes being made to the currently used fee schedule. Previously, the HCPCS codes had been referenced, but not reproduced, at N.J.A.C. 10:61-3. The proposed reimbursement methodology means that hospitals will be reimbursed for outpatient laboratory procedures according to the provisions set forth in N.J.A.C. 10:61-3.

There are some procedural changes associated with N.J.A.C. 10:52-1.6. The sentence in N.J.A.C. 10:52-1.6(c) which states, "If the hospital charge is less than the fee allowance, reimbursement shall be based upon the actual billed charge," is modified to state, "If the hospital charge is less than the amount in the fee schedule, reimbursement shall be based upon the actual billed charge."

There are certain HCPCS laboratory procedure codes that are subject to the cost-to-charge ratio and are listed as exceptions to the general reimbursement policy. These exceptions are already set forth in the Hospital Services Manual at N.J.A.C. 10:52-1.6(c)2. There is no change in this policy associated with the amendments. There is one minor textual change being added for clarification. The phrase that reimbursement is based on actual billed charges which are subject to the cost-to-charge ratio is more descriptive of the existing Medicaid reimbursement policy.

Also, it was necessary to delete N.J.A.C. 12:52-1.6(c)2i and recodify subparagraphs (c)2i and ii and iii as (c)2iii, respectively. This recodification is necessary because the Medicare Laboratory HCPCS Procedure Code File is no longer the basis of reimbursement for hospital outpatient laboratory services.

There are also some changes in N.J.A.C. 10:53 which appear to be substantive because they are being introduced for codification into the Special Hospital Services Manual at this time. The intent is to make the text of N.J.A.C. 10:52-1.6 and N.J.A.C. 10:53-1.5 synonymous wherever possible. For example, the text for the reimbursement methodology for specimen collection, automated multi-channel laboratory testing, and the exception for certain laboratory procedures that are subject to the cost-to-charge ratio appears in boldface because these provisions did not appear in the Special Hospital Manual. However, the actual reimbursement methodology is not being affected by the proposed amendments.

Social Impact

The proposed amendments will have a minimal social impact because the rules' primary impact is economic. Recipients are not required to

pay for these services. Recipients should continue to receive all medically necessary services, including hospital outpatient laboratory services, because the hospital will continue to be paid but at a different rate.

These amendments impact upon hospitals that perform medically necessary laboratory tests to diagnose or treat patients. The laboratory tests affected by these rules are certain tests billed through the outpatient department. Laboratory tests billed for hospital inpatients will be covered under the appropriate hospital reimbursement methodology.

The proposed amendments have no impact upon independent clinical laboratories.

Economic Impact

The Division will not incur additional administrative costs due to these amendments, because the existing file can be converted.

There are no costs to the Medicaid recipient for hospital outpatient laboratory services.

Hospitals will experience a reduction in reimbursement due to the change in the fee schedule when the conversion takes place from the Medicare A status file to the Medicaid laboratory/pathology fee schedule. Those laboratory procedures that are affected by this change will result in a lower payment to providers. Procedures, such as blood products and pathology, which are not reimbursed using the Medicare Fee Schedule are not affected by these amendments. These procedures are listed at N.J.A.C. 10:52-1.6(c)2 and at proposed N.J.A.C. 10:53-1.5(c). In addition, there is no change in reimbursement for laboratory services in conjunction with an inpatient admission. Hospitals will continue to be reimbursed for inpatient laboratory services under the existing methodology. The amendments do not apply to government psychiatric hospitals.

In general, the fees associated with the Medicare A status file are 20 percent higher than the fees associated with the Medicaid laboratory/pathology fee schedule. However, there are variations depending on the mix of laboratory services that could cause Medicaid reimbursement to an individual provider to be equal to, or less than, the 20 percent figure.

The Division does not currently have an estimate of an aggregate increase or decrease in annual expenditures because there is no current data on the mix of laboratory services which will be reimbursed under the proposed fee schedule.

The proposed amendments do not affect independent clinical laboratories.

The reimbursement schedule for independent clinical laboratories and hospital outpatient laboratory services will not be the same.

Regulatory Flexibility Analysis

The proposed amendments impact upon hospitals, the majority of whom would not be considered small businesses under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., because they employ more than 100 people. In the event there is a hospital that would qualify as a small business, this analysis is undertaken. The proposed amendments apply equally to all hospitals, regardless of size. Hospitals are required to maintain individual records to fully disclose the name of the recipient to whom the service was rendered, the date of service, the nature and extent of service, etc. (see N.J.S.A. 30:4D-12). Aside from the Medicaid statutory requirement, hospitals must maintain records of laboratory tests and results to insure that appropriate diagnostic information about the patient's condition is available to physicians and to hospital staff treating the patient. The types of professional services needed to comply are health care professionals who are qualified to perform laboratory testing. The proposed amendments impose no new reporting, recordkeeping, and/or other compliance requirements. There are already existing requirements imposed upon hospitals by either the Medicaid program and/or the New Jersey Department of Health.

There are no capital costs associated with this proposal.

From a recordkeeping or compliance standpoint, the amendments minimize any adverse economic impact by not imposing any additional requirements pertaining to reporting, collecting data, staffing, equipment, etc. The economic consequence of the amendments, as discussed in the Economic Impact above, is the change in fee schedule.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

10:52-1.6 Outpatient hospital services—basis of payment

(a) (No change.)

(b) The New Jersey Medicaid Program [shall reimburse] **reimburses** providers for covered services in a hospital outpatient department consistent with the following conditions and reimbursement methodology:

1. Establishment of a final rate of reimbursement: The final rate of reimbursement [shall be] **is** based on the lower of cost or charges as defined by Medicare principles of reimbursement at 42 CFR 447.321;

2. Establishment of an interim rate of reimbursement: The charge for an outpatient service [shall be] **is** subject to a reduction based on the application of a cost-to-charge ratio determined for each individual hospital by the New Jersey Medicaid Program, in accordance with Medicare principles of reimbursement at 42 CFR 447.321. This cost-to-charge ratio [shall be] **is** used to assure that reimbursement for outpatient services does not exceed the lower of cost or charges.

3. (No change.)

(c) Certain outpatient services, that is, most laboratory services, **all** renal dialysis services, **all** dental services, **some** HealthStart services, and the Medicare deductible and coinsurance amounts, [shall be] **are** excluded from a reduction based on the cost-to-charge reimbursement methodology and [shall] have their own reimbursement methodology as follows:

1. [Outpatient] **Most outpatient** laboratory services [shall be] **are** reimbursed on the basis of a fee-for-service using the [HCPCS] [(]Health Care Financing Administration Common Procedure Coding System[)] **(HCPCS)** procedure codes and [fee schedule contained in the Medicare A File (Medicare Laboratory HCPCS Procedure Code File (see 42 U.S.C. Sec. 13951)] **the Medicaid Laboratory/Pathology Maximum Fee Allowance Schedule at N.J.A.C. 10:61-3.** If the hospital charge is less than the [fee allowance] **amount on the fee schedule**, reimbursement [shall be] **is** based upon the actual billed charge. In addition, there are situations which have unique billing arrangements, as follows:

i. Specimen collection, that is, a routine venipuncture for collection of specimen(s) or a catheterization for collection of urine specimen(s) [(multiple) patients, shall be] **is** reimbursed at a fixed rate or at the amount of the hospital charge (whichever is less) per specimen type, per **patient** encounter, regardless of the number of **patient** encounters per day;

ii. Automated, Multi-Channel Laboratory Tests [shall be] **are** grouped. Multi-channel grouping may start with two tests. Hospitals shall group the individual test codes into one multichannel group and bill the group code only. A laboratory test that cannot be grouped into a multi-channel group code shall be billed using the HCPCS codes assigned for that laboratory test. Laboratory test codes that are billed separately but should be billed as a multi-channel group code, [will be] **are** combined into the appropriate multi-channel group code during claims processing and [shall be] **are** reimbursed accordingly.

2. [Outpatient laboratory services generally are not subject to cost-to-charge ratio. There are certain] **Some outpatient** laboratory **services which use laboratory** HCPCS procedure codes **that are reimbursed based on actual billed charges,** [which] are subject to the cost-to-charge ratio. These include procedure codes such as:

[i. Those HCPCS procedure codes valid for Medicaid reimbursement but not listed in the Medicare Laboratory HCPCS Procedure Code File (see 42 U.S.C. Section 1395L):]

[ii.]**i.** [Those] **For those** HCPCS codes submitted for payment on the same claim with charges for blood products (if no blood product is provided and/or billed for on the same claim, the codes are reimbursed according to the fee allowance schedule); and

[iii.]**ii.** [Some] **For some** codes associated with other laboratory services, such as, for organ or disease oriented panels; clinical pathology consultations; unlisted chemistry or toxicology procedures; certain bone marrow testing; certain specific or unlisted hematology procedures; certain immunology testing; unlisted microbiology procedures; and certain procedures under anatomic pathology.

3. [Renal] **All renal** dialysis services for end-stage renal disease (ESRD), as follows:

i. Reimbursement [shall be made] **is** at 100 percent of the Medicare composite rate and [shall include] **includes** any add-on charge to the composite rate approved by Medicare.

(1) Renal dialysis services provided on an emergency basis in a hospital center not approved to provide renal dialysis services for ESRD [shall be] **are** reimbursed actual billed charges, subject to the cost-to-charge ratio.

4. [Dental] **All dental** services [shall be] **are** reimbursed in accordance with the New Jersey Medicaid Program Dental Fee Schedule. This fee-for-service schedule [shall be] is consistent with the New Jersey Medicaid Program fees paid to the private practitioners and independent dental clinics. (For policies and procedures for dental services, see the Manual for Dental Services, N.J.A.C. 10:56.)

5. **All** HealthStart Maternity Health Support Services and HealthStart Pediatric Continuity of Care [shall be] **are** reimbursed on a fee-for-service basis in the hospital outpatient department.

i. All other HealthStart Maternity Medical Care Services and all other HealthStart Pediatric Care Services [shall be] **are** reimbursed based on the cost-to-charge ratio. (For policies and procedures for HealthStart Services, see Administration, N.J.A.C. 10:49-3.)

6. [The] **All** deductible and coinsurance amounts for Medicare/Medicaid crossover claims [shall not be] **are not** subject to the cost-to-charge ratio.

10:53-1.5 [Outpatient] **Special (Classification A and B) and private psychiatric outpatient** hospital services; general provisions and basis of payment

[(a) Outpatient hospital services in special hospitals are:

1. Those preventive, diagnostic, therapeutic, rehabilitative, or palliative items or services furnished to an outpatient by or under the direction of a physician or dentist licensed pursuant to the law of the State of New Jersey (See paragraph 2 below) in an approved special hospital outpatient department.]

(a) Special (Classification A and B) and private psychiatric outpatient hospital services are:

1. Those preventive, diagnostic, therapeutic, rehabilitative or palliative items or services furnished to an outpatient by or under the direction of a physician or dentist licensed pursuant to the laws of the State of New Jersey.

2.-3. (No change.)

(b) The New Jersey Medicaid Program reimburses providers for covered services in a hospital outpatient department consistent with the following conditions and reimbursement methodology:

1. The final rate of reimbursement is based on the lower of cost or charges as defined by Medicare principles of reimbursement at 42 CFR 447.321;

2. The charge for an outpatient service is subject to a reduction based on the application of a cost-to-charge ratio determined for each individual hospital by the New Jersey Medicaid Program, in accordance with Medicare principles of reimbursement at 42 CFR 447.321. This cost-to-charge ratio is used to assure that reimbursement for outpatient services does not exceed the lower of cost or charges.

(c) Certain outpatient services, that is most laboratory services, all renal dialysis services, all dental services, some HealthStart services, and the Medicare deductible and coinsurance amounts, are excluded from a reduction based on the cost-to-charge reimbursement methodology and have their own reimbursement methodology as follows:

1. Most outpatient laboratory services are reimbursed on the basis of a fee-for-service using the Health Care Financing Administration Common Procedure Coding System (HCPCS) procedure codes and the Medicaid Laboratory/Pathology Maximum Fee Allowance Schedule at N.J.A.C. 10:61-3. If the hospital charge is less than the amount on the fee schedule, reimbursement is based upon the actual billed charge. In addition, there are situations which have unique billing arrangements, as follows:

i. Specimen collection, that is, a routine venipuncture for collection of specimen(s) or a catheterization for collection of urine specimen(s), is reimbursed at a fixed rate or at the amount of the hospital charge (whichever is less) per specimen type, per patient encounter, regardless of the number of patient encounters per day;

ii. Automated, multi-channel laboratory tests are grouped. Multi-channel grouping may start with two tests. Hospitals shall group the individual test codes into one multi-channel group and bill the group code only. A laboratory test that cannot be grouped into a multi-channel group code, shall be billed using the HCPCS code assigned for that laboratory test. Laboratory test codes that are billed separately but should be billed as a multi-channel group code, are combined into the appropriate multi-channel group code during claims processing and are reimbursed accordingly.

2. Some outpatient laboratory services which use HCPCS procedure codes, that are reimbursed based on actual billed charges, are subject to the cost-to-charge ratio. These include procedure codes such as:

i. Those HCPCS codes submitted for payment on the same claim with charges for blood products (if no blood product is provided and/or billed for on the same claim, the codes are reimbursed according to the fee allowance schedule); and

ii. Some codes associated with other laboratory services, such as, for organ or disease oriented panels; clinical pathology consultations; unlisted chemistry or toxicology procedures; certain bone marrow testing; certain specific or unlisted hematology procedures; certain immunology testing; unlisted microbiology procedures; and certain procedures under anatomic pathology.

3. All deductible and coinsurance amounts for Medicare/Medicaid crossover claims are not subject to the cost-to-charge ratio.

SUBCHAPTER 3. HCFA COMMON PROCEDURE CODING SYSTEM (HCPCS)

10:61-3.1 Introduction

(a) The New Jersey Medicaid Program utilizes the Health Care Financing Administration's (HCFA) Common Procedure Coding System (HCPCS). HCPCS follows the American Medical Association's Physicians' Current Procedural Terminology—4th Edition (CPT-4) architecture, employing a five-position code and as many as two 2-position modifiers. Unlike the CPT-4 numeric design, the HCFA assigned codes and modifiers contain alphabetic characters. HCPCS was developed as a three-level coding system.

1. Level I Codes (narratives found in CPT-4): These codes are adapted from CPT-4 for utilization primarily by Physicians, Podiatrists, Optometrists, Certified Nurse-Midwives, Independent Clinics and Independent Laboratories. CPT-4 is a listing of descriptive terms and numeric identifying codes and modifiers for reporting medical services and procedures performed by physicians. Copyright restrictions make it impossible to print excerpts from CPT-4 procedure narratives for Level I codes. Thus, in order to determine those narratives it is necessary to refer to CPT-4, which is incorporated herein by reference, as amended and supplemented.

2. Level II Codes (narratives found at N.J.A.C. 10:61-3.3): These codes are assigned by HCFA for physicians and non-physician services which are not in CPT-4.

3. Level III Codes (narratives found at N.J.A.C. 10:61-3.3): These codes are assigned by the Division to be used for those services not identified by CPT-4 codes or HCFA-assigned codes. Level III codes identify services unique to New Jersey.

(b) The responsibility of the provider when rendering specific services and requesting reimbursement is listed in both subchapter 1 and subchapter 2 of the Independent Laboratory Services Manual, N.J.A.C. 10:61.

(c) Regarding specific elements of HCPCS codes which requires attention of provider, the lists of HCPCS code numbers for Pathology and Laboratory are arranged in tabular form with specific information for a code given under columns with titles such as: "IND", "HCPCS CODE", "MOD", "DESCRIPTION", and "MAXIMUM FEE ALLOWANCE". The information given under each column is summarized below:

COLUMN TITLE	DESCRIPTION
IND	(Indicator-Qualifier) Lists alphabetic symbols used to refer provider to information concerning the New Jersey Medicaid Porgram's qualifications and requirements when a procedure or services code is used.

Explanation of indicators and qualifiers used in this column are given below:

"A" preceding any procedure code indicates that these tests can be and are frequently done as groups and combinations (profiles) on automated equipment.

"L" preceding any procedure code indicates that the complete narrative for the code is located in the Appendix A of this Pathology and Laboratory section.

"M" preceding any procedure code indicates that this service is a medical necessity procedure. Refer to Appendix D of this Pathology and Laboratory section.

"N" preceding any procedure code indicates that qualifiers are applicable to that code. These qualifiers are listed by procedure code number in Appendix B of this Pathology and Laboratory section.

HCPCS CODE — Lists the HCPCS procedure code numbers.

MOD — Lists alphabetic and numeric symbols. Services and procedures may be modified under certain circumstances. When applicable, the modifying circumstance should be identified by the addition of alphabetic and/or numeric characters at the end of the code. The New Jersey Medicaid Program's recognized modifier codes are listed at N.J.A.C. 10:61-3.5.

DESCRIPTION — Lists the code narrative. (Narratives for Level I codes are found in CPT-4. Narratives for Level II and Level III codes are found at N.J.A.C. 10:61-3.3).

MAXIMUM FEE ALLOWANCE — Lists New Jersey Medicaid Program's maximum reimbursement schedule for Pathology and Laboratory services. If the symbols "B.R." (By Report) are listed instead of a dollar amount, it means that additional information will be required in order to properly evaluate the service. Attach a copy of the report to the MC-13A C2 claim form.

1. The fee listed under "Office Total Fee(s)" represents the combined technical and professional component of the reimbursement for the procedure code notwithstanding any statement to the contrary in the narrative. It will be paid only to one provider and will not be broken down into its component parts.

2. The fee schedule for all diagnostic Medical, Radiology and Pathology services performed in a hospital setting is indicated in the "Prof. Comp." and represents the professional component for those hospital based physicians whose contract is based on fee-for-service.

(d) Regarding alphabetic and numeric symbols under "IND" and "MOD", these symbols when listed under the "IND" and "MOD" columns are elements of the HCPCS coding system used as qualifiers or indicators (as in the "IND" column) and as modifiers (as in the "MOD" column). They assist the physician in determining the appropriate procedure codes to be used, the area to be covered, the minimum requirements needed, and any additional parameters required for reimbursement purposes.

1. These symbols and/or letters must not be ignored because in certain instances requirements are created in addition to the narrative which accompanies the CPT/HCPCS code as written in CPT-4. The provider will then be liable for the additional requirements and not just the CPT/HCPCS code narrative. These requirements must be fulfilled in order to receive reimbursement.

2. If there is no identifying symbol listed, the CPT/HCPCS code narrative prevails.

10:61-3.2 HCPCS code numbers and maximum fee schedules; pathology/laboratory (CPT-4)

			MAXIMUM FEE ALLOWANCE		
IND	HCPCS CODE	MOD	OFFICE TOTAL FEE	$	PROF. COMP.
>N	80002		5.00		
>N	80003		6.20		
>N	80004		6.20		
>N	80005		6.20		
>N	80006		6.20		
N	80007		7.50		
N	80008		7.50		
N	80009		7.50		
N	80010		7.50		
N	80011		7.50		
N	80012		7.50		
N	80016		7.50		
N	80018		11.00		
N	80019		11.00		
	80031		4.50		
	80032		4.50		
	80033		4.50		
	80052		3.00		
N	80055		15.00		
N	80055	22	19.00		
N	80055	52	10.00		
>N	80059		30.00		
	80061		15.00		
	80061	22	23.00		
N	80070		12.00		
N	80072		12.00		
>	80090		28.80		
N	81000		1.20		
	81010		1.20		
	81030		3.00		
N	82011		3.90		
	82024		30.00		
	82030		34.00		
>	82035		24.00		
A	82040		1.80		
	82055		4.50		
	82060		4.50		
	82065		4.50		
	82070		4.50		
	82087		40.00		
	82088		40.00		
	82089		40.00		
	82112		12.60		
	82137		15.00		
	82138		15.00		
	82140		6.00		
	82141		6.00		
	82143		4.20		
	82145		12.00		
	82150		4.50		
	82155		4.50		
	82156		2.40		
>	82157		29.00		
>	82163		21.00		
>N	82173		11.20		
	82175		7.20		
	82180		3.60		
	82205		12.00		
	82210		12.00		
A	82250		3.00		
A	82251		4.50		
	82265		3.00		
	82270		1.20		
>	82273		3.70		
	82290		3.00		
	82291		3.00		
	82308		34.00		
A	82310		3.00		

IND	HCPCS CODE	MOD	MAXIMUM FEE ALLOWANCE OFFICE TOTAL FEE	$	PROF. COMP.
	82315		3.00		
	82320		3.00		
	82335		.90		
	82340		3.60		
N	82365		9.00		
N	82370		9.00		
A	82374		3.30		
	82375		6.00		
	82380		6.00		
	82382		12.00		
	82383		12.00		
	82384		18.00		
	82390		6.00		
A	82435		3.00		
	82436		3.00		
>N	82437		2.60		
	82438		3.00		
A	82465		3.00		
	82470		7.00		
	82480		4.50		
>	82486		4.40		
	82525		9.00		
	82526		9.00		
	82533		17.00		
	82534		17.00		
	82540		3.00		
	82545		3.00		
	82546		3.00		
A	82550		4.80		
>	82552		7.80		
	82555		4.80		
A	82565		3.00		
	82570		3.00		
	82575		4.50		
	82595		1.50		
	82607		15.00		
	82608		15.00		
>	82626		37.00		
	82628		15.00		
>	82633		48.00		
	82634		39.00		
	82640		15.00		
	82641		15.00		
	82643		15.00		
	82656		15.00		
	82660		9.00		
	82670		25.00		
>	82671		41.00		
	82672		25.00		
	82673		10.20		
>	82674		17.50		
	82676		10.20		
>	82677		28.00		
>	82678		30.00		
>	82679		25.00		
	82705		.60		
	82710		7.80		
	82715		7.80		
	82728		16.00		
	82730		5.70		
	82746		16.00		
	82785		16.00		
	82791		6.00		
	82792		6.00		
	82793		6.00		
	82800		5.20		
	82801		3.30		
	82926		6.00		
	82931		6.00		
	82941		16.00		
>	82943		23.00		
N	82946		13.00		
A	82947		3.00		
	82949		.60		
	82954		1.50		
	82955		6.00		
A	82977		4.80		
	82985		6.60		
	82995		1.80		
	82996		3.00		
	82998		18.00		
	83001		17.00		
	83002		17.00		
	83003		16.00		
	83004		16.00		
>	83008		27.00		
	83010		12.00		
	83011		12.00		
	83012		12.00		
	83015		10.20		
	83020		6.00		
	83036		6.60		
	83040		3.00		
	83050		3.00		
N	83051		1.20		
>	83052		1.80		
>N	83053		1.80		
	83060		3.00		
	83093		3.00		
	83094		3.00		
	83095		3.00		
	83150		12.00		
	83491		12.60		
	83493		12.60		
	83494		12.60		
	83495		12.60		
	83496		12.60		
	83497		6.00		
>	83498		30.50		
>	83499		30.50		
	83523		15.00		
	83525		12.00		
N	83526		10.00		
	83530		6.00		
A	83540		4.50		
	83545		4.50		
A	83550		7.20		
	83555		7.20		
	83570		6.00		
	83571		6.00		
	83578		12.60		
	83582		6.00		
	83583		12.00		
	83586		7.50		
	83587		15.00		
	83589		7.50		
>	83590		9.40		
	83593		6.00		
>	83597		9.40		
	83610		4.20		
A	83615		4.20		
	83620		4.20		
	83625		9.00		
	83626		9.00		
	83629		4.20		
	83631		4.20		

IND	HCPCS CODE	MOD	MAXIMUM FEE ALLOWANCE OFFICE TOTAL FEE	$	PROF. COMP.
	83632		16.00		
	83645		3.00		
	83650		3.00		
	83655		9.00		
	83660		9.00		
	83661		10.50		
	83670		2.10		
	83675		2.10		
	83680		2.10		
	83690		4.50		
A	83700		3.00		
	83715		7.50		
	83718		8.00		
	83720		10.00		
	83725		9.00		
	83727		17.00		
	83735		4.50		
	83740		4.50		
	83755		4.50		
	83760		4.50		
	83795		.90		
	83825		8.40		
	83830		8.40		
	83835		10.20		
	83840		4.50		
	83915		6.00		
	83970		54.00		
	83971		12.60		
	84005		3.00		
	84030		6.00		
	84031		6.00		
>	84045		19.00		
A	84060		3.60		
	84065		3.60		
A	84075		3.60		
	84078		3.60		
	84080		3.60		
	84090		3.00		
A	84100		3.00		
	84105		3.00		
	84106		1.80		
	84110		7.50		
	84118		3.00		
	84119		3.00		
	84120		7.50		
	84121		7.50		
A	84132		3.90		
	84133		3.90		
	84135		12.00		
	84136		12.00		
	84138		12.00		
	84139		12.00		
	84142		15.00		
	84144		20.00		
	84146		20.00		
A	84155		1.80		
	84160		1.80		
	84165		6.00		
A	84170		6.00		
	84180		2.40		
	84185		.60		
	84190		7.50		
	84200		7.50		
>	84202		10.40		
	84203		3.00		
	84205		15.00		
	84230		15.00		
	84233		16.00		
	84234		20.00		
	84244		25.00		
	84246		25.00		
A	84295		3.90		
	84300		3.90		
M	84317		.60		
	84403		32.00		
>	84405		30.00		
>	84408		15.00		
	84420		15.00		
	84430		3.60		
	84435		6.00		
	84436		6.00		
	84437		6.00		
>	84439		10.00		
	84442		12.00		
	84443		25.00		
A	84450		3.00		
	84455		3.00		
A	84460		3.00		
	84465		3.00		
A	84478		8.30		
	84479		6.00		
	84480		15.00		
	84481		15.00		
	84485		3.30		
	84488		3.30		
	84490		3.30		
A	84520		3.00		
	84525		3.00		
	84540		3.00		
	84545		6.00		
A	84550		3.00		
	84555		3.00		
	84560		3.00		
	84577		6.00		
	84580		2.10		
	84583		2.10		
	84585		12.00		
	84590		6.00		
	84605		3.60		
	84610		3.60		
	84695		12.60		
>	84701		15.00		
	84800		25.00		
	84810		12.60		
	85000		1.20		
	85002		1.20		
	85005		3.00		
N	85007		2.40		
N	85009		1.20		
	85012		1.80		
N	85014		1.50		
N	85018		1.20		
	85021		1.80		
>	85022		3.00		
>	85027		4.80		
>	85028		4.80		
>N	85028	22	8.40		
N	85031		3.00		
N	85041		1.20		
	85044		1.80		
N	85048		1.20		
>	85060		8.00		8.00
>	85095		24.00		24.00
>	85097		24.00		24.00
>	85100		53.00		48.00
>	85101		29.00		24.00

IND	HCPCS CODE	MOD	MAXIMUM FEE ALLOWANCE OFFICE TOTAL FEE	$	PROF. COMP.
>	85102		24.00		24.00
>	85103		29.00		24.00
>	85105		24.00		24.00
	85150		1.80		
	85170		.60		
	85171		.60		
	85210		3.00		
	85345		1.80		
	85347		3.00		
	85348		1.20		
	85362		3.00		
	85363		3.00		
	85364		8.40		
	85376		5.70		
	85377		5.70		
	85544		6.00		
	85555		4.80		
	85557		4.80		
>	85560		3.00		
	85575		1.80		
	85577		1.80		
	85580		1.80		
	85590		1.80		
	85595		1.80		
	85610		3.00		
	85614		3.00		
	85615		4.50		
	85650		1.50		
	85651		1.50		
	85660		1.80		
	85700		9.00		
	85730		3.00		
	85732		3.00		
	86000		.90		
	86002		1.80		
	86004		1.80		
	86006		2.70		
	86008		6.00		
	86009		3.00		
	86017		4.20		
	86024		3.00		
	86028		3.00		
	86031		3.00		
	86032		3.00		
	86033		3.00		
	86038		7.80		
	86060		3.60		
	86063		1.20		
	86064		7.80		
	86067		7.80		
	86068		4.50		
>	86077		25.00		25.00
>	86078		17.00		17.00
>	86079		17.00		17.00
	86080		1.80		
	86082		1.80		
	86090		1.80		
	86095		1.80		
	86100		1.80		
	86105		1.80		
	86115		1.80		
	86120		3.00		
	86140		3.00		
N	86151		22.40		
	86162		15.60		
	86163		7.80		
	86164		9.00		
	86171		4.50		

IND	HCPCS CODE	MOD	MAXIMUM FEE ALLOWANCE OFFICE TOTAL FEE	$	PROF. COMP.
	86225		13.00		
	86244		10.20		
	86255		7.80		
	86256		9.00		
	86277		16.00		
	86280		5.40		
	86281		3.00		
>	86285		7.50		
	86286		10.00		
	86287		10.00		
>	86288		12.00		
>	86289		15.00		
>	86291		15.00		
>	86293		12.00		
>	86295		12.00		
>	86296		10.00		
>	86298		12.00		
>	86299		12.00		
	86300		3.00		
	86305		4.50		
	86310		4.50		
>	86312		14.84		
>	86314		32.33		
	86320		10.50		
	86329		16.80		
	86335		6.00		
	86337		12.00		
	86376		6.60		
	86377		6.60		
>N	86421		20.00		
>N	86422		4.00		
	86423		16.00		
	86430		1.80		
	86490		4.00		
	86510		4.00		
	86540		4.00		
>	86580		4.00		
	86585		4.00		
A	86592		1.50		
	86593		3.00		
	86594		6.00		
	86595		6.00		
	86600		7.80		
	86650		12.00		
	86660		12.00		
	86662		12.00		
>	86800		13.00		
	86812		12.60		
	86813		12.60		
	87001		9.00		
	87015		5.10		
N	87040		9.00		
N	87045		9.00		
N	87060		9.00		
N	87070		9.00		
>	87072		6.00		
>	87075		9.00		
	87076		6.00		
>	87081		10.00		
>	87082		4.00		
>	87083		4.00		
	87084		3.00		
>	87085		4.00		
	87086		3.00		
	87087		2.70		
	87088		2.70		
	87101		8.00		
	87102		8.00		

IND	HCPCS CODE	MOD	MAXIMUM FEE ALLOWANCE OFFICE TOTAL FEE	$	PROF. COMP.
	87106		8.00		
>	87109		14.00		
	87116		6.00		
	87117		9.00		
	87140		3.00		
	87143		3.00		
	87145		3.00		
	87147		3.00		
	87151		3.00		
	87155		3.00		
	87158		3.00		
	87164		6.00		
	87166		6.00		
	87177		5.10		
N	87184		9.00		
	87188		6.00		
	87190		.60		
	87205		4.20		
	87206		4.20		
	87207		3.00		
	87208		5.10		
	87210		2.40		
	87211		5.10		
	87220		2.40		
>	87250		32.00		
>	88104		12.00		7.00
>	88106		12.00		7.00
>	88107		12.00		7.00
>	88108		12.00		7.00
>	88125		7.00		7.00
>	88130		9.65		7.00
>	88140		4.20		3.00
	88150		6.00		6.00
	88151		6.00		6.00
N	88155		6.00		6.00
>	88160		7.00		7.00
>	88161		12.00		7.00
>	88162		BR		BR
>	88170		30.00		30.00
>	88171		61.00		61.00
>	88172		8.00		8.00
>	88173		25.00		25.00
>N	88260		120.00		86.00
>N	88261		120.00		86.00
>N	88262		120.00		86.00
>N	88265		85.00		41.00
>N	88267		172.00		123.00
>N	88268		172.00		60.00
>N	88270		172.00		60.00
>	88300		9.35		7.00
>	88302		21.00		15.00
>	88304		26.00		19.00
>	88305		40.00		30.00
>	88307		59.00		44.00
>	88309		89.00		66.00
>	88311		4.00		4.00
>	88312		13.00		8.00
>	88313		10.00		5.00
>	88314		12.00		7.00
>	88318		7.00		7.00
>	88319		7.00		7.00
>	88321		28.00		28.00
>	88323		33.00		33.00
>	88325		44.00		44.00
>	88329		33.00		33.00
>	88331		48.00		41.00
>	88332		15.00		15.00
>	88342		9.00		7.00
>	88346		8.00		8.00
>N	88348		BR		BR
	89050		.90		
	89051		.90		
	89105		6.00		
	89125		.60		
	89132		6.00		
	89135		6.00		
	89136		6.00		
	89141		6.00		
	89160		2.10		
	89205		1.20		
	89300		2.40		
	89310		4.80		
	89320		3.00		
M	89355		.60		
N	89360		9.00		
L N	P7001		6.00		
>L	W8010		43.75		
L N	W8200		2.00		
L N	W8205		9.00		
L N	W8210		12.00		
L A	W8215		4.00		
L	W8225		18.00		
L	W8615		7.80		
L	W8620		7.80		
L	W8621		12.60		
>L	W8622		25.00		
L	W8700		3.00		
L	W8710		3.00		
>L	W8720		15.00		
>L	W8725		30.00		
L	W8900		10.00		
L	W8920		1.80		
L	W8925		.60		

10:61-3.3 HCPCS code numbers, procedure description and maximum fee schedule; pathology/laboratory (codes and narratives not found in CPT-4)

IND	HCPCS CODE	MOD	PROCEDURE DESCRIPTION	MAXIMUM FEE ALLOWANCE
N	P7001		CULTURE, BACTERIAL, URINE; QUANTITATIVE, SENSITIVITY STUDY	6.00
>	W8010		HEPATITIS B PROFILE; HEPATITIS B SURFACE ANTIGEN; HEPATITIS B SURFACE ANTIBODY; HEPATITIS B ANTIGEN AND ANTIBODY; HEPATITIS B CORE ANTIBODY	43.75
N	W8200		GLUCOSE, SERUM (SEPARATE TUBE, GREY TOP) NOTE: SUBMITTED ON SAME CLAIM, AND PERFORMED ON SAME DATE AS CHEMISTRY PROFILES	2.00
N	W8205		3 HR. GLUCOSE TOLERANCE TEST, PER 4 SPECIMENS	9.00
N	W8210		5 HR. GLUCOSE TOLERANCE TEST, PER 6 SPECIMENS	12.00
A	W8215		T-4 (THYROXINE) BY IMMUNOASSAY (ENZYME IMMUNOASSAY) (EMIT)	4.00

	W8225	THYROXINE—BINDING GLOBULIN WITH T4 (THYROBINDING-GLOBULIN WITH T4) (RIA) (TBG AND T4)	18.00
	W8615	ANTI-DNA, ANTI-DEOXYRIBONUCLEIC ACID, (CHEMICAL METHOD, NON-RIA)	7.80
	W8620	HERPES SIMPLEX ANTIBODIES: (HERPES SIMPLEX VIRUS, I OR II)	7.80
	W8621	HERPES SIMPLEX VIRUS, I AND II	12.60
>	W8622	HERPES SIMPLEX VIRUS ISOLATION AND IDENTIFICATION, TOTAL STUDY	25.00
	W8700	YEAST SCREEN (NOT DEFINITIVE) FROM URINE, VAGINAL OR THROAT CULTURES ONLY (EG., GERM TUBE)	3.00
	W8710	TRICHOMONAS PREPARATION—SMEAR OR HANGING DROP (SMEAR NOT ELIGIBLE FOR SEPARATE REIMBURSEMENT IF PAP SMEAR DONE ON THE SAME DAY)	3.00
>	W8720	CHLAMYDIA DIRECT SPECIMEN TEST; MICROTRACK; CHLAMYDIAZIME; CHLAMYDIA A.G. DIRECT; CHLAMYDIA TITER: CHLAMYDIA CF; CHLAMYDIA ASSAYS BY IFA AND CIS; CHLAMYDIA ISOLATION; FLUORESCENT ANTIBODY FA	15.00
>	W8725	CHLAMYDIA CULTURE	30.00
	W8900	HOUSE CALL TO HOME BOUND PATIENT IN HOME OR SHELTERED BOARDING HOME FOR PURPOSE OF OBTAINING BLOOD BY VENOUS OR ARTERIAL PUNCTURE REIMBURSEMENT LIMITED TO ONCE PER TRIP REGARDLESS OF NUMBER OF PATIENTS	10.00
	W8920	VISIT TO OBTAIN BLOOD SPECIMENS BY VENOUS OR ARTERIAL PUNCTURE "FIRST PERSON IN NURSING HOME"	1.80
	W8925	EACH ADDITIONAL PERSON IN NURSING HOME	.60

10:61-3.4 Pathology and Laboratory HCPCS Codes—Qualifiers

(a) Qualifiers for pathology and laboratory services are summarized below:

1. Chemistry Automated, Multichannel Tests: Applies to CPT Codes: 80002, 80003, 80004, 80005, 80006, 80007, 80008, 80009, 80010, 80011, 80012, 80016, 80018 and 80019. The following list contains those tests which can be and are frequently performed as groups and combinations (profiles) on automated multichannel equipment: Apply this methodology to the above CPT Codes. For reporting one test, regardless of method of testing, use appropriate single test code number. For any combination of tests among those listed below use the appropriate number 80002-80019. Groups of the tests listed here are distinguished from multiple tests performed individually for immediate or "stat" reporting (for handling of specimen, see 99000 and 99001).

Albumin
Alkaline Phosphatase
Bilirubin, Total
Bilirubin, Direct
Blood Urea Nitrogen (BUN)
Calcium
Carbon Dioxide (CO_2)
Chlorides (Cl)
Cholesterol
Creatinine
Gamma Glutamyl Transpeptidase (GGTP)
Glucose (Sugar)
Iron
Lactic Dehydrogenase (LDH)
Phosphorus
Potassium (K)
Protein, Total
Sodium (NA)
Total Lipids
Transaminase, Glutamic Oxalacetic (SGOT)
Transaminase, Glutamic Pyruvic (SGPT)
Triglycerides
T4 by Immune Assay (EMIT)
Uric Acid

i. If any two of the following HCPCS procedure codes are performed on the same day by automated equipment and the total reimbursement of the two chemistry tests would have exceeded $5.00: the maximum reimbursement will not be more than $5.00; 82251, 82374, 82801, 83540, 83545, 83610, 83615, 83620, 83629, 83631, 84075, 84078, 84080, 84132, 84133, 84295, 84300, 84478, 82977, W8215.

ii. The following calculations and ratios are not eligible for separate or additional reimbursement, and, therefore, should not be included in determining the calculations alloted to the above Procedure Codes.

A/G Ratio	Globulin
BUN/Creatinine Ratio	FTI (T7)
Free Calcium	Free Thyroxine

iii. Any additional automated multichannel chemistry tests (other than those listed) performed on same date as Codes 80002, 80003, 80004, 80005, 80006, 80007, 80008, 80009, 80010, 80011, 80012, 80016, 80018 and 80019 will be reimbursed at the current allowable fee for each added test.

iv. Code (W8200)—Glucose (separate tube, gray top) performed on the same date as the following chemistry profiles 80002, 80003, 80004, 80005, 80006, 80007, 80008, 80009, 80010, 80011, 80012, 80016, 80018 and 80019 will be paid an additional $2.00.

2. Code 80072—Arthritis Panel should include as a minimum four of the following tests:

ASO Titer	
C-Reactive Protein (CRP)	Uric Acid
RA Latex	Alkaline Phosphatase
(Rheumatoid Arthritis factor)	Calcium

3. Code 80070—Thyroid Panel—T4 by RIA, plus T3 uptake, resin (T3RU) (RT3U).

i. The following calculations will be included in the fee for the Thyroid Panel:

"T7" Free Thyroxine
Index (FTI), Calculated Free Thyroxine
Index (CFT4) or Calculated Thyroxine
Iodine (T4I)

ii. T3 by uptake, resin (T3RU) is eligible for reimbursement only when done in conjunction with T4 by RIA as part of Thyroid profile.

4. Code 80055-52—Obstetric profile.

i. At least four of the following tests must be included in the profile:

Blood Group (ABO)
RH Factor
Antibody screen (Atypical Antibody Identification)
Complete Blood Count (CBC) (with or without differential)
Serology (STS, VDRL, RPR)

5. Code 80055—Obstetric profile with Rubella HI Antibody Titer.

6. Code 80055-22—Expanded Obstetric profile.

i. For reimbursement purposes the following must be included:

Blood Group (ABO)
RH Factor
Antibody screen (Atypical Antibody Identification)
Complete Blood Count (CBC) (with or without differential)
Serology (STS, VDRL, RPR)
Cytology (Pap smear)

Urinalysis
Urea Nitrogen (BUN)
Glucose
Sickle Cell with Rubella II Antibody Titer

7. Code 81000—Urinalysis.

i. Stick, dip or tablet tests done on urine are considered part of the urinalysis, and therefore, are not eligible for separate reimbursement. Microscopy is required for reimbursement.

8. Code 86151—(CEA-RIA) Carcinoembryonic Antigen.

i. "CEA is not useful to diagnose cancer. Claims are eligible for reimbursement only when CEA is used to follow treated cases of cancer (for example, gastro-intestinal, breast, lung) primary detection of recurrence, or for estimate of prognosis in certain cases." (Documentation required)

9. Code 88155—pap smear.

i. Obtaining a specimen is not a separate eligible service.

10. Cultures, Codes 87040, 87045, 87060, 87070, 87184, P7001.

i. These codes may only be billed when a pathogenic microorganism is reported. A culture that indicates no growth or normal flora must be billed as a presumptive culture.

11. Code 82173 and 82946—Glucagon Tolerance Test.

i. Total payment is not to exceed $65.00.

12. Code 83526—Insulin Tolerance Test.

i. Total payment is not to exceed $70.00 (RIA).

13. Code 85031—Complete Blood Count—CBC.

i. Components of a CBC—the maximum fee for any of the following combinations of components is $3.00. (83051, 83053, 85007, 85009, 85014, 85018, 85041, 85048).

ii. For reimbursement purposes, CBC testing is all-inclusive and covers tests performed either by automation and manually.

14. Code 82365 and 82370—Calculus (stone), Quantitative: (Infra-red spectroscopy) X-ray diffraction.

i. Reimbursement for this code is not eligible for chemical methods.

15. Code 82437 and 89360—Sweat (without iontophoresis) Test.

i. Reimbursement for this code is not eligible for qualitative tests.

16. Code 82011—Salicylates, quantitative only.

i. Reimbursement for this code is not eligible for screening (Qualitative) tests for salicylates (82012).

17. Code W8205 and W8210—Glucose Tolerance.

i. For reimbursement purposes includes all urines for sugar.

18. Code 88260, 88261 and 88262—Chromosome Analysis: Peripheral blood.

i. Rule out numerical and structural abnormalities.

ii. For Medicaid reimbursement purposes. The provider must include an average of 20 cells and two or three karyotypes analyzed, including banding.

19. Code 88265—Chromosome Analysis: Various leukemias, bone marrow and peripheral blood (includes Philadelpia Chromosome study).

i. For reimbursement purposes. The provider must include a minimum of 10 cells and two karyotypes analyzed, including banding.

20. Code 88267—Chromosome Analysis: Amniotic Fluid Cells (Prenatal Chromosome Analysis).

i. For reimbursement purposes. The provider must include 20 cells and two or three karyotypes analyzed, including banding.

21. Code 88268 and 88270—Chromosome Analysis: Tissue Biopsy, Abortuses, etc. (Documentation report required).

i. For reimbursement purposes as a minimum, the provider include 15-20 cells and two or three karyotypes analyzed, including banding.

22. Code 88280, 88285.

i. Additional karyotyping and cells counted are not reimbursable for Medicaid payment.

23. Code 80059—Hepatitis Panel: For reimbursement purposes includes:

i. Hepatitis Profile:
Hepatitis B Surface Antigen (Australian)
Hepatitis B Surface Antigen Antibody
Hepatitis B Core Antibody
Hepatitis A Antibody

24. Code 85028-22 (8630) Hemogram 22—Service Greater than Usual.

i. The definition of a complete Hemogram is: supravital morphological study of the formed elements of the blood, hematocrit, reticulocyte count, platelet count, hemoglobin, total white count, supravital differential or phase, regular differential, total red count and indicies, MCV, MCH, MCHC. A Hemogram will be reimbursed at $8.40. Providers must indicate on the claim form what components are part of their Hemogram and use the Modifier 22.

25. Code 86421 (8525) Radioallergosorbent Test (Rast); up to five Antigens.

i. For reimbursement purposes, payment for each individual Antigen is $4.00 up to the first five Antigens. List number of Antigens in the appropriate box of the claim form.

26. Code 86422 (8526) Six or more Antigens.

i. For reimbursement purposes, payment is per each additional Antigen.

27. Code 88348.

i. Not reimbursable when used as a research tool.

ii. For payment purposes, the Department will pay for the above diagnostic scanning procedure when it pertains to x-ray microanalysis for identification of asbestos particles and heavy metals, that is, gold, mercury, etc., and also when examining tissue specimens in occassional cases of malabsorption.

10:61-3.5 Pathology and Laboratory HCPS Codes—Modifiers

(a) Services and procedures may be modified under certain circumstances. When applicable, the modifying circumstance should be identified by the addition of alphabetic and/or numeric charaters at the end of the code. The New Jersey Medicaid Program's recognized modifier codes are:

MODIFIER CODE	DESCRIPTION
22	Unusual Services: When the service(s) provided is greater than that usually required for the listed procedure, it may be identified by adding modifier '22' to the usual procedure number.
52	Reduced Services: Under certain circumstances a service or procedure is partially reduced or eliminated at the physician's election. Under these circumstances the service provided can be identified by its usual procedure number and the addition of the modifier '52', signifying that the service is reduced. This provides a means of reporting reduced services without disturbing the identification of the basic service.
90	Reference (Outside) Laboratory: When laboratory procedures are performed by a party other than the treating or reporting physician, the procedure may be identified by adding the modifier '90' to the usual procedure number.

(a)

DIVISION OF ECONOMIC ASSISTANCE

General Assistance Manual

Household Size

Proposed Amendment: N.J.A.C. 10:85-3.1, 3.3 and 4.1

Authorized By: Alan J. Gibbs, Commissioner, Department of Human Services.
Authority: N.J.S.A. 44:8-111(d).
Proposal Number: PRN 1992-111.

Submit comments by April 15, 1992 to:
Marion E. Reitz, Director
Division of Economic Assistance
CN 716
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendments eliminate the concept of household size in the determination of General Assistance (GA) allowances and serve to align GA grant determination methodology with that employed in the Aid to Families with Dependent Children program. The proposed amendments recognize the fact that GA recipients who live with others may not necessarily experience a reduction in economic need due to such living arrangements. The rule as currently set forth provides for a reduction in allowance levels based on household size and serves to discourage recipients from seeking more advantageous and permanent living situations. Schedules I and II at N.J.A.C. 10:85-4.1 have been revised to eliminate the household size concept from the allowance determination process.

Social Impact

The social impact of the proposed amendments will be favorable since, with the exception of married couples and families with minor children not otherwise provided for under AFDC, GA recipients will be able to reside with other people regardless of relationship without suffering grant reductions. These amendments should allow recipients to seek permanent living arrangements more freely and forestall or reduce the incidence of homelessness and need for emergency assistance.

Economic Impact

It is estimated that the elimination of household size in the determination of GA allowance levels will have negligible fiscal impact on direct assistance expenditures. The practical application of policy in this program area has already resulted in sanctioned methodology which restricted the calculation of benefits to economic units without regard to multiple household membership, age and or relationship, except for situations involving married couples and families not otherwise entitled to AFDC.

It is anticipated that in instances where a literal interpretation was restrictively applied, the proposed amendments will not only result in a slightly increased grant level but will also minimize the incidence of homelessness which inevitably resulted in expenditures of emergency aid funds. Moreover, the elimination of the household size approach will result in a streamlining of administration by simplifying grant computation, which under existing rules is labor intensive and not a justifiable cost benefit mechanism.

Regulatory Flexibility Statement

The proposed amendments have been reviewed with regard to the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The amendments impose no reporting, recordkeeping or other compliance requirements on small businesses; therefore, a regulatory flexibility analysis is not required. The rules govern a public assistance program designed to certify eligibility for the GA program to a low-income population by a governmental agency, rather than a private business establishment.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

10:85-3.1 Persons eligible for General Assistance

(a) (No change.)

(b) Eligibility for general assistance is determined according to the number of persons applying as a unit (eligible unit) [and the number of persons with whom such person(s) lives (household size)].

1. (No change.)

[2. Household size: Household size is defined as the number of related persons living together as a family unit. It is not necessarily the same as eligible unit size. In room and board or residential treatment situations, each person is a household of one. Each roomer is a household of one. In all other situations, the household shall consist of:

i. All members of the eligible unit, and

ii. Any spouse of any member of the eligible unit when the spouse lives in the same home and has not been included in the eligible unit, and

iii. If all members of the eligible unit are under age 60, all other persons who are under age 60 who live in the same home and who are not roomers or roomer-boarders and who are related by blood or marriage to any member of the eligible unit. If any member of the eligible unit is over age 60, the household size consists only of those listed in (b)2i and 2ii above.]

[3.]**2.** (No change in text.)

(c)-(f) (No change.)

10:85-3.3 Financial eligibility

(a)-(e) (No change.)

(f) Assistance allowance standards are as follows[.]:

1. (No change.)

2. Allowance schedules: Schedules I and II at N.J.A.C. 10:85-4.1 have been established under the authority in N.J.S.A. Title 44 and give the standards, in monthly amounts, to be used as the basis for granting assistance.

i. (No change.)

[ii. The household size is defined at N.J.A.C. 10:85-3.1(b)2.]

Recodify existing iii. through vii. as **ii.** through **vi.** (No change in text.)

3. (No change.)

4. Room and board living arrangements: When an individual is purchasing a room and board living arrangement, the following shall apply:

i. (No change.)

ii. Other boarding homes: When an individual is purchasing room and board in a group facility or a boarding home (including a private home) other than a Residential Health Care Facility as in (f)4i above, or a center for treatment of drug or alcohol abuse as in (f)4iv below, the total monthly allowance shall be the amount for a single individual [in a household of one] as given in Schedule I or Schedule II, as appropriate, less any countable income.

(1) (No change.)

[(2) A child age 18 or over of a boarding home operator may be a boarder in the home of the parent/operator if the parent/operator (or one of them if both are present) is age 60 or over. Otherwise such child shall not be considered a boarder but a member of the parent's household.]

iii.-v. (No change.)

5. (No change.)

(g) (No change.)

10:85-4.1 State and local responsibilities

(a)-(b) (No change.)

[Schedule I

Monthly Assistance Allowances

(Limited to persons determined unable to accept employment)

Number in Household	Eligible Unit 1	2
1	$210	
2	145	289
3	130	260
4	116	232
5	107	214
6	101	201
7	86	172
8	83	166
9	79	156
10	75	150
11	74	148
12	72	146
13	70	141
14	69	139
15	68	137]

[Schedule II
Monthly Assistance Allowances
(For eligible units in which at least one person is employable)

Number in Household	Number in Eligible Unit														
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1	$140														
2	97	193													
3	81	163	244												
4	70	140	210	280											
5	64	128	192	256	320										
6	60	120	180	240	300	360									
7	57	114	171	227	284	341	398								
8	55	109	164	219	273	328	382	437							
9	52	104	157	209	261	313	366	418	470						
10	50	100	151	201	251	301	351	402	452	502					
11	49	98	148	197	246	295	344	393	443	492	541				
12	48	97	145	193	241	290	338	386	434	483	531	579			
13	48	95	143	191	238	286	334	382	429	477	525	572	620		
14	47	93	140	187	233	280	326	373	420	466	513	560	606	653	
15	46	91	137	183	229	274	320	366	412	457	503	549	594	640	686

In eligible units of more than 15, add $32.00 for each additional member.]

Schedule I (All Eligible Unit Members Unemployable)	Number in Eligible Unit	Schedule II (One or more Eligible Unit Members employable)
$ 210	1	$140
289	2	193
366	3	244
420	4	280
480	5	320
540	6	360
597	7	398
655	8	437
705	9	470
753	10	502
811	11	541
868	12	579
930	13	620
979	14	653
1029	15	686
Add $48.00 Each Person	More Than 15	Add $32.00 Each Person

(c)-(d) (No change.)

TRANSPORTATION

(a)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID

Speed Limits
Highway Redesignation
Route 139 in Hudson County
Proposed Repeal and New Rule: N.J.A.C. 16:28-1.113

Authorized By: Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Authority: N.J.S.A. 27:1A-5, 27:1A-6, and 39:4-98.
Proposal Number: PRN 1992-115.

Submit comments by April 15, 1992 to:
Charles L. Meyers
Administrative Practice Officer
Department of Transportation
Bureau of Policy and Legislative Analysis
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625

The agency proposal follows:

Summary

In compliance with the provisions of Executive Order No. 66(1978) and the Department's on-going review of its rules to ascertain their necessity and usefulness, the Bureau of Policy and Legislative Analysis found duplicate speed limits along U.S. 1 Business, as depicted in N.J.A.C. 16:28-1.113 and 16:28-1.150. A review of the Department's "Straight Line Diagrams," 1990, indicated that the information provided in N.J.A.C. 16:28-1.113 pertained to Route 139, and not U.S. 1 Business, which was redesignated in 1975.

The Department therefore proposes to repeal the present text appearing in the New Jersey Administrative Code at N.J.A.C. 16:28-1.113 and promulgate a new rule identifying the county and municipality.

There are no changes proposed for the speed limit along this highway.

Social Impact

The proposed new rule will clarify and delineate the designated route to which the speed limit restrictions apply. The motoring public should be appreciative of this corrective action.

Economic Impact

There is no economic impact on the public, because this is a street redesignation for regulatory purposes only. Correct route and speed limit signs have already been erected; no additional sign costs will be borne by the Department. The Department incurs only minimal costs associated with the publication of this rule.

Regulatory Flexibility Statement

The proposed new rule does not place any reporting, recordkeeping or compliance requirements on small businesses as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed new rule still affects the motoring public and the governmental entities responsible for the enforcement of the rules.

Full text of the proposal follows (deletion shown in brackets [thus]; addition shown in boldface **thus**):

[16:28-1.113 Route U.S. 1 Business

(a) The rate of speed designated for the certain part of State highway Route U.S. 1 Business described in this section shall be and hereby is established and adopted as the maximum legal rate of speed thereat:

1. For both directions of traffic:

i. Forty-five mph from the junction of Route U.S. 1 and 9 at Tonnele Avenue to the easterly terminus of the route at Jersey Avenue (Holland Tunnel Plaza);

ii. Thirty-five mph on Underwood Place and Hoboken Avenue between Hudson County Boulevard and Palisades Avenue.]

16:28-1.113 Route 139

(a) The rate of speed designated for the certain parts of State highway Route 139 described in this subsection shall be established and adopted as the maximum legal rate of speed:

1. For both directions of traffic in Hudson County:

i. In Jersey City:

(1) 45 miles per hour from the junction of Route U.S. 1 and 9 at Tonnelle Avenue to the easterly terminus of the Route at Jersey Street (Holland Tunnel Plaza); thence

(2) 35 miles per hour on Underwood Place, Hoboken Avenue and between John F. Kennedy Boulevard and Palisades Avenue.

(a)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID

Restricted Stopping and Parking Route U.S. 206 in Mercer County

Proposed Amendment: N.J.A.C. 16:28A-1.57

Authorized By: Richard A. Dube, Director, Division of Traffic Engineering and Local Aid.

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-138.1 and 39:4-198.

Proposal Number: PRN 1992-122.

Submit comments by April 15, 1992 to:

Charles L. Meyers
Administrative Practice Officer
Department of Transportation
Bureau of Policy and Legislative Analysis
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendment will establish a "no stopping or standing" zone along Route U.S. 206 in Lawrence Township, Mercer County, for the efficient flow of traffic, the enhancement of safety, and the well-being of the populace.

Based upon a request from the local government in the interest of safety, and as part of a review of current conditions, the Department's Bureau of Traffic Engineering and Safety Programs conducted a traffic investigation. The investigation proved that the establishment of the "no stopping or standing" zone along Route U.S. 206 in Lawrence Township, Mercer County, was warranted.

The Department therefore proposes to amend N.J.A.C. 16:28A-1.57, based upon the request from the local government and the traffic investigation.

Social Impact

The proposed amendment will establish a "no stopping or standing" zone along Route U.S. 206 in Lawrence Township, Mercer County, for the efficient flow of traffic, the enhancement of safety, and the well-being of the populace. Appropriate signs will be erected to advise the motoring public.

Economic Impact

The Department and local government will incur direct and indirect costs for mileage, personnel and equipment requirements. The Department will bear the costs for the installation of "no stopping or standing" zone signs. The costs involved in the installation and procurement of signs vary, depending upon the material used, size, and method of procurement. Motorists who violate the rules will be assessed the appropriate fine in accordance with the "Statewide Violations Bureau Schedule", issued under New Jersey Court Rule 7:7-3.

Regulatory Flexibility Statement

The proposed amendment does not place any reporting, recordkeeping or compliance requirements on small businesses as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendment primarily affects the motoring public and the governmental entities responsible for the enforcement of the rules.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

16:28A-1.57 Route U.S. 206

(a) The certain parts of the State highway Route U.S. 206 described in this subsection shall be designated and established as "no stopping or standing" zones. **In accordance with the provisions of N.J.S.A. 39:4-198, proper signs must be erected:**

1.-6. (No change.)

7. No stopping or standing in Lawrence Township, Mercer County: [along the north side of Route U.S. 206 (Brunswick Circle) beginning at a point 134 feet north of the northerly curb line of Lanning Avenue and extending 50 feet north therefrom.]

i. Along both sides:

(1) For the entire length within the corporate limits, including all ramps and connections thereto, which are under the jurisdiction of the Commissioner of Transportation; except in approved designated bus stops and time limit parking areas.

8.-23. (No change.)

(b)-(c) (No change.)

(b)

DIVISION OF TRANSPORTATION ASSISTANCE

Trucks

Designated Routes for Double Trailer Truck Combinations

Proposed Amendments: N.J.A.C. 16:32-1.1, 1.2 and 1.3

Proposed Repeal and New Rule: N.J.A.C. 16:32-1.4

Authorized By: George Warrington, Deputy Commissioner, Department of Transportation.

Authority: N.J.S.A. 27:1A-5, 27:1A-6, and 39:3-84.

Proposal Number: PRN 1992-123.

Submit comments by April 15, 1992 to:

Charles L. Meyers
Administrative Practice Officer
Department of Transportation
Bureau of Policy and Legislative Analysis
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The New Jersey Department of Transportation (Department) is hereby proposing to amend N.J.A.C. 16:32, Subchapter 1, Designated Routes for Double Trailer Truck Combinations, to comply with Federal regulations as mandated by 23 CFR Part 658. This final rule, dated June 1, 1990, was promulgated by the Federal Highway Administration (FHWA), and pertains to truck size and weight and reasonable access provisions for commercial motor vehicles with lengths and widths authorized by the Surface Transportation Assistance Act of 1982 (STAA), as amended.

As of June 1, 1991, Federal regulations governing STAA Vehicles have preempted State regulations, and the access permitting process has been negated. In view of this pre-emption, the Department envisions that requests for additions to the reasonable access system will be made and has provided the process wherein action on such requests must be made within 90 days of receipt. Should the Department fail to act within this established time frame the request will be deemed approved. Additionally, the rules have been revised to meet Federal requirements.

The Department therefore proposes to amend N.J.A.C. 16:32, by revising its definition of "terminal," amending its review period criteria, eliminating the current permitting process, and allowing twin trailer access to the approved 102-inch wide standard truck network with the exclusion of the Garden State Parkway, and with a temporary provision covering the portion of Route 17 from Route 80 to the New York State line.

Social Impact

The proposed amendment is intended to minimize safety concerns related to the use of these vehicles. Additionally, these amendments will provide expanded opportunities for shippers and motor carriers by permitting double trailer truck combinations to access the approved 102-inch wide standard network, except as restricted. Ability to use this equipment will further enhance New Jersey's position as a Transportation Center.

Economic Impact

The proposed amendment and new rules will provide substantial economic benefit to shippers and motor carriers by permitting them to use double trailer combinations on a larger network. This equipment offers superior efficiency for some kinds of loads and is rapidly becoming the interstate standard for the movement of goods. The Department does not envision that these amendments and new rules will lead to any increase in highway construction and maintenance costs because existing truck weight limits are not affected and because the shippers and motor carriers most likely to use twin trailer combination equipment are those moving "light and bulky" cargo which is normally well within legal limits.

Regulatory Flexibility Analysis

The proposed amendments do not place any reporting or recordkeeping requirements on small businesses as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. They do, however, place travel and size restrictions on truckers and household goods carriers, who may be small businesses, as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. No differentiation in requirements, or exceptions, can be provided, as these requirements are imposed under Federal law and are related to public safety.

Full text of the proposal follows (additions indicated in boldface **thus;** deletions indicated in brackets [thus]):

SUBCHAPTER 1. DESIGNATED ROUTES FOR DOUBLE TRAILER TRUCK COMBINATIONS

16:32-1.1 Double trailers

(a)-(b) (No change.)

(c) [On a temporary basis only, until such time as Interstate Route 78 is open from Greenwich Township to the Pennsylvania State line, double trailer truck combinations may be operated on Route 22 from the interstate with Route 78 to the Pennsylvania State line, subject to the provisions of this chapter.] **Notwithstanding any other provision of this chapter, double-trailer truck combinations shall enter and exit this State only on those specific routes designated for double-trailer truck combinations as authorized in this section. On a temporary basis only, until such time as Interstate Route 287 is open from Montville Township in Morris County to the New York State line, double-trailer truck combinations may be operated on Route 17 from the interchange with Interstate Route 80 to the New York State line, subject to the provisions of this chapter.**

[(d) Notwithstanding any other provision of this chapter, double-trailer truck combinations shall enter and exit this State only on those specific routes designated for double-trailer truck combinations as authorized in this section.]

16:32-1.2 Width restrictions

The maximum width permitted on the routes designated in N.J.A.C. 16:32-1.1 and N.J.A.C. [16:32-1.3(g)] **16:32-1.3(b)** is 102 inches, exclusive of mirrors and other safety devices.

16:32-1.3 Reasonable access to terminals and other facilities

(a) Any person or terminal operator [who wishes to gain access] **seeking reasonable access for** double-trailer truck combinations, or [trucks wider than 96 inches but not more than 102 inches in width from the system designated in N.J.A.C. 16:32-1.1 to a terminal which is not located on that system must apply in writing for a letter of permission to the Chief, Bureau of Traffic Engineering, New Jersey Department of Transportation, 1035 Parkway Avenue, Trenton, New Jersey 08625. The application should be specific as to the exact location of the terminal and the exact route or routes of access requested.] **other STAA authorized vehicles as defined in 23 CFR Part 658.5 and 658.13, or trucks wider than 96 inches but not more than 102 inches in width, from the system designated in N.J.A.C. 16:32-1.1, may do so by utilizing the route system as designated in N.J.A.C. 16:32-3.3, excluding the Garden State Parkway.**

[(b) The determination of reasonable access and the issuance of a letter of permission for access to a terminal will be made based on an overall review of all of the criteria set forth below which are general guidelines only and are not necessarily of equal weight. Criteria number two, three and four may be relaxed where the Department has made a determination, after a physical inspection of the requested route, that the surrounding circumstances would permit safe travel by these vehicles along the proposed (or alternate) course of travel.

1. A terminal is defined as a faculty of which 80 percent of the building area is used for loading, unloading and the breaking down or storing of goods, which can be used in combination with manufacturing facilities on the same site, and shall consist of a minimum dock area to provide the capability of loading and off-loading five trailers simultaneously. For the purpose of this policy, a distribution center or a rail, water-borne, or air terminal shall be considered the same as a terminal.

2. The terminal should be located within five road miles of an exit from a route designated in N.J.A.C. 16:32-1.1 except when the surrounding circumstances otherwise permit.

3. The total travel distance on two-lane roadways from a designated route to the terminal should not exceed one road mile except when the surrounding circumstances otherwise permit. This restriction does not include travel on two-lane roadways which provide the only access to an area zoned industrial.

4. Access from a designated route to a terminal should not be through an area considered residential as defined in Title 39 of the New Jersey Statutes (N.J.S.A. 39:1.1) except when the surrounding circumstances otherwise permit.

5. Adequate off-roadway area must exist for the maneuvering of double-trailer truck combinations to provide adequate ingress and egress without backing onto or from a highway, street, road, public alley or other public thoroughfare.

6. Results of an on-site investigation, conducted by the Bureau of Traffic Engineering, of the routes which can be travelled so as to obtain access to a terminal facility for which a permit is sought. Such investigations will take into consideration items including, but not limited to:

i. Sight distance at intersections;
ii. Traffic volumes;
iii. Roadway geometrics;
iv. Roadside development or environment;
v. Accident records;
vi. The use of the route by other trucks to date;
vii. Alternate routings.

(c) The Bureau will respond to request for access within 60 days of receipt of same, unless extenuating circumstances necessitate additional time in which case the applicant will be provided notice thereof.

(d) If the Bureau determines that the requested access route or an alternate route is reasonable and prudent, it will issue a letter of permission, specifying the route of access and any other conditions of operation deemed appropriate. The letter of permission will constitute legal authority for use of the access route under the conditions specified therein and may be photographically or similarly reproduced by the applicant so that proof of permission can be kept in all vehicles utilizing the granted routes. Each permission letter will be given an identification number which will be kept on file in the Bureau of Traffic Engineering.

(e) The Department of Transportation retains the right to rescind permission for access should conditions change or should records indicate that the double-trailer truck combinations or trucks wider than 96 inches are causing specific traffic or safety problems.

(f) The Department reserves the right to restrict hours of ingress or egress to a terminal when either distance, roadway configuration, traffic volumes or other factors preclude unrestricted access or to select an alternate route to the terminal facility for which access is requested.]

1. For the purposes of these rules, a terminal is defined as any location where freight originates, terminates, or is handled in the transportation process and, when serviced by twin trailers, includes sufficient off-street area for ingress, egress, drop off or pick up and maneuvering of twin trailer combinations. Additionally, a motor carrier operating facility, a distribution center, or a rail, waterborne, or air terminal shall be considered the same as a terminal.

2. Access from a designated route to a terminal should avoid areas considered residential as defined in Title 39 of the New Jersey Statutes Annotated (N.J.S.A. 39:1-1 et seq.).

[(g)](b) A double-trailer truck combination is permitted access from the system designated in N.J.A.C. 16:32-1.1 to facilities providing food, fuel, repairs and rest, within one mile roadway distance from the designated system except upon those roads, highways, streets, public alleys or other thoroughfares which cannot safely accommodate a double-trailer truck combination and are so designated by the Department.

[1. Designation of those roads upon which travel is prohibited shall be governed by the criteria outlined in paragraph (b) of this section where applicable.

2. Double-trailer truck combinations may only utilize those facilities which provide adequate ingress and egress without the need of backing onto or from a highway, street, road, public alley or other public thoroughfare.

(h) A household goods carrier is deemed to have permission of access from the system designated in N.J.A.C. 16:32-1.1 to a point of loading or unloading. For the purpose of this provision, a "household goods carrier" is defined as a vehicle being used to transport household goods and effects to or from a private residence or to or from a place of storage.]

16:32-1.4 [Appeals process] **Reasonable access system review process.**

[(a) An applicant for an access permit under N.J.A.C. 16:32-1.3 whose request is denied in part or in whole may seek an informal review by serving a written request upon the Chief, Bureau of Traffic Engineering within 30 days of receipt of the Department of Transportation's initial determination. The request for review shall clearly state the reasons why the applicant contends the initial Bureau decision should be modified and the manner in which determination should be changed. Additional engineering data or other material relating to the safeness of the proposed route may be submitted at such time. The Bureau will respond to the request in writing within 60 days from receipt of the request and any supporting material submitted unless extenuating circumstances necessitate additional time, in which case the applicant shall be given notice of the need for the additional time.

(b) An applicant for an access permit may seek a formal hearing subsequent to exhaustion of the informal review process by providing the Commissioner of Transportation or designated official with a written appeal of the Bureau of Traffic Engineering's final determination. The appeal shall specify which determination of the Bureau of Traffic Engineering the applicant is appealing and a clear explanation of the nature of the relief sought and the reason or reasons why such relief ought to be granted. The appeal must be served upon the Commissioner or the designated official within 45 days from the date the Department of Transportation's response to the applicant's request for a review of its initial determination is received by the applicant. The Commissioner may within 45 days from receipt of the appeal schedule a date for a formal hearing if he decides to preside over the matter himself. Otherwise, the Commissioner may request that the matter be heard by the Office of Administrative Law.

(c) The procedural conduct of all such matters whether heard by the Department of Transportation or the Office of Administrative Law shall be governed by the Uniform Administrative Procedure Rules of Practice N.J.A.C. 1:1, where applicable.]

(a) The Department anticipates that from time to time requests for additions to the reasonable access system will be made. These requests will be investigated by taking into consideration items including, but not limited to:

1. Sight distance at intersections;
2. Traffic volumes;
3. Roadway geometrics;
4. Roadside development or environment;
5. Accident records;
6. The use of the route by other trucks to date;
7. Alternate routings.

Approval or denial of such requests will be issued based upon those criteria contained in N.J.A.C. 16:32-3.5.

(b) The Department will respond to requests for additions to the reasonable access system within 90 days of receipt of same. If the Department fails to respond to a request within the aforementioned 90-day period, approval for such request shall be deemed automatic.

(c) Requests should be sent to the Manager, Bureau of Traffic Engineering and Safety Programs, New Jersey Department of Transportation, CN 613, 1035 Parkway Avenue, Trenton, New Jersey 08625. They should be specific as to the exact route or routes of access being requested.

OTHER AGENCIES

(a)

NEW JERSEY TURNPIKE AUTHORITY

Limitations on Use of Turnpike

Proposed Amendment: N.J.A.C. 19:9-1.9

Authorized By: New Jersey Turnpike Authority, Donald L. Watson, Executive Director.

Authority: N.J.S.A. 27:23-1 et seq., specifically 27:23-29 and 52:24B-4(f).

Proposal Number: PRN 1992-124.

Submit comments by April 15, 1992 to:
Donald L. Watson, Executive Director
New Jersey Turnpike Authority
P.O. Box 1121
New Brunswick, New Jersey 08903

The agency proposal follows:

Summary

The proposed amendment will authorize 53-foot semitrailers to be operated on the New Jersey Turnpike, in compliance with Assembly Bill No. 3458 (SR), P.L. 1991, c.155, approved and effective April 19, 1991, which amended the provisions of N.J.S.A. 39:3-84, and in accordance with regulations promulgated by the U.S. Department of Transportation and applicable Federal laws. Federal law allows the states to permit 53-foot semitrailers on certain portions of their highways.

Social Impact

The proposed amendment will have no impact beyond addressing safety concerns related to the use of 53-foot semitrailers. The New Jersey Turnpike Authority has determined that the safety of its patrons will not be adversely affected by the use of 53-foot semitrailers.

Economic Impact

The proposed amendment will provide significant economic benefits to all shippers and motor carriers by permitting the use of 53-foot semitrailers on the New Jersey Turnpike. The New Jersey Turnpike Authority has determined that this amendment will not increase maintenance costs as long as the current maximum weight of 80,000 pounds remains the same.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required because this proposed amendment does not impose reporting, recordkeeping or other compliance requirements on small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Shippers and motor carriers of any size will benefit from this amendment, which increases the length of semitrailers permitted on the New Jersey Turnpike.

Full text of proposal follows (deletions shown in brackets [thus]; addition shown in boldface **thus**):

19:9-1.9 Limitations on use of turnpike

(a) Use of the New Jersey Turnpike and entry thereon by the following is prohibited:

1.-11. (No change.)

12. Vehicles or combinations of vehicles, including any load thereon, exceeding the following extreme overall dimensions[1] or weights:

i.-ii. (No change.)

iii. Length: semitrailer in excess of [48] **53** feet in length when in a tractor-semitrailer combination;

iv.-vi. (No change.)

13.-25. (No change.)

(b) (No change.)

[1]No private utility, house-type-semitrailer or trailer with a maximum length for a single vehicle of more than 35 feet, a maximum length for a semitrailer and its towing vehicle of more than 45 feet and a maximum length for a trailer and its towing vehicle of more than 50 feet shall be operated on the New Jersey Turnpike.

(a)

CASINO CONTROL COMMISSION

Accounting and Internal Controls
Accounting Controls Within the Cashiers' Cage
Jackpot Payouts of Cash or Slot Tokens That Are Not Paid Directly From the Slot Machine

Proposed Amendments: N.J.A.C. 19:45-1.15 and 1.40.

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63(c), 69, 70(f), (m) and 99.

Proposal Number: PRN 1992-114.

Submit comments by April 15, 1992 to:

Barbara A. Mattie, Chief Analyst
Casino Control Commission
Tennessee Avenue and the Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

The proposed amendments to N.J.A.C. 19:45-1.15 and 1.40 would permit a general cashier or a master coin bank cashier to prepare a jackpot payout slip for the payment of a slot machine jackpot of cash or slot tokens that is not totally and automatically paid directly from the slot machine. Presently, the rules permit only slot cashiers to prepare jackpot payout slips.

Social Impact

The proposed amendments to N.J.A.C. 19:45-1.15 and 1.40 would expedite the payment of a slot machine jackpot when a patron requests that payment be made by casino check. Presently, the patron must wait for the slot cashier to prepare the jackpot payout slip and a separate form must be sent to the cashiers' cage as documentation supporting the preparation of the casino check. The proposed amendments would allow the patron to be escorted directly to the casino cage or master coin bank to receive payment. Depending on the physical layout of the casino, this change will permit casino licensees to provide better service to slot patrons who win jackpots that are not paid directly from the slot machine.

Economic Impact

The proposed amendments to N.J.A.C. 19:45-1.15 and 1.40 are not anticipated to have any significant economic impact since they merely simplify the delivery of jackpot payouts to a winning patron.

Regulatory Flexibility Statement

A regulatory flexibility statement is not required since this proposal will only affect the operation of New Jersey casino licensees, none of which qualifies as a small business protected under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

19:45-1.15 Accounting controls within the cashiers' cage

(a) (No change.)

(b) The cashiers' cage shall be physically segregated by personnel and function as follows:

1. General cashiers shall operate with individual imprest inventories of cash and such cashiers' functions shall be, but **are** not limited to, the following:

i.-xi. (No change.)

xii. Receive Voucher forms in accordance with N.J.A.C. 19:45-1.9A for the processing of travel expense reimbursements; [and]

xiii. Exchange Slot Counter Checks in accordance with N.J.A.C. 19:45-1.25A[.]; **and**

xiv. Prepare Jackpot Payout Slips in accordance with N.J.A.C. 19:45-1.40.

2. Check cashiers shall not have access to cash, gaming chips and plaques and such cashiers' functions shall be, but **are** not limited to, the following:

i.-vii. (No change.)

3. Chip bank cashiers shall not have access to currency or cash equivalents, but shall operate with a limited inventory of $0.50 and $0.25 cent coins which may only be used to facilitate odds payoffs or vigorish bets. Such cashiers' functions shall be, but **are** not limited to, the following:

i.-v. (No change.)

4. Reserve cash ("main bank") cashiers' functions shall be, but are not limited to, the following:

i. Receive cash, cash equivalents, issuance copies of Slot Counter Checks, **original copies of Jackpot Payout Slips,** personal checks received for non-gaming purposes, gaming chips and plaques from general cashiers in exchange for cash;

ii.-vi. (No change.)

5. Master coin bank cashiers' functions shall be, but **are** not limited to, the following:

i.-ii. (No change.)

iii. Provide slot cashiers with currency, coin and slot tokens in exchange for proper documentation; [and]

iv. Prepare the daily bank deposit of excess cash and coin[.]; **and**

v. Prepare Jackpot Payout Slips in accordance with N.J.A.C. 19:45-1.40.

(c)-(d) (No change.)

19:45-1.40 Jackpot payouts of cash **or slot tokens that are not paid directly from the slot machine**

(a) Whenever a patron wins a jackpot of cash or **slot** tokens to be exchanged for cash that is not totally and automatically paid directly from the slot machine, a slot booth cashier ("slot cashier"), **a general cashier or a master coin bank cashier** shall prepare a [Jackpot Payout Slip ("Payouts")] **jackpot payout slip.**

(b) [Payouts] **Jackpot payout slips** shall be serially prenumbered forms, each series of [Payouts] **which** shall be used in sequential order, and the series of numbers of all [Payouts] **jackpot payout slips** received by a casino shall be accounted for by employees independent of the cashiers' cage and the slot department. All original and duplicate void [Payouts] **jackpot payout slips** shall be marked "VOID" and shall require the signature of the preparer. Notwithstanding the above, a serially prenumbered combined [Jackpot Payout/Hopper Fill] **jackpot payout hopper fill** form may be utilized in conjunction with N.J.A.C. 19:45-1.41(b), as approved by the Commission, provided that the combined form shall be used in a manner which otherwise complies with the procedures and requirements established by this section.

(c) For establishments in which [Payouts] **jackpot payout slips** are manually prepared, the following procedures and requirements shall be observed:

1. Each series of [Payouts] **jackpot payout slips** shall be a three-part form, at a minimum, and shall be inserted in a locked dispenser that will permit an individual slip in the series and its copies to be written upon simultaneously while still locked in the dispenser, and

that will discharge the original and duplicate while the triplicate remains in a continuous, unbroken form in the dispenser; and

2. Access to the triplicates shall be maintained and controlled at all times by employees responsible for controlling and accounting for the unused supply of [Payouts] **jackpot payout slips**, placing [Payouts] **jackpot payout slips** in the dispensers, and removing from the dispensers each day the triplicates remaining therein. These employees shall have no incompatible functions.

(d) For establishments in which [Payouts] **jackpot payout slips** are computer prepared, each series of [Payouts] **jackpot payout slips** shall be a two-part form, at a minimum, and shall be inserted in a printer that will: simultaneously print an original and a duplicate and store, in a machine-readable form, all information printed on the original and duplicate; and discharge the original and duplicate. The stored data shall not be susceptible to change or removal by any personnel after preparation of a [Payout] **jackpot payout slip.**

(e) On originals, duplicates, triplicates, or in stored data, the preparer shall record, at a minimum, the following information:

1.-4. (No change.)

5. The serial number of the casino check, if applicable;

[5.]**6.** The [slot booth number if applicable,] **location** from which the amount is to be paid; and

[6.]**7.** The signature or, if computer prepared, identification code of the preparer.

(f) (No change.)

(g) All coin or currency paid **or any casino check issued** to a patron as a result of winning a jackpot shall be:

1. Distributed by the slot cashier, **general cashier or master coin bank cashier** directly to the patron; or

2. Disbursed by a slot cashier, **general cashier or master coin bank cashier** to a slot attendant or slot supervisor, and if the manual jackpot is $1,200 or more, to a slot supervisor who shall transport the coin [or], currency **or casino check** directly to the patron.

(h) Signatures attesting to the accuracy of the information contained on the original shall be, at a minimum, of the following personnel at the following times:

1. The original:

i. The slot cashier, **general cashier or master coin bank cashier** upon preparation; and

ii. (No change.)

2. The duplicate[;]**:**

i. The slot cashier, **or general cashier or master coin bank cashier** upon preparation;

ii.-iv. (No change.)

(i) Upon meeting the signature requirements as described in (h)1 and (h)2 above, the security department member[s] shall maintain and control the duplicate and the slot, **master coin bank** or [cage] **general** cashier shall maintain and control the original.

(j) At the end of each gaming day, at a minimum, the original and duplicate of the [Jackpot Payout Slip] **jackpot payout slip** shall be forwarded as follows:

1. The **slot cashier shall forward the** original [shall be forwarded] to the [cashiers' cage by the slot cashier] **master coin bank cashier** in exchange for coin, currency[,] or credit, after which the original shall be forwarded to the accounting department for agreement with the triplicate or stored data[.] **or, if prepared in the master coin bank, the master coin bank cashier shall forward the original directly to the accounting department for agreement with the triplicate or stored data;**

2. The general cashier shall forward the original to the main bank cashier in exchange for coin, currency or credit, after which the original shall be forwarded to the accounting department for agreement with the triplicate or stored data; and

[2. Duplicate Jackpot Payout Slip] **3. The** duplicate **jackpot payout slip** shall be forwarded directly to the accounting department for recording on the Slot Win Sheet, agreement with the meter reading stored on the Slot Meter Sheet, and agreement with the triplicate or stored data.

(a)

CASINO CONTROL COMMISSION

Accounting and Internal Controls
Procedure for Acceptance, Accounting for and Redemption of Patron's Cash Deposits

Proposed Amendment: N.J.A.C. 19:45-1.24

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63(c), 69(a), 70(g) and 99(a)(4).

Proposal Number: PRN 1992-113.

Submit comments by April 15, 1992 to:

Catherine A. Walker, Senior Assistant Counsel
Casino Control Commission
Tennessee Avenue and the Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

The Casino Control Commission is proposing an amendment to N.J.A.C. 19:45-1.24(m). This proposed amendment specifically clarifies that a counter check may satisfy the documentation requirements for refunding a patron's front money deposit at the cage, so long as it contains the information required by N.J.A.C. 19:45-1.24(m)3. Such use of a counter check poses no problems from an audit or an accounting or internal controls perspective.

N.J.A.C. 19:45-1.24(m)3 states that "necessary documentation" must be prepared, evidencing the return of the refund. The proposed amendment will clarify that a counter check may satisfy this documentation requirement, so long as it contains all of the information required by paragraph 3 of subsection (m).

Social Impact

There will be no social impact as a result of the proposed amendment to N.J.A.C. 19:45-1.24(m), since it only clarifies that the practice of utilizing a counter check to satisfy the documentation requirements of subsection (m) is acceptable, so long as it contains all of the information required by paragraph 3.

Economic Impact

There will be no economic impact as a result of the proposed amendment, since it merely clarifies that the practice of utilizing a counter check to satisfy the documentation requirements of subsection (m) is acceptable, so long as it contains all of the information required by paragraph 3.

Regulatory Flexibility Statement

No regulatory flexibility statement is required since the proposed amendment will only affect the operation of New Jersey casino licensees, none of which is a "small business," as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

19:45-1.24 Procedure for acceptance, accounting for and redemption of patron's cash deposits

(a)-(l) (No change.)

(m) A patron may obtain a refund of his or her deposit or any unused portion of a deposit by requesting the refund from a general cashier and returning his or her copy of the Customer Deposit Form. The general cashier shall verify the customer's identification and shall:

1.-2. (No change.)

3. Prepare necessary documentation evidencing such refund, **which documentation may include a counter check or any other document which contains** [containing] the following information:

i.-v. (No change.)

(n)-(q) (No change.)

RULE ADOPTIONS

BANKING

(a)

THE COMMISSIONER

Organizational Rule

Adopted Amendment: N.J.A.C. 3:3-1.1

Adopted: January 30, 1992 by Jeff Connor, Commissioner, Department of Banking.
Filed: February 13, 1992 as R.1992 d.112.
Authority: N.J.S.A. 17:1B-3a; N.J.S.A 52:14B-4(b).
Effective Date: February 13, 1992.
Expiration Date: January 11, 1995.

Take notice that Jeff Connor, Commissioner of Banking, pursuant to the authority of P.L. 1970, c.11 (N.J.S.A. 17:1B-1 to 17:1B-3), as supplemented by P.L. 1970, c.88 (N.J.S.A. 17:1B-3a), and in accordance with applicable provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., has adopted an amendment to the rule concerning the organization of the Department of Banking. The proposed amendments are organizational in nature and therefore may be adopted without prior notice and are effective upon filing pursuant to N.J.S.A. 52:14B-4(b).

The amendment retains the basic organizational structure previously promulgated by the Commissioner at 22 N.J.R. 335(a) in the February 5, 1990 New Jersey Register. The name of the Division of Examinations is changed to the Division of Supervision, and that Division takes on the responsibility of overseeing special investigations and enforcement actions.

Similarly, the name of the former Division of Supervision is changed to the Division of Regulatory Affairs. The Office of Regulatory Affairs, previously a separate entity in the Department, is now included in the Division of Regulatory Affairs.

With this adopted amendment, the Office of Legislative Affairs takes on responsibility for overseeing press and public information activities. This was previously done directly by the Commissioner.

An Office of Administration is created, which is comprised of the Office of Human Resources, the Office of Information Resources and the Office of Fiscal and Facilities Management. The functions of these offices do not change, but they are combined into one Office which reports directly to the Commissioner.

With these changes, the position of Chief Operations Officer, which previously assisted the Commissioner in coordinating the functions and activities of the various units, is removed.

The units in their reorganized form are outlined in the adopted organizational rule set forth below.

Full text of the adoption follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]).

3:3-1.1 Department organization

(a) The Department of Banking is organized into the following elements:

1. The Division of [Supervision] **Regulatory Affairs**, which is responsible for the processing of all applications, corporate filings, and licensing activities. In addition, this division supervises the Department's consumer services functions [and oversees special investigations and enforcement actions taken against depository institutions and licensees]**, provides regulatory advice to the other units, analyzes existing and proposed legislation and coordinates the formulation of departmental positions on regulations;**

2. The Division of [Examinations] **Supervision**, which is responsible for the examination of all depository institutions, financial services companies and licensed lenders**, and which oversees special investigations and enforcement actions taken against depository institutions and licensees.** [A separate unit of this] **This** division performs financial analysis, including the analysis of financial reports from regulated entities;

3. The Office of Legislative Affairs, which serves as a liaison to the legislature, industry groups, governmental agencies and the Governor's Counsel on legislative matters. In addition, it prepares and coordinates the formulation of departmental positions on proposed legislation. **This office also directly oversees the press and public information functions; and**

[4. The Office of Regulatory Affairs, which provides regulatory advice to the operating units, reviews the legal sufficiency of departmental positions and drafts regulations. In addition, it provides the Department with information on existing Federal and state laws and regulations, and coordinates the formulation of departmental positions on regulations proposed by related agencies;]

4. The Office of Administration, which is comprised of the following units:

[5.]**i.** The Office of Human Resources, which designs and implements human resource systems and polices, among other personnel functions;

[6.]**ii.** The Office of Information Resources, which manages the computer and communication needs of the Department; and

[7.]**iii.** The Office of Fiscal and Facilities Management, which oversees the fiscal and facilities systems including budget preparation, revenue and expenditure analysis, revenue collection, and facilities procurement and maintenance.

(b) [All of the units in (a) above] **The Division of Regulatory Affairs, Division of Supervision, Office of Legislative Affairs and Office of Administration** report directly to the Commissioner, [as assisted by the Chief Operations Officer,] who coordinates the functions and activities of the units. The Commissioner also [directly oversees the press and public information function] maintains such support staff as is necessary to perform the full scope of duties of the Commissioner.

COMMUNITY AFFAIRS

(b)

DIVISION OF HOUSING AND DEVELOPMENT

Continuing Care Retirement Community Rules
Civil Penalties

Adopted Amendments: N.J.A.C. 5:19-2.12 and 9.3

Proposed: January 6, 1992 at 24 N.J.R. 3(b).
Adopted: February 10, 1992 by Melvin R. Primas, Jr., Commissioner, Department of Community Affairs.
Filed: February 14, 1992 as R.1992, d.114, **without change.**
Authority: N.J.S.A. 52:27D-351 and 358.
Effective Date: March 16, 1992.
Expiration Date: February 1, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

5:19-2.12 Cease and desist orders; injunctions; civil penalties

(a)-(c) (No change.)

(d) In addition to, or in lieu of, the actions authorized by (a) through (c) above, the Department may levy and collect civil penalties in the amount of not less than $250.00, and not more than $50,000.00, for each violation of the Act or of this chapter, or of any order issued thereunder, and may compromise and settle any claim for a penalty in such amount as in the discretion of the Department may appear appropriate and equitable under the circumstances of the violation.

1. Each day during which a violation continues after the effective date of a notice to terminate issued by the Department shall constitute an additional, separate and distinct violation.

2. Except as set forth in (d)3 below, the initial penalty levied for any violation shall not exceed $250.00 per violation, or $250.00 per

unit in the case of any violation of N.J.A.C. 5:19-2.1, and a subsequent penalty for the same act or omission shall not exceed 10 times the amount of the last previous penalty or the statutory maximum, whichever is less.

3. The limitations set forth in (d)2 above shall not apply to any violation involving either dishonesty in dealings with residents or prospective residents or willful disregard of the rights of residence.

4. If an administrative order levying a civil penalty is not satisfied within 30 days of its issuance, the Department may sue for and recover the penalty with costs in a summary proceeding under N.J.S.A. 2A:58-1 et seq. in the Superior Court.

5:19-9.3 Rights to a hearing

Any applicant aggrieved by an order or determination of the Department issued under these rules shall be entitled to a hearing as provided by law, provided a written request for such hearing is filed within 20 days of the receipt of the order or determination. Hearing requests shall be addressed to the Hearing Coordinator, Division of Housing and Development, CN 802, Trenton, New Jersey 08625.

HEALTH

(a)

DIVISION OF HEALTH FACILITIES EVALUATION

Long Term Care Licensing Standards

Advance Directives for Health Care Act; Patient Self-Determination Act

Adopted Amendments: N.J.A.C. 8:39-4.1, 9.1, 11.2, 13.4 and 35.2

Adopted New Rule: N.J.A.C. 8:39-9.5

Proposed: December 2, 1991 at 23 N.J.R. 3611(a).

Adopted: February 20, 1992 by Frances J. Dunston, M.D., M.P.H., Commissioner, Department of Health (with approval of the Health Care Administration Board).

Filed: February 24, 1992 as R.1992 d.128, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5.

Effective Date: March 16, 1992.

Operative Date: April 1, 1992.

Expiration Date: June 20, 1993.

Summary of Public Comments and Agency Responses:

The proposed amendments and new rule were published on December 2, 1991. Two letters of comment were received during the comment period which closed on January 1, 1992. The comment letters, from the New Jersey Association of Non-Profit Homes for the Aging and the New Jersey Association of Health Care Facilities, included recommendations for changes to the proposed amendments at N.J.A.C. 8:39-9.1(e) and 9.1(f), and to the proposed new rule at N.J.A.C. 8:39-9.5(e) and 9.5(f).

COMMENT: The commenters recommended that N.J.A.C. 8:39-9.1(e) be changed from the proposed requirement for consultation with an ethics committee or "with one or more staff members who are qualified by their background or experience to make clinical and ethical judgements." The recommended change would permit the delegation of dispute resolution "to any individual or individuals who are qualified by their background and/or experience." The change is requested in order to allow facilities to delegate dispute resolution responsibility to qualified persons who are not staff members, such as an ethics consultant, a board member, a physician, or a clergyman.

RESPONSE: The Department agrees and has made the recommended change.

COMMENT: The commenters requested modifications to N.J.A.C. 8:39-9.1(f) so that the proposed amendment would better conform to the New Jersey Advance Directives for Health Care Act, P.L. 1991, c.201, Section 13.a(6). As proposed, the amendment would require facilities to provide a "forum for patients, families, and staff to discuss and reach decisions on bioethical concerns relating to patients." The suggested revision would require the facility to establish policies and procedures "to inform physicians, nurses and other health care professionals of their rights and responsibilities under the New Jersey Advance Directives for Health Care Act (the Act) and to provide a forum for such individuals to discuss the requirements of that Act." According to the comments, the proposed amendment could be interpreted to require "public case consultations and this would be inconsistent with the plain requirements and intentions of the Act," and "would engender many other problems including the lack of confidentiality which is considered essential to effective dispute resolution."

RESPONSE: The Department believes that patients, families and staff should be able to discuss bioethical concerns. The proposed amendment is intended to give families and patients an opportunity to discuss these concerns before formal dispute resolution procedures are initiated. Facilities' responsibilities to inform health care professionals of their rights and responsibilities under the Act are delineated at N.J.A.C. 8:39-13.4(d). However, in order to further clarify the proposed amendment, the rule has been modified to require a process for patients, families and staff to discuss and address questions and concerns about advance directives and decisions on accepting or refusing medical care.

COMMENT: The commenters suggested that the proposal at N.J.A.C. 8:39-9.5(e) should apply only to those health care professionals who are employed by the facility and further recommended that language from Section 13a(4) of the Act (N.J.S.A. 26:2H-64a(4)) be incorporated into the proposal at N.J.A.C. 8:39-9.5(e). According to one commenter, "the responsibility for assuring transfer of care when a health care professional declines to participate in withholding or withdrawing life sustaining treatment should not be the sole responsibility of the health care facility," and the Act "makes the transfer of care under such circumstances the joint responsibility of the health care professional and the facility." The commenter further believes that language of Section 13a(4) (N.J.S.A. 26:2H-64a(4)) expresses this joint responsibility well and recommends that similar or identical language be added to the proposal, to the effect that "a health care institution shall, in consultation with the attending physician, take all reasonable steps to effect the appropriate, respectful and timely transfer of the patient to the care of an alternative health care professional."

RESPONSE: The Department agrees that the transfer of care should be the joint responsibility of the facility and the health care professional, although the Department does not regulate physician practitioners, nor does it agree that the rules should apply only to health care professionals who are employed by the facility. The proposed amendment has been changed to reflect the role of the health care professionals in transfer of patients' care, and an additional sentence has been added which indicates the facilities' responsibilities when the health care practitioner who declines to participate in the advance directive is the patient's physician.

COMMENT: One letter of comment also requested clarification of the Association's understanding of proposed N.J.A.C. 8:39-9.5(f), which would require a facility to "provide each adult patient . . . with a written statement of their rights under New Jersey law to make decisions concerning their right to refuse medical care and the right to formulate an advance directive." The commenter understands this to require a clear, accurate and comprehensive statement of the facility's policies concerning implementation of a patient's rights, rather than a "verbatim recitation" of internal procedures which might be lengthy and contain extraneous annotations and background material. The second commenter suggested that patients be provided with a summary of the facility's written policies and procedures and that the full text be available upon request during normal business hours. This commenter further suggested that the proposal be changed to require that such written information be made available in any language which is spoken by more than 10 percent of the "patients/residents of the facility," rather than the proposed 10 percent of the population served by the facility.

RESPONSE: The Department agrees that the written statement which the facility must provide to each patient upon admission, explaining their legal rights to accept or refuse medical treatment and to execute an advance directive, should be "clear, accurate and comprehensive." A copy of such statement, which is approved by the Commissioner of Health, was forwarded to each long-term care facility on January 17, 1992 for distribution to patients. As stated in proposed N.J.A.C. 8:39-9.5(f), additional written information and materials on advance directives and the facility's policies and procedures concerning implementation of such rights must also be provided. This additional information must be developed by each facility, and needs to include all information

that directly affects patients' rights to make health care decisions. It is not required that all internal policies regarding advance directives be given routinely to patients. An example of a policy directly affecting implementation of a patient's advance directive would be a mandatory review of the advance directive by the institutional ethics committee (neither required nor encouraged by the Department). Internal procedures concerning location of the advance directives in the medical record, for example, need not be disclosed. The length of the document would, of course, vary according to individual facility policies and procedures. The document should be written in a way that it is useful to patients and families, and should describe any further written materials which are available in the facility but are too lengthy to include as part of the document. Although the suggested change regarding written information "in any language spoken by more than 10 percent of the population served by the facility" has not been made, the phrase "as a primary language" has been inserted in order to clarify the proposal. The adopted standard is less burdensome upon the regulated public, while complying with the original intent of the standard, which is to communicate with the patient and/or the patient's representatives. The requested change would be more burdensome, since it would include bilingual populations, who would be able to comprehend the information when provided in English.

Summary of Agency-Initiated Changes:

The Department, in order to provide a more comprehensive definition which is consistent with the definition used in amendments being adopted for licensure rules for other health care facilities, has added the following sentence to the proposed amendment at N.J.A.C. 8:39-9.5(a): "An advance directive may include a proxy directive, an instruction directive, or both."

The words "or upon" have been added to N.J.A.C. 8:39-9.5(d), in order to allow facilities to provide notice of advance directive policies to patients or families either before or on admission. This change is in conformance with changes made to licensure rules for hospitals and other health care facilities.

The word "approved" has been deleted from N.J.A.C. 8:39-9.5(f) and replaced with the word "issued," since the Commissioner has forwarded a statement of patient rights concerning advance directives to all long-term care facilities.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

8:39-4.1 Patient rights

(a) Each patient shall be entitled to the following rights:

1.-29. (No change.)

30. To be transferred or discharged only for one or more of the following reasons and the reason for the transfer or discharge must be recorded in the patient's medical record:

i.-ii. (No change.)

iii. To comply with clearly expressed and documented patient choice, or in conformance with the New Jersey Advance Directives for Health Care Act, as specified in N.J.A.C. 8:39-9.5(d).

Recodify existing iii. as iv. (No change in text.)

31.-34. (No change.)

(b) (No change.)

8:39-9.1 Mandatory structural organization

(a)-(d) (No change.)

(e) The facility shall establish procedures for considering disputes among the patient, health care representative and the attending physician concerning the patient's decision-making capacity or the appropriate interpretation and application of the terms of an advance directive to the patient's course of treatment. The procedures may include consultation with an institutional ethics committee, a regional ethics committee or another type of affiliated ethics committee, or with *[one or more staff members]* ***any individual or individuals*** who are qualified by their background and/or experience to make clinical and ethical judgments.

(f) *[The facility shall establish policies and procedures for providing a forum for patients, families, and staff to discuss and reach decisions on bioethical concerns relating to patients.]* ***The facility shall establish a process for patients, families and staff to discuss and address questions and concerns relating to advance directives and decisions to accept or reject medical treatment.***

(g) The facility shall provide periodic community education programs, individually or in coordination with other area facilities or organizations, that provide information to consumers regarding advance directives and their rights under New Jersey law to execute advance directives.

8:39-9.5 Mandatory policies and procedures for advance directives

(a) For purposes of this Chapter, "advance directive" means a written statement of a patient's instructions and directions for health care in the event of future decision making incapacity, in accordance with the New Jersey Advance Directives for Health Care Act, N.J.S.A. 26:2H-53 et seq., P.L.1991, c.201. ***An advance directive may include a proxy directive, an instruction directive, or both.***

(b) The facility shall develop and implement procedures to ensure that there is a routine inquiry made of each adult patient, upon admission to the facility and at other appropriate times, concerning the existence and location of an advance directive. If the patient is incapable of responding to this inquiry, the facility shall have procedures to request the information from the patient's family or in the absence of a family member, another individual with personal knowledge of the patient. The procedures must assure that the patient or family's response to this inquiry is documented in the medical record. Such procedures shall also define the role of facility admissions, nursing, social service and other staff as well as the responsibilities of the attending physician.

(c) The facility shall develop and implement procedures to promptly request and take reasonable steps to obtain a copy of currently executed advance directives from all patients. These shall be entered when received into the medical record of the patient.

(d) A patient shall be transferred to another health care facility only for a valid medical reason, in order to comply with other applicable laws or Department regulations, to comply with clearly expressed and documented patient choice, or in conformance with the New Jersey Advance Directives for Health Care Act in the instance of private, religiously affiliated health care institutions who establish policies defining circumstances in which it will decline to participate in the implementation of advance directives. Such institutions must provide notice to patients or their families or health care representatives prior to ***or upon*** admission of their policies. A timely and respectful transfer of the individual to another institution which will implement the patient's advance directive must be effected. The facility's inability to care for the patient shall be considered a valid medical reason. The sending facility shall receive approval from a physician and the receiving health care facility before transferring the patient.

(e) The facility shall *[develop and implement policies for transfer of the responsibility for care]** ***, in consultation with the attending physician, take all reasonable steps to effect the appropriate, respectful and timely transfer*** of patients with advance directives ***to the care of an alternative health care professional*** in those instances where a health care professional declines as a matter of professional conscience to participate in withholding or withdrawing life-sustaining treatment. ***In those instances where the health care professional is the patient's physician, the facility shall take reasonable steps, in cooperation with the physician, to effect the transfer of the patient to another physician's care in a responsible and timely manner.*** Such transfer shall assure that the patient's advance directive is implemented in accordance with their wishes within the facility, except in cases governed by 9.5(d) above.

(f) The facility shall have procedures to provide each adult patient upon admission and where the patient is unable to respond, to the family or other representative of the patient, with a written statement of their rights under New Jersey law to make decisions concerning the right to refuse medical care and the right to formulate an advance directive. Such statement shall be *[approved]* ***issued*** by the Commissioner. Appropriate written information and materials on advance directives and the institution's written policies and procedures concerning implementation of such rights shall also be provided. Such written information shall also be made available in any language which is spoken***, as a primary language,*** by more than 10*[%]* ***percent*** of the population served by the facility.

(g) The facility shall develop and implement procedures for referral of patients requesting assistance in executing an advance directive or additional information to either staff or community resource persons that can promptly advise and/or assist the patient.

(h) The facility shall develop and implement policies to address application of the facility's procedures for advance directives to patients who experience an urgent life-threatening situation.

(i) The facility shall develop and implement policies and procedures for the declaration of death of patients, in instances where applicable, in accordance with N.J.S.A. 26:6 and the New Jersey Declaration of Death Act N.J.S.A. 26:6A-1 et seq. (P.L.1991, c.90). Such policies shall also be in conformance with rules promulgated by the New Jersey Board of Medical Examiners which address declaration of death based on neurological criteria, including the qualifications of physicians authorized to declare death based on neurological criteria and the acceptable medical criteria, tests, and procedures which may be used. The policies and procedures shall also accommodate a patient's religious beliefs with respect to declaration of death.

8:39-11.2 Mandatory policies and procedures for patient assessment and care plans

(a)-(d) (No change.)

(e) A comprehensive assessment must be completed for each patient within 14 days of admission utilizing the Standardized Resident Assessment Instrument (Minimum Data Set) as specified by the Department, or on an equivalent assessment instrument which has been developed by the facility. The complete assessment and care plan shall be based on oral or written communication and assessments provided by nursing, dietary, patient activities, and social work staff; and when ordered by the physician, assessments shall also be provided by other health professionals. The care plan shall include specific, measurable goals, based on the patient's care needs and means of achieving each goal.

(f) The complete care plan shall be established and implementation shall begin within 21 days, and shall include, at least, rehabilitative/restorative measures, preventive intervention, and training and teaching of self-care.

(g)-(k) (No change.)

8:39-13.4 Mandatory staff education and training for communication

(a)-(c) (No change.)

(d) At least one education training program each year shall be held for all administrative and patient care staff regarding the rights and responsibilities of staff under the New Jersey Advance Directives for Health Care Act (P.L.1991, c.201) and the Federal Patient Self Determination Act (P.L. 101-508), and internal facility policies and procedures to implement these laws.

Recodify existing (d) as (e) (No change in text.)

8:39-35.2 Mandatory policies and procedures for medical records

(a)-(c) (No change.)

(d) A medical record shall be initiated for each patient upon admission and include at least the following information when such information becomes available:

1.-2. (No change.)

3. Complete transfer information from the sending facility, including results of diagnostic, laboratory, and other medical and surgical procedures, and a copy of the patient's advance directive, if available, or notice that the patient has informed the sending facility of the existence of an advance directive;

4.-13. (No change.)

14. Documentation of the existence, or nonexistence, of an advance directive and the facility's inquiry of the patient concerning this.

Recodify existing 14.-15. as 15. and 16. (No change in text.)

(e)-(g) (No change.)

(a)

DIVISION OF HEALTH FACILITIES EVALUATION

Long Term Care Licensing Standards Mandatory Policies and Procedures for Administration

Adopted Amendment: N.J.A.C. 8:39-9.2

Proposed: December 2, 1991 at 23 N.J.R. 3613(a).
Adopted: February 20, 1992 by Frances J. Dunston, M.D., M.P.H., Commissioner, Department of Health (with approval of the Health Care Administration Board).
Filed: February 24, 1992 as R.1992 d.129, **without change.**

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5.

Effective Date: March 16, 1992;
Operative Date: April 1, 1992.
Expiration Date: June 20, 1993.

Summary of Public Comments and Agency Responses:

The proposed amendment was published in the New Jersey Register on December 2, 1991 at 23 N.J.R. 3613(a). During the comment period, which closed on January 1, 1992, one comment was submitted by the New Jersey Association of Health Care Facilities.

COMMENT: The commenter requested that the amendment be changed to indicate that the definition of insolvency would not apply to a long term care facility which was refinancing existing debt.

RESPONSE: The Department has considered the effect of refinancing existing debt on the calculation of the current ratio. Refinancings would have an effect on the current ratio under only very limited circumstances. In addition, as the effect of the rule would only be to trigger notification to the Department, no detrimental effect will result to facilities and, therefore, no change was made to the text proposed.

Full text of the adoption follows.

8:39-9.2 Mandatory policies and procedures for administration

(a)-(h) (No change.)

(i) A facility shall notify the Department of Health, Division of Health Facilities Evaluation and the Division of Medical Assistance and Health Services, Department of Human Services, if it is a participating Medicaid provider, immediately in writing at such time as it becomes financially insolvent and upon the filing of a voluntary or involuntary petition for bankruptcy under Title 11 of the United States Code. Insolvency means that the sum of the facility's debts is greater than the value of all of its assets, or that the facility defaults on the primary debt on the property, or that in any month the current ratio falls below 1.0, or that the average payment period ratio for current liabilities exceeds 150 days. Facilities which are in the first 12 months of operation from the date of initial licensure are exempt from reporting a condition of insolvency to the Department. All notification of insolvency or a bankruptcy filing, when received by the Department of Health or the Department of Human Services, shall be kept confidential from the public and any other organization, unless express authorization to do so has been provided by the facility.

(a)

DIVISION OF HEALTH FACILITIES EVALUATION AND LICENSING
OFFICE OF EMERGENCY MEDICAL SERVICES
Mobile Intensive Care Programs
Administration of Medications
Readoption with Amendments: N.J.A.C. 8:41

Proposed: December 16, 1991 at 23 N.J.R. 3734(a).
Filed: February 13, 1992 as R.1992 d.113, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).
Adopted By: Frances J. Dunston, M.D., M.P.H., Commissioner, State Department of Health.
Authority: N.J.S.A. 26:1A-15 and 26:2K-7 et seq.
Effective Date: February 13, 1992.
Expiration Date: February 13, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Summary of Agency-Initiated Changes:
Changes were made to the text of N.J.A.C. 8:41-8.1 regarding dextrose in water and nitroglycerine. The previous text was concentration specific and had created the need for waivers for units to conform with current developments in pediatric treatment protocols. The change permits authorized mobile intensive care units to carry the proper concentration (for example, Dextrose 10 percent, Dextrose 25 percent) of dextrose for pediatric treatment, in the best medical judgment of the program medical director. This shall not be interpreted to relieve any program from carrying Dextrose 5 percent in water or Dextrose 50 percent, as is currently required. The rules were previously ambiguous as to the permissibility of nitroglycerine in other than tablet form (for example, spray). The rules now specify that nitroglycerine is to be carried, leaving the method (spray, tablet or ointment) at the discretion of the program medical director.

Full text of the readoption follows (additions to proposal are indicated by boldface with asterisks ***thus***; deletions from proposal are indicated in brackets *[thus]*).

8:41-8.1 Approved drug list for mobile intensive care units

(a) The following is an alphabetical list of generic therapeutic agents authorized for administration by mobile intensive care paramedics:

Adensosine
Acetylsalicylic acid
Aminophylline
Albuterol
Atropine sulfate
Bretylium tosylate
Calcium chloride
Dextrose, 50 percent
Dextrose, 5 percent in water
Dextrose in water
Dextrose, 5 percent in water and normal saline 0.45 percent
Dexamethasone sodium phosphate
Diazapam
Diphenhydramine HCL
Dopamine HCL
Epinephrine
Furosemide
Glucagon
Ipecac syrup
Isoetharine HCL
Isoproterenol HCL
Lidocaine HCL
Magnesium sulfate—with Commissioner's approval only
Metaproterenol sulfate
Morphine sulfate
Naloxone HCL
Nifedipine
Nitroglycerine
[Nitroglycerine ointment]
Normal saline
Oxygen
Procainamide HCL
Ringer's lactate
Sodium bicarbonate
Terbutaline sulfate
Thiamine HCL
Verapamil HCL

(b)

DIVISION OF HEALTH FACILITIES EVALUATION
Manual of Standards for Licensure of Home Health Agencies
Medical Records Advance Directives
Adopted Amendments: N.J.A.C. 8:42-1.1, 6.1, 6.2 and 11.2

Proposed: November 4, 1991 at 23 N.J.R. 3254(b).
Adopted: February 20, 1992 by Frances J. Dunston, M.D., M.P.H., Commissioner, Department of Health (with approval of the Health Care Administration Board).
Filed: February 24, 1992 as R.1992 d.130, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).
Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5, and P.L. 1991 d.201.
Effective Date: March 16, 1992.
Operative Date: April 1, 1992.
Expiration Date: August 17, 1992.

Summary of Public Comments and Agency Responses:
Three letters of comment were received, one from the New Jersey Bioethics Commission, one from the Home Health Assembly of New Jersey, Inc., and one from Jean Paashaus, a private citizen.

COMMENT: The commenter for the New Jersey Bioethics Commission recommended the following changes:

At N.J.A.C. 8:42-6.2(d)1, replace the word "concerning" with the word "including;"

At N.J.A.C. 8:42-6.2(d)4, replace the full text with the following: "Evaluating promptly the validity of the advance directive, where a question of validity is indicated," so that inquiry is made not routinely but only where there is a question about the validity of the document; and

At N.J.A.C. 8:42-6.2(e)3, add language to specify that policies adopted by private, religiously affiliated agencies must be in writing. This requirement is specified in the Act, at N.J.S.A. 26:2H-65b.

RESPONSE: The Department agrees with the suggested changes, and the rules have been amended accordingly, to conform to the New Jersey Health Care Advance Directives Act.

COMMENT: The Home Health Assembly of New Jersey, Inc. has commented upon the requirement for a multidisciplinary bioethics committee or equivalent process at N.J.A.C. 8:42-6.1(c), noting that the New Jersey Advance Directives for Health Care Act (hereafter "the Act") only provides for procedures for conflict resolution. The Home Health Assembly believes that the proposed regulation is both too prescriptive in regards to requiring a specific committee, and not broad enough when a patient lacks decision making capacity.

RESPONSE: In order to more nearly reflect the intent of the Act and to achieve consistency with rules in other regulated health care facilities, the Department has amended the proposed standard to eliminate the requirement for a bioethics committee. The rule will require the establishment of procedures for conflict resolution, which may be achieved through consultation with an ethics committee or with individuals who are qualified by training or experience.

COMMENT: The Home Health Assembly has recommended deletion of the requirement for consumer participation in policy formulation at N.J.A.C. 8:42-6.1(d), noting that this is outside the scope of the Act's mandate, which calls only for participation in the resolution of problems.

RESPONSE: Since there is no longer a requirement for a bioethics committee, the subsection regarding consumer participation in policy formulation has also been deleted. An alternative rule now requires the agency to establish a process for patients, families, and staff to address bioethical concerns relating to patients.

COMMENT: The Home Health Agency has requested that specific requirements regarding frequency or "geographic stipulations" be added to the standard at N.J.A.C. 8:42-6.1(e) regarding community education so that there is clarity during the inspection process.

RESPONSE: The Department has deleted the concept of "periodic" community education programs and has specified that these programs shall be provided at least annually. The intent of the rule is that the programs shall be given within each agency's service area as recognized by the Certificate of Need process, and the necessary language has been added to reflect that intent.

COMMENT: In regards to the proposed standard requiring translated statements being made available in any language which is spoken by more than 10 percent of the population of the agency's service area, the Home Health Assembly recommends that this requirement be limited to groups with no English language capacity rather than requiring the translations for groups with bilingual capability.

RESPONSE: The rule has been amended to require the statement to be made available in any language which is spoken as the primary language by more than 10 percent of the population in the agency's service area.

COMMENT: The Home Health Assembly recommends that N.J.A.C. 8:42-6.2(d)3 be revised to require only that the agency request and obtain "if possible" (instead of "promptly") copies of currently executed advance directives.

RESPONSE: The language of the standard has been modified to delete the word "promptly" and to require instead that the agency "take reasonable steps to obtain" copies of currently executed advance directives from patients, since such documents may not be readily available to the agency.

COMMENT: The Home Health Assembly believes that the provision at N.J.A.C. 8:42-6.2(d)4 requiring the agency to "evaluate the validity" or "assist in the execution" of a document implies a necessity for legal expertise which agencies do not possess, and should be deleted.

RESPONSE: The Act requires a health care facility "to assist patients interested in discussing and executing an advance directive." The Department does not believe that such assistance requires specific legal expertise, but that only a valid form and witnessed signature are required. Should questions of validity arise, the agency must have a means to evaluate the validity, such as consultation with in-house counsel or an institutional or other ethics committee (amended N.J.A.C. 8:42-6.1(c)).

COMMENT: The Home Health Assembly comments that the requirement for an actual copy of the advance directive is missing from the medical records section at N.J.A.C. 8:42-11.2(a) (unless the mandate to obtain a copy is changed).

RESPONSE: The requirement that a copy of the advance directive (if available) be included in the patient's medical record has been added at N.J.A.C. 8:42-11.2(a)12.

COMMENT: Ms. Jean Paashaus commented that in the home health setting, problems interpreting a patient's advance directive could arise, given distant supervision, the daily absence of family members, and the fact that aides can now take their certifying exam in Spanish. The commenter also noted possible difficulty in implementing a patient's advance directive if he or she needs transfer to a hospital and the document is kept for security purposes at the home health agency's office, and requested that the code proposals be withdrawn for revision.

RESPONSE: The intent of the Act, and of the Department of Health regulations which implement parts of the Act, is that a patient's advance directive be carried out under physician orders. Home health agency personnel would not be required (or permitted) to implement advance directives independently. In regards to transfer to a hospital, a copy of the patient's medical record, including the advance directive, would accompany the patient. An additional safeguard is the requirement that the hospital request and obtain a copy of the advance directive at the time of the patient's admission. No changes are made to the rules in this regard.

Summary of Agency-Initiated Changes:

A comment was received by the Department addressed to the proposed amendments for advance directives in hospitals (N.J.A.C. 8:43G). The commenter requested a more comprehensive definition of "advance directive" in the rule. In order to respond to the commenter's suggestion and to achieve consistency in the definition for advance directives for all health care facilities, the Department has added the following clarification to the definition at N.J.A.C. 8:42-1.1: "It [an advance directive] may include a proxy directive, an instruction directive, or both."

At N.J.A.C. 8:42-6.2(d)1, the word "approved" has been changed to "issued" since the Commissioner has sent to all licensed home health agencies an official statement of patient rights concerning advance directives which must be distributed to the agency's patients.

At N.J.A.C. 8:42-6.2(d)1, the Department has modified the phrase "prior to initiation of service" to "prior to or at the time of admission to services, or as soon after admission as is practicable" to more accurately reflect the language and the intent of the Act.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

8:42-1.1 Definitions

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

...

"Advance directive" means a written statement of the patient's instructions and directions for health care in the event of future decisionmaking incapacity, in accordance with the New Jersey Advance Directives for Health Care Act, (P.L. 1991, c.201). ***It may include a proxy directive, an instruction directive, or both.***

...

8:42-6.1 Advisory groups

(a)-(b) (No change.)

*[(c) The agency shall have a multidisciplinary bioethics committee, or an equivalent process which assures participation by individuals with medical, nursing, legal, social work, and clergy backgrounds. The committee or process shall have at least the following functions:

1. Participation in the formulation of agency policy related to bioethical issues;

2. Participation in the formulation of agency policy related to advance directives;

3. Participation in the resolution of patient-specific bioethical issues, and responsibility for conflict resolution in the interpretation and implementation of advance directives. The committee may partially delegate responsibility for conflict resolution to one or more qualified staff members; and

4. Providing a forum for patients, families, and staff to discuss and reach decisions on ethical concerns relating to patients.

(d) The agency shall establish a mechanism for involving consumers in the formulation of policy related to bioethical issues.]*

(c) The agency shall establish procedures for the resolution of conflict concerning the patient's decision-making capacity or the appropriate interpretation and application of the terms of an advance directive to the patient's course of treatment. The procedures may include consultation with an institutional ethics committee, a regional ethics committee, or another type of affiliated ethics committee, or with an individual or individuals who are qualified by training or experience to make clinical and ethical judgements.

(d) The agency shall establish a process for patients, families, and staff to address concerns relating to advance directives.*

(e) The agency shall provide *[periodic]* community education programs ***at least annually***, individually or in coordination with other area agencies or organizations*[, that]***. ***These programs shall be provided within the agency's service area as recognized by the Certificate of Need process and shall*** provide information to consumers regarding advance directives and their rights under New Jersey law to execute advance directives.

(f) (No change in text.)

8:42-6.2 Policies and procedures

(a)-(c) (No change.)

(d) The agency shall have written policies and procedures governing the services provided to implement the New Jersey Advance Directives for Health Care Act (P.L.1991, c.201). These policies and

procedures shall be reviewed annually, revised as needed, and shall include at least:

1. Providing to each patient prior to *[the provision of care]* ***or at the time of admission to services or as soon after admission as is practicable***, or to ***a*** family member or other representative if the patient is unable to respond, a written statement of the patient's rights under New Jersey law to make decisions *[concerning]* ***including*** the right to refuse medical care and to formulate an advance directive, as well as the agency's written policies and procedures regarding implementation of such rights. This statement shall be *[approved]* ***issued*** by the Commissioner and shall be made available in any language which is spoken ***as the primary language*** by more than 10 percent of the population *[of]* ***in*** the agency's service area;

2. Routinely inquiring of each adult patient, in advance of coming under the care of the agency and at other appropriate times, about the existence and location of an advance directive. If the patient is incapable of responding to this inquiry, the agency shall request the information from the patient's family or other representative. The response to this inquiry shall be documented in the patient's medical record;

3. Requesting and *[promptly obtaining]* ***taking reasonable steps to obtain*** for all patients copies of currently executed advance directives, which shall be entered into the medical records;

4. Evaluating the validity of the advance directive***, where a question of validity is indicated,*** and establishing procedures for assisting in the execution of a currently valid advance directive;

5. Providing appropriate written informational materials concerning advance directives to all interested patients, families, and health care representatives, and assistance or referral to staff or community resource persons for patients interested in discussing and executing an advance directive;

6. Delineation of the responsibilities of attending physicians, administration, nursing, social service, and other staff in regards to (d)1 through 5 above; and

7. Policies for transfer of the responsibility for care of patients with advance directives when a health care professional declines as a matter of professional conscience to participate in withholding or withdrawing life-sustaining treatment. Such transfer shall assure that the advance directive is implemented by the agency in accordance with the patient's wishes.

(e) A patient shall be transferred to another agency only for the following reasons:

1. A valid medical reason, including the agency's inability to care for the patient;

2. In order to comply with clearly expressed and documented patient choice in accordance with applicable laws, rules or regulations; or

3. In conformance with the New Jersey Advance Directives for Health Care Act in the instance of a private, religiously affiliated home health agency which establishes ***written*** policies defining circumstances in which it will decline to participate in the withholding or withdrawal of life-sustaining treatment. Such agencies shall:

i. Provide ***written*** notice of the policy to patients, families or health care representatives prior to *[initiation of]* ***or at the time of admission to*** service***s***; and

ii. Implement a timely and respectful transfer of the patient to an agency which will implement the advance directive.

(f) The sending agency shall receive approval from the receiving agency before transferring the patient.

(g) The agency shall provide staff training and education programs regarding the New Jersey Advance Directives for Health Care Act (P.L.1991, c.201) and the Federal Patient Self Determination Act (P.L.101-508). This education and training shall address at least the following:

1. The rights and responsibilities of staff; and

2. Internal policies and procedures to implement these laws.

(h) The agency shall establish policies and procedures for the declaration of death of patients in accordance with N.J.S.A. 26:6 and the New Jersey Declaration of Death Act (P.L.1991, c.90). Such policies shall also be in conformance with rules promulgated by the New Jersey Board of Medical Examiners which address declaration of death based on neurological criteria and the acceptable medical criteria, tests, and procedures that may be used. The policies and procedures must accommodate the patient's religious beliefs with respect to declaration of death.

8:42-11.2 Contents and maintenance of medical/health records

(a) The patient's medical/health record shall include at least the following:

1.-8. (No change.)

9. Copies of written instructions given to the patient and/or the patient's family;

10. A record of any treatment, medication, or service offered by a staff member of the faculty and refused by the patient;

11. Written informed consents, if indicated; and

12. One of the following:

i. A copy of the patient's advance directive if available; or*

*[12.]****ii.*** Documentation of the existence or nonexistence of an advance directive; and documentation of the agency's inquiry to the patient, family, or health care representative regarding this.

(b) If the patient is transferred to another home health agency, the agency shall maintain a transfer record reflecting the patient's immediate needs and shall send a copy of this record to the receiving agency at the time of transfer. The transfer record shall contain at least the following information:

1. Diagnosis, including history of any serious condition unrelated to the proposed treatment, which might require special attention to keep the patient safe;

2. Physician orders in effect at the time of transfer and the last time each medication was administered;

3. The patient's nursing needs;

4. Hazardous behavioral problems;

5. Drug and other allergies;

6. The reason for transfer; and

7. A copy of the patient's advance directive, if available, or notice of the existence of an advance directive.

Redesignate (b)-(d) as (c)-(e) (No change in text.)

(a)

DIVISION OF HEALTH FACILITIES EVALUATION

Manual of Standards for Licensure of Residential Health Care Facilities

Advance Directives for Health Care Act; Patient Self-Determination Act

Adopted Amendments: N.J.A.C. 8:43-4.7 and 7.2
Adopted New Rules: N.J.A.C. 8:43-4.15 and 4.16

Proposed: December 2, 1991 at 23 N.J.R. 3616(a).

Adopted: February 20, 1992 by Frances J. Dunston, M.D., M.P.H., Commissioner, Department of Health (with approval of the Health Care Administration Board).

Filed: February 24, 1992 as R.1992 d.131, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5.

Effective Date: March 16, 1992.

Operative Date: April 1, 1992.

Expiration Date: November 19, 1992.

Summary of Public Comments and Agency Responses:

The proposed amendments and new rule were published in the New Jersey Register on December 2, 1991, at 23 N.J.R. 3616(a). Two letters of comment were received during the comment period, which closed on January 1, 1992. The comment letters, from the New Jersey Association of Non-Profit Homes for the Aging and the New Jersey Association of Health Care Facilities, included recommendations for changes to the proposals at N.J.A.C. 8:43-4.15 and 4.16.

COMMENT: The commenters recommended that N.J.A.C. 8:43-4.15(a) be changed from the proposed requirement for consultation with an ethics committee or "with one or more staff members who are qualified by their background or experience to make clinical and ethical judgements." The recommended change would permit the delegation of dispute resolution "to any individual or individuals who are qualified by their background and/or experience." The change is requested in order to allow facilities to delegate dispute resolution responsibility to qualified persons who are not staff members, such as an ethics consultant, a board member, a physician, or a clergyman.

RESPONSE: The Department agrees and has made the recommended change.

COMMENT: The commenters requested modifications to N.J.A.C. 8:43-4.15(b) so that the proposal would better conform to the New Jersey Advance Directives for Health Care Act, P.L. 1991, c.201, Section 13.a(6). As proposed, the rule would require facilities to provide a "forum for patients, families, and staff to discuss and reach decisions on bioethical concerns relating to patients." The suggested revision would require the facility to establish policies and procedures "to inform physicians, nurses and other health care professionals of their rights and responsibilities under the New Jersey Advance Directives for Health Care Act (the Act) and to provide a forum for such individuals to discuss the requirements of that Act." According to the comments, the proposal could be interpreted to require "public case consultations and this would be inconsistent with the plain requirements and intentions of the Act," and "would engender many other problems including the lack of confidentiality which is considered essential to effective dispute resolution."

RESPONSE: The Department believes that patients, families and staff should be able to discuss bioethical concerns. The proposed amendment is intended to give families and patients an opportunity to discuss these concerns before formal dispute resolution procedures are initiated. Facilities' responsibilities to inform health care professionals of their rights and responsibilities under the Act are delineated at N.J.A.C. 8:43-4.16(h). However, in order to further clarify the proposed amendment, the rule has been modified to require a process for patients, families and staff to discuss and address questions and concerns about advance directives and decisions on accepting or refusing medical care.

COMMENT: One letter of comment also requested clarification of the Association's understanding of proposed N.J.A.C. 8:43-4.16(d), which would require a facility to "provide each adult patient . . . with a written statement of their rights under New Jersey law to make decisions concerning their right to refuse medical care and the right to formulate an advance directive." The commenter understands this to require a clear, accurate and comprehensive statement of the facility's policies concerning implementation of a patient's rights, rather than a "verbatim recitation" of internal procedures which might be lengthy and contain extraneous annotations and background material. The second commenter suggested that patients be provided with a summary of the facility's written policies and procedures and that the full text be available upon request during normal business hours. This commenter further suggested that the proposal be changed to require that such written information be made available in any language which is spoken by more than 10 percent of the "patients/residents of the facility," rather than the proposed 10 percent of the population served by the facility.

RESPONSE: The Department agrees that the written statement which the facility must provide to each patient upon admission, explaining their legal rights to accept or refuse medical treatment and to execute an advance directive, should be "clear, accurate and comprehensive." A copy of such statement, which is approved by the Commissioner of Health, was forwarded to each residential health care facility on January 17, 1992 for distribution to patients. As stated in proposed N.J.A.C. 8:43-4.16(d), additional written information and materials on advance directives and the facility's policies and procedures concerning implementation of such rights must also be provided. This additional information must be developed by each facility, and needs to include all information that directly affects patients' rights to make health care decisions. It is not required that all internal policies regarding advance directives be given routinely to patients. An example of a policy directly affecting implementation of a patient's advance directive would be a mandatory review of the advance directive by the institutional ethics committee (neither required nor encouraged by the Department). Internal procedures concerning location of the advance directives in the medical record, for example, need not be disclosed. The length of the document would, of course, vary according to individual facility policies and procedures. The document should be written in a way that it is useful to patients and families, and should describe any further written materials which are available in the facility but are too lengthy to include as part of the document. Although the suggested change regarding written information "in any language spoken by more than 10 percent of the population served by the facility" has not been made, the phrase "as a primary language" has been inserted in order to clarify the proposal. The adopted standard is less burdensome upon the regulated public, while complying with the original intent of the standard, which is to communicate with the patient and/or the patient's representative. The requested change would be more burdensome, since it would include bilingual populations, who would be able to comprehend the information when provided in English.

Summary of Agency-Initiated Changes:

The Department, in order to provide a more comprehensive definition which is consistent with the definition used in amendments being adopted for licensure rules for other health care facilities, has added the following sentence to the proposed amendment at N.J.A.C. 8:43-4.16(a): "An advance directive may include a proxy directive, an instruction directive, or both."

The word "approved" has been deleted from N.J.A.C. 8:43-4.16(d) and replaced with the word "issued," since the Commissioner has forwarded a statement of patient rights concerning advance directives to all residential health care facilities.

The words "or upon" have been added to N.J.A.C. 8:43-4.16(g), in order to allow facilities to provide notice of advance directive policies to patients or families either before or on admission. This change is in conformance with changes made to licensure rules for hospitals and other health care facilities.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

8:43-4.7 Record maintenance

(a)-(c) (No change.)

(d) The following records shall be maintained and shall be kept available on the premises for review at any time by representatives of the Department of Health.

1. (No change.)

2. Resident's records: Each resident's record shall include an admission record, a medical certification, a record of physician's visits, documentation of the existence or nonexistence of an advance directive and the facility's inquiry of the resident concerning this, and a death record when applicable:

i.-ii. (No change.)

iii. Advance directives: Advance directives, if available.

Recodify existing iii.-iv. as iv.-v. (No change in text.)

(e)-(f) (No change.)

8:43-4.15 Policies and procedures for dispute resolution; forum for discussion of advance directives

(a) The facility shall establish procedures for considering disputes among the resident, health care representative and the attending physician concerning the resident's decision-making capacity or the appropriate interpretation and application of the terms of an advance directive to the resident's course of treatment. The procedures may include consultation with an institutional ethics committee, a regional ethics committee or another type of affiliated ethics committee, or with *[one or more staff members]* ***any individual or individuals*** who are qualified by their background and/or experience to make clinical and ethical judgements.

(b) *[The facility shall establish policies and procedures for providing a forum for residents, families, and staff to discuss and reach decisions on bioethical concerns relating to residents.]* ***The facility shall establish a process for residents, families and staff to discuss and address questions and concerns relating to advance directives and decisions to accept or reject medical treatment.***

8:43-4.16 Policies and procedures for advance directives

(a) For purposes of this Chapter, "advance directive" means a written statement of a resident's instructions and directions for health care in the event of future decision making incapacity, in accordance with the New Jersey Advance Directives for Health Care Act, N.J.S.A. 26:2H-53 et seq., P.L. 1991, c.201. ***An advance directive may include a proxy directive, an instruction directive, or both.***

(b) The facility shall develop and implement procedures to ensure that there is a routine inquiry made of each adult resident, upon admission to the facility and at other appropriate times, concerning the existence and location of an advance directive. If the resident is incapable of responding to this inquiry, the facility shall have procedures to request the information from the resident's family or, in the absence of a family member, another individual with personal knowledge of the resident. The procedures must assure that the resident or family's response to this inquiry is documented in the resident's record. Such procedures shall also define the role of facility admissions, nursing, social service and other staff as well as the responsibilities of the attending physician.

(c) The facility shall develop and implement procedures to promptly request and take reasonable steps to obtain a copy of currently executed advance directives from all residents. These shall be entered into the resident's record when received.

(d) The facility shall have procedures to provide each adult resident upon admission, and, where the resident is unable to respond, the family or other representative of the resident, with a written statement of his or her rights under New Jersey law to make decisions concerning the right to refuse medical care and the right to formulate an advance directive. Such a statement shall be *[approved]* ***issued*** by the Commissioner. Appropriate information and materials on advance directives and the institution's written policies and procedures concerning implementation of such rights shall also be provided. Such written information shall also be made available in any language which is spoken***, as a primary language,*** by more than 10 percent of the population served by the facility.

(e) The facility shall develop and implement procedures for referral of residents requesting assistance in executing an advance directive or additional information to either staff or community resource persons that can promptly advise and/or assist the resident.

(f) The facility shall develop and implement policies to address application of the facility's procedures for advance directives to residents who are experiencing an urgent life-threatening situation.

(g) A resident shall be transferred to another health care facility only for a valid medical reason, in order to comply with other applicable laws or Department rules, to comply with clearly expressed and documented resident choice, or in conformance with the New Jersey Advance Directives for Health Care Act, in the instance of private, religiously affiliated health care institutions who establish policies defining circumstances in which it will decline to participate in the implementation of advance directives. Such institutions must provide notice to residents or their families or health care representatives prior to ***or upon*** admission of their policies. A timely and respectful transfer of the individual to another institution which will implement the resident's advance directive must be effected. The facility's inability to care for the resident shall be considered a valid medical reason. The sending facility shall receive approval from a physician and the receiving health care facility before transferring the resident.

(h) At least one education training program each year shall be held, for all administrative staff and employees providing resident supervision and/or personal care, on the rights and responsibilities of staff under the New Jersey Advance Directives for Health Care Act, N.J.S.A. 26:2H-53 et seq., P.L. 1991, c.201, and internal facility policies and procedures to implement this law.

8:43-7.2 Policies and procedures

(a) Resident rights policies and procedures shall ensure that, as a minimum, each resident admitted to the facility:

1.-3. (No change.)

4. Is, except in the case of an emergency, transferred or discharged only for medical reasons or for his/her welfare or that of other residents upon the written order of the resident's physician, who shall document the reason for the transfer or discharge in the resident's record, or for nonpayment for the resident's stay, or for repeated violations of the facility's written rules and regulations after being advised of them in writing, if required by the Department, or to comply with clearly expressed and documented resident choice, or in conformance with the New Jersey Advance Directives for Health Care Act, N.J.S.A. 26:2H-53 et seq., as specified in N.J.A.C. 8:43-4.16;

i. (No change.)

5.-22. (No change.)

(a)

DIVISION OF HEALTH FACILITIES EVALUATION

Hospital Licensing Standards
Administrative and Hospital Wide; Medical Records
Advance Directives

Adopted Amendments: N.J.A.C. 8:43G-5.1, 5.2, 5.9 and 15.2

Proposed: November 4, 1991 at 23 N.J.R. 3256(a).

Adopted: February 20, 1992 by Frances J. Dunston, M.D., M.P.H., Commissioner, Department of Health (with approval of the Health Care Administration Board)

Filed: February 24, 1992 as R.1992 d. 132 **with substantive** changes not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5.

Effective Date: March 16, 1992.

Operative Date: April 1, 1992.

Expiration Date: February 5, 1995.

Summary of Public Comments and Agency Responses:

The amendments were proposed November 4, 1991. Four letters of comment were received during the public comment period which closed December 4, 1991. The following is a list of persons and organizations who submitted comments on this proposal: Commission on Legal and Ethical Problems in the Delivery of Health Care, the New Jersey Hospital Association, the Valley Hospital and Jean Paashaus.

COMMENT: The New Jersey Commission on Legal and Ethical Problems in the Delivery of Health Care (the "Commission") commends the Department for its work in drafting the proposed regulations and for its efforts to implement the New Jersey Advance Directives for Health Care Act. The Commission expresses support for the proposed amendments.

RESPONSE: The Department appreciates the opportunity to have worked with the Commission in developing the rules and thanks the Commission for its support and endorsement of the amendments.

N.J.A.C. 8:43G-5.1(h)1-3

COMMENT: One commenter suggests the Department use a more comprehensive definition of "advance directive" than proposed at N.J.A.C. 8:43G-5.1(h)2, as it appears to refer only to an instruction directive.

RESPONSE: The Department acknowledges the commenter's request and accordingly has added the following sentence: "An advance directive" may include a proxy directive or an instruction directive, or both.

COMMENT: The Commission notes that the full title of the Act was not identified in this rule.

RESPONSE: The Commission is correct; the term "Advance" was inadvertently omitted. The Department has amended the rule to refer to the Act by its full title.

COMMENT: Several commenters object to the requirement for involvement of the bioethics committee in the process of conflict resolution and added that such a requirement goes beyond the scope of the Act. One commenter stresses that the State law spoke only of "ethics" committees, and therefore objects to the proposed rules reference to a "bioethics" committee for conflict resolution. The commenter expresses concern that although it may be advantageous to rely on "bioethics" committees for purposes of bureaucratic expediency, it provides no assurance that decisions were made on the basis of ethical rigor. One commenter believes the Department should more narrowly define conflict resolution and expressed concern that inclusion of the phrase "interpretation and implementation" may encompass issues which go beyond the areas of conflict resolution identified in the Act, and which would likely be essentially legal in nature. The New Jersey Hospital Association (NJHA) also objects to the required involvement of the bioethics committee in the formation of hospital policy related to advance directives.

RESPONSE: It is a requirement of the Department of Health that each hospital have a bioethics committee, and/or prognosis committee(s), or equivalent. This requirement, found at N.J.A.C. 8:43G-5.1(h), in the Licensing Standards for Hospitals, has been in effect since February 20, 1990, and has been implemented since July 1, 1990. Given the existence and nature of this Committee, the Department believes that it is reasonable and in the best interest of both the hospital and its patients to ensure that the bioethics committee provides guidance in this issue. From the perspective of the Department, the bioethics committee should be comprised of those individuals within the hospital most qualified to address the issues associated with "Advance Directives". The Department has revised the rule, however, to enable individuals, other than those employed by the hospital, to be delegated partial responsibility for conflict resolution.

In response to the concern regarding the ethical rigor of decisions made by a bioethics committee regarding dispute resolution, the Department directs the commenter's attention to the option, permitted by the Act, to have dispute resolutions determined by a court of competent jurisdiction.

The Department has revised the language of the rule in response to the commenter's suggestion that inclusion of the phrase "interpretation and implementation of advance directives" may be too broad and may bring issues which go beyond the scope intended by the Act into the process of dispute resolution. The language has been revised to specify that conflict resolution concerns the patient's decision making capacity or the appropriate interpretation and application of the terms of an advance directive.

The Department has not eliminated the requirement for involvement of the bioethics committee in formation of hospital policy related to Advance Directives as it believes this is an appropriate area for consideration by such a committee.

N.J.A.C. 8:43G-5.2(a)4

COMMENT: The Commission recommends three changes to the section concerning the rights of private, religiously-affiliated health care institutions, in order to bring the language of the rules in closer conformity with the Act. The first request is to clarify that the phrase "withholding or withdrawing of specified measures", as found at paragraph (a)4, specifically refers to specified measures "utilized to sustain life". The Commission recommends replacement of the specific reference to "advance directives" found in subparagraph (a)4i with a more encompassing phrase "withholding or withdrawing of specified life-sustaining measures." Lastly, the Commission requests insertion of the phrase "prior to or upon admission, or as soon after admission as is practical" in subparagraph (a)4ii. They comment that this phrase adopts the language of the Act and defines the meaning of "prompt notice."

RESPONSE: The Department acknowledges the importance of conformity with the language of the Act and amends the rule in accordance with the Commission's first and last request. With regard to the second request, the Department agrees to add the phrase suggested by the Commission; however, it also believes it is important to retain the reference to advance directives. The Department revises the rule as follows: "The hospital shall establish written policies defining circumstances in which it will decline to participate in withholding or withdrawing of specified life-sustaining measures in accordance with the patient's advance directive".

N.J.A.C. 8:43G-5.2(a)5

COMMENT: N.J.H.A. comments that the second sentence of the rule appears to be incomplete and recommends addition of the phrase "of the patient" to the end of the sentence. They also comment that in certain situations hospitals may be unable to find "another individual with personal knowledge of the patient," and suggest the rule be further revised by adding "if available and known to the hospital."

RESPONSE: The Department agrees and has revised the rule accordingly.

N.J.A.C. 8:43G-5.2(a)6

COMMENT: Several commenters express concern about the requirement for documentation of an advance directive in the medical record of individuals not admitted to the hospital. It was felt compliance would be very difficult, given the large volume of individuals who receive care in the emergency department and/or on an outpatient basis. The commenters also add that such a requirement appears to be inconsistent with the State law and the Federal Patient Self-Determination Act.

RESPONSE: The Department developed the proposed rules at a time when it interpreted the Federal Patient Self-Determination Act's reference to "all patients receiving medical care" as encompassing more than just those patients admitted to the hospital. In light of additional information, the Department has eliminated the specific requirement found at proposed N.J.A.C. 8:43G-5.2(a)6, but has replaced it with a requirement for the hospital to develop policies and procedures related to this issue. Although the Department recognizes that it may not be necessary nor appropriate to make a routine inquiry of every out-patient, it nonetheless believes that there may be some patients for whom such an inquiry would be relevant. The policies and procedures being required at N.J.A.C. 8:43G-5.2(a)6 will require the hospital to address patients treated in the same day surgery and medical service, emergency department, and those receiving outpatient renal dialysis services.

N.J.A.C. 8:43G-5.2(a)7

COMMENT: N.J.H.A. asks that the rule be amended to require hospitals to "request" rather than "obtain" a copy of the advance directive. They also express their belief that hospitals should be entitled to presume that an advance directive is valid unless there is evidence that the document may be invalid, and therefore requests the language of the rule be revised to reflect this.

RESPONSE: The Department has revised the rule so as to address the concerns raised by the commenter. The reference to "obtain" has been retained; however, the revised language now requires hospitals to "take reasonable steps" to obtain. The language referring to the issue of validity has also been revised, to assert that steps for evaluating the validity of an advance directive must be taken when there is a question of validity.

N.J.A.C. 8:43G-5.2(a)8

COMMENT: Two commenters question the necessity of this provision. It was asked whether the intent of the rule was to ensure that efforts were made to obtain an actual copy of the patient's advance directive.

RESPONSE: The intent of this rule is to ensure that the primary care providers are aware that the patient has executed an advance directive and therefore has personally expressed his or her wishes regarding the withholding or withdrawing of specified life-sustaining measures. This information should be considered in the provider's discussion of the medical treatment to be provided to such a patient.

N.J.A.C. 8:43G-5.2(a)10

COMMENT: One commenter questions the need for the Commissioner of Health to approve a hospital's written statement of a patient's rights under the Act and suggests as an alternative, that the Department include the required text of the statement as part of this rule. The commenter also objects to the requirement to provide a copy of the statement in any language which is spoken by more than 10 percent of the population of the hospital's service area. The Commission suggests two grammatical changes to bring the rule into conformity with the language of the Act. They ask that the word "concerning" be replaced with "including" in the first sentence and deletion of the phrase "shall be provided" which follows "the right to formulate an advance directive."

RESPONSE: Since publication of this proposed rule, the Department has developed and issued a statement of rights under this Act which has been signed by the Commissioner of Health. A copy has been distributed to all hospitals for their use. The Department has revised the language of the rule to reflect this, and has also clarified the requirement regarding copies of the statement in languages other than English.

N.J.A.C. 8:43G-5.2(a)11

COMMENT: One commenter objected to the language of this proposed rule, and believed it obligated the hospital to provide direct assistance to individuals in executing advance directives. The commenter added that, if indeed that was the Department's intent, it was going beyond the scope of the Act.

RESPONSE: In the event a patient requests assistance, the intent of the rule is to ensure that such assistance is provided to the patient during his or her inpatient stay. The rule provides the option for assistance from hospital staff or community resource persons. The Department adds that assistance should be available to the patient without charge. This is not to be interpreted, however, that the hospital is obligated to provide legal expertise, as it is conceivable that some patients may desire to retain an attorney.

N.J.A.C. 8:43G-5.2(a)12

COMMENT: One commenter expresses concern about the ability of the hospital to validate the advance directive of a patient who is in an urgent life-threatening situation. N.J.H.A. comments that this rule is redundant in light of the requirements *supra* that hospitals establish policies and make routine inquiry at the time of admission.

RESPONSE: Although the Department's recognizes that an advance directive does not become operative until it has been transmitted to the patient's attending physician or the hospital, it nonetheless believes an attempt should be made to determine whether such an individual has executed an advance directive or has verbally expressed his or her wishes regarding withholding or withdrawing specified life sustaining measures in such an event. This information, if available, should be considered in discussion of the course of medical treatment to be followed. The Department does not agree that this rule is redundant, as its purpose is to address a situation different from a customary admission to the hospital.

N.J.A.C. 8:43G-5.9(a)7

COMMENT: N.J.H.A. requests that the rule be amended to reflect that only staff engaged in direct patient care are in need of such an education program.

RESPONSE: The Department prefaces this rule with N.J.A.C. 8:43G-5.9(a), which states that a department's plan of education should be relevant to the service. The Department believes this language serves to satisfy the commenter's request, and therefore has made no further revision to the rule.

Full text of the adoption follows (additions to proposal are indicated by boldface with asterisks ***thus***; deletions from proposal are indicated in brackets *[thus]*).

8:43G-5.1 Administrative and hospital-wide structural organization; mandatory

(a)-(g) (No change.)

(h) The hospital shall have a multidisciplinary bioethics committee, and/or prognosis committee(s), or equivalent(s). The hospital shall assure participation by individuals with medical, nursing, legal, social work, and clergy backgrounds. The committee or commitees shall have at least the following functions:

1. (No change.)

2. Participation in the formulation of hospital policy related to advance directives. Advance directive shall mean a written statement of the patient's instructions and directions for health care in the event of future decision making incapacity in accordance with the New Jersey ***Advance*** Directives for Health Care Act (P.L. 1991, c.201). ***An "advance directive" may include a proxy directive or an instruction directive, or both.***

3. Participation in the resolution of patient-specific bioethical issues, and responsibility for conflict resolution ***concerning the patient's decision-making capacity and*** in the interpretation and *[implementation]* ***application*** of advance directives. The committee may partially delegate responsibility for this function to *[one or more qualified staff members]* ***any individual or individuals who are qualified by their backgrounds and/or experience to make clinical and ethical judgments***; and

4. (No change in text.)

(i) (No change.)

(j) The hospital shall provide periodic community education programs, individually or in coordination with other area facilities or organizations, that provide information to consumers regarding advance diretives and their rights under New Jersey law to execute advance directives.

(k) The hospital shall establish policies and procedures for the declaration of death of patients in accordance with N.J.S.A. 26:6 and the New Jersey Declaration of Death Act (P.L. 1991, c.90). The policies and procedures shall accommodate a patient's religious beliefs with respect to declaration of death. Such policies shall also be in conformance with regulations and policies promulgated by the New Jersey Board of Medical Examiners which address declaration of death based on neurological criteria, including the qualifications of physicians authorized to declare death based on neurological criteria and the acceptable medical criteria, tests, and procedures which may be used.

8:43G-5.2 Administrative and hospital-wide policies and procedures

(a) The hospital shall have written policies, procedures and bylaws that are reviewed annually, revised as needed, and implemented. They shall include at least:

1. Policies on the admission of patients, transfer of patients to another facility, and discharge of patients;

2. Procedures for obtaining the patient's written informed consent for all medical treatment;

3. Delineation of the responsibilities of the medical staff, nursing, and other staff in contacting the patient's family in the event of death, elopement, or a serious change in condition;

4. Policies addressing bio-ethical issues affecting individual patients, including at least removal of life support systems, discontinuance or refusal of treatment, and designation not to resuscitate. In accordance with the New Jersey ***Advance*** Directives for Health Care Act (P.L. 1991, c.201), private, religiously-affiliated health care institutions which decline to participate in the withholding or withdrawing of specified ***life-sustaining*** measures shall comply with the following:

i. The hospital shall establish written policies defining circumstances in which it will decline to participate in the *[implementation of advance directives]* ***withholding or withdrawing of specified life-sustaining measures in accordance with the patient's advance directive***;

ii. The hospital shall provide prompt notice to patients or their families or health care representatives of these policies ***prior to or upon admission, or as soon after admission as is practical***; and

iii. The hospital shall implement a timely and respectful transfer of the individual to another institution who will implement the patient's advance directive;

5. Procedures to ensure that there is a routine inquiry made of each adult patient, upon admission to the hospital and at other appropriate times, concerning the existence and location of an advance directive (as required and defined in the New Jersey Advance Directives for Health Care Act, P.L. 1991, c.201). If the patient is incapable to respond to this inquiry, the hospital shall have procedures to request the information from the patient's family or in the absence of family, another individual with personal knowledge ***of the patient, if available and known to the hospital***. The procedures must assure that the patient or family's response to this inquiry is documented in the medical record. Such procedures shall also define the role of hospital admissions, nursing, social service and other staff as well as the responsibilities of the attending physician;

6. *[Procedures to document]* *** Policies which identify circumstances in which an inquiry will be made of adult individuals receiving same day surgery, same day medical services, treatment in the emergency department or out-patient hemodialysis treatment regarding*** the existence ***and location*** of an advance directive *[in the patient's medical record for adult individuals receiving outpatient, emergency, or other non-inpatient care]*;

7. Procedures to request and ***to take reasonable steps to*** promptly obtain a copy of currently executed advance directives from inpatients and other critically ill patients who are under treatment at the hospital. These shall be entered when received into the medical record of the patient. *[Where]* ***When there is a*** question of validity *[is indicated]*, procedures for promptly evaluating the validity of the advance directive must be established;

8. Procedures for promptly alerting physicians, nurses, and other professionals providing care to patients who have informed the hospital of the existence of an advance directive in instances where a copy is not immediately available for the medical record;

9. Policies for transfer of the responsibility for care of patients with advanced directives in those instances where a health care professional declines as a matter of professional conscience to participate in withholding or withdrawing life-sustaining treatment. Such transfer shall assure that the patient's advance directive is implemented in accordance with their wishes within the hospital;

10. Means to provide each adult patient upon admission, or where the patient is unable to respond, family or other representative with a written statement of their rights under New Jersey law to make

decisions concerning the right to refuse medical care and the right to formulate an advance directive *[shall be provided]*. This statement of rights shall be *[approved]* ***issued*** by the Commissioner. Appropriate written information and materials on advance directives and the institution's written policies and procedures *[concerning]* ***including*** the withdrawal or withholding of life sustaining treatment shall be provided to each patient and others upon request. Such written information shall also be made available in any language which is spoken ***as the primary language*** by more than 10 percent of the population of the hospital's service area;

11. Procedures for referral of patients requesting assistance in executing an advance directive or additional information to either staff or community resource persons that can promptly advise and/or assist the patient during the inpatient stay; and

12. Policies to ensure application of the hospital's procedures for advance directives to patients who are receiving emergency room care for an urgent life-threatening situation.

(b) A patient shall be transferred to another hospital only for a valid medical reason, in order to comply with other applicable laws or Department rules, to comply with clearly expressed and documented patient choice, or in conformance with the New Jersey Advance Directives for Health Care Act.

The hospital's inability to care for the patient shall be considered a valid medical reason. The sending hospital shall receive approval from a physician and the receiving hospital before transferring the patient. Documentation for the transfer shall be sent with the patient, with a copy or summary maintained by the transferring hospital. This documentation shall include, at least:

1.-4. (No change.)

5. Patient information collected by the sending hospital, as specified in N.J.A.C. 8:43G-15.2*[(f)]***(e)***;

6. The name of the contact person at the receiving hospital; and

7. A copy of the patient's advance directive where available or notice that the individual has informed the sending hospital of the existence of an advance directive.

(c)-(m) (No change.)

8:43G-5.9 Department education programs

(a) (No change.)

(b) The plan shall include education programs that address at least the following:

1.-4. (No change.)

5. Education on statutory requirements relevant to the specific service ***such as identification and reporting of victims of abuse; and***

6. Areas identified by the hospital-wide quality assurance program as needing educational programs; and

7. Rights and responsibilities of staff under the New Jersey Advance Directives for Health Care Act (P.L. 1991, c.201) and the federal Patient Self Determination Act (P.L. 101-508), and internal hospital policies and procedures to implement these laws.

(c) (No change.)

8:43G-15.2 Medical records policies and procedures; mandatory

(a)-(c) (No change.)

(d) The inpatient's complete medical record shall include at least:

1. Written informed consents, if indicated and documentation of the existence, or nonexistence, of an advanced directive and the hospital's inquiry of the patient concerning this;

2.-15. (No change.)

(e) If the patient is transferred to another health care facility (including a home health agency) on a nonemergency basis, the hospital shall maintain a transfer record reflecting the patient's immediate needs and send a copy of this record to the receiving facility at the time of transfer. The transfer record shall contain at least the following information:

1-3. (No change.)

4. Hazardous behavioral problems;

5. Drug and other allergies; and

6. A copy of the patient's advance directive, where available.

(f)-*[(l)]***(k)*** (No change.)

(a)

DIVISION OF HEALTH FACILITIES EVALUATION

Manual of Standards for Licensure of Rehabilitation Hospitals

Advance Directives for Health Care Act; Patient Self Determination Act

Adopted Amendments: N.J.A.C. 8:43H-3.4, 17.2, 19.3 and 19.5

Adopted New Rule: N.J.A.C. 8:43H-5.3 and 5.4

Proposed: December 2, 1991 at 23 N.J.R. 3614(a).

Adopted: February 20, 1992, by Frances J. Dunston, M.D., M.P.H., Commissioner, Department of Health (with approval of the Health Care Administration Board).

Filed: February 24, 1992 as R.1992 d.133, **with substantive changes** not requiring additional notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5, and N.J.S.A. 26:2H-53 et seq.

Effective Date: March 16, 1992.

Operative Date: April 1, 1992.

Expiration Date: August 21, 1994.

Summary of Public Comments and Agency Responses:

No comments received.

Summary of Agency-Initiated Changes:

The proposal at N.J.A.C. 8:43H-5.3(a) has been changed from the proposed requirement for consultation with an ethics committee or "with one or more staff members who are qualified by their background or experience to make clinical and ethical judgements." The recommended change will allow facilities to delegate dispute resolution responsibility to qualified persons who are not staff members, such as an ethics consultant, a board member, a physician, or a clergyman.

The Department, in order to clarify the proposal and to conform with amendments being adopted for other health care facilities, has modified the rule at N.J.A.C. 8:43H-5.3(b) to require a process for patients, families and staff to discuss and address questions and concerns about advance directives and decisions on accepting or refusing medical care.

The Department, in order to provide a more comprehensive definition which is consistent with the definition used in amendments being adopted for licensure rules for other health care facilities, has added the following sentence to the proposal at N.J.A.C. 8:43H-5.4(a): "An advance directive may include a proxy directive, an instruction directive, or both."

The words "or upon" have been added to proposed N.J.A.C. 8:43H-5.4(d), in order to allow facilities to provide notice of advance directive policies to patients or families either before or on admission. This change is in conformance with changes made to licensure rules for hospitals and other health care facilities.

The proposed rule at N.J.A.C. 8:43H-5.4(e) has been changed to reflect the role of the health care professionals in transfer of patients' care, and an additional sentence has been added which indicates the facilities' responsibilities when the health care practitioner who declines to participate in the advance directive is the patient's physician.

The word "approved" has been deleted from proposed N.J.A.C. 8:43H-5.4(f) and replaced with the word "issued," since the Commissioner has forwarded a statement of patient rights concerning advance directives to all rehabilitation hospitals.

The phrase "as a primary language" has been inserted in order to clarify the proposal at N.J.A.C. 8:43H-4.5(f) requiring the provision of written information in any language which is spoken by more than 10 percent of the population served by the facility.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

8:43H-3.4 Personnel

(a)-(c) (No change.)

(d) The facility shall develop and implement a staff orientation and a staff education plan, including plans for each service and designation of person(s) responsible for training.

1. (No change.)

2. At least one education training program each year shall be held for all administrative and patient care staff regarding the rights and responsibilities of staff under the New Jersey Advance Directives for Health Care Act, N.J.S.A. 26:2H-53 et seq. (P.L. 1991, c.201), and the Federal Patient Self Determination Act (P.L. 101-508), and internal facility policies and procedures to implement these laws.

(e) (No change.)

8:43H-5.3 Advance directives; dispute resolution; forum for discussion; community education

(a) The facility shall establish procedures for considering disputes among the patient, the health care representative and the attending physician concerning the patient's decision-making capacity or the appropriate interpretation and application of the terms of an advance directive to the patient's course of treatment. The procedures may include consultation with an institutional ethics committee, a regional ethics committee or another type of affiliated ethics committee, or with *[one or more staff members]* ***any individual or individuals*** who are qualified by their background and/or experience to make clinical and ethical judgments.

(b) *[The facility shall establish policies and procedures for providing a forum for patients, families, and staff to discuss and reach decisions on bioethical concerns relating to patients.]* ***The facility shall establish a process for patients, families and staff to discuss and address questions and concerns relating to advance directives and decisions to accept or reject medical treatment.***

(c) The facility shall provide periodic community education programs, individually or in coordination with other area facilities or organizations, that provide information to consumers regarding advance directives and their rights under New Jersey law to execute advance directives.

8:43H-5.4 Policies and procedures for advance directives

(a) For purposes of this chapter, "advance directive" means a written statement of a patient's instructions and directions for health care in the event of future decision making incapacity, in accordance with the New Jersey Advance Directives for Health Care Act, N.J.S.A. 26:2H-53 et seq., (P.L. 1991, c.201). ***An advance directive may include a proxy directive, an instruction directive, or both.***

(b) The facility shall develop and implement procedures to ensure that there is a routine inquiry made of each adult patient, upon admission to the facility and at other appropriate times, concerning the existence and location of an advance directive. If the patient is incapable of responding to this inquiry, the facility shall have procedures to request the information from the patient's family or, in the absence of a family member, another individual with personal knowledge of the patient. The procedures must assure that the patient or family's response to this inquiry is documented in the medical record. Such procedures shall also define the role of facility admissions, nursing, social service and other staff as well as the responsibilities of the attending physician.

(c) The facility shall develop and implement procedures to promptly request and take reasonable steps to obtain a copy of currently executed advance directives from all patients. These shall be entered when received into the medical record of the patient.

(d) A patient shall be transferred to another health care facility only for a valid medical reason, in order to comply with other applicable laws or Department rules, to comply with clearly expressed and documented patient choice, or in conformance with the New Jersey Advance Directives for Health Care Act in the instance of private, religiously affiliated health care institutions who establish policies defining circumstances in which it will decline to participate in the implementation of advance directives. Such institutions shall provide notice to patients or their families or health care representatives prior to ***or upon*** admission of their policies. A timely and respectful transfer of the individual to another institution which will implement the patient's advance directive shall be effected. The facility's inability to care for the patient shall be considered a valid medical reason. The sending facility shall receive approval from a physician and the receiving health care facility before transferring the patient.

(e) The facility shall *[develop and implement policies for transfer of the responsibility for care]** ***, in consultation with the attending physician, take all reasonable steps to effect the appropriate, respectful and timely transfer*** of patients with advance directives ***to the care of an alternative health care professional*** in those instances where a health care professional declines as a matter of professional conscience to participate in withholding or withdrawing life-sustaining treatment. ***In those instances where the health care professional is the patient's physician, the facility shall take reasonable steps, in cooperation with the physician, to effect the transfer of the patient to another physician's care in a responsible and timely manner.*** Such transfer shall assure that the patient's advance directive is implemented in accordance with their wishes within the facility, except in cases governed by (d) above.

(f) The facility shall have procedures to provide each adult patient upon admission and, where the patient is unable to respond, to the family or other representative of the patient, with a written statement of their rights under New Jersey law to make decisions concerning the right to refuse medical care and the right to formulate an advance directive. Such statement shall be *[approved]* ***issued*** by the Commissioner. Appropriate written information and materials on advance directives and the institution's written policies and procedures concerning implementation of such rights shall also be provided. Such written information shall also be made available in any language which is spoken***, as a primary language,*** by more than 10 percent of the population served by the facility.

(g) The facility shall develop and implement procedures for referral of patients requesting assistance in executing an advance directive or additional information to either staff or community resource persons that can promptly advise and/or assist the patient.

(h) The facility shall develop and implement policies to address application of the facility's procedures for advance directives to patients who experience an urgent life-threatening situation.

(i) The facility shall develop and implement policies and procedures for the declaration of death of patients, in instances where applicable, in accordance with N.J.S.A. 26:6 and the New Jersey Declaration of Death Act, N.J.S.A. 26:6A-1 et seq. (P.L. 1991, c.90). Such policies shall also be in conformance with rules promulgated by the New Jersey Board of Medical Examiners which address declaration of death based on neurological criteria, including the qualifications of physicians authorized to declare death based on neurological criteria and the acceptable medical criteria, tests, and procedures which may be used. The policies and procedures must also accommodate a patient's religious beliefs with respect to declaration of death.

8:43H-17.2 Rights of each patient

(a) Patient rights policies and procedures shall ensure that, as a minimum, each patient admitted to the facility:

1.-4. (No change.)

5. Is transferred or discharged only for medical reasons, to comply with clearly expressed and documented patient choice, or in conformance with the New Jersey Advance Directives for Health Care Act, as specified in N.J.A.C. 8:43H-5.4(d), or for his or her welfare or that of other patients, upon the written order of the patient's physician, and such actions are documented in the patient's medical record, except in an emergency situation, in which the administrator shall notify the physician and the family immediately, and document the reason for the transfer in the patient's medical record. If a transfer or discharge on a nonemergency basis is requested by the facility, including transfer or discharge for nonpayment for the patient's stay (except as prohibited by sources of third party payment), the patient and his or her family shall be given at least 10 days advance notice of such transfer or discharge;

6.-21. (No change.)

(b)-(d) (No change.)

8:43H-19.3 Contents of medical records

(a) The patient medical record shall include, but not be limited to, the following:

1.-18. (No change.)

19. Documentation of the existence, or nonexistence, of an advance directive and the facility's inquiry of the patient concerning this;

Recodify existing 19.-22. as 20.-23. (No change in text.)

8:43H-19.5 Medical records policies and procedures

(a) The facility shall establish and implement written policies and procedures regarding medical records including, but not limited to, policies and procedures for the following:

1.-2. (No change.)

3. The transfer of patient information when the patient is transferred to another health care facility, or if the patient becomes an outpatient at the same facility, including a copy of the patient's advance directive, if available, or notice that the patient has informed the sending facility of the existence of an advance directive; and

4. (No change.)

(a)

HEALTH FACILITIES EVALUATION AND LICENSING

Notice of Deletion
Controlled Dangerous Substances
Propylhexedrine
N.J.A.C. 8:65-10.5(d)

Authority: N.J.S.A. 24:21-3.

Effective Date: March 16, 1992.

Authorized By: Frances J. Dunston, M.D., M.P.H., Commissioner, Department of Health.

Take notice that, effective December 3, 1991, Propylhexedrine (CDS Code 8161) was delisted as a controlled dangerous substance by the Drug Enforcement Administration because it had been decontrolled internationally from the 1971 Convention on Psychotropic Substances, dated June 10, 1991. This action obviates the need for domestic control, under Federal and State regulations. This notice action has been taken pursuant to N.J.S.A. 24:21-3 which provides that once a controlled substance has been scheduled or delisted under Federal law and notice is given to the Commissioner of Health, the Commissioner shall similarly schedule or delist the substance after 30 days following the publication in the Federal Register of a final Order scheduling or delisting the substance.

A final Order delisting Propylhexedrine from the Controlled Substances Act (CSA) was published in the Federal Register December 3, 1991 (see 56 F.R. 61372).

(b)

DRUG UTILIZATION REVIEW COUNCIL

List of Interchangeable Drug Products
Adopted Amendments: N.J.A.C. 8:71

Proposed: January 6, 1992 at 24 N.J.R. 61(a).

Adopted: February 11, 1992 by the Drug Utilization Review Council, Robert Kowalski, Chairman.

Filed: February 18, 1992 as R.1992 d.134, **with portions of the proposal not adopted but still pending.**

Authority: N.J.S.A. 24:6E-6(b).

Effective Date: March 16, 1992.

Expiration Date: February 17, 1994.

Summary of Public Comments and Agency Responses:

The Drug Utilization Review Council received the following comments pertaining to the products affected by this adoption.

COMMENT: Parke Davis Pharmaceutical Company, Inc., objected to the proposed addition of the Danbury gemfibrozil caps 300 mg. Parke Davis' objection was based on the extended patent of its brand Lopid until January, 1993. Parke Davis pointed out that it would be premature and misleading to approve Danbury's gemfibrozil since no generic version of Lopid could be marketed until the expiration of this extended patent.

RESPONSE: The DURC does not consider matters of patents in reviewing application for the inclusion of drug products in the Formulary. The Attorney General's Office has advised that there is generally no legal impediment to the Council including potentially patent infringing drug products into the Formulary. However, the Council deferred taking action because Danbury has not submitted bioequivalency data on its gemfibrozil product nor has the product obtained FDA approval.

COMMENT: Regarding Phos Flur oral rinse substitute, Danbury Pharmacal noted that it was incorrectly listed as the manufacturer for the product in the proposal.

RESPONSE: The Council agreed that the listing was erroneous. Copley's Phos Flur oral rinse substitute should have been the product listed. This product was formally proposed in the March 2, 1992 *New Jersey Register* at 24 N.J.R. 735(a). No action could be taken on Copley's Phos Flur oral rinse substitute.

COMMENT: From McNeil Pharmaceutical Corporation, in opposition to Purepac tolmetin sodium caps 400 mg and Danbury tolmetin sodium tabs 200 mg and caps 400 mg, McNeil states that to the best of their knowledge Purepac and Danbury have not received FDA approval for the aforementioned generic versions of tolmetin sodium. Approval from the FDA has been required by the Council before addition into the *Formulary*.

RESPONSE: The Council verified that Purepac's tolmetin sodium caps 400 mg has received FDA approval for marketing with an "AB" therapeutic equivalency rating and agreed to defer taking action on Danbury's tolmetin pending FDA approval.

COMMENT: From Solvay Pharmaceuticals in opposition to the Zenate Prenatal Vitamin substitute by Copley Pharmaceutical Co., Solvay informs the Council that iron bioavailability varies significantly among the various prenatal vitamin/mineral supplement products. Solvay suggests that the Council determine if equivalent amounts of iron are delivered by Zenate and Copley's generic version.

RESPONSE: The Council and the FDA have not required dissolution and biodata from manufacturer of prenatal vitamin/mineral supplements that have been added to the Formulary, and, therefore, it was not required for Copley's product.

The Council considers Copley's product based on the same information required of other prenatal vitamins: sources of calcium and iron and comparative disintegration data.

COMMENT: From Norwich Eaton Pharmaceuticals in opposition to Danbury's nitrofurantoin caps 25 mg, 50 mg, and 100 mg, Norwich Eaton states that to the best of their knowledge Danbury has not received FDA approval for its nitrofurantoin caps. Approval from the FDA has been required by the Council before addition into the Formulary.

RESPONSE: The Council deferred taking action on this product, pending FDA approval.

COMMENT: From Johnson & Johnson, on behalf of Janssen Pharmaceutica, in opposition to Mylan's loperamide caps 2 mg, Johnson & Johnson (J&J) informed the Council that the treatment of diarrhea is the balancing of efficacy against possible side effects. J&J stated that Janssen's brand name of loperamide, Imodium, has provided highly effective relief from the discomforts and problems associated with diarrhea.

J&J noted that the treatment of diarrhea needs consistent and effective medication. J&J points out that patients effectively controlled with Imodium would not be well served by being switched to a generic product which could result in loss of bowel control. J&J contended that these patients would not be well served from either a cost or health perspective. J&J requested the Council reject Mylan's application of loperamide as an addition to the New Jersey List of Interchangeable Drugs.

RESPONSE: The Council unanimously approved Mylan's loperamide 2 mg capsules based on the acceptable comparative values of the AUC, T-max and C-max, as well as, the acceptable ranges of the 90 percent confidence intervals. Johnson & Johnson did not provide any conclusive information to show any therapeutic difference between the brand Imodium and Mylan's loperamide.

COMMENT: From Warner Lambert, in opposition to Danbury's gemfibrozil capsules 300 mg, Warner Lambert markets the brand gemfibrozil, Lopid, and the patent for the brand does not expire until January 4, 1993. Warner Lambert stated that an ANDA could not become effective nor could any marketing take place until the expiration of the patent. Warner Lambert reported that the Council has deferred taking action on a proposed product if the ability to market the product cannot be proven. Warner Lambert requested that the Council's deferral would avoid confusion.

In addition, Warner Lambert stated that to the best of their knowledge Danbury has not received FDA approval for its gemfibrozil caps nor has biodata been submitted to the DURC. Warner Lambert requested that Danbury's application be rejected and any further consideration be deferred until the expiration of the patent on Lopid is imminent.

RESPONSE: The Council does not consider matters of patents in reviewing application for the inclusion of drug products in the Formulary. The Attorney General's Office has advised that there is generally no legal impediment to the Council including potentially patent infringing drug products into the Formulary. However, the Council deferred taking action, because Danbury has not submitted bioequivalency data on its gemfibrozil product, nor has the product obtained FDA approval.

Summary of Hearing Officer's Recommendations and Agency Responses:

A public hearing on the proposed additions to the list of interchangeable drug products was held on January 27, 1992. Mark A. Strollo, R.Ph., M.S., served as hearing officer. Five persons attended the hearing. Seven comments were offered, as summarized above. The hearing officer recommended that the decisions made be based upon available biodata. The Council adopted the products specified as "adopted," declined to adopt the products specified as "not adopted," and referred the products identified as "pending" for further study.

The following products and their manufacturers were **adopted**:

Amatadine HCl Syrup 50mg/5ml	Copley
Amiloride/HCTZ tabs 5/50	Mylan
Atenolol tabs 50mg, 100mg	Danbury
Atenolol tabs 50mg, 100mg	Mylan
Fluphenazine HCl Oral Soln 5mg/ml	Copley
Granulex spray substitute	Armstrong
Inflamase Forte ophth soln substitute 1%	Steris
Inflamase Mild ophth soln substitute 0.125%	Steris
Loperamide caps 2mg	Mylan
Metaproterenol sulfate syrup 10mg/5ml	Copley
Minocycline caps 50mg, 100mg	Danbury
Nifedipine caps 10mg, 20mg	Miles
Poly-Vi-Flor with Iron tabs 0.5mg substitute	Copley
Propantheline Bromide tabs 15mg	Danbury
Propranolol/HCTZ tabs 40/25, 80/25	Danbury
Tolmetin sodium caps 400mg	Purepac
Zenate Prenatal Vitamin substitute	Copley

The following drugs were **not adopted but are still pending**:

Amoxapine tabs 25mg, 50mg, 100mg, 150mg	Danbury
Atenolol tab 25mg	Geneva
Atenolol/chlorthalidone tabs 50/25, 100/25	Danbury
Bromocriptine mesylate tabs 2.5mg	Danbury
Chlorzoxazone tabs 250mg, 500mg	Ohm
Clorazepate tabs 3.75mg, 7.5mg, 15mg	Danbury
Desipramine HCl tabs 10mg, 25mg, 50mg	Danbury
Desipramine HCl tabs 75mg, 100mg, 150mg	Danbury
Fiorinal tabs substitute	Danbury
Fluphenazine HCl Oral Soln 5mg/ml	Copley
Fluphenazine HCl tabs 1mg, 2.5mg, 5mg, 10mg	Danbury
Gemfibrozil caps 300mg	Danbury
Guaifenesin tabs 600mg	DURA
Ibuprofen tabs 300mg	Danbury
Isosorbide Dinitrate tabs 20mg, 30mg, 40mg	Danbury
Loperamide HCl caps 2mg	Danbury
Loxapine succinate caps 5mg, 10mg, 25mg, 50m	Danbury
Methylprednisolone tabs 4mg, 16mg	Danbury
Metoclopramide HCl tabs 5mg	Danbury
Minocycline HCl tabs 50mg, 100mg	Danbury
Nadolol tabs 40mg, 80mg, 120mg	Danbury
Nitrofurantoin caps 25mg, 50mg, 100mg	Danbury
Nortryptylline HCl caps 10mg, 25mg, 50mg, 75mg	Danbury
Propoxyphene naps/APAP tabs 100/650	Danbury
Spironolactone tabs 25mg, 50mg, 100mg	Danbury
Spironolactone/HCTZ tabs 50/50	Danbury
Temazepam caps 15mg, 30mg	Danbury
Tolmetin sodium caps 400mg	Danbury
Tolmetin sodium tabs 200mg	Danbury
Trazodone HCl tabs 150mg	Danbury

(a)

DRUG UTILIZATION REVIEW COUNCIL

List of Interchangeable Drug Products

Adopted Amendments: N.J.A.C. 8:71

Proposed: September 3, 1991 at 23 N.J.R. 2610(a).
Adopted: February 11, 1992 by the Drug Utilization Review Council, Robert Kowalski, Chairman.
Filed: February 18, 1992 as R.1992 d.135, **with portions of the proposal not adopted but still pending.**

Authority: N.J.S.A. 24:6E-6(b).

Effective Date: March 16, 1992.
Expiration Date: February 17, 1994.

Summary of Public Comments and Agency Responses:
No comments were received regarding the adopted products.

Summary of Hearing Officer's Recommendations and Agency Responses:

A public hearing on the proposed additions to the List of Interchangeable Drug Products was held on September 24, 1991. Mark A. Strollo, R.Ph., M.S., served as the hearing officer. Two persons attended the hearing. Six comments were received as summarized in a previous Register (see 23 N.J.R. 3334(a)). The hearing officer recommended that the decisions be made based upon the available biodata. The Council adopted the products specified as "adopted," declined to adopt the products specified "not adopted," and referred the products identified as "pending" for further study.

The following products and their manufacturers were **adopted**:

Clemastine fumarate tabs 1.34, 2.68 mg	Lemmon
Cyclobenzaprine tabs 10 mg	Cord
Stuartnatal 1+1 substitute	J. Stevens

The following drugs were **not adopted but are still pending**:

Albuterol tabs 2, 4 mg	Purepac
Atenolol tabs 50, 100 mg	W-C
Cephalexin 250, 500 mg	Yoshitomi
Chlorthalidone tabs 25, 50, 100 mg	Zenith
Ibuprofen tabs 200, 400, 600, 800 mg	Invamed
Loperamide HCL caps 2 mg	Lemmon
Methocarbamol tabs 500, 750 mg	Mutual
Minoxidil tabs 2.5, 10 mg	Mutual
Piroxicam caps 10, 20 mg	Mutual
Propoxphene naps/APAP 50/325, 100/650	Mutual
Sulindac tabs 150, 200 mg	Purepac
Tolmetin caps 400 mg	Cord
Trazondone tabs 50, 100, 150 mg	Mutual
Triamterene/HCTZ tabs 37.5/25	Cord
Verapamil tabs 40 mg	Cord
Verapamil tabs 40 mg	Purepac

OFFICE OF ADMINISTRATIVE LAW NOTE: See related notices of adoption at 23 N.J.R. 3334(b) and 24 N.J.R. 144(b).

(b)

DRUG UTILIZATION REVIEW COUNCIL

List of Interchangeable Drug Products

Adopted Amendments: N.J.A.C. 8:71

Proposed: November 4, 1991 at 23 N.J.R. 3258(a).
Adopted: February 11, 1992 by the Drug Utilization Review Council, Robert Kowalski, Chairman.
Filed: February 18, 1992 as R.1992 d.136, **with portions of the proposal not adopted but still pending.**

Authority: N.J.S.A. 24:6E-6(b).

Effective Date: March 16, 1992.
Expiration Date: February 17, 1994.

Summary of Public Comments and Agency Responses:

The Drug Utilization Review Council received the following comment pertaining to the product affected by this adoption.

COMMENT: Regarding "Benzatropine mesylate tabs 1mg, 2mg," Mutual Pharmaceutical, its manufacturer, pointed out that the proposal should state "Benztropine" mesylate tabs 1mg and 2mg. (The proposal had a typographical error).

RESPONSE: The Council considered this product under the correct spelling, "benztropine mesylate 1 mg & 2 mg" tablets, and has corrected the spelling on adoption.

Summary of Hearing Officer's Recommendations and Agency Responses:

A public hearing on the proposed additions to the List of Interchangeable Drug Products was held on November 25, 1991. Mark A. Strollo, R.Ph., M.S., served as the hearing officer. Seven persons attended the hearing. Four comments were received as summarized in a previous Register (see 24 N.J.R. 145(b)). The hearing officer recommended that the decisions be made based upon the available biodata. The Council adopted the products specified as "adopted," declined to adopt the products specified "not adopted," and referred the products identified as "pending" for further study.

The following product and its manufacturers was **adopted**:

Benztropine mesylate tabs 1, 2 mg	Mutual

The following drugs were **not adopted but are still pending**:

Levothyroxine sodium tabs 25, 50, 75 mcg	J. Stevens
Levothyroxine sodium tabs 100, 125, 150 mcg	J. Stevens
Levothyroxine sodium tabs 200, 300 mcg	J. Stevens
Metoclopramide 10 mg tabs	Mutual
Metoprolol tartrate tabs 50, 100 mg	Mutual
Pindolol tabs 5, 10 mg	Mutual

OFFICE OF ADMINISTRATIVE LAW NOTE: See related notice of adoption at 24 N.J.R. 145(b).

(a)

DRUG UTILIZATION REVIEW COUNCIL

List of Interchangeable Drug Products

Adopted Amendments: N.J.A.C. 8:71

Proposed: January 6, 1992 at 24 N.J.R. 59(b).

Adopted: February 11, 1992 by the Drug Utilization Review Council, Robert Kowalski, Chairman.

Filed: February 18, 1992 as R.1992 d.137, **with portions not adopted.**

Authority: N.J.S.A. 24:6E-6(b).

Effective Date: March 16, 1992.

Expiration Date: February 17, 1994.

Summary of Public Comments and Agency Responses:

The Drug Utilization Review Council received the following comments pertaining to the products affected by this adoption.

COMMENT: From Halsey Drug Co. requesting that propoxyphene naps/APAP 50/325 remain in the Formulary. Halsey stated that patients should have the ability to access this product, especially for pain. Halsey conceded that usage may be lower than full strength, however, it sells several million tablets (nationwide) per year. Halsey verbally clarified that it sold 2,980 units of 100 tablets and 212 units of 500 tablets in New Jersey during 1991.

RESPONSE: Using Halsey's figures, the Council calculated that an average of less than three units of 100 tablets have been sold to each New Jersey pharmacy over 12 months (using approximately 1500 pharmacies in New Jersey as a denominator to calculate the average number of units sold per pharmacy). Halsey's argument alone was not persuasive.

However, the Council concluded that the proposed products with low utilization, which includes Halsey's propoxyphene naps/APAP 50/325, should be retained in the Formulary, based on the consumer cost savings of these items, the need to encourage substitution via listing these products in the Formulary, and the fact that pharmacies are not required to stock these products.

COMMENT: In objection to the proposed deletion of chlorpromazine concentrate and trifluperazine concentrate from the Formulary, Geneva commented that these drug entities are widely prescribed and dispensed and the price differential between the brand and generic is substantial. Geneva noted that the generic version of these drugs outpaces the use of the brand name products nationwide. Geneva contended that if these products are deleted from the Formulary, an opposite trend will occur in New Jersey at a great expense to the patient.

Geneva asserted that nationwide sales approach $1 million for each product, with a growth rate greater than 10 percent.

Geneva suggested that utilization can be measured by comparing total (sales) dollars of these products to other drugs in the Formulary that are not being considered for deletion. A conclusion is drawn that the higher sales dollars of the chlorpromazine concentrate and trifluperazine concentrate confirms their higher utilization and therefore should not be deleted.

Geneva concluded that deletion of chlorpromazine concentrate and trifluperazine concentrate will increase pharmacy inventory, place time-consuming restraints on the pharmacist in seeking substitution, and increase the cost of health care to the consumer.

RESPONSE: Geneva did not provide any conclusive data to support that chlorpromazine and trifluperazine concentrates are widely prescribed. However, Geneva was correct that there is a significant price differential between the brand and the generics and the Council supported the passing on of savings to the consumer when substitution occurs.

The Council determined that Geneva's suggested comparative analysis using gross sales figures of products with different unit prices was flawed. A higher total sales figure for product A does not necessarily mean it is utilized more than product B. Gross sales must be converted to the number of units sold and then a comparison made of this measurement.

The Council concluded that the proposed items with low utilization should be retained in the Formulary based on the intent of the legislation to provide consumer cost savings, the need to encourage substitution via listing these products in the Formulary, the potential time consuming restraints on the pharmacist seeking substitution and the fact that pharmacies are not required to stock these products.

COMMENT: From Danbury Pharmacal, Inc. in opposition to the deletion of the following products from the Formulary:

Acetohexamide tabs 250 mg, 500 mg	Danbury
Trimethoprim tabs 100 mg	Danbury
Clofibrate caps 500 mg	Chase
Cyclandelate caps 200 mg, 400 mg	Pioneer
Doxepin oral soln, 10mg.ml	Copley
Lithium citrate syrup 8 mEq/5ml	PharmBasics
Loxapin succinate caps 5, 10, 25, 50 mg	Watson
Rondec drops substitute	Hi-Tech
Sulfinpyrazone tabs 100 mg, caps 200 mg	Barr
Tussend Expectorant syrup substitute	LuChem
Tussend Syrup liquid substitute	LuChem

Danbury stated that the Council does not have the authority to delete any item without a request.

Danbury also contended that the Council has not established that the above products are unavailable or infrequently used. Danbury uses gross sales figures to measure utilization and concludes that the aforementioned proposed products have higher annual sales than items that are retained in the Formulary.

Danbury added that the Formulary exists to save consumers money. Since prescribers do not write for drugs generically, patients will be forced to spend more on branded items.

Danbury made the observation that the Formulary is not cluttered and there is ample space for these products.

The Council should consider the potential economic impact on the New Jersey pharmacies with interstate business, such as mail order pharmacy operations.

Danbury noted that pharmacies are not required to stock slow-moving generic substitutes.

In addition, Danbury does not oppose the deletion of its phenylbutazone tabs 100 mg and Probanthine with Phenobarbital substitute, which are no longer available.

RESPONSE: The Council verified that Danbury was incorrect in stating that a product can only be deleted if a request is made. The Attorney General's Office confirmed that the Council may delete a product on its own motion.

The Council also verified that the manufacturers of the unavailable products proposed for deletion confirmed in writing and/or verbally that their products are no longer manufactured or marketed. The Council unanimously agreed to delete HiTech's Rondec drops substitute because it is not manufactured or marketed. Low utilization had been established through a subcommittee of retail pharmacy practitioners convened by the New Jersey Pharmaceutical Association.

The Council determined that Danbury's example of a utilization comparison was flawed. A comparative analysis using gross sales figures of products with different unit prices is not valid. Gross sales must be convened to the number of units sold and then a comparison made of this measurement.

The Council felt that Danbury made a valid point in that the Formulary exists to save the consumer money and there is no restriction to the number of pages that may be contained in the Formulary.

The Council did not consider the potential economic impact on pharmacies with interstate business nor is it directed to do so by legislation.

The Council agreed that Danbury was correct in that pharmacies are not required to stock slow-moving generic substitutes and the Formulary notifies pharmacies that this is NOT a requirement.

The Council agreed to delete Danbury's phenylbutazone tabs 100 mg and Probanthine with Phenobarb substitute since these products are no longer manufactured or marketed.

The Council concluded that the proposed items with low utilization should be retained in the Formulary based on the intent of the legislation to provide consumer cost savings, the need to encourage substitution via listing these products in the Formulary, the potential time consuming restraints on the pharmacist seeking substitution and the fact that pharmacies are not required to stock these products.

COMMENT: From Zenith Laboratories requesting the retention of its product, sulfinpyrazone tabs 100 mg and caps 200 mg. In rebuttal to the proposed deletion of its sulfinpyrazone product based on low utilization, Zenith provided total sales figures to justify the retention of this product in the Formulary. Zenith suggested that the proposed deletion does not take into account hospital and nursing home utilization. Zenith contended that deletion of sulfinpyrazone will deprive New Jersey consumers of the benefits of generic substitution.

RESPONSE: The Council determined that Zenith's sales figures alone did not provide a convincing argument as evidenced by the significant drop in units sold between 1990 and 1991 for the 100 mg tabs and 200 mg caps (25 percent and 75 percent, respectively). In addition, the point concerning the consideration of hospital utilization was not germane. However, the Council supported Zenith's assumption that the deletion of this product could negatively affect the New Jersey consumer.

The Council concluded that the proposed items with low utilization, which included Zenith's sulfinpyrazone tabs 100 mg and caps 200 mg, should be retained in the Formulary based on the intent of the legislation to provide consumer cost savings, the need to encourage substitution via listing these products in the Formulary, the potential time consuming restraints on the pharmacist seeking substitution and the fact that pharmacies are not required to stock these products.

COMMENT: From H.L. Moore in objection to the proposed deletion of the following products:

Clofibrate caps 500 mg	Chase
Cyclandelate caps 200 mg, 400 mg	Pioneer
Doxepin oral soln	Copley
Loxapine caps 5, 10, 25, 50 mg	Watson
Sulfinpyrazone tabs 100 mg, caps 200 mg	Barr
Trimethoprim tabs 100 mg, 200 mg	Biocraft

H.L. Moore presented gross national sales figures of these products to demonstrate that they are being prescribed in sufficient quantities to justify being retained in the Formulary. Moore also contended that the deletion of these products will create a financial burden on the consumers in New Jersey.

RESPONSE: The Council determined that H.L. Moore's argument based on the data submitted was not persuasive. It was calculated that on the average, less than one bottle of 100 tablets has been sold to each New Jersey pharmacy over 12 months (using approximately 1500 pharmacies in New Jersey as a denominator to calculate the average number of units sold per pharmacy).

However, the Council agreed with H.L. Moore's point that there is a potential financial burden shift to consumers by deleting products from the Formulary and considered it an overriding concern. The Council concluded that the proposed items with low utilization should be retained in the Formulary, based on the intent of the legislation to provide consumer cost savings, the need to encourage substitution via listing these products in the Formulary, the potential time consuming restraints on the pharmacist seeking substitution and the fact that pharmacies are not required to stock these products.

Summary of Hearing Officer's Recommendations and Agency Responses:

A public hearing on the proposed additions to the list of interchangeable drug products was held on January 27, 1992. Mark A. Strollo, R.Ph., M.S., served as hearing officer. Five persons attended the hearing. Five comments were offered, as summarized above. The hearing officer recommended that the decisions made be based upon the available information. The Council deleted the products specified as "deleted," and declined to delete the products specified as "not deleted."

The following products and their manufacturers were **deleted**:

Albuterol sulfate tabs 2mg, 4mg	Amer. Ther.
Allopurinol tabs 100mg, 300mg	Bolar
Atenolol tabs 25mg	Geneva
Bactrim suspension substitute	PBI
Bactrim tabs substitute	PBI
Bactrim tabs substitute single & DS	Par
Bactrim injection substitute	Lemmon
Berroca tabs substitute	Par
Bethanechol Cl tabs 5mg, 10mg, 25mg, 50mg	Bolar
Butabarbital tabs 15mg, 30mg	Vitarine
Carbamazepine tabs 200mg	PBI
Carisprodol tabs 350mg	Bolar
Carisprodol/ASA tabs 200/325	Bolar
Chlordiazepoxide HCl caps 25mg	Vitarine
Chlordiazepoxide HCl caps 5mg, 10mg, 25mg	Zenith
Chlorothiazide tabs 250mg	Bolar
Chlorpropamide tabs 100mg, 250mg	Barr
Chlorpropamide tabs 100mg, 250mg	PBI
Chlorpropamide tabs 100mg, 250mg	Bolar
Chlorthalidone tabs 25mg, 50mg	Bolar
Chlorthalidone tabs 25mg, 50mg	Barr
Clindamycin inj. 150mg/ml	Lemmon
Clonidine HCl tabs 0.1mg, 0.2mg, 0.3mg	Bolar
Clonidine HCl tabs 0.1mg, 0.2mg, 0.3mg	Amer. Ther.
Cyclandelate caps 200mg, 400mg	Geneva
Cyclandelate caps 200mg, 400mg	Zenith
Cyproheptadine HCl tabs 4mg	Bolar
Dicyclomine caps 10mg, tabs 20mg	Bolar
Dycyclomine HCl syrup 10mg/5ml	PBI
Dipyridamole tabs 25mg, 50mg, 75mg	Par
Disopyramide caps 100mg, 150mg	Zenith
Doxepin caps 25mg, 50mg, 75mg, 100mg	Barr
Doxycycline caps 50mg, 100mg	Par
Ergoloid mesylates sl tabs 0.5mg, 1mg	Bolar
Ergoloid mesylates sl tabs 0.5mg, 1mg	Barr
Ergoloid mesylates tabs oral 1mg	Bolar
Ergoloid mesylates tabs oral 1mg	Barr
Erythromycin estolate caps 250mg	Barr
Fenoprofen calcium caps 200mg, 300mg	Amer. Ther.
Fenoprofen calcium tabs 600mg	Amer. Ther.
Fenoprofen calcium tabs 600mg	PBI
Flufenazine HCl tabs 1mg, 2.5mg, 5mg, 10mg	Bolar
Flurazepam HCl caps 15mg, 30mg	PBI
Fuorsemide Oral Solution 10mg/ml	PBI
Furosemide tabs 20mg, 40mg, 80mg	Barr
Haloperidol 20mg	Par
Hydralazine/HCTZ caps 25/25, 50/50, 50/100	Zenith
Hydralazine HCl tabs 10mg, 25mg, 50mg	Amer. Ther.
Hydralazine HCl tabs 25mg, 50mg	Vitarine
Hydralazine tabs 10mg, 25mg, 50mg	Zenith
Hydralazine/HCTZ caps 100/50	Bolar
Hydrochlorthiazide tabs 25mg, 50mg, 100mg	Bolar
Hydroxazine HCl tabs 10mg, 25mg, 50mg	Amer. Ther.
Hydroxazine HCl tabs 10mg, 25mg, 50mg	PBI
Hydroxazine pamoate caps 25mg, 50mg, 100mg	Par
Imipramine tabs 10mg, 25mg, 50mg	Bolar
Isosorbide tabs oral 5mg	Zenith
Isosorbide tabs sublingual 2.5mg, 5mg	Zenith

Isoxsuprine tabs 10mg, 20mg	Zenith
Isoxsuprine tabs 10mg, 20mg	Par
Lomotil tabs substitute	Zenith
Lorazepam tabs 0.5mg, 1mg, 2mg	Amer. Ther.
Lorazepam tabs 1mg, 2mg	PBI
Maprotiline HCl tabs 25mg, 50mg, 75mg	Bolar
Meclizine tabs 12.5mg	Zenith
Meclofenamate caps 50mg, 100mg	Amer. Ther.
Meprobamate caps 200mg, 400mg	Zenith
Metaclopramide tabs 10mg	Bolar
Metaclopramide tabs 10mg	PBI
Methocarbamol tabs 500mg, 750mg	Bolar
Methocarbamol tabs 500mg, 750mg	Zenith
Methocarbamol tabs 500mg, 750mg	Par
Methocarbamol tabs 500mg, 750mg	Barr
Methyclothiazide tabs 2.5mg, 5mg	Bolar
Methyldopa tabs 125mg, 250mg, 500mg	Bolar
Methyldopa/HCTZ tabs 250/15, 250/25	Bolar
Methyldopa/HCTZ tabs 500/30, 500/5	Bolar
Metoclopramide tabs 10mg	Barr
Minoxidil tabs 2.5mg	PBI
Nylidrin HCl tabs 6mg, 12mg	Geneva
Nylidrin HCl tabs 6mg, 12mg	Zenith
Nystatin vaginal tabs 100,000u	Vitarine
Oxazepam caps 10mg, 15mg, 30mg	Amer. Ther.
Penicillin G Potassium tabs 200,000u, 400,000u	Zenith
Penicillin VK soln 125mg/5ml	Zenith
Penicillin VK tabs 250mg	Zenith
Perphenazine with amitriptyline 2/10, 2/25, 4/10	Bolar
Perphenazine with amitriptyline 4/25, 4/50	Bolar
Phenazopyridine tabs 100mg, 200mg	Barr
Phenybutazone tabs 100mg	Danbury
Potassium chloride liquid 10%, 20mEq/15ml	Vitarine
Prazosin caps 1mg, 2mg, 5mg	Amer. Ther.
Probanthine with Phenobarb tabs substitute	Danbury
Procainamide HCl caps 250mg, 500mg	Bolar
Procainamide mod. release tabs 750mg, 1000mg	Bolar
Procainamide mod. release tabs 250mg, 500mg	Bolar
Prochlorperazine maleate tabs 5mg, 10mg, 25mg	Bolar
Propoxyphene caps 65mg	Barr
Propoxyphene naps/APAP 50/325	Bolar
Propoxyphene naps/APAP tabs 50/325, 100/650	Bolar
Propranolol HCl tabs 10mg, 20mg, 40mg	Bolar
Propranolol HCl tabs 60mg, 80mg	Bolar
Quinadine gluconate ext. release tabs 324mg	Bolar
Rondec drops substitute	Hi-Tech
Spironolactone tabs 25mg	Bolar
Spironolactone tabs 25mg	Zenith
Sprionolactone/HCTZ tabs 25/25	Zenith
Spironolactone/HCTZ tabs 25/25	Bolar
Sulfamethoxazole tabs 500mg	Bolar
Sulfamethoxazole tabs 500mg	Geneva
Sulfamethoxazole tabs 500mg	Heather
Sulindac tabs 150mg, 200mg	Amer. Ther.
Temazepam caps 15mg, 30mg	Bolar
Temazepam caps 15mg, 30mg	PBI
Thioridazine HCl tabs 10mg, 15mg, 25mg	Bolar
Thioridazine HCl tabs 150mg, 200mg	Bolar
Thioridazine HCl tabs 50mg, 100mg	Bolar
Thioridazine tabs 150mg, 200mg	Par
Thiothixine caps 1mg, 2mg, 5mg, 10mg, 20mg	Amer. Ther.
Timolol maleate tabs 5mg, 10mg, 20mg	Bolar
Tolazamide tabs 100mg, 250mg, 500mg	Bolar
Tolazamide tabs 100mg, 250mg, 500mg	PBI
Tolbutamide tabs 0.5g	Bolar
Trazodone tabs 50mg, 100mg	Bolar
Trazodone HCl tabs 50mg, 100mg	Amer. Ther.
Trazodone HCl tabs 50mg, 100mg	PBI
Tri-Vi-Flor chewable tabs substitute	Par
Triamcinolone acetonide cream 0.025%, 0.1%, 0.5%	PBI
Triamcinolone acetonide ointment 0.1%, 0.5%	PBI
Triamterene/HCTZ tabs 75/50	Amer. Ther.
Trifluoperazine HCl tabs 1mg, 2mg, 5mg, 10mg	Bolar
Trihexylphenidyl HCl tabs 2mg, 5mg	Bolar

The following drugs were **not deleted**:

Acetohexamide tabs 250mg, 500mg	Danbury
Acetohexamide tabs 250mg, 500mg	PharmBasics
Aldoclor 150 tabs substitute	Par
Aldoclor 250 tabs substitute	Par
Amitriptyline tabs 100mg, 150mg	Barr
Amitriptyline tabs 10mg, 25mg, 50mg, 75mg	Barr
Ampicillin caps 250mg, 500mg	Zenith
Cefazolin inj. 250mg, 500mg, 1g, 5g, 10g	TEVA
Chlorpromazine conc 30mg/ml	Geneva
Chlorpromazine conc 30mg/ml	PharmBasics
Chlorpromazine conc 30mg/ml	Roxane
Chlorzoxazone tabs 250mg	Amide
Chlorzoxazone tabs 250mg	Geneva
Chlorzoxazone tabs 250mg	Pioneer
Clofibrate caps 500mg	Chase
Clofibrate caps 500mg	Chelsea
Clofibrate caps 500mg	Pharmacaps
Cyclandelate caps 200mg, 400mg	Chelsea
Cyclandelate caps 200mg, 400mg	Inwood
Cyclandelate caps 200mg, 400mg	Lemmon
Cyclandelate caps 200mg, 400mg	Par
Cyclandelate caps 200mg, 400mg	Pioneer
Cyclandelate caps 200mg, 400mg	Sidmak
Cyclandelate caps 200mg, 400mg	Zenith
Cyclandelate caps 200mg	MD
Cyclandelate caps 200mg	West-Ward
Dolophine tabs 5mg, 10mg	Roxane
Doxepin HCl oral solution 10mg/ml	Copley
Doxepin HCl oral solution 10mg/ml	PharmBasics
Elixophyllin KI elixir substitute	Barre-National
Elixophyllin KI elixir substitute	Berlex
Elixophyllin KI elixir substitute	Naska
Elixophyllin KI elixir substitute	PharmBasics
Equagesic tabs substitute	Par
Equagesic tabs substitute	Vitarine
Isoproterenol HCl inhalation 0.5%	Dey
Lithium citrate syrup 8mEq/5ml syrup	PharmBasics
Loxapine caps 5mg, 10mg, 25mg, 50mg	Watson
Meclofenamate caps 50mg, 100mg	Par
Meclofenamate caps 50mg, 100mg	Barr
Meclofenamate sodium caps 50mg, 100mg	PBI
Nylidrin HCl tabs 6mg, 12mg	Chelsea
Nylidrin HCl tabs 6mg, 12mg	Danbury
Nylidrin HCl tabs 6mg, 12mg	Lemmon
Nylidrin HCl tabs 6mg, 12mg	Sidmak
Nylidrin HCl tabs 6mg, 12mg	USV
Nylidrin HCl tabs 6mg, 12mg	West-Ward
Papaverine HCl tabs 300mg	Sidmak
Phenergan Fortis syrup substitute 25mg/5ml	Barre-National
Phenybutazone tabs 100mg, caps 100mg	Chelsea
Phenybutazone tabs 100mg, caps 100mg	Geneva
Phenybutazone tabs 100mg, caps 100mg	USV
Phenybutazone tabs 100mg	Zenith
Propoxyphene naps/APAP 50/325	Barr
Propoxyphene naps/APAP 50/325	Chelsea
Propoxyphene naps/APAP 50/325	Halsey
Sulfamethoxazole tabs 500mg	Roche
Sulfinpyrazone tabs 100mg, caps 200mg	Barr
Sulfinpyrazone tabs 100mg, caps 200mg	Zenith
Sulfinpyrazone tabs 100mg	Danbury
Trifluperazine HCl concentrate 10mg/ml	Geneva
Trifluperazine HCl concentrate 10mg/ml	My-K/PharmBasics
Trimethoprim tabs 100mg, 200mg	Biocraft
Trimethoprim tabs 100mg	Barr
Trimethoprim tabs 100mg	Danbury
Trimipramine caps 25mg, 50mg, 100mg	PharmBasics
Tuss Ornade liquid substitute	PharmBasics
Tussend Expectorant syrup substitute	Barre-National
Tussend Expectorant syrup substitute	LuChem
Tussend Expectorant syrup substitute	PharmBasics
Tussend Syrup liquid substitute	Barre-National
Tussend Syrup liquid substitute	Barre-National
Tussend Syrup liquid substitute	LuChem
Twin-K solution substitute 20mEq/15ml	LuChem

Vioform HC cream substitute 0.5%/3%	Clay-Park
Vioform HC cream substitute 1%/3%	Bausch & Lomb
Vioform HC cream substitute 1%/3%	Clay-Park
Vioform HC cream substitute 1%/3%	NMC
Vioform HC cream substitute 1%/3%	Syoset
Vioform HC cream substitute 1%/3%	Thames
Vioform HC ointment substitute 1%/3%	Clay-Park
Viokase tabs substitute	Anabolic

HUMAN SERVICES

(a)

DIVISION OF ECONOMIC ASSISTANCE

Service Programs for Aged, Blind, or Disabled Supplemental Security Income Payment Levels

Adopted Concurrent Amendments: N.J.A.C. 10:83-1.11

Proposed: January 21, 1992 at 24 N.J.R. 300(a).
Adopted: February 21, 1992 by Alan J. Gibbs, Commissioner, Department of Human Services.
Filed: February 21, 1992 as R.1992 d.124, **without change.**

Authority: N.J.S.A. 44:7-87 and Section 1618(a) of the Social Security Act.

Effective Date: February 21, 1992.
Expiration Date: January 19, 1994.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

10:83-1.11 New Jersey Supplemental Security Income payment levels

(a) New Jersey Supplemental Security Income payment levels are as follows:

Living Arrangement Categories	Payment Level 1/1/92
Eligible Couple	
Licensed Medical Facility (Hospital, skilled Nursing Facility or Intermediate Care Facility) Publicly operated community residence of 16 or less	$80/633.00†
Residential Health Care Facilities and certain residential facilities for children and adults	$1125.36
Living Alone or with Others	$658.36
Living in Household of Another, Receiving Support and Maintenance	$515.09
Eligible Individual	
Licensed Medical Facility (Hospital, skilled Nursing Facility or Intermediate Care Facility) Publicly operated community residence of 16 or less	$40/422.00†
Residential Health Care Facilities and certain residential facilities for children and adults	$572.05
Living Alone or with Others	$453.25
Living with Ineligible Spouse (No other individuals in household)	$658.36
Living in Household of Another, Receiving Support and Maintenance	$325.65

†The lower figure applies when Medicaid payments with respect to an individual equal an amount over 50 percent of the cost of services provided in a month.

(b)

DIVISION OF ECONOMIC ASSISTANCE

Home Energy Assistance

Eligibility Requirements; Income Eligibility Guidelines

Adopted Concurrent Amendments: N.J.A.C. 10:89-2.3, 3.3, 3.5 and 4.1

Adopted Concurrent Repeal and New Rule: N.J.A.C. 10:89-3.6

Proposed: January 21, 1992 at 24 N.J.R. 300(b).
Adopted: February 21, 1992 by Alan J. Gibbs, Commissioner, Department of Human Services.
Filed: February 21, 1992 as R.1992 d.125, **without change.**

Authority: N.J.S.A. 30:4B-2.

Effective Date: February 21, 1992.
Expiration Date: May 24, 1995.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

10:89-2.3 Income eligibility

(a)-(d) (No change.)

(e) Income exclusions: The following income is not considered in the determination of gross income for this program:

1. Loans which are not used to meet current living costs and which are held and used in accordance with the conditions of the loan. Personal loans are excluded when such loans are evidenced by a document, signed by the borrower and the lender, which states the amount of the loan and terms of repayment (this includes loans from financial institutions);

2.-7. (No change.)

(f) (No change.)

(g) Gross Income Eligibility Limits for Home Energy Assistance:

Household Size	Monthly Allowable Gross Income Limit
1	$ 828
2	1111
3	1394
4	1677
5	1960
6	2243
7	2526
8	2809
9	3092
10	3375
Each Additional Member	+283

10:89-3.3 Cooling assistance

(a) Income eligible households for which there is medical evidence that the health of at least one household member will be seriously endangered unless the household's living quarters are cooled shall receive a one-time benefit in the amount of $100.00 subject to the following provisions. This benefit is available in addition to any other benefits made under this program and will be paid directly to the household.

1.-3. (No change.)

10:89-3.5 Maximum program benefit

(a) An eligible household may receive maximum of $750.00 in program benefits to include automatic or special payments plus any emergency assistance payments exclusive of emergency rehousing payments and emergency furnace repair payments. A household which receives more than the maximum program benefit is subject to recoupment procedures in accordance with N.J.A.C. 10:89-5.3.

(b) (No change.)

10:89-3.6 Payment schedule

(a) Schedule A: Electricity, Natural Gas:

Household Size	1 or 2		3 to 5		6 or more	
Region Designation	Blue	Red	Blue	Red	Blue	Red
Monthly Income						
$0-$667.00	454	394	606	526	726	632
$668.00-$1084.00	378	330	504	438	606	526
$1085.00-$1501.00	304	262	404	350	484	422
$1502.00-$1918.00			302	262	364	314
$1919.00-$2335.00					242	210
Over $2335.00					122	104

"Blue" means Sussex and Warren counties.
"Red" means all other counties.

(b) Schedule B: Fuel Oil, Kerosene:

Household Size	1 or 2		3 to 5		6 or more	
Region Designation	Blue	Red	Blue	Red	Blue	Red
Monthly Income						
$0-$667.00	428	372	572	498	686	596
$668.00-$1084.00	356	310	476	414	572	498
$1085.00-$1501.00	286	248	380	332	458	398
$1502.00-$1918.00			284	248	342	298
$1919.00-$2335.00			190	164	228	198
Over $2335.00					114	98

"Blue" means Sussex and Warren counties.
"Red" means all other counties.

(c) Schedule C: All other fuel and renters:

Household Size	1 or 2		3 to 5		6 or more	
Region Designation	Blue	Red	Blue	Red	Blue	Red
Monthly Income						
$0-$667.00	280	244	374	324	448	390
$668.00-$1084.00	232	204	310	270	374	324
$1085.00-$1501.00	188	164	248	216	298	258
$1502.00-$1918.00			186	162	224	194
$1919.00-$2335.00			124	108	150	130
Over $2335.00					74	64

"Blue" means Sussex and Warren counties.
"Red" means all other counties.

10:89-4.1 Opportunity and decision to apply

(a)-(c) (No change.)

(d) At the time of application, the CWA shall advise the household of all program eligibility requirements and the method by which assistance will be provided. Additionally, the CWA shall assist the household in completing the application and explain what elements of eligibility must be verified. The CWA must advise the household what verification is required and explain that the case will be denied if verification is not provided.

1. Verification requirements: The CWA shall assist the household in obtaining the required verification.

i. Required documentation: The following must be verified, documented and retained in the case record by the CWA prior to transmitting the application to DEA:

(1)-(6) (No change.)

(7) Earned and unearned income shall be verified by wage stubs or any applicable documentation relative to any consecutive four week period within the five weeks before the date the client signs the Form EP-1 or reports a change in earnings.

(8) Other income including pensions, outside contributions, interest, dividends, UIB, disability, and support payments;

(9)-(10) (No change.)

ii. (No change.)

(e)-(j) (No change.)

CORRECTIONS

(a)

THE COMMISSIONER

Notice of Administrative Correction
Notice of Adoption
Community Release Programs
Residential Community Release Agreement Programs
Adopted New Rules: N.J.A.C. 10A:20-4

Take notice that the Department of Corrections has discovered an error in the Summary of Public Comments and Agency Responses in the notice of adoption for adopted new rules N.J.A.C. 10A:20-4, published in the February 18, 1992 New Jersey Register at 24 N.J.R. 616(a). In the Response to the first comment from the Division of Youth and Family Services, the first clause should read, "The Department of Corrections believes that such inmate assignments are not being made;" The word "not," which appears in the original notice of adoption filed by the Department (see R.1992 d.80), was inadvertently omitted upon publication. This notice of administrative correction is published pursuant to N.J.A.C. 1:30-2.7.

Full text of the corrected Comment and Response follows:

COMMENT: The Division of Youth and Family Services (DYFS) suggested that N.J.A.C. 10A:20-4.12 be amended to add an additional exclusion that inmates with a history of child abuse not be permitted to work in a Residential Community Release Agreement Program which services minors.

RESPONSE: The Department of Corrections believes that such inmate assignments are not being made; however, the suggested language will be added to encourage careful review of inmate placement into Residential Community Release Agreement Programs.

INSURANCE

(b)

DIVISION OF FRAUD

Automobile Physical Damage Inspection Procedures
Adopted Amendments: N.J.A.C. 11:3-36.2, 36.4, 36.5, 36.6 and 36.7
Adopted New Rules: N.J.A.C. 11:3-36.11 and 36.12

Proposed: May 6, 1991 at 23 N.J.R. 1262(a).
Adopted: February 24, 1992 by Samuel F. Fortunato, Commissioner, Department of Insurance.
Filed: February 24, 1992 as R.1992 d.142, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 17:33B-33.

Effective Date: March 16, 1992.
Expiration Date: January 4, 1996.

Summary of Public Comments and Agency Responses:

Fourteen public comments were received from insurance companies (Allstate Insurance Company, Colonial Penn Insurance Company, Fireman's Fund Insurance Company, Liberty Mutual Insurance Company, New Jersey Manufacturers Insurance Company, Prudential Property & Casualty Insurance Company of New Jersey, New Jersey CURE, Selective Insurance Company of America, State Farm Insurance Companies and the Travelers Companies), the Market Transition Facility of New Jersey, a producer trade association (Professional Insurance Agents of New Jersey), an insurance trade association (Alliance of American Insurers) and the National Motorists Association.

COMMENT: One commenter objected to N.J.A.C. 11:3-36.4(a)2 which permits a waiver of a mandatory inspection when the automobile is more than seven model years old. The commenter believes that if the Department is going to permit a waiver of a mandatory inspection

for automobiles more than seven model years old, insurers should be able to waive inspections for 1984 model year vehicles in 1991. The commenter suggested that the Department amend the rule to read as follows: "In 1991 an insurer shall inspect 1985 and newer model year vehicles".

RESPONSE: The Department disagrees. This rule provides an inspection waiver for automobiles that are **more** than seven model years old. The commenter's suggestion would permit a waiver for automobiles that are seven model years old.

COMMENT: One commenter expressed concern with N.J.A.C. 11:3-36.4(a)9. This section permits an insurer to waive a mandatory inspection when an insured's coverage is being transferred by an independent agent to a new insurer and the previous insurer provides the new insurer with a copy of the inspection report. The commenter stated that it is unreasonable to expect a carrier that has lost an insured to voluntarily provide the new carrier with a copy of the inspection report. The commenter believes that a waiver of a mandatory inspection should be permitted if the insured can provide the new carrier with a copy of the inspection report from the previous carrier.

RESPONSE: The Department disagrees with the commenter. The Department believes that if the previous insurer does not provide the new insurer with a copy of the inspection report then the new insurer should conduct an insurance inspection, if required by this subchapter.

COMMENT: One commenter objected to N.J.A.C. 11:3-36.4(a)9i regarding the waiver of an inspection when a block of business is transferred. This provision states that if the new insurer does not receive a copy of the inspection report 60 days prior to the first annual renewal date, an inspection must be conducted upon renewal. The commenter asked how it should handle a situation where the automobile is a replacement automobile purchased a month before or after 60 days prior to the next renewal date. The commenter stated that the insured may not have had a chance to submit the required new automobile documents prior to this 60 day deadline and if the transfer of coverage occurs midterm as part of a block transfer of business, problems may occur.

RESPONSE: The Department disagrees with the commenter. The Department believes that block transfers are generally accomplished as the policies renew, and therefore, the Department does not believe that the situation described by the commenter will occur. The commenter should further note the additional provision at N.J.A.C. 11:3-36.7(e)3 which addresses new automobiles purchased near the end of a policy period, irrespective of whether the insured was included in a block transfer.

COMMENT: One commenter stated that N.J.A.C. 11:3-36.5, which permits an insurer to defer a mandatory inspection for a period of seven calendar days, should be amended to permit an insurer to defer an inspection for 10 days.

RESPONSE: The Department disagrees with the commenter. The Department believes that the seven calendar day deferral period provides the insured with sufficient time to obtain an inspection.

COMMENT: Two commenters stated that the Department should clarify the meaning of N.J.A.C. 11:3-36.5(b)2, the three day automatic coverage rule. This rule permits an insurer to provide three days of automatic coverage prior to the insured's request for coverage on a replacement automobile when the insured has had physical damage coverage for at least 12 months. One commenter asked: If an insured gets a replacement automobile on Monday but does not request coverage until the following Monday (and the only non-business days are Saturday and Sunday), does the insured have physical damage coverage for Monday, Tuesday and Wednesday but no physical damage coverage for Thursday, Friday, Saturday, Sunday and on the following Monday until the request for coverage is made? Additionally, the commenter asked: Where an insured requests coverage after the three day automatic coverage period has begun, can the person receive a seven-day deferral of the inspection beginning on the date the request for coverage was made (not on the date the automatic coverage was triggered)? The commenter further suggested that the Department amend this provision to provide that:

Where the three-day period of automatic coverage is extended and the insured fails to request coverage within the three-day period, then coverage shall cease on 12:01 a.m. of the fourth day and coverage shall not be revived until the insured requests coverage pursuant to this regulation. When the insurer receives the request for coverage within the three-day period of automatic coverage or later, the insurer may defer the mandatory inspection for seven calendar days from the date of the request for coverage.

RESPONSE: N.J.A.C. 11:3-36.5(b)2 permits an insurer to provide an insured with automatic coverage prior to an insured's request for coverage **for a period of three days,** including the day on which the automobile is acquired (which is extended by one day for each Saturday, Sunday or N.J. State holiday falling within the period). Physical damage coverage for a replacement automobile shall not continue after the three days of automatic coverage expires unless the insured has requested coverage. Upon the insured's request for coverage the mandatory inspection may be deferred for an additional period up to seven days. No change is necessary.

COMMENT: One commenter noted that if a company elects to provide three days of automatic physical damage coverage for replacement automobiles, a problem arises in trying to complete the Acknowledgement of Requirement for Insurance Inspection (Appendix A). The commenter stated that the effective date of coverage and the date by which the inspection must be completed are required entries on this form, which includes the following wording: "Date: not more than seven days after the effective date of coverage".

The commenter asked what date should be used for the inspection completion date if the insured signs the "Acknowledgement of Requirement for Insurance" on August 1, 1991 rather than August 2, 1991 or August 3, 1991. The commenter noted that if it is notified about the automobile and the form is signed on August 3, 1991 the proper effective date of coverage is still August 1, 1991. However, if August 1, 1991 is entered for the effective date of coverage and August 10, 1991 for the date by which the automobile must be inspected (seven days notice), this violates the "not more than seven days after the effective date of coverage" notation. The commenter suggested eliminating the "not more than seven days after the effective date of coverage" wording from the form, so that insureds can be given seven calendar days notice of required inspection regardless of whether they had under three days of automatic coverage.

RESPONSE: The Department agrees and has amended this section to delete the wording "Date: not more than seven days after the effective date coverage."

COMMENT: One commenter objected to N.J.A.C. 11:3-36.6(a), which provides that an inspection shall be made by an authorized representative of the insurer at a time and place reasonably convenient to the insured. The rule states that a reasonably convenient place shall not be more than 10 miles from the city or town where the automobile is principally garaged. The commenter stated that it has authorized and equipped all of its 179 agents located throughout New Jersey to conduct automobile inspections. The commenter stated that it has chosen its agents to perform inspections based in part on where the agent's office is located. The commenter argued that an insured's agent's office will be reasonably convenient for the insured even if located more than 10 miles from the town or city where the automobile is principally garaged in because the agent may be located where the insured works or principally shops. The commenter believes that the Department's rule should define a reasonably convenient place as an the insured's own agent's or broker's office where that agent or broker is authorized to conduct automobile inspections. The commenter suggested that the Department amend N.J.A.C. 11:3-36.6(a) to read:

"A reasonably convenient place shall **be the insured's agent's or broker's office if that agent or broker is authorized to conduct vehicle inspections or a place** not [be] more than 10 miles from the city or town where the automobile is principally garaged."

RESPONSE: The Department disagrees with the commenter. The Department has determined that an insured's place of work shall not be considered in determining the location of an inspection facility for compliance with N.J.A.C. 11:3-16.6. The purpose of this rule is to prevent the insured from having to travel more than 10 miles to obtain an inspection. In order to achieve this purpose the Department requires an insurer to provide the inspection at a reasonably convenient location not more than 10 miles from where the insured's automobile is principally garaged.

COMMENT: Several commenters objected to N.J.A.C. 11:3-36.6(b) and (c), which require insurers to arrange for an inspection to be conducted during the deferral period within 50 miles from the temporary location when the automobile to be insured is temporarily out-of-State and will not return before the expiration of the deferral period. This applies to those automobiles that are either acquired as an additional or replacement automobile or an automobile that is required (pursuant to this subchapter) to be inspected upon renewal. One commenter noted that as a result of this provision, N.J.A.C. 11:3-36.4(a)6 was deleted which permitted insurers to waive an inspection on automobiles that are

garaged out-of-State when the insurer has no inspection facility or authorized representative within 10 miles of the city or town where the automobile is garaged. The commenter further suggested that the Department reconsider its amendments because the amended language would result in an obligation upon insurers to arrange for automobile inspections in remote locations, potentially in states where the insured does no business and has no authorized representative. The commenter stated that as a result, a company doing business only in New Jersey would be required to provide an automobile inspection facility within 50 miles of a vehicle garaged in Alaska. The commenter stated that obviously, compliance with this requirement may be physically impossible, not to mention economically infeasible. The commenter suggested that a more preferable approach would be to mandate an inspection within a reasonable time period after the vehicle returns to New Jersey.

RESPONSE: The Department's rule does not require an insurer to provide an automobile inspection facility within 50 miles of an automobile garaged out-of-State. The rule requires an insurer to arrange to have an inspection conducted by an authorized representative at a **place** (which could be an agent's office) which shall not be more than 50 miles from the temporary location. The Department's definition of an authorized representative (N.J.A.C. 11:3-36.2) includes any person who is authorized by the insurer to conduct insurance inspections pursuant to this subchapter. The definition includes employees of the insurer, and producers even if located outside of this State. If the inspection cannot be performed, the insurer may not provide physical damage coverage until it is done.

COMMENT: One commenter questioned proposed N.J.A.C. 11:3-36.7(d), which prohibits the suspension of physical damage coverage when an inspection is not conducted due to the fault of an insurer. The commenter believes that if the insurer discovers that an inspection should have been ordered but failed to do so, the insurer should be permitted to include mail time (three days) in addition to the seven calendar days before removing physical damage coverage. The commenter stated that the insured will already be two to three days into the seven day deferral period before receiving notification requiring them to have their automobile inspected.

RESPONSE: The Department agrees with the commenter. No change in the rule is necessary. If an insurer discovers that an inspection should have been ordered but it failed to do so, it is permitted to include mail time in addition to the seven calendar day period before removing physical damage coverage.

COMMENT: One commenter objected to N.J.A.C. 11:3-36.7(e), which does not permit suspension of physical damage coverage when an insured fails to produce the documentation needed to permit an insurer to waive an inspection of a new car. The commenter believes that furnishing documentation within seven days of the purchase of a new automobile is far less burdensome than having to report to an inspection site. The commenter stated that the current proposal draws a radical distinction between two groups of insureds whose circumstances may be very similar. The commenter believes that the Department's position makes little sense and does not prevent fraud. The commenter further stated that the proposed rule will cause needless claims disputes with insureds who submit claims months after purchase of a new car and can no longer locate the documents. The commenter stated that the same lost documentation problems will plague the renewal process, forcing carriers to notify insureds that they now must have their vehicles inspected or have coverage suspended. The commenter believes that the Department has created a loophole for new car buyers, extending a period of possible fraudulent activity from seven to 364 days.

RESPONSE: Since the New York regulation provided the standards for the Department's procedures, the Department believes it is desirable to maintain this aspect of the New York regulation in order to facilitate the implementation of these rules by insurers which do business in both states.

COMMENT: One commenter objected to N.J.A.C. 11:3-36.7(e)1, which conditions the payment of physical damage claims for new automobiles upon the receipt of proper documentation by the insurer. The commenter noted that this may be preferable to imposing suspension of coverage, but it only seems fair to require the insured to be notified of this possible consequence. The commenter suggested that the Department amend this provision along with the Acknowledgement of Insurance form (Appendix A) and the Notice of Insurance Inspection (Appendix B).

RESPONSE: Insurers can provide insureds with notification of the possible consequence of failing to provide the proper documents for new automobiles on Appendix A or B, or in some other manner. Appendix A and B are minimum standards; insurers are permitted to include additional information. The Department does not want to establish standards for other communications between the insurer and the insured that may be inconsistent with already approved policy form language of some insurers.

COMMENT: Two commenters objected to proposed N.J.A.C. 11:3-36.7(e)2, which provides that if the proper (new automobile) documents are not submitted by the insured 60 days prior to the next policy renewal date then the insurer shall require an inspection upon renewal. One commenter suggested that the Department amend this provision to provide that "new automobiles acquired less than 90 days prior to the next policy renewal date have until 60 days prior to the following policy renewal date to submit the required document(s) or be subject to an inspection at that renewal."

RESPONSE: The Department believes that insureds should be provided with a reasonable amount of time to comply with the requirements of N.J.A.C. 11:3-36.4(a). The Department recognizes that if an insured purchases a new automobile within 60 days of renewal, it may be difficult to comply with the requirements of N.J.A.C. 11:3-36.4(b)8i. Therefore, the Department agrees with the commenter and has amended this section accordingly.

COMMENT: One commenter stated that proposed N.J.A.C. 11:3-36.11, which requires amendatory endorsements, provides specific dates for new business and renewal business but provides no effective date for automobiles added or replaced by endorsement. The commenter stated that the Department should keep in mind that three to six month policies should receive the mandatory endorsement on the anniversary date and not on an installment date.

RESPONSE: The Department's rules apply to all newly written policies providing automobile physical damage coverage that are **issued** on or after June 1, 1991. All existing policies that renew on or after July 1, 1991 are required to have the amendatory endorsement language provided in the policy. The Department's rules cover automobiles added or replaced by an endorsement once the insured's policy includes language to provide for an inspection as required by this subchapter.

COMMENT: One commenter stated that the amendatory endorsements made pursuant to this rule should be altered to reflect current policy terminology. The commenter stated that, for example, the phrase "physical damage coverage" is used in a sample endorsement. The commenter stated that this phrase is not used or defined in the ISO form used by many carriers. The commenter believes that any endorsements to these policies should employ the same terms as the basic form and include definitions of terms made a part of the endorsement. "For instance, the phrase 'nonowned auto' is used in the endorsement, but the definition intended for endorsement from the proposal is different from the definition given in the basic ISO form." The commenter stated that an endorsement that can be used automatically by filing with the Department should be one that is compatible with current forms.

RESPONSE: The Department disagrees. ISO no longer files policy forms for insurers; therefore, each insurer must independently file its own form for approval with the Department. As a result the Department believes its sample endorsement is sufficient for its purposes. Insurers are permitted to submit forms for approval with different terminology consistent with their currently approved forms.

COMMENT: One commenter questioned what constitutes an insurer's claim file. The commenter asked, that if an insurer uses electronic imagery to store their inspection, is it necessary to print the inspection report and photographs and place them in the paper file, or does it satisfy this requirement to document the paper file that the inspection report was viewed. Additionally, is the inspection report and photographs in the electronic system considered part of the insurers claim filed.

RESPONSE: Insurers that are using electronic imaging to store their inspection report must use a system that provides for a backup system or other duplicate or secondary source for the report and for inspection conducted after April 1, 1994 for the photographs. Insurers do not need to store additional hard copies (paper files) if the electronic system provides for a backup system or other duplicate system.

COMMENT: One commenter stated that the visual imaging technology required by the Department's rules is still in the early stages of development, very expensive, and highly unlikely to yield any benefits to insurers or insureds. The commenter stated that the technique of using hard copy photographs with such damage has worked very efficiently and it sees nothing to be gained through this new requirement.

The commenter stated that the cost of this technology may come down considerably, but its senior personnel do not believe that this will occur

by April 1, 1994, the effective date for this provision. The commenter further stated that, indeed if it does, it believes that the decision to use this technology should rest with the insurer and other automobile carriers in this State, each of which will make individual business judgements as to whether the imaging system offers advantages over hard copy photographs.

RESPONSE: While this comment addressed matters beyond the scope of the proposal, the Department believes that the technology required by its rules is reasonable and important to the implementation of these rules.

COMMENT: One commenter questioned whether the endorsement is required when an insurer will waive an inspection. The commenter was specifically concerned about situations involving commercial automobile policies with fleet automatic coverage that normally do not report automobile changes until the audit (after the policy expiration). The commenter questioned if it is necessary for the endorsement to be attached when these large commercial policies insure five or more private passenger automobiles and the company is electing to waive the mandatory inspection. The commenter stated that attaching an endorsement literally wipes out fleet automatic coverage for physical damage and adds considerably to the administrative burden and expense for both the policyholder and the insurance company. The commenter believes that since the inspection will not be required, it seems prudent not to require the attachment of the mandatory physical damage endorsement.

RESPONSE: Nothing in these rules prohibit insurers from developing and submitting their own endorsement which requires a physical damage insurance inspection but waives the inspection, for fleets which insures five or more private passenger automobiles.

COMMENT: One commenter stated that language should be added to the Department's rules in order to link the physical damage inspection procedures with the coverage selection form so that they could be handled in conjunction with each other. The commenter believes that this will prevent conflicts which may arise when telephone or mail requests for coverage are subject to the inspection requirements. The commenter provided the following examples of the types of conflicts that may arise.

Example #1—An insured first requests a physical damage coverage change by mailing a coverage selection form to the insurer, the insured may not have a reasonable amount of time to comply with the inspection requirement. In this instance, the coverage change would be made effective on the day following the postmark date in accordance with the regulations on the Coverage Selection Form. Since the deferral period begins on the date coverage is effective, mailing time for the Coverage Selection Form and the Notice of Inspection would absorb at least four to five days of the seven day deferral period. If the Coverage Selection Form was mailed prior to a weekend or holiday or if there is any postal service delay, the deferral period will be exhausted by the time the insured receives the Notice of Inspection.

Example #2—Another problem occurs when an insured phones to add vehicles or physical damage coverage. The insured would in this instance, be required to complete and return a Coverage Selection Form and comply with the inspection requirement. Coverage changes cannot be effective without receipt of the Coverage Selection Form of the mandated language of the Notice of Insurance inspection **confirms** physical damage coverage on the vehicle to be inspected during the seven day deferral period. If the notice is not sent until coverage is actually effective, the insured is then in the same position described in example #1 where the deferral period can be exhausted prior to the insurer's receipt of the notice.

Example #3—Further complications can result if the insured fails to submit the Coverage Selection Form and comply with inspection requirement where both are required. If the insured obtains the inspection but does not complete and send the Coverage Selection Form, coverage has not been effective. Upon receipt of a Coverage Selection Form from the insured, a second inspection would be required since it is a new request for coverage.

RESPONSE: The Department has reviewed its coverage selection form and has proposed amendments to N.J.A.C. 11:3-15.7 in the February 15, 1992 issue of the New Jersey Register at 24 N.J.R. 523(a) to ensure that there are no conflicts between requests for coverage.

COMMENT: One commenter requested that the Department provide an exemption from its rules for small businesses. The commenter further requested that the Department modify its Regulatory Flexibility Statement to reflect the costly and onerous impacts upon small businesses.

RESPONSE: N.J.S.A. 17:33B-33 states that "the provisions of sections 17:33B-33 to 17:33B-40 shall be applicable to **all** automobile physical damage insurance policies covering automobiles" (emphasis supplied). N.J.S.A. 17:33B-40(b) permits inspections to be exempted or deferred under circumstances specified in regulations of the Commissioner. The Department permits waivers of mandatory inspection in N.J.A.C. 11:3-36.4. The waivers are not based on an insurer's size but are based on the type of vehicle and other factors that relate to the insured. The Department does not believe that the statute intended to provide exemptions based on the size of the insurer.

COMMENT: One commenter suggests that the department amend Appendices A, B and D. The commenter's objections related to the wording found in these forms that coverage will be restored only after the inspection has been completed and the adjusted premium for such coverages has been paid. The commenter questioned whether this provision requires an insured to pay the full annual premium and have the car inspected in order to continue, or reinstate, the physical damage coverage.

RESPONSE: N.J.A.C. 11:3-36.7 addresses the procedure that an insurer is to follow in suspending physical damage coverage. N.J.A.C. 11:3-36.7(c) states that:

A reinstatement of physical damage coverage shall only be effective upon inspection and payment by the insured to the insurer of the adjusted premium for the physical damage coverage **in full or in accordance with the insurer's normal payment plan.** (emphasis added.)

Appendices A, B and D establish minimum standards. Insurers are permitted to add language as long as all the information specified in the appendices is included.

Summary of Agency-Initiated Changes:

The Department has also made three changes in these rules which it believes will remove potential problems and make them easier to apply in the market. First, the Department has amended the definition of "new automobile" to more closely conform these rules with the rules of the Division of Consumer Affairs in the Department of Law and Public Safety (see N.J.A.C. 13:45A-2.) Automobile dealers, insurers and agents are familiar with that rule's definition of "used motor vehicle" as one with more than 1,000 miles recorded on the odometer; the Department believes that a different mileage standard in these rules may generate confusion in the market. The rules continue to require, however, that "demo" automobiles with more than 1,000 miles be inspected.

Secondly, the Department has amended the rules to require that insurers waive inspections for new automobiles; the proposed language was merely permissive. The Department notes that a mandatory waiver for new automobiles more closely sets forth the legislative intent of N.J.S.A. 17:33B-40b, which states that: "... The Commissioner shall exempt new automobiles from inspection under conditions he establishes by regulation..." Adding the additional condition of an affirmative decision by the insurer to waive the inspection is not necessary and may result in serious inconvenience to the public.

Thirdly, the Department deleted a sentence in N.J.A.C. 11:3-36.7(e)1 which stated that: "No physical damage claim occurring after the effective date of coverage shall be payable until the document(s) are provided to the insurer." The Department deleted this sentence, because it is redundant to the preceding sentence.

Fourthly, the Department has added a new rule which provides a delayed operative date for policies written as part of depopulation pursuant to N.J.S.A. 17:33B-11c(5). The Department notes that depopulation will result in a significant transfer of business from the Market Transition Facility ("MTF") to the voluntary market in the period between April and September, 1992. The transfer of business from the MTF to the voluntary market could burden existing systems of insurers, insurance inspection services and agents. If inspections cannot be conducted promptly with available resources, the public would be severely inconvenienced by the delays and may suffer unnecessary suspensions of physical damage coverage.

The Department further notes that it expects the physical damage inspection procedures to assist in the stabilization of premiums on physical damage coverage, which increases are partly due to fraudulent physical damage claims. However, the costs of physical damage inspections represent expenses in the market place, and the Department recognizes that it may not be cost-effective to impose such inspections for policies written as part of the depopulation effort between April 1, 1992 and September 30, 1992. New policies written by voluntary market insurers pursuant to depopulation represent a large, involuntary transfer of business, as is done when a producer transfers a book of business. The Department believes that it is desirable to delay the operative date

of this subchapter for policies written by voluntary market insurers as part of depopulation in order to avoid additional costs.

The Department has made editorial changes as a matter of form to N.J.A.C. 11:3-36.4, 36.5 and 36.6

Full text of the adoption follows (additions indicated in boldface with asterisks ***thus***; deletions indicated in brackets with asterisks *[thus]*).

11:3-36.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Authorized representative" means any person which is authorized by the insurer to conduct insurance inspections pursuant to this subchapter; an authorized representative may be an employee of the insurer, a producer or an inspection service other than the insured, whether located inside or outside of this State.

...

"New automobile" means an automobile not previously titled with *[less than 300 recorded miles]* ***not more than 1,000 miles recorded on the odometer.***

...

"Nonowned automobile" means a private passenger automobile in the possession of the insured or being operated by the insured which is neither owned by nor furnished for the regular use of either the named insured or any relative (as defined in the policy), other than a temporary substitute automobile.

...

"Temporary substitute automobile" means any private passenger automobile not owned by the insured, while temporarily used with the permission of the owner as a substitute for an owned automobile, when the latter is withdrawn from normal use because of breakdown, repair, servicing, loss or destruction.

11:3-36.4 Waivers of mandatory inspection

(a) An insurer shall waive a mandatory inspection when a new automobile is purchased from a franchised automobile dealership and the insurer is provided with the following documents in accordance with N.J.A.C. 11:3-36.7(e):

1. A copy of the bill of sale which contains a full description of the automobile, including all options and accessories;

2. A copy of the window sticker or advanced dealer shipping notice (invoice) showing the itemized options and equipment, the total retail price of the automobile, and any dealer installed option purchased by the customer; or

3. Vehicle buyer's order (contract) and/or the dealership invoice to the buyer, including all options and accessories.*

*[(a)]****(b)**** An insurer may waive a mandatory inspection under any of the following circumstances:

*[1. When a new automobile is purchased from a franchised automobile dealership and the insurer is provided with the following:

i. A copy of the bill of sale which contains a full description of the automobile, including all options and accessories; or

ii. A copy of the window sticker or advanced dealer shipping notice (invoice) showing the itemized options and equipment, the total retail price of the automobile, and any dealer installed option purchased by the customer; or

iii. Vehicle buyer's Order (contract) and/or the dealership invoice to the buyer, including all options and accessories;]*

Recodify (a)2 through 3 as ***(b)1*** through ***2*** (No change in text.)

*[4.]****3.**** When the insured automobile is insured under a commercially rated policy which insures five or more automobiles;

*[5.]****4.**** (No change.)

Recodify existing 7. and 8. as *[6. and 7.]* ***5. and 6.*** (No change in text).

*[8.]****7.**** When the named insured has been continuously insured for automobile insurance with the same insurer, or an affiliate of the insurer, for four or more policy years.

*[9.]****8.**** Where an individual insured's coverage is being transferred by an independent insurance agent to a new insurer and the previous insurer provides the new insurer with a copy of the inspection report.

i. If the new insurer does not receive a copy of the inspection report 60 days prior to the first annual renewal date, the insurer, upon renewal of the automobile physical damage insurance, shall require a physical inspection in accordance with N.J.A.C. 11:3-36.5 ***(e)****.

Recodify (b) and (c) as ***(c)*** and ***(d)*** (No change in text.)

11:3-36.5 Deferral of inspections

(a) An insurer, by itself or through its authorized producers, may defer the mandatory inspection required by N.J.A.C. 11:3-36.3 for seven calendar days following the effective date of coverage, upon an insured's requests for coverage for automobile physical damage insurance on an additional or replacement automobile.

(b) An insurer may defer the mandatory inspection under any of the following circumstances:

1. On new business for seven calendar days following the effective date of coverage; and

2. On replacement automobiles, an insurer may provide the same type and level of physical damage coverage which covered the replaced automobile, without a request for coverage by the insured. Such automatic coverage prior to the insured's request for coverage shall be for a period of three days, including the day on which the automobile is acquired. The three-day period shall be extended by one day for each Saturday, Sunday or any New Jersey State legal holiday falling within the period. The insurer's election shall apply only to automobiles replacing covered automobiles which were insured by the insurer for physical damage coverage for at least the 12-month period preceding the replacement date and such election once made shall apply to all the insurer's private passenger automobile insurance. An insurer which makes an election pursuant to this clause shall file an appropriate policy endorsement with the Commissioner and furnish a copy of such endorsement to all of it insureds who have physical damage coverage.

(c) When an inspection is deferred pursuant to (a) **or (b)** above, the insurer or producer shall:

1. At the time the insurance application is completed, obtain the Acknowledgment of Requirement for Insurance Inspection form (as set forth in Appendix A and incorporated herein by reference) signed by the insured if the insured has applied for coverage in person; or

2. At the time the insurance application is completed, confirm physical damage coverage and advise the insured of the inspection requirements and mail the insured the Notice of Insurance Inspection form (as set forth in Appendix B and incorporated herein by reference) if the insured has applied for coverage by mail or by telephone. Documentation of such verbal notices shall include the name of the person giving the notice.

(d) In addition to the notice requirements set forth in (c)1 and 2 above, the insurer or producer shall furnish the insured with information about where an inspection can be conducted and the consequences of the insured's failure to have the automobile inspected.

1. The insurer shall retain documentation of the required notice in (c) above in the insurer's file on the insured.

(e) When an insurer requires an insured's automobile to be inspected as a condition for any annual renewal of physical damage coverage, the insurer shall provide notice and coverage as follows:

1. Whenever a renewal of physical damage coverage is conditioned upon inspection, the insurer shall mail or deliver a written Notice of Insurance Inspection (Appendix B) to the insured at least 30 days prior to the renewal date. The insurer's file on the insured shall reflect the mailing of such notice.

2. If the insured has not responded to the Notice of Insurance Inspection, the insurer shall, at least 10 days prior to the expiration of the above 30-day deferral period, mail a second Notice of Insurance Inspection to the insured, to the producer of record, and any lienholders, restating that failure to have the automobile inspected prior to the expiration of the deferral period will result in suspension of physical damage coverage. A certificate of mailing of

the second notice to the insured shall be retained by the insurer. The insurer shall assist the insured in arranging a convenient appointment for the required inspection. The written notice of the inspection requirement shall clearly inform the insured of the failure to comply with the inspection requirement will result in the suspension of automobile physical damage coverage. The notice shall also state that a copy of the inspection report will be given to the insured.

(f) (No change in text).

11:3-36.6 Standards and procedures for inspection

(a) (No change.)

(b) If the insured acquires an additional or replacement automobile outside of New Jersey, and such automobile will be located outside New Jersey until after the expiration of the deferral period *[required]* ***permitted*** by N.J.A.C. 11:3-36.5***(a) or (b)***, the insurer shall arrange to conduct the inspection by an authorized representative during the deferral period at a place which shall not be more than 50 miles from the temporary location.

(c) If the insured automobile required to be inspected upon renewal is temporarily located outside of New Jersey when the required notice of inspection is mailed to the insured, and such automobile will continue to be located outside of New Jersey until the expiration of the deferral period ***required*** by N.J.A.C. 11:3-36.5 ***(e)1***, the insurer shall arrange to conduct the inspection by an authorized representative before the expiration of the deferral period at a place which shall not be more than 50 miles from the temporary location.

Recodify existing (b) and (c) as (d) and (e) (No change to text.)

(f) The insurer shall utilize authorized representatives and systems to implement the provisions of this subchapter which meet the following standards:

1.-3. (No change.)

4. Takes photographs as required in (e)2 through 3 above;

5. Provides for the storage and retrieval of reports and photographs in a manner that facilitates their use as set forth in paragraph (j) below;

6.-9. (No change.)

Recodify existing (e)-(j) as (g)-(l) (No change to text.)

11:3-36.7 Suspension of physical damage coverages

(a)-(d) (No change.)

(e) Physical damage coverage on a new automobile shall not be suspended during the term of the policy due to the insured's failure to provide the documents required by N.J.A.C. 11:3-36.4(a)*[1]*.

1. Payment of a physical damage claim shall be conditioned upon the receipt of such document(s) by the insurer. *[No physical damage claim occurring after the effective date of coverage shall be payable until the document(s) are provided to the insurer.]*

2. If the above document(s) are not submitted by the insured 60 days prior to the next policy renewal date, the insurer shall require an inspection upon renewal.

3. New automobiles acquired less than 90 days prior to the next policy renewal date have until 60 days prior to the following policy renewal date to submit the required document(s) or be subject to an inspection at that renewal in accordance with N.J.A.C. 11:3-36.5(e).

(f) For renewal inspections, if the insured fails to have the insured automobile inspected before the expiration of the 30-calendar day deferral period required by N.J.A.C. 11:3-36.5(e)1, physical damage coverage on the insured automobile shall be suspended effective at 12:01 A.M. on the day following the last day of the deferral and suspension shall continue until such inspection is effected. The insurer, however, must reinstate coverage for automobile physical damage if the insured thereafter completes the inspection. Any such reinstatement shall be effective at the time of the inspection and, for the purposes of this subchapter, shall not be considered new business.

1. If the insurer fails to mail or deliver the initial written notice of inspection to the insured in the accordance with N.J.A.C. 11:3-36.5(e), it shall, nevertheless, give written notice of the inspection requirement, and automobile physical damage coverage shall continue without the required inspection past the renewal date for up to 30 days from the same of the delayed notice.

2. An insurer shall make every effort to conduct a renewal inspection in advance of the normal inspection period for such risk, in order to mitigate any hardship to the insured which would otherwise result.

3. If an automobile is not inspected due to the fault of the insurer, physical damage coverage on the automobile shall not lapse.

11:3-36.11 Required amendatory endorsements

(a) For all policies providing automobile physical damage coverage issued on or after June 1, 1991, or renewed on or after July 1, 1991, insurers may adopt any one of the following procedures:

1. Amend the policy by adding thereto the endorsements as set out in (c) below, which may include the option set forth in (d) below and which is hereby deemed approved upon filing with the Department;

2. Submit for Department approval the insurer's own similar endorsement; or

3. Submit for Department approval the insurer's basic policy form incorporating the substance of the endorsements set out in (c) below, which may include the option set forth in (d) below.

(b) An insurer which adopts any of the above procedures may subsequently submit filings under any of the other procedures.

(c) The required endorsement is as follows: New Jersey Mandatory Inspection Endorsement for Physical Damage Coverage. Notwithstanding any conflicting provisions contained in the automobile physical damage coverage of this policy, it is agreed that the following conditions are added:

1. The company or its authorized representative has the right to inspect any private passenger automobile, including a nonowned automobile, insured or intended to be insured under this policy before physical damage coverage shall be effective.

2. During the term of the policy, coverage for an additional or replacement private passenger automobile shall not become effective until the insured notifies the company and requests coverage for the automobile.

3. When an inspection is required by the company the insured shall cooperate and make the automobile available for the inspection.

(d) Insurers which elect to provide physical damage coverage for a replacement automobile for three days without an insured's request for coverage in accordance with N.J.A.C. 11:3-36.5 may substitute the following provision for item 2 in the endorsement in (c) above:

1. During the term of the policy, coverage for an additional or replacement private passenger automobile shall not become effective until the insured notifies the company and requests coverage for the automobile. However, this provision does not apply to a replacement private passenger automobile, for a period of three days, including the day on which the automobile is acquired, if:

i. The automobile is acquired during the policy period; and

ii. There was Physical Damage Coverage on the vehicle replaced for at least the 12-month period preceding the replacement date.

(1) The three-day period in paragraph 1 above shall be extended by one day for each Saturday, Sunday or New Jersey State holiday falling within the three-day period.

11:3-36.12 Delayed operative date for policies written as part of depopulation pursuant to N.J.S.A. 17:33B-11c(5)

The operative date of this subchapter is October 1, 1992, for policies written as part of depopulation pursuant to N.J.S.A. 17:33B-11c(5) by voluntary market insurers for insureds which were previously insured by the New Jersey Market Transition Facility.*

APPENDIX A

IFD 30 A

(COMPANY LETTERHEAD)

ACKNOWLEDGMENT OF REQUIREMENT FOR INSURANCE INSPECTION
(THIS IS NOT A SAFETY INSPECTION)

NAME OF INSURED
OR APPLICANT: _____
ADDRESS: _____
_____
_____

EFFECTIVE DATE
OF COVERAGE: _____
(Date)
INSPECTION SHALL BE
COMPLETED BY: _____
[(Date: not more than 7 days after the effective date of coverage)]

AUTOMOBILE(S) TO BE INSPECTED

	YEAR	MAKE	MODEL
1.	_____,	_____,	_____.
2.	_____,	_____,	_____.
3.	_____,	_____,	_____.

BY MY SIGNATURE BELOW I CERTIFY THAT I HAVE BEEN INFORMED THAT MY AUTOMOBILE(S) WHICH IS (ARE) BEING INSURED FOR FIRE AND THEFT/ COMPREHENSIVE AND/OR COLLISION COVERAGE SHALL BE INSPECTED BY A REPRESENTATIVE OF THE INSURER. THIS INSPECTION SHALL BE COMPLETED NO LATER THAN THE DATE SHOWN ABOVE TO AVOID A SUSPENSION IN COVERAGE.

I UNDERSTAND THAT FAILURE TO SUBMIT TO THE REQUIRE INSPECTION(S) WILL RESULT IN THE SUSPENSION (LOSSES WILL NOT BE COVERED) OF THE PHYSICAL DAMAGE COVERAGES (FIRE AND THEFT/COMPREHENSIVE, COLLISION), AS OF 12:01 A.M. OF THE DAY FOLLOWING THE DATE BY WHICH THE INSPECTION SHALL BE COMPLETED, AS SHOWN ABOVE.

I UNDERSTAND THAT IF COVERAGE IS SUSPENDED IT WILL BE RESTORED ONLY AFTER THE INSPECTION HAS BEEN COMPLETED AND THE ADJUSTED PREMIUM DUE FOR SUCH COVERAGE(S) HAS BEEN PAID.

SIGNATURE OF INSURED OR
APPLICANT: _____ _____
(Date)

SIGNATURE OF PRODUCER
OR INSURANCE COMPANY
REPRESENTATIVE: _____ _____
(Date)

NAME, ADDRESS & TELEPHONE NUMBER OF PRODUCER OR INSURANCE REPRESENTATIVE COMPLETING THIS FORM: _____
_____
_____
_____

INSURED/APPLICANT MUST RECEIVE A COMPLETED COPY OF THIS FORM ALONG WITH A LIST OF AUTHORIZED AUTOMOBILE PHYSICAL DAMAGE INSPECTION SITES.

cc: INSURANCE COMPANY
PRODUCER OF RECORD

DHT3/REGS

LAW AND PUBLIC SAFETY

(a)

DIVISION OF MOTOR VEHICLES

Licensing Service

Commercial Driver Licensing

Adopted New Rules: N.J.A.C. 13:21-23

Proposed: January 21, 1992 at 24 N.J.R. 219(b).

Adopted: February 24, 1992 by Stratton C. Lee, Jr., Director, Division of Motor Vehicles.

Filed: February 24, 1992 as R.1992 d.138, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: P.L. 1990, c.103, §§12, 19 and 21; N.J.S.A. 39:3-36 and 39:5-30.

Effective Date: March 16, 1992.

Operative Date: March 16, 1992 except that N.J.A.C. 13:21-23.22 through 23.27 shall become operative on April 1, 1992.

Expiration Date: December 13, 1995.

Summary of Public Comments and Agency Responses:

Opportunity to be heard with regard to the proposal was invited via notice published in the January 21, 1992 New Jersey Register. A media advisory was also prepared by the Division of Motor Vehicles with regard to the proposal.

Two commenters forwarded comments to the Division of Motor Vehicles regarding the proposal prior to the close of the comment period. These commenters were the New Jersey State First Aid Council and the Home State Insurance Company. The comments are available for inspection at the Office of the Director, Division of Motor Vehicles, 25 South Montgomery Street, 7th Floor, Trenton, New Jersey 08666.

The comments touched upon two points which are summarized below, together with the Division's responses.

COMMENT: The New Jersey First Aid Council expressed concern that the proposal impinges upon the statutory exemption set forth in P.L. 1991, c.126.

RESPONSE: The New Jersey First Aid Council's concerns are unfounded. P.L. 1991, c.126 exempts "operators of emergency or rescue equipment operated for the purposes of a first aid, ambulance or rescue squad" from the commercial driver license requirements. The statutory exemption is not affected by the proposed rules. The rules do not require that operators of emergency or rescue equipment be licensed as commercial drivers. The change upon adoption to N.J.A.C. 13:21-23.28 is intended to reinforce the statutory exemption by relieving owners of ambulances, first aid and rescue vehicles from the GVWR display requirements of N.J.S.A. 39:4-46(b).

COMMENT: The Home State Insurance Company recommended that drivers of limousines and vans be required to obtain a commercial driver license.

RESPONSE: The new commercial driver licensing rules establish a small vehicle (Group C) classification which includes vehicles which are "designed to transport 16 or more passengers including the driver, whether used for hire or not" and vehicles which are "designed to transport eight to 16 passengers including the driver and is used for hire". N.J.A.C. 13:21-23.5(a)3. Limousines and passenger vans as described in the commenter's submission fall within this small vehicle classification. Drivers of such vehicles are required to obtain a Class C commercial driver license with a passenger endorsement.

Summary of Agency-Initiated Changes:

N.J.A.C. 13:21-23.2(e) has been changed to provide for the surrender of a current CDL when a person applies for a CDL in a different group or endorsement. The Division believes that this change will serve to clarify procedures for upgrading CDLs.

N.J.A.C. 13:21-23.5 has been changed to clarify the types of vehicles included in the CMV groups. The "omnibus" category has been deleted from Group C because taxicabs are not intended to be included in any CMV group. The term "omnibus" includes vehicles, including taxicabs, used to transport passengers for hire. This section has also been changed to provide that persons who were licensed as a bus driver before December 1, 1990, may operate a school bus without a CDL if the bus is designed to carry not more than 15 passengers including the driver. The Division believes that persons who have driven small school buses for non-profit organizations (for example, senior citizens groups, organizations providing services to the handicapped community) should be permitted to continue to operate small school buses for this limited purpose. This section also contains technical changes to make the vehicle categories comport with the definition of "commercial motor vehicle" set forth in N.J.A.C. 13:21-23.1 and to differentiate the passenger vehicle category contained in Group B from the passenger vehicle category contained in Group C. The last two references to "16" passengers and "16" persons in Group C have therefore been changed to "15" passengers and "15" persons.

N.J.A.C. 13:21-23.18 has been changed so as to specifically set forth all restriction and/or exception codes that may appear on a CDL. The Division believes that this change will serve to clarify the restrictions and exceptions that a particular driver may be subject to. This section also contains a technical change to provide that a prominent statement that the license is a CDL shall be contained on all CDLs. The language "except as specified in (b) below" has been deleted from N.J.A.C. 13:21-23.18(a)1. That exception pertained to "Nonresident CDLs" which are not provided for in the rules as proposed. The exception language is therefore misleading.

N.J.A.C. 13:21-23.21 has been changed to provide that the Division shall be notified of the change of a legal name within two weeks of such change. The Division believes that this change is necessary to comport with the statutory time frame established in N.J.S.A. 39:3-9a.

N.J.A.C. 13:21-23.28 has been changed to also exempt ambulances, first aid and rescue vehicles from the GVWR display requirements of N.J.S.A. 39:4-46(b). This exemption is consistent with N.J.S.A. 39:3-10j which exempts "operators of emergency or rescue equipment operated for the purposes of a first aid, ambulance or rescue squad" from the CDL requirements. The exemption is also consistent with N.J.S.A. 39:3-10.29 which authorizes the Director to waive application of any provision of the New Jersey Commercial Driver License Act with respect to a class of persons or class of commercial motor vehicles if the Director determines that such waiver is not contrary to the public interest and does not diminish the safe operation of commercial motor vehicles.

The operative date of the new rules will be upon publication in the New Jersey Register except that N.J.A.C. 13:21-23.22 through 13:21-23.27 shall become operative on April 1, 1992. The expiration date of the new rules is December 13, 1995, in conformance with the expiration date of the other rules in N.J.A.C. 13:21.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

SUBCHAPTER 23. COMMERCIAL DRIVER LICENSING

13:21-23.1 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings:

"Basic driver's license" means a license issued by the Division which authorizes a person to operate motor vehicles other than CMVs.

"Cargo tank" means any tank permanently attached to or forming a part of any motor vehicle or any bulk liquid or compressed gas packaging not permanently attached to any motor vehicle which by reason of its size, construction, or attachment to a motor vehicle, is loaded or unloaded without being removed from the motor vehicle. Any packaging fabricated under specifications for cylinders is not a cargo tank.

"Commercial driver license" or "CDL" means a license issued in accordance with the "New Jersey Commercial Driver License Act" (P.L. 1990, c.103) to a person authorizing the person to operate a certain class of commercial motor vehicle.

"Commercial Driver License Information System" or "CDLIS" means the information system established pursuant to the Federal "Commercial Motor Vehicle Safety Act of 1986," Pub. L. 99-570 (49 U.S.C. §2701 et seq.) to serve as a clearing house for locating information related to the licensing and identification of commercial motor vehicle drivers.

"Commercial motor vehicle" or "CMV" means a motor vehicle or combination of motor vehicles used or designed to transport passengers or property on a highway:

1. If the motor vehicle has a gross vehicle weight rating of 26,001 or more pounds or displays a gross vehicle weight rating of 26,001 or more pounds;

2. If the motor vehicle has a gross combination weight rating of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds;

3. If the motor vehicle is designed to transport 16 or more passengers including the driver;

4. If the motor vehicle is designed to transport eight or more but less than 16 persons, including the driver, and is used to transport such persons for hire, including such vehicles used to transport persons on a daily basis to and from places of employment; or

5. If the motor vehicle is transporting or used in the transportation of hazardous materials and is required to be placarded in accordance with subpart f. of 49 CFR §172, or the vehicle displays a hazardous material placard.

This term shall include those vehicles specifically described and classified in N.J.A.C. 13:21-23.5.

This term shall not include recreation vehicles.

"Controlled substance" means any substance so classified under subsection (6) of section 102 of the "Controlled Substances Act" (21 U.S.C. §802), and includes all substances listed on Schedules I through V of 21 CFR §1308, or under P.L. 1970, c.226 (C. 24:21-1 et seq.) as they may be revised from time to time. The term shall include controlled substance analogs.

"Controlled substance analog" means a substance that has a chemical structure substantially similar to that of a controlled dangerous substance and that was specifically designed to produce an effect substantially similar to that of a controlled dangerous substance. The term shall not include a substance manufactured or distributed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of section 505 of the Federal Food, Drug and Cosmetic Act, (21 U.S.C. §355).

"Conviction" means a final adjudication that a violation has occured, a final judgment on a verdict, a finding of guilt in a tribunal of original jurisdiction, or a conviction following a plea of guilty, non vult or nolo contendere accepted by a court. It also includes an unvacated forfeiture of bail, bond or collateral deposited to secure the person's appearance in court, or the payment of a fine or court costs, or violation of a condition of release without bail, regardless of whether the penalty is rebated, suspended, or probated.

"Director" means the Director of the Division of Motor Vehicles in the Department of Law and Public Safety.

"Disqualification" means either:

1. The suspension, revocation, cancellation, or any other withdrawal by a state of a person's privilege to operate a commercial motor vehicle;

2. A determination by the Federal Highway Administration under the rules of practice for motor carrier safety contained in 49 CFR §386, that a person is no longer qualified to operate a commercial motor vehicle under 49 CFR §391; or

3. The loss of qualification which automatically follows conviction of an offense listed in 49 CFR §383.51.

"Division" means the Division of Motor Vehicles in the Department of Law and Public Safety.

"Domicile" means that state where a person has a true, fixed, and permanent home and principal residence and to which the person intends to return whenever the person is absent.

"Driver license" means a license issued by this State or any other jurisdiction to a person authorizing the person to operate a motor vehicle.

"Endorsement" means an authorization to a commercial driver license required to permit the holder of the license to operate certain types of commercial motor vehicles.

"Foreign jurisdiction" means any jurisdiction other than a state of the United States or the District of Columbia.

"Gross vehicle weight rating" or "GVWR" means the value specified by a manufacturer as the loaded weight of a single or a combination (articulated) vehicle, or the registered gross weight, whichever is greater. The GVWR of a combination (articulated) vehicle, commonly referred to as the "gross combination weight rating" or "GCWR," is the GVWR of the power unit plus the GVWR of the towed unit or units. In the absence of a value specified for the towed unit or units by the manufacturer, the GVWR of a combination (articulated) vehicle is the GVWR of the power unit plus the total weight of the towed unit, including the loads on them.

"Hazardous material" means a substance or material determined by the Secretary of the United States Department of Transportation to be capable of posing an unreasonable risk to health, safety, and property when transported in commerce and so designated pursuant to the provision of the "Hazardous Materials Transportation Act," (49 U.S.C. §1801 et seq.).

"Motor vehicle" includes all vehicles propelled otherwise than by muscular power, except such vehicles as run only upon rails or tracks. The term "motor vehicle" includes motorized bicycles.

"Out of service order" means a temporary prohibition against operating a CMV.

"Portable tank" means a bulk packaging (except a cylinder having a water capacity of 1,000 pounds or less) designed primarily to be loaded onto, or on, or temporarily attached to a transport vehicle or ship and equipped with skids, mountings, or accessories to facilitate handling of the tank by mechanical means. It does not include a cargo tank, tank car, multi-unit tank car tank, or trailer carrying 3AX, 3AAX, or 3T cylinders.

"Recreation vehicle" means a self-propelled or towed vehicle equipped to serve as temporary living quarters for recreational, camping, or travel purposes and is used solely as a family or personal conveyance.

"Representative vehicle" means a motor vehicle which represents the type of motor vehicle that a commercial driver license applicant operates or expects to operate.

"Serious traffic violation" means conviction for one of the following offenses committed while operating a commercial motor vehicle:

1. Excessive speeding, involving any single offense for a speed of 15 miles per hour or more above the speed limit;

2. Reckless driving, as defined by state or local law or regulation, including, but not limited to, offenses of driving a commercial motor vehicle in willful or wanton disregard of the safety of persons or property, including violations of N.J.S.A. 39:4-96;

3. Improper or erratic traffic lane changes;

4. Following a vehicle ahead too closely, including violations of N.J.S.A. 39:4-89;

5. A violation, arising in connection with a fatal accident, of state or local law relating to motor vehicle traffic control, other than a parking violation; or

6. Any other violation of a state or local law relating to motor vehicle traffic control determined by the Secretary of the United States Department of Transportation in 49 CFR §383.5 to be a serious traffic violation.

This term shall not include vehicle weight or equipment defect violations.

"State" means a state of the United States or the District of Columbia.

"State of domicile" means the state where a person has a true, fixed, and permanent home and principal residence and to which the person intends to return whenever he is absent.

"Tank vehicle" means any commercial motor vehicle that is designed to transport any liquid or gaseous material within a tank that is either permanently or temporarily attached to the vehicle or the chassis. Such vehicles include, but are not limited to, cargo tanks and portable tanks as defined in this section. However, this definition does not include portable tanks having a rated capacity under 1,000 gallons.

"Vehicle group" means a class or type of vehicle with certain operating characteristics.

13:21-23.2 Driver application procedures; initial; examination permit; transfer from another state; renewal; upgrade; endorsements; form; fee; legal name defined

(a) To obtain a CDL, a person must meet the following requirements:

1. Pass a knowledge test in accordance with the standards contained in N.J.A.C. 13:21-23.9 for the type of motor vehicle the person operates or expects to operate;

2. Pass a driving or skills test in accordance with the standards contained in N.J.A.C. 13:21-23.8 through 23.15 taken in a motor vehicle which is representative of the type of motor vehicle the person operates or expects to operate or provide evidence that he or she has successfully passed a driving test administered by an authorized third party;

3. If a person operates or expects to operate in interstate commerce, meet the driver qualification requirements set forth in 49 CFR 391;

4. Make application for an initial CDL, CDL examination permit, transfer of a CDL from another state, CDL upgrade, CDL endorsement, or renewal of a CDL, to the Division in the form specified in (g) below. An applicant must provide complete and accurate information and all required certifications on the application;

5. Complete the application form with the information required to be included on the CDL as specified in N.J.A.C. 13:21-23.18;

6. Surrender his or her noncommercial driver's license to the Division; and

7. Pay to the Division the license fee established by N.J.S.A. 39:3-10.30.

(b) In addition to any other requirements provided by law, a person applying for a CDL, a CDL examination permit, a transfer of a CDL from another state, a renewal of a CDL or a person applying to operate a CMV in a different group or endorsement from the group or endorsement in which he or she already holds a CDL, shall provide the following certifications:

1. A certification that he or she meets the qualification requirements contained in 49 CFR §391; provided, a person who operates or expects to operate entirely in intrastate commerce and is not subject to 49 CFR 391, may instead certify that he or she is not subject to Part 391; and

2. Certify that the motor vehicle in which he or she takes the driving skills test, where such test is required, is representative of the type of motor vehicle he or she operates or expects to operate; and

3. Certify that he or she is not subject to any disqualification, suspension, revocation or cancellation as contained in the "New Jersey Commercial Driver License Act" or 49 CFR 383.51; and

4. Certify that he or she does not have a driver license from more than one state or jurisdiction.

(c) When applying to transfer a CDL from another state of domicile to New Jersey, an applicant shall apply for a CDL from the Division within no more than 30 days after establishing his or her new domicile in New Jersey. The applicant shall:

1. Provide to the Division the certifications contained in (b)1 and (b)3 above;

2. Provide to the Division updated information as specified in N.J.A.C. 13:21-23.18;

3. If the applicant wishes to retain a hazardous materials endorsement, comply with Division requirements as specified in N.J.A.C. 13:21-23.3(b)4; and

4. Surrender the CDL from the old state of domicile to the Division.

(d) When applying for a renewal of a CDL, all applicants shall:

1. Provide to the Division the certifications contained in (b)1 above;

2. Provide to the Division updated information as specified in N.J.A.C. 13:21-23.18; and

3. If a person wishes to retain a hazardous materials endorsement, pass the test for such endorsement as specified in N.J.A.C. 13:21-23.14.

(e) When applying to operate a CMV in a different group or endorsement from the group or endorsement in which the applicant already has a CDL, all applicants shall:

1. Provide to the Division the necessary certifications as specified in (b)1 and (b)2 above; *[and]*

2. Pass the tests specified in (a)1 and (a)2 above for the new vehicle group and/or different endorsements*[.]***; and**

3. Surrender his or her current CDL to the Division.*

(f) When applying for a CDL examination permit, all applicants shall:

1. Provide to the Division the certifications contained in (b)1 through (b)4 above;

2. Provide to the Division the information required to be included on the CDL as specified in N.J.A.C. 13:21-23.18;

3. Pay to the Division the examination permit fee established by N.J.S.A. 39:3-10.30; and

4. Pass a knowledge test in accordance with the standards contained in N.J.A.C. 13:21-23.9 for the type of motor vehicle the person intends to operate.

(g) An application for an initial CDL, commercial driver examination permit, transfer of a CDL from another state, CDL upgrade, CDL endorsement, or renewal of a CDL shall include the following:

1. The full legal name, the street address of the residence and the mailing address, if different from the street address of the applicant. A post office box shall appear on the application only as a part of a mailing address that is submitted in addition to a street address;

2. A physical description of the person including sex, height, weight, and eye color;

3. Full date of birth;

4. The applicant's Social Security number (An applicant shall be required to exhibit the original Social Security card or other acceptable proof of said number);

5. The applicant's signature;

6. Such proof of physical condition, experience, training, prior driving experience and knowledge as the Director may require; and

7. Any other information required by the Director.

(h) For purposes of this section, legal name shall mean the name recorded on a birth certificate unless otherwise changed by marriage, divorce or order of court.

13:21-23.3 Driver testing and licensing; initial licenses; license transfers; renewals; upgrades; issuance; penalties for false information; reciprocity

(a) Prior to issuing a CDL to a person, the Division shall:

1. Require the driver applicant to certify, pass tests, and provide information as described in N.J.A.C. 13:21-23.2(a) and (b);

2. Check that the vehicle in which the applicant takes his or her test is representative of the vehicle group the applicant has certified that he or she operates or expects to operate;

3. Initiate and complete a check of the applicant's driving record as specified in Section 6 of the New Jersey Commercial Driver License Act to ensure that the person is not subject to any disqualification, suspensions, revocations or cancellations as contained in the New Jersey Commercial Driver License Act or 49 CFR §383.51 and that the person does not have a driver's license from more than one state. The record check shall include, but not be limited to, the following:

i. A check of the applicant's driving record as maintained by his or her current state of licensure, if any;

ii. A check with CDLIS to determine whether the driver applicant already has a CDL, whether the applicant's license has been suspended, revoked, or canceled, or if the applicant has been disqualified from operating a CMV; and

iii. A check with the National Driver Register (NDR) to determine whether the driver applicant has:

(1) Been disqualified from operating a motor vehicle (other than a CDL);

(2) Had a license (other than a CDL) suspended, revoked, or canceled for cause in the three-year period ending on the date of application; or

(3) Been convicted of any offenses contained in section 205(a)(3) of the National Drivers Register Act of 1982 (23 U.S.C. 401 note); and

4. Require the driver applicant, if he or she has moved from another state, to surrender his or her driver's license issued by another state.

(b) Prior to issuing a CDL to a person who has a CDL from another state, the Division shall:

1. Require the driver applicant to make the certifications contained in N.J.A.C. 13:21-23.2(b);

2. Complete a check of the driver applicant's record as contained in (a)3 above;

3. Request and receive updates of information specified in N.J.A.C. 13:21-23.18;

4. If such applicant wishes to retain a hazardous materials endorsement, ensure that the driver has, within the two years preceding the transfer, either:

i. Passed the test for such endorsement specified in N.J.A.C. 13:21-23.14; or

ii. Successfully completed a hazardous materials test or training that is given by a third party and that is deemed by the Director to substantially cover the same knowledge base as that described in N.J.A.C. 13:21-23.14; and

5. Obtain the CDL issued by the applicant's previous State of domicile.

(c) Prior to renewing any CDL the Division shall:

1. Require the driver applicant to make the certification contained in N.J.A.C. 13:21-23.2(b);

2. Complete a check of the driver applicant's record as contained in (a)3 above;

3. Request and receive updates of information specified in N.J.A.C. 13:21-23.18; and

4. If such applicant wishes to retain a hazardous materials endorsement, require the driver to pass the test for such endorsement specified in N.J.A.C. 13:21-23.14.

(d) Prior to issuing an upgrade of a CDL, the Division shall:

1. Require such driver applicant to obtain an examination permit, provide certifications and pass tests as described in N.J.A.C. 13:21-23.2(e); and

2. Complete a check of the driver applicant's record as described in (a)3 above.

(e) After the Division has completed the procedures described in (a), (b), (c), or (d) above, it may issue a CDL to the driver applicant. The Division shall notify the operator of the CDLIS of such issuance, transfer, renewal, or upgrade within the 10-day period beginning on the date of license issuance.

(f) If the Division determines, in its check of an applicant's license status and record prior to issuing a CDL, or at any time after the CDL is issued, that the applicant has falsified information contained in N.J.A.C. 13:21-23.18 or any of the certifications required in N.J.A.C. 13:21-23.2(b), the Division shall, after notice and an opportunity for a hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1 at a minimum suspend, cancel, or revoke the person's CDL, or his or her pending application, or disqualify the person from operating a CMV for a period of at least 60 consecutive days.

(g) Any person who has a valid CDL which is not suspended, revoked, or canceled, and who is not disqualified from operating a CMV, may operate a CMV in this State on a reciprocal basis in accordance with N.J.S.A. 39:3-17.

13:21-23.4 Substitute for driving skills tests

(a) At the discretion of the Director, the driving skill test as specified in N.J.A.C. 13:21-23.10 may be waived for a CMV operator provided that the applicant holds a license issued in accordance with N.J.S.A. 39:3-10 which is substantially similar to a CDL at the time of his or her application for a CDL, and the applicant's driving record is satisfactory in the discretion of the Director and the applicant has previously passed a Federally-approved skills test, or the applicant's driving record is satisfactory in the discretion of the Director and the applicant has substantial driving experience with CMVs. The Division shall impose the following conditions and limitations to restrict the applicants from whom the Division may accept alternative requirements for the skills test described in N.J.A.C. 13:21-23.10:

1. An applicant must certify that, during the two-year period immediately prior to applying for a CDL, he or she:

i. Has not had more than one license (except in the instances specified in 49 CFR 383.21(b));

ii. Has not had any license suspended, revoked, or canceled;

iii. Has not had any convictions for any type of motor vehicle for the disqualifying offenses contained in the New Jersey Commercial Driver License Act or 49 CFR §383.51(b)(2);

iv. Has not had more than one conviction for any type of motor vehicle for serious traffic violations; and

v. Has not had any conviction for a violation of State or local law relating to motor vehicle traffic control (other than a parking violation) arising in connection with any traffic accident, and has no record of an accident in which he or she was at fault; and

2. An applicant must provide evidence and certify that:

i. He or she has been regularly employed in a job requiring operation of a CMV, and that either:

ii. He or she has previously taken and passed a skills test given by a state with a classified licensing and testing system, and that the test was behind-the-wheel in a representative vehicle for that applicant's driver's license classification; or

iii. He or she has operated, for at least two years immediately preceding application for a CDL, a vehicle representative of the CMV the driver applicant operates or expects to operate.

13:21-23.5 Commercial motor vehicle groups; description; representative vehicle; relation between classes

(a) Each driver applicant must possess and be tested on his or her knowledge and skills, described in N.J.A.C. 13:21-23.8 through 23.14 for the CMV group(s) for which he or she desires a CDL. The CMV groups are as follows:

1. Combination vehicle (Group A)—Any combination of vehicles with a Gross Combination Weight Rating (GCWR) of 26,001 or more pounds provided the GVWR of the vehicle(s) being towed is in excess of 10,000 pounds.

2. Heavy Straight Vehicle (Group B)—Any single vehicle with a GVWR of 26,001 or more pounds, any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR, any vehicle with a GVWR of 26,001 or more pounds and designed to carry 16 or more persons including the driver whether used for hire or not.

3. Small Vehicle (Group C)—Any single vehicle less than 26,001 pounds GVWR, or any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR provided that the vehicle is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which is required to be placarded under the Hazardous Materials Regulations (49 CFR Part 172, Subpart F); or the vehicle is designed to transport 16 or more passengers including the driver, whether used for hire or not; or the vehicle is designed to transport eight to *[16]* ***15*** passengers including the driver and is used for hire; or the vehicle is used to transport eight to *[16]* ***15*** persons including the driver for hire on a daily basis to and from places of employment; or the vehicle is used for the transportation of more than six passengers to or from summer day camps or summer residence camps; *[or the vehicle is an omnibus;]* or the vehicle is required to be registered as a school bus ***except that a person licensed as a bus driver before December 1, 1990 may operate a bus required to be registered as a school bus without a CDL provided the vehicle is designed to carry not more than 15 passengers including the driver***.

(b) For purposes of taking the driving test in accordance with N.J.A.C. 13:21-23.10, a representative vehicle for a given vehicle group contained in (a) above is any CMV which meets the definition of that vehicle group.

(c) Each driver applicant who desires to operate in a different CMV group from the one which his or her CDL authorizes shall be required to take and pass all related tests, except the following:

1. A driver who has passed the knowledge and skills tests for a combination vehicle (Group A) may operate a heavy straight vehicle (Group B) or a small vehicle (Group C), provided that he or she possesses the requisite endorsement(s); and

2. A driver who has passed the knowledge and skills tests for a heavy straight vehicle (Group B) may operate any small vehicle (Group C), provided that he or she possesses the requisite endorsement(s).

13:21-23.6 Endorsements; descriptions; testing requirements

(a) In addition to taking and passing the knowledge and skills tests described in N.J.A.C. 13:21-23.8 through 23.14, all persons who operate or expect to operate the type(s) of motor vehicles described in (b) below shall take and pass specialized tests to obtain each endorsement. The Division shall issue CDL endorsements only to drivers who successfully complete the tests.

(b) An operator must obtain endorsements to his or her CDL to operate CMVs which are:

1. Double/triple trailers;
2. Passenger vehicles (for example, omnibuses and school buses);
3. Tank vehicles; or
4. Required to be placarded for hazardous materials.

(c) The following tests are required for the endorsements contained in (b) above:

1. Double/Triple Trailers—a knowledge test;
2. Passenger—a knowledge and a skills test;
3. Tank vehicle—a knowledge test; and
4. Hazardous Materials—a knowledge test.

13:21-23.7 Air brake restrictions

(a) If an applicant either fails the air brake component of the knowledge test, or performs the skills test in a vehicle not equipped with air brakes, the Division shall indicate on the CDL, if issued, that the person is restricted from operating a CMV equipped with air brakes.

(b) For the purposes of the skills test and the restriction, air brakes shall include any braking system operating fully or partially on the air brake principle.

13:21-23.8 General requirement for knowledge and skills

All drivers of CMVs shall have knowledge and skills necessary to operate a CMV safely as contained in this subchapter.

13:21-23.9 Required knowledge

(a) All CMV operators must have knowledge of the following general areas as developed by the Division and approved by the United States Department of Transportation as meeting its minimum standards:

1. Driver-related elements of the regulations contained in 49 CFR Parts 391, 392, 393, 395, 396, and 397, such as: motor vehicle inspection, repair, and maintenance requirements; procedures for safe vehicle operations; the effects of fatigue, poor vision, hearing, and general health upon safe CMV operation; the types of motor vehicles and cargoes subject to the requirements; and the effects of alcohol and drug use upon safe CMV operations;

2. Proper use of the motor vehicle's safety system, including lights, horns, side and rear-view mirrors, proper mirror adjustments, fire extinguishers, symptoms of improper operation revealed through instruments, motor vehicle operation characteristics, and diagnosing malfunctions. CMV drivers shall have knowledge on the correct procedures needed to use these safety systems in an emergency situation, for example, skids and loss of brakes;

3. The purpose and function of the controls and instruments commonly found on CMVs;

4. The proper procedures for performing various basic maneuvers;

5. The basic shifting rules and terms, as well as shift patterns and procedures for common transmissions;

6. The procedures and rules for various backing maneuvers;

7. The importance of proper visual search, and proper visual search methods;

8. The principles and procedures for proper communications and the hazards of failure to signal properly;

9. The importance of understanding the effects of speed;

10. The procedures and techniques for controlling the space around the vehicle;

11. Preparations and procedures for night driving;

12. The basic information on operating in extreme driving conditions and the hazards that are encountered in extreme conditions;

13. The basic information on hazard perception and clues for recognition of hazards;

14. The basic information concerning when and how to make emergency maneuvers;

15. The information on the causes and major types of skids, as well as the procedures for recovering from skids;

16. The principles and procedures for the proper handling of cargo;

17. The objectives and proper procedures for performing vehicle safety inspections, as follows:

i. The importance of periodic inspection and repair to vehicle safety;

ii. The effect of undiscovered malfunctions upon safety;

iii. What safety-related parts to look for when inspecting vehicles;

iv. Pre-trip/enroute/post-trip inspection procedures; and

v. Reporting findings;

18. What constitutes hazardous material requiring an endorsement to transport; classes of hazardous materials; labeling/placarding requirements; and the need for specialized training as a prerequisite to receiving the endorsement and transporting hazardous cargoes;

19. Operators of vehicles equipped with air brakes shall also have knowledge of:

i. Air brake system nomenclature;

ii. The dangers of contaminated air supply;

iii. Implications of severed or disconnected air lines between the power unit and the trailer(s);

iv. Implications of low air pressure readings;

v. Procedures to conduct safe and accurate pre-trip inspections; and

vi. Procedures for conducting enroute and post-trip inspections of air actuated brake systems, including ability to detect defects which may cause the system to fail; and

20. Operators for the combination vehicle group shall also have knowledge of:

i. Coupling and uncoupling—The procedures for proper coupling and uncoupling a tractor to semi-trailer; and

ii. Vehicle inspection—The objectives and proper procedures that are unique for performing safety inspections on combination vehicles.

13:21-23.10 Required skills; control skills; safe driving skills; air brake skills; test area; simulation

(a) All applicants for a CDL must possess and demonstrate basic motor vehicle control skills for each vehicle group which the driver operates or expects to operate. These skills should include the ability to start, to stop, and to move the vehicle forward and backward in a safe manner.

(b) All applicants for a CDL must possess and demonstrate the safe driving skills for their vehicle group. These skills should include proper visual search methods, appropriate use of signals, speed control for weather and traffic conditions, and ability to position the motor vehicle correctly when changing lanes or turning.

(c) Except as provided in N.J.A.C. 13:21-23.7, applicants shall demonstrate the following skills with respect to inspection and operation of air brakes:

1. Applicants shall demonstrate the skills necessary to conduct a pre-trip inspection which includes the ability to:

i. Locate and verbally identify air brake operating controls and monitoring devices;

ii. Determine the motor vehicle's brake system condition for proper adjustments and that air system connections between motor vehicles have been properly made and secured;

iii. Inspect the low pressure warning device(s) to ensure that they will activate in emergency situations;

iv. Ascertain, with the engine running, that the system maintains an adequate supply of compressed air;

v. Determine that required minimum air pressure build up time is within acceptable limits and that required alarms and emergency devices automatically deactivate at the proper pressure level; and

vi. Operationally check the brake system for proper performance.

2. Applicants shall successfully complete the skills test contained in this subsection in a representative vehicle equipped with air brakes.

(d) Skills tests shall be conducted in on-street conditions or under a combination of on-street and off-street conditions.

13:21-23.11 Requirements for double/triple trailers endorsement

(a) In order to obtain a double/triple trailers endorsement, each applicant must have knowledge covering:

1. Procedures for assembly and hookup of the units;

2. Proper placement of heaviest trailer;

3. Handling and stability characteristics including off-tracking, response to steering, sensory feedback, braking, oscillatory sway, rollover in steady turns, yaw stability in steady turns; and

4. Potential problems in traffic operations, including problems the motor vehicle creates for other motorists due to slower speeds on steep grades, longer passing times, possibility for blocking entry of other motor vehicles on freeways, splash and spray impacts, aerodynamic buffeting, view blockages, and lateral placement.

13:21-23.12 Requirements for passenger endorsement

(a) An applicant for the passenger endorsement must satisfy both of the following additional knowledge and skills test requirements:

1. All applicants for the passenger endorsement must have knowledge covering at least the following topics:

i. Proper procedures for loading/unloading passengers;

ii. Proper use of emergency exits, including push-out windows;

iii. Proper responses to such emergency situations as fires and unruly passengers;

iv. Proper procedures at railroad crossings and drawbridges; and

v. Proper braking procedures.

2. To obtain a passenger endorsement applicable to a specific vehicle group, an applicant must take his or her skills test in a passenger vehicle satisfying the requirements of that group as defined in N.J.A.C. 13:21-23.5.

13:21-23.13 Requirements for tank vehicle endorsement

(a) In order to obtain a tank vehicle endorsement, each applicant must have knowledge covering the following:

1. Causes, prevention, and effects of cargo surge on motor vehicle handling;

2. Proper braking procedures for the motor vehicle when it is empty, full and partially full;

3. Differences in handling of baffled/compartmental tank interiors versus non-baffled motor vehicles;

4. Differences in tank vehicle type and construction;

5. Differences in cargo surge for liquids of varying product densities;

6. Effects of road grade and curvature on motor vehicle handling with filled, half-filled and empty tanks;

7. Proper use of emergency systems; and

8. For drivers of Federal Department of Transportation specification tank vehicles, retest and marking requirements.

13:21-23.14 Requirements for hazardous materials endorsement; waiver of knowledge test

(a) In order to obtain a hazardous material endorsement, each applicant must have such knowledge as is required of a driver of a hazardous materials laden vehicle, from information contained in 49 CFR Parts 171, 172, 173, 177, 178, and 397 on the following:

1. Hazardous materials regulations including:

i. Hazardous materials table;

ii. Shipping paper requirements;

iii. Marking;

iv. Labeling;

v. Placarding requirements;

vi. Hazardous materials packaging;

vii. Hazardous materials definitions and preparation;

viii. Other regulated material (for example, ORM-D);

ix. Reporting hazardous materials accidents; and

x. Tunnels and railroad crossings;

2. Hazardous materials handling including:

i. Forbidden materials and packages;

ii. Loading and unloading materials;

iii. Cargo segregation;

iv. Passenger carrying buses and hazardous materials;

v. Attendance of motor vehicles;

vi. Parking;

vii. Routes;

viii. Cargo tanks; and

ix. "Safe Havens";

3. Operation of emergency equipment including:

i. Use of equipment to protect the public;

ii. Special precautions for equipment to be used in fires;

iii. Special precautions for use of emergency equipment when loading or unloading a hazardous materials laden motor vehicle; and

iv. Use of emergency equipment for tank vehicles; and

4. Emergency response procedures including:

i. Special care and precautions for different types of accidents;

ii. Special precautions for driving near a fire and carrying hazardous materials, and smoking and carrying hazardous materials;

iii. Emergency procedures; and

iv. Existence of special requirements for transporting Class A and B explosives.

(b) The Director may waive the written knowledge test if an applicant for a renewal of a hazardous materials endorsement or the transfer of a hazardous materials endorsement from another state has satisfactorily completed an approved training course pertaining to the operation of motor vehicles transporting hazardous materials within two years of the date of application.

13:21-23.15 Minimum passing scores; test longevity; waiting period between tests

(a) The driver applicant must correctly answer at least 80 percent of the questions on each knowledge test in order to achieve a passing score on such knowledge test. The results of a knowledge test shall remain valid for a period of one year from the date that the applicant achieved a passing score.

(b) To achieve a passing score on the skills test, the driver applicant must demonstrate that he or she can successfully perform all of the skills listed in N.J.A.C. 13:21-23.10.

(c) If the driver applicant does not obey traffic laws, or causes an accident during the test, he or she shall automatically fail the test.

(d) The scoring of the basic knowledge and skills test shall be adjusted as follows to allow for the air brake restriction (see N.J.A.C. 13:21-23.7):

1. If the applicant scores less than 80 percent on the air brake component of the basic knowledge test as described in N.J.A.C. 13:21-23.9(a)(7), the driver will have failed the air brake component and, if the driver is issued a CDL, an air brake restriction shall be indicated on the license; and

2. If the applicant performs the skills test in a vehicle not equipped with air brakes, the driver will have omitted the air brake component as described in N.J.A.C. 13:21-23.10(c) and, if the driver is issued a CDL, the air brake restriction shall be indicated on the license.

13:21-23.16 Third party testing; proof of testing

(a) The Director may authorize a person (including an employer, or a department, agency or instrumentality of a local government) to administer the skills test as specified in N.J.A.C. 13:21-23.10 if the following conditions are met:

1. The tests given by the third party are the same as those which would otherwise be given by the Division; and

2. The third party has an agreement with the Division containing, at a minimum, provisions that:

i. Allow the Federal Highway Administration, or its representative, and the Division to conduct random examinations, inspections and audits without prior notice;

ii. Require the Division to conduct on-site inspections at least annually;

iii. Require that all third party examiners meet the same qualification and training standards as Division examiners, to the extent necessary to conduct skills tests in compliance with N.J.A.C. 13:21-23.10;

iv. Require that, at least on an annual basis, Division employees take the tests actually administered by the third party as if the Division employees were test applicants, or that the Division test a sample of drivers who were examined by the third party to compare pass/fail results; and

v. Reserve unto the Division the right to take prompt and appropriate remedial action against the third-party testers in the event that the third-party fails to comply with Division or Federal standards for the CDL testing program, or with any other terms of the third-party contract.

(b) A driver applicant who takes and passes driving tests administered by an authorized third party shall provide evidence to the Division that he or she has successfully passed the driving tests administered by the third party.

(c) An authorized third party may charge a driver applicant a fee for the administration of the skills test, except that said fee shall not exceed an amount equal to the cost to the State for administering such testing.

13:21-23.17 Commercial driver's license document; general

The CDL shall be a document that is easy to recognize as a CDL. At a minimum, the document shall contain the information specified in N.J.A.C. 13:21-23.18.

13:21-23.18 Information on the document and application

(a) All CDLs shall contain the following information:

1. The prominent statement that the license is a "Commercial Driver's License" or *["CDL," except as specified in (b) below]* ***"CDL"***;

2. The full name, signature, and mailing address of the person to whom such license is issued;

3. Physical and other information to identify and describe such person including date of birth (month, day, and year), sex, and height;

4. A color photograph of the driver;

5. The driver's license number;

6. The name of New Jersey as the State which issued the license;

7. The date of issuance and the date of expiration of the license;

8. The group or groups of CMV(s) that the driver is authorized to operate, indicated as follows:

i. A for Combination Vehicle;

ii. B for Heavy Straight Vehicle; and

iii. C for Small Vehicle;

9. The endorsement(s) for which the driver has qualified, if any, indicated as follows:

i. T for double/triple trailers;

ii. P for passenger;

iii. N for tank vehicle;

iv. H for hazardous materials;

v. NH for a combination of the tank vehicle and hazardous materials endorsements; and

vi. At the discretion of the Director, additional codes for additional classes of endorsements, as long as each such discretionary code is fully explained on the front or back of the CDL document*[.]**; **and***

10. The restriction(s) and/or exception(s) applicable to the driver, if any, indicated as follows:

i. L except vehicles with air brakes;

ii. M except Class A Passenger Vehicles;

iii. N except Class A & B Passenger Vehicles;

iv. O except Tractor-Trailer (Tow Trucks);

v. P Passenger endorsement restricted to school bus capacity 15 or less;

vi. Q except Passenger Vehicles Capacity 16 or more;

vii. R No Passengers (Bus Mechanics); and

viii. S except School Age Passengers.*

(b) If the Division has issued the applicant an air brake restriction as specified in N.J.A.C. 13:21-23.7, that restriction must be indicated on the license.

(c) If the Division has issued the applicant a Small Vehicle (Group C) CDL which is restricted to the operation of vehicles, including school buses, which are designed to transport not more than 15 passengers including the driver, that restriction must be indicated on the license.

(d) A driver applicant must provide his or her Social Security Number on the application of a CDL. If the applicant has been exempted from applying for a Social Security Number because of his or her religious beliefs, the applicant must submit a letter from the Social Security Administration or the Internal Revenue Service confirming the grant of the exemption. The Division will assign an identification number for the applicant if the applicant has been granted an exemption from applying for a Social Security Number.

(e) The Division must provide the Social Security Number or identification number assigned by the Division to the CDLIS.

13:21-23.19 Tamperproofing requirements

The Division shall make the CDL tamperproof to the maximum extent practicable. At a minimum, the Division shall use the same tamperproof method used for noncommercial drivers' license.

13:21-23.20 Duplicate CDL

The Director, upon presentation of a statement, stating that the original CDL has been destroyed, lost or stolen, may, if he or she is satisfied that the facts as set forth in the statement are true, issue a duplicate CDL, if needed, to the original holder thereof, upon the payment to the Director of the fee set forth in N.J.S.A. 39:3-31 for the duplicate CDL so issued and a fee for the color photograph established by the Director in accordance with N.J.S.A. 39:3-10.30.

13:21-23.21 Change of legal name or address; application for corrected CDL

When a person holding a CDL issued by this State changes his or her legal name, mailing address or residence, he or she shall notify the Director, in writing, of such change within ***two weeks after the change of legal name is made and within*** one week after the change ***of mailing address or residence*** is made. The Director may issue a corrected CDL, if needed, only if the person surrenders his or her current CDL and provides such other information as the Director may require.

13:21-23.22 Guidelines and conditions under which certain suspensions or revocations of CMV driving privileges for life may be reduced to a period of not less than 10 years

(a) A person whose CMV driving privilege has been revoked for life under Section 12(c) or 12(h) of the New Jersey Commercial Driver License Act, or under a similar provision of the law of any other state or jurisdiction, may apply to the Director to have his or her CMV driving privilege restored.

(b) The Director may, in his or her discretion, restore the CMV driving privileges of such applicant provided the applicant satisfies all of the following requirements:

1. The applicant has served a minimum suspension period of 10 years under the suspension imposed pursuant to Section 12(c) or 12(h) of the New Jersey Commercial Driver License Act, or under a similar provision of the law of any other state or jurisdiction;

2. The applicant has enrolled in, paid for, attended and successfully completed a rehabilitation program (that is, driver improvement program and/or alcohol education or rehabilitation program) approved by the Director and has provided sufficient proof of program completion;

3. The applicant is domiciled in this State and has produced sufficient proof of domicile;

4. The applicant has paid the restoration fee provided in N.J.S.A. 39:3-10a, if required;

5. The applicant has paid the Alcohol Education Rehabilitation, and Enforcement Fund fee provided in N.J.S.A. 39:4-50(b), if required;

6. The applicant has satisfied all of the requirements for obtaining a CDL and applicable endorsements in this State. No waiver of the skills test shall be permitted for applicants under this section;

7. The applicant has not previously had his or her CMV driving privileges restored pursuant to this section or the law of another state or jurisdiction similar to this section;

8. The applicant's driving privileges are not suspended or revoked in this State or any other state or jurisdiction and he or she has satisfied all outstanding suspensions in this State or any other state or jurisdiction;

9. If the lifetime revocation was imposed by a licensing authority or court of any other state or jurisdiction authorizing a restoration;

10. The applicant's driving record in this and any other state or jurisdiction, including his or her driving record during the period

when his or her CMV driving privilege was suspended, clearly demonstrates that it is consistent with public safety that the applicant be again permitted to operate CMVs. The Director may consider all relevant evidence including the frequency, nature and number of violations, accidents, suspensions and revocations, any special circumstances connected with any violation or suspension, including whether applicant has been involved in any accident resulting in death or bodily injury to any person. The burden shall be on the applicant to demonstrate requisite qualification. The applicant's failure to produce requisite evidence of qualification shall be sufficient grounds to deny the application; and

11. The applicant has submitted an application for such restoration as provided by the Director.

13:21-23.23 Ineligibility for reduction of lifetime revocation

No person whose CMV driving privilege has been revoked pursuant to Section 12(e) or 12(h) of the New Jersey Commercial Driver License Act or the similar law of any other state or jurisdiction because of his or her use of a CMV in the commission of a crime involving the manufacture, distribution, or dispensing of a controlled substance or controlled substance analog, or possession with intent to manufacture, distribute, or dispense a controlled substance or controlled substance analog, shall be eligible to have his or her CMV driving privilege restored pursuant to N.J.A.C. 13:21-23.22.

13:21-23.24 Driver rehabilitation program

(a) For purposes of this subchapter, a driver rehabilitation program shall consist of:

1. A driver improvement course, or a program in another state or jurisdiction which the Director determines is substantially similar; and

2. If the applicant has ever been convicted of a violation of Section 5 or 16 of the New Jersey Commercial Driver License Act or N.J.S.A. 39:4-50 or N.J.S.A. 39:4-50.2 or similar laws of this or any other state or jurisdiction, he or she must show that he or she has satisfied the educational and rehabilitation requirements set forth in N.J.S.A. 39:4-50 or the similar program requirements of another state or jurisdiction which the Director or the Division of Alcoholism, as the case may be, has determined satisfy those requirements.

(b) The fee for the Driver Improvement Course shall be the fee set forth in N.J.A.C. 13:20-17.3.

13:21-23.25 Application to another jurisdiction for restoration; notice to Director

A person whose CMV driving privileges have been revoked for life pursuant to Section 12(c) or 12(h) of the New Jersey Commercial Driver License Act shall notify the Director, in writing, within 10 days of any application to the licensing authority of another state or jurisdiction for restoration of those privileges. The notice shall provide the information specified at N.J.A.C. 13:21-23.2(g)1 through (g)5, the New Jersey drivers license number issued to such person, and any other information required by the Director.

13:21-23.26 Temporary authority to applicant for restoration under N.J.A.C. 13:21-23.22

(a) The Director may issue a letter of temporary authority to a person who has applied for restoration of his or her CMV driving privilege under N.J.A.C. 13:21-23.22 for the purpose of allowing said person to fit himself or herself to become a CMV operator. A person making application for a letter of temporary authority under this section shall comply with the application procedures set forth in N.J.A.C. 13:21-23.2.

(b) If, upon expiration of the letter of temporary authority, a CDL has not been issued as provided in N.J.A.C. 13:21-23.22, the applicant's CMV driving privileges shall continue to be revoked in accordance with the original revocation order.

13:21-23.27 Interrelationship between basic driver's license and CDL relative to suspension of driving privileges; rules of general application; specialized cases under the New Jersey Commercial Driver License Act

(a) No person may operate a CMV while his or her CDL is suspended or revoked in this State. No person may operate a CMV while his or her basic driver license is suspended or revoked in this State. No person properly licensed in another state may operate a CMV in this State while his or her CDL is suspended in that state.

(b) For those persons licensed by this State, a valid basic driver license is a prerequisite for the operation of a CMV. For persons properly licensed in another state, the law of that state should be consulted.

(c) Whenever a person's basic driver license is suspended, revoked, or prohibited pursuant to any statute or regulation of this State, the person's CDL, if any, shall be suspended, revoked or prohibited, as the case may be, until the basic driver license and the CDL have been restored by the Director.

(d) Whenever a person is convicted for a violation of N.J.S.A. 39:4-50 committed in a CMV, the person's basic driver's license shall be suspended or revoked for the appropriate time periods specified in N.J.S.A. 39:4-50(a)(1), (a)(2) or (a)(3). For purposes of assessing the appropriate suspension period under N.J.S.A. 39:4-50, all violations of N.J.S.A. 39:4-50 shall be counted without regard to whether they occurred in a commercial or noncommercial motor vehicle.

(e) The suspension or revocation of a person's CMV driving privilege for a violation of N.J.S.A. 39:3-10.13 shall not serve to suspend the person's basic driver's license unless the violation that gave rise to the CMV driving privilege suspension, revocation, or denial would have resulted in a suspension, revocation, or denial of the person's basic driver's license if committed in a noncommercial motor vehicle. An example of such a violation would be where the court has convicted the person of a violation of both N.J.S.A. 39:3-10.13 and 39:4-50, or where the court has convicted the person of a violation of N.J.S.A. 39:3-10.3 and has exercised its power under N.J.S.A. 39:5-31.

(f) Whenever a person is convicted for a violation of N.J.S.A. 39:4-129 committed in a CMV and an injury or death to any person has occurred, the person's basic driver's license shall be suspended or revoked for the appropriate time periods specified in N.J.S.A. 39:4-129(a). For purposes of assessing the appropriate suspension period under N.J.S.A. 39:4-129(a), all violations of N.J.S.A. 39:4-129 shall be counted without regard to whether they occurred in a commercial or noncommercial motor vehicle.

(g) The suspension or revocation of a person's CMV driving privilege for a violation of using a CMV in the commission of a crime or using a CMV in the commission of a crime involving the manufacture, distribution, or dispensing of a controlled substance or a controlled substance analog, or possession with intent to manufacture, distribute or dispense a controlled substance or controlled substance analog shall not serve to suspend the person's basic driver's license unless otherwise ordered by the court.

(h) Whenever a person is convicted for a violation of N.J.S.A. 39:4-50.2 or section 16 of the Act or other similar law committed in a CMV the person's basic driver's license shall be suspended in accordance with N.J.S.A. 39:4-50.4a or 39:3-10.24(f) or other similar law.

(i) The suspension or revocation of a person's CMV driving privilege for a violation of N.J.S.A. 39:3-10.18(b) shall not serve to suspend the person's basic driver's license unless otherwise ordered by the court.

(j) With regard to serious traffic violations, the suspension or revocation of a person's CMV driving privilege by a court shall not serve to suspend the person's basic driver's license unless otherwise ordered by the court. If the particular serious traffic violation also is cause for suspension of the basic driver license by the Director pursuant to N.J.S.A. 39:5-30(b), 39:5-30(c), 39:5-30(e), 39:5-30.8, 39:5-30.10 or N.J.A.C. 13:19-10, the person may accept the period proposed by the Director and ask that the suspension of the basic driver's license imposed by the Director run to the greatest extent possible concurrently with the court-imposed suspension of CMV driving privilege. However, the pendancy of any administrative action shall not serve to stay any court-imposed suspension.

(k) The provisions of this rule are not intended to be exhaustive or otherwise to restrict the court's or the director's powers.

13:21-23.28 Display of GVWR not required on firefighting apparatus*, **ambulances, first aid and rescue vehicles***

Owners of firefighting apparatus*, **ambulances, first aid and rescue vehicles*** are exempted from the requirement of N.J.S.A. 39:4-46(b) pertaining to the display of the GVWR on the vehicle.

13:21-23.29 Operative date

This subchapter shall take effect *[upon publication of the notice of its adoption]* ***March 16, 1992***, except that N.J.A.C. 13:21-23.22 through 13:21-23.27 shall become operative on April 1, 1992.

(a)

DIVISION OF CONSUMER AFFAIRS

Advisory Board of Public Movers and Warehousemen Fees

Adopted Amendment: N.J.A.C. 13:44D-2.4

Proposed: December 2, 1991 at 23 N.J.R. 3638(a).
Adopted: February 11, 1992 by Emma N. Byrne, Director Division of Consumer Affairs.
Filed: February 24, 1992 as R.1992 d.127, **without change.**

Authority: N.J.S.A. 45:14D-15.

Effective Date: March 16, 1992.
Expiration Date: August 7, 1994.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

13:44D-2.4 Fees

(a) Fees for initial licenses, renewal licenses and copies of licenses shall be as follows:

1.-3. (No change.)

4. Late renewal fee	$100.00

5. (No change.)

TRANSPORTATION

(b)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID

BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS

Turn Prohibitions
Route U.S. 206 in Mercer County

Adopted Amendment: N.J.A.C. 16:31-1.1

Proposed: January 6, 1992 at 24 N.J.R. 78(a).
Adopted: February 9, 1992 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Filed: February 14, 1992 as R.1992 d.115, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-123 and 39:4-183.6.

Effective Date: March 16, 1992.
Expiration Date: June 1, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

16:31-1.1 Route U.S. 206

(a) Turning movement of traffic on the certain parts of State highway Route U.S. 206 described in this subsection are regulated as follows:

1.-4. (No change.)

5. No left turn in Lawrence Township, Mercer County:

1. From Route U.S. 206 northbound onto Monroe Avenue and Hendrickson Road between the hours of 7:00 A.M. and 9:00 A.M. and 4:00 P.M. and 6:00 P.M. Monday through Friday.

(c)

DIVISION OF TRANSPORTATION ASSISTANCE OFFICE OF REGULATORY AFFAIRS

Practices and Procedures before the Office of Regulatory Affairs

Readoption with Amendments: N.J.A.C. 16:51

Proposed: January 6, 1992 at 24 N.J.R. 78(b).
Adopted: February 6, 1992 by George Warrington, Deputy Commissioner, Department of Transportation.
Filed: February 14, 1992 as R.1992 d.116, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, and 52:14B-3.

Effective Date: March 16, 1992.
Expiration Date: February 14, 1997.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 16:51.

Full text of the adopted amendments follows.

16:51-1.3 Definitions

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

...

"Commissioner" means the Commissioner of the Department of Transportation or, in his or her absence, the Assistant Commissioner for Policy and Planning.

...

16:51-1.4 Offices

The Office of Regulatory Affairs is physically located at 1600 North Olden Avenue, Ewing Township, New Jersey 08638 or such other location as publicly noted.

16:51-1.6 Communications

(a) All pleadings, correspondence and other papers shall be addressed, if sent by U.S. mail, to the Director, Office of Regulatory Affairs, New Jersey Department of Transportation, 1035 Parkway Avenue, CN 611, Trenton, New Jersey 08625 and shall include the appropriate Department docket number.

(b) Pleadings, correspondence and other papers, if sent by private premium service, or by courier service, shall be addressed as in (a) above, but may be sent to the Director, Office of Regulatory Affairs, New Jersey Department of Transportation, 1600 North Olden Avenue, Ewing Township, New Jersey 08638.

Recodify (b)-(c) as (c)-(d) (No change in text.)

16:51-11.2 Letter of transmittal

(a) (No change.)

(b) The letter of transmittal shall take the following form:

LETTER OF TRANSMITTAL
(Name of Common Carrier)

Transmittal Advice No. _____ Place and Date _____

To: Office of Regulatory Affairs
State of New Jersey
Trenton, New Jersey

The enclosed tariff, issued _____ is transmitted for filing in compliance with the requirements of the Department of Transportation, State of New Jersey.

(If a complete tariff)

N.J.D.O.T. (P.U.C.N.J. or I.C.C.) No. _____ Effective _____

(Or if a revised page)

_____ Revised Page No. _____

Effective

(Or if a supplement)

Supplement No. _____ to N.J.D.O.T. (P.U.C.N.J. or I.C.C.)

No. _____ Effective _____

_____
(Name of Utility)

_____
(Signature of Officer Transmitting)

16:51-11.11 Less than 30 days' notice request; application

(a) Any common carrier desiring permission to change existing rates on less than 30 days' notice shall file with the Department a tariff, part of tariff, or supplement, if necessary, containing the proposed change and the application in the form prescribed herein requesting authority to put such tariff into effect in less than 30 days after filing, and indicating the date it is desired that such rates become effective. Where special conditions arise necessitating a change in the proposed effective date, extension may be requested. Such application shall be contained in the statement of tariff changes.

APPLICATION FOR AUTHORITY TO MAKE CHANGES EFFECTIVE ON LESS THAN THIRTY DAYS NOTICE

To: Office of Regulatory Affairs
State of New Jersey
Trenton, New Jersey

_____
(Name of Common Carrier) by (Name of Officer)

_____its (Title of Officer) _____ hereby applies for _____ authority to make effective the following rates, N.J.D.O.T. or (P.U.C.N.J. or I.C.C.) No. _____ on _____ 19___ by filing with the Department on days notice. This application is based upon the following special circumstances and conditions:

_____ (Name of Utility)

_____
(Name and title of authorized representative

(b) (No change.)

_____

TREASURY-TAXATION

(a)

DIVISION OF TAXATION

Sales and Use Tax
Receipt Defined
Adopted Amendment: N.J.A.C. 18:24-1.4

Proposed: November 18, 1991 at 23 N.J.R. 3433(b).
Adopted: February 25, 1992 by Leslie A. Thompson, Director, Division of Taxation.
Filed: February 25, 1992 as R.1992 d.139, **without change**.

Authority: N.J.S.A. 54:32B-24.

Effective Date: March 16, 1992.
Expiration Date: June 7, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

18:24-1.4 Receipt defined

(a)-(h) (No change.)

(i) Where a manufacturer or a vendor issues a coupon involving a reimbursement but does not disclose that fact to the purchaser on the coupon or in an accompanying advertisement, the vendor will collect from the purchaser only the tax due on the reduced price, but will be required to pay the tax applicable to the entire receipt, that is, the amount of the price paid and the reimbursement received from the manufacturer. The abbreviation "Mfr." appearing on the coupon shall constitute adequate notice that it is reimbursable by a third party.

(j)-(n) (No change.)

_____

(b)

DIVISION OF TAXATION

Sales and Use Tax
Admission Records and Information; Promoter Registration
Adopted New Rule: N.J.A.C. 18:24-2.16

Proposed: November 4, 1991 at 23 N.J.R. 3275(b).
Adopted: February 25, 1992 by Leslie A. Thompson, Director, Division of Taxation.
Filed: February 25, 1992 as R.1992 d.140, **with a technical change** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 54:32B-24.

Effective Date: March 16, 1992.
Expiration Date: June 7, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Summary of Agency-Initiated Changes:
In N.J.A.C. 18:24-2.16(a), one technical amendment was made to change the application for registration from "CIS-1" to "REG-1."

Full text of the adoption follows (addition to proposal indicated in boldface with asterisks ***thus***; deletion from proposal indicated in brackets with asterisks *[thus]*).

18:24-2.16 Admission records and information; promoter registration

(a) Every person who contracts, agrees to or otherwise arranges to hold, produce or sponsor an event, entertainment, or amusement the admission to which is subject to tax under N.J.S.A. 54:32B-3(e) of the Sales and Use Tax Act is deemed a promoter and a person required to collect sales tax and shall, within three days after com-

mencing business, file with the Division of Taxation an application for registration *(REG-1)* for New Jersey sales tax purposes *[(CIS-1)]*. When registration is granted it will be for an indefinite period. However, the applicant must notify the Division of Taxation of any change of address, ownership, and business activity.

(b) Every person required to collect sales tax shall collect the tax on receipts from sales of taxable admissions for events, entertainments, or amusements to be held in New Jersey, including exempt organizations described in N.J.S.A. 54:32B-9 of the Sales and Use Tax Act. If the customer is given a ticket or other evidence of a right to admission which states the price of the admission, there must be a separate statement thereon of the sales tax imposed and collected with respect to the sale of the admission for remittance to the Division of Taxation.

(c) Any person who sells admission tickets or collects admission charges for a promoter is considered the recipient of amusement charges and is also a person required to register and collect and remit sales tax; provided, however, that the sales tax collected may be turned over to and remitted to the Division of Taxation by the promoter for whom the admissions were sold if all the following requirements are met:

1. The ticket sales agent is acting under a written agreement with the promoter which accounts for the sales tax and provides for the tax collected to be remitted by the promoter;
2. The promoter provides the ticket sales agent with a copy of its New Jersey Certificate of Authority;
3. The ticket sales agent has no reason to believe the sales tax will not be remitted by the promoter;
4. The ticket sales agent maintains records showing the promoter's name, address, telephone number, a copy of the promoter's New Jersey Certificate of Authority, the number of tickets sold or admissions granted, gross receipts from admission ticket sales, sales tax collected for New Jersey, and such other information as the Director may specify from time to time; and,
5. The Division of Taxation has not instructed the ticket sales agent in writing to remit the tax collected for that promoter directly to the State.

(d) A person who sells admission tickets or collects admission charges for a promoter or who rents or leases space for an event, amusement or entertainment the admission to which is subject to tax shall, upon request, furnish information to the Division of Taxation concerning any such New Jersey events, entertainment or amusements and their promoters.

(a)

DIVISION OF TAXATION

Gross Income Tax
Reporting of Interest on Certain Obligations
Adopted Amendment: N.J.A.C. 18:35-1.9

Proposed: January 21, 1992 at 24 N.J.R. 177(a).
Adopted: February 25, 1992 by Leslie A. Thompson, Director, Division of Taxation.
Filed: February 25, 1992 as R.1992 d.141, **without change.**

Authority: N.J.S.A. 54A:9-17(a).

Effective Date: March 16, 1992.
Expiration Date: June 7, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

18:35-1.9 Reporting of interest on certain obligations; taxable status of State and Federal securities

(a) (No change.)

(b) Under the authority of N.J.S.A. 54A:9-17, which empowers the Division to require such facts and information to be reported as are deemed necessary to enforce the provisions of the Gross Income Tax Act, every person required to file a resident New Jersey gross income tax return (NJ-1040) for a taxable year shall report on such return the amount of interest received or accrued during the taxable year which is exempt from the gross income tax.

Recodify existing (b) and (c) as (c) and (d) (No change in text.)

OTHER AGENCIES

(b)

NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY

Direct Loan Program
Adopted Amendment: N.J.A.C. 19:31-3.1

Proposed: January 21, 1992 at 24 N.J.R. 177(b).
Adopted: February 21, 1992 by the New Jersey Economic Development Authority, Anthony M. Coscia, Executive Director.
Filed: February 24, 1992 as R.1992 d.126, **without change.**

Authority: N.J.S.A. 34:1B et seq., specifically 34:1B-5(k) and (1).

Effective Date: March 16, 1992.
Expiration Date: August 20, 1995.

Summary of Public Comments and Agency Responses:
No comments were received.

Full text of the adoption follows:

19:31-3.1 Program description

(a)-(d) (No change.)

(e) Interest on fixed asset or working capital loans is equal to the lower of the Federal Discount Rate at the time of approval or at the time of the loan closing, with a minimum of five percent.

(f) (No change.)

(c)

CASINO CONTROL COMMISSION

Applications; Gaming Equipment
Slot Machine Fees; Possession of Slot Machines; Transportation of Slot Machines Into, Within, and Out-of-State
Adopted Amendments: N.J.A.C. 19:41-9.6 and 19:46-1.22
Adopted Repeal and New Rule: N.J.A.C. 19:46-1.23

Proposed: December 16, 1991 at 23 N.J.R. 3729(a).
Adopted: February 19, 1992 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: February 21, 1992 as R.1992 d.118, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 5:12-63(c), 69(a), 70(e), 70(f), 70(i), and 100(b).

Effective Date: March 16, 1992.
Expiration Dates: N.J.A.C. 19:41—May 12, 1993;
N.J.A.C. 19:46—April 28, 1993.

Summary of Public Comments and Agency Responses:

Comments on the proposal, which would eliminate the requirement for a slot machine demonstration permit and fee of $500.00 and clarify rules for the possession and transport of slot machines, were submitted by the Division of Gaming Enforcement (Division); and by two casino licensees: the Boardwalk Regency Corporation (Caesars); and Greate Bay Hotel and Casino, Inc. (Sands).

COMMENT: The Division interposed no objection to the proposals, and requested the addition to the required shipping notice of the name and address of the owner of the slot machines being transported, based on the difficulty of tracking changes in ownership.

RESPONSE: The Commission agrees with this comment. The adopted amendments include minor substantive and technical changes at N.J.A.C. 19:46-1.23(a)2 to require that the shipping notice provided to the Commission and Division include the name and address of the person owning the slot machine, including any new owner in the event ownership is changed in conjunction with the shipment or movement.

COMMENT: Caesars commented that licensees may need possession of slot machines for training purposes and asks for clarification of the proposal with respect to that need.

RESPONSE: The Commission agrees that licensees may require use of slot machines for training purposes. Such use is fully contemplated within the meaning of N.J.A.C. 19:46-1.22(b), and N.J.A.C. 19:1.23(b) which also refers to N.J.A.C. 19:45-1.38(b) and (c) which provide the rules for such movement or use. Consequently it is unnecessary to adopt further rules to provide for any particular non-gaming management use of a slot machine.

COMMENT: The Sands commented that it does not object to these proposed regulatory amendments as presented.

RESPONSE: The Commission thanks the Sands for its review and comment.

The Commission is also correcting a typographic error in a rule cross-reference at N.J.A.C. 19:46-1.23(b).

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

19:41-9.6 Slot machine fees

(a)-(b) (No change.)

19:46-1.22 Possession of slot machines

(a) Except as otherwise provided in this section and N.J.S.A. 2C:37-7, no person shall possess within this State any slot machine or similar device which may be used for gambling activity.

(b) The following persons and any employee or agent acting on their behalf may, subject to any terms and conditions imposed by the Commission, possess slot machines in this State for the purposes provided herein provided that the machines are kept only in such locations as may be specifically approved in writing by the Commission and that any machines located outside of a licensed casino room not be used for gambling activity:

1. An applicant for or holder of:

i. A casino license, for the purpose of maintaining for use or actually using such machines in the operation of a licensed casino;

ii. A gaming school license, for the purpose of teaching slot machine design, operation, repair or servicing; or

iii. A gaming related casino service industry license, for the purpose of manufacturing, distributing, repairing or servicing slot machines;

2. An out-of-State manufacturer or distributor of slot machines for the purpose of exhibition or demonstration;

3. A common carrier, for the purpose of transporting such slot machines in accordance with N.J.A.C. 19:46-1.23;

4. An employee or agent of the Commission or Division, for the purpose of fulfilling official duties or responsibilities; or

5. Any other person the Commission may approve after finding that possession of slot machines by such person in this State is necessary and appropriate to fulfill the goals and objectives of the Act.

19:46-1.23 Transportation of slot machines into, within and out-of-State

(a) Prior to the transport or movement of any slot machine into, from one authorized location to another authorized location within, or out of, this State, the manufacturer, distributor, seller, or other person causing such slot machine to be transported or moved shall first notify the Commission and Division in writing giving the following information:

1. The full name and address of the person shipping or moving said machine;

2. The full name and address of the person who owns the machine, including the name of any new owner in the event ownership is being changed in conjunction with the shipment or movement;

*[2.]****3.*** The method of shipment or movement and the name of the carrier or carriers;

*[3]****4.***. The full name and address of the person to whom the machine is being sent and the destination of said machine if different from such address;

*[4.]****5.*** The quantity of machines being shipped or moved and the serial number of each machine;

*[5.]****6.*** The expected date and time of delivery to or removal from any authorized location in this State;

*[6.]****7.*** The port of entry, or exit, if any, of the machine if the origin or destination of the machine is outside the continental United States; and

*[7.]****8.*** The reason for transporting the machine.

(b) The movement of any slot machine into or out of a casino room shall be approved pursuant to N.J.A.C. 19:45-*[1.39(b)]* ***1.38(b)*** and a record thereof shall be maintained in accordance with N.J.A.C. 19:45-1.38(c).

(c) The person shipping or moving any slot machine shall provide to the common carrier, or to the operator of the transporting conveyance in the event the mode of transport is not a common carrier, an invoice, at least one copy of which shall be kept with the slot machine at all times during the shipping process, containing the following information:

i. The serial number of the machine being transported;

ii. The full name and address of the person from whom the machine was obtained;

iii. The full name and address of the person to whom the machine is being sent; and

iv. The dates of shipment.

(a)

CASINO CONTROL COMMISSION

Gaming Schools

Courses and Programs of Instruction; Minimum Hours

Adopted Amendment: N.J.A.C. 19:44-8.3

Proposed: December 16, 1991 at 23 N.J.R. 3731(a).

Adopted: February 19, 1992 by the Casino Control Commission, Steven P. Perskie, Chairman.

Filed: February 21, 1992 as R.1992 d.119, **without change.**

Authority: N.J.S.A. 5:12-63(c), 69(a) and 92.

Effective Date: March 16, 1992.

Expiration Date: September 29, 1993.

Summary of Public Comment and Agency Response:

COMMENT: The Division of Gaming Enforcement (Division) objected to the proposal. It believes, due to the simplistic nature of the game of red dog, that an in-house training program with properly licensed personnel would be sufficient to assure the honesty and integrity of the game.

RESPONSE: The Commission rejects the commenters proposal. Although the game of red dog is fairly simple, the Commission still believes that a minimum of five hours of training is needed to teach even experienced blackjack or baccarat dealers the rules and proper conduct of the game. The proposed amendment would not prevent casino licensees from offering their own in-house training programs if they so desired; it would simply mandate a minimum of five hours of training in the game. For these reasons, the Division's comment is not accepted, and the amendment will be adopted as proposed.

Full text of the adoption follows.

19:44-8.3 Minimum hours

(a) Any training or instruction designed to prepare a student for employment as a dealer shall satisfy the following minimum requirements:

1. For a student being trained to deal a first game the following minimum hours of training and instruction shall be required:

i. 165 hours to deal blackjack and red dog;

ii. 213 hours to deal baccarat, minibaccarat and red dog;

iii. 200 hours to deal roulette; and
iv. 240 hours to deal craps.

2. For a student being trained to deal a second or subsequent game the following minimum hours of training and instruction shall be required:

i. For a student trained to deal blackjack:
(1) 180 hours to deal craps;
(2) 120 hours to deal roulette;
(3) 90 hours to deal baccarat, minibaccarat and red dog; and
(4) Five hours to deal red dog.

ii. For a student trained to deal roulette:
(1) 180 hours to deal craps;
(2) 85 hours to deal blackjack and red dog; and
(3) 93 hours to deal baccarat, minibaccarat and red dog.

iii. For a student trained to deal craps:
(1) 120 hours to deal roulette;
(2) 85 hours to deal blackjack and red dog; and
(3) 93 hours to deal baccarat, minibaccarat and red dog.

iv. For a student trained to deal baccarat:
(1) 180 hours to deal craps;
(2) 120 hours to deal roulette;
(3) 85 hours to deal blackjack and red dog;
(4) 10 hours to deal minibaccarat; and
(5) Five hours to deal red dog.

v. For a student trained to deal blackjack and baccarat, five hours shall be required to deal minibaccarat.

(b) For any training or instruction not listed in (a) above, the required minimum hours of training and instruction shall be determined by the Commission on a case by case basis.

(a)

CASINO CONTROL COMMISSION

Internal Controls

Personnel Assigned to the Operation and Conduct of Gaming and Slot Machines

Adopted Amendment: N.J.A.C. 19:45-1.12

Proposed: January 6, 1992 at 24 N.J.R. 56(a).
Adopted: February 19, 1992 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: February 21, 1992 as R.1992 d.120, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 5:12-70(f) and 70(j).

Effective Date: March 16, 1992.
Expiration Date: March 24, 1993 (note that the expiration date for N.J.A.C. 19:45-1.12(d)-(f) is September 16, 1992, pursuant to N.J.A.C. 19:45-1.12(g)).

Summary of Agency-Initiated Changes:

The proposal summary indicated that the revised supervision provisions in N.J.A.C. 19:45-1.12(d)-(f) would expire six months from the effective date of the amendments. Upon adoption, subsection (g) specifies the actual expiration date of September 16, 1992.

Subsection (e) has been modified to provide for notice to the Commission and the Division of Gaming Enforcement, rather than specifying the principal inspector. Subsection (f) has likewise been modified with regard to the Commission's authority to mandate termination of a revised supervision plan. Commission rules generally refer to the Commission itself, with subsequent formal delegations of authority to the appropriate staff member.

Finally, a minor technical change makes clear that the revised supervisory levels for floorpersons in paragraphs (d)1 and (d)2 are in the alternative.

Summary of Public Comments and Agency Responses:

Comments were received from the Division of Gaming Enforcement (Division), the Casino Association of New Jersey (CANJ), Bally's Park Place Casino Hotel, Harrah's Casino Hotel, Resorts International Hotel, the Sands Hotel, Casino and Country Club, the Taj Mahal Casino Resort and TropWorld Casino and Entertainment Resort.

COMMENT: The Division commented that the reduced levels of supervision in proposed subsection (c) would provide the industry with flexibility in configuring the casino floor, while maintaining the security and integrity of gaming operations.

RESPONSE: The Commission agrees and has adopted the reduced staffing levels in subsection (c).

COMMENT: While commenting that any supervisory reduction raises concerns regarding maintenance of the current degree of honesty and integrity of gaming operations, the Division noted that implementation of a revised supervision plan pursuant to the proposal will be conditioned upon prior notice, including facts and circumstances adequate to justify the proposed reduction in supervisory personnel. The Division also pointed out that the revised supervision provisions in subsections (d)-(f) are scheduled to expire six months from the effective date, thus allowing for further review and analysis of the issue of revised supervision. In light of these conditions, the Division stated its support for the proposal. The Division did, however, request that subsection (e) be modified so as to require prior notice of a revised supervision plan to both the Division and the Commission.

RESPONSE: The Commission agrees that the notice provisions in subsection (e), and the sunset provision in subsection (g) will provide a necessary and appropriate system of review for the implementation of revised supervision. Upon adoption, a technical modification to subsection (e) provides for notice to the Division as well as the Commission.

COMMENT: Bally's Park Place, Harrah's, the Sands, the Taj Mahal and TropWorld expressed their general support of the proposal, noting that the amended standards provide greater flexibility and discretion in staffing while preserving the integrity of gaming operations.

RESPONSE: The Commission agrees that the modified staffing rules will accomplish these goals, and has therefore adopted these proposed amendments to N.J.A.C. 19:45-1.12.

COMMENT: CANJ commented that, although the proposal "falls far short of recommendations put forth by the Casino Association," it does enhance management's ability to respond to "an everchanging casino environment." CANJ therefore stated its support for the proposal.

RESPONSE: The Commission believes that the adopted staffing standards balance the casino industry's need for some discretion in assigning supervisory personnel, and the Commission's statutory obligation to ensure that such regulatory flexibility does not threaten the security or integrity of gaming operations.

COMMENT: CANJ noted that the proposal clarifies that a casino clerk may service up to 24 gaming tables "and more than 24 games upon notice to the principal inspector of reasons for the change."

RESPONSE: This comment does not accurately reflect the new standards, as proposed or adopted. N.J.A.C. 19:45-1.12(c)1 provides that one casino clerk shall be assigned to not more than 24 gaming tables. The "revised supervision" provisions in N.J.A.C. 19:45-1.12(d)-(f) make no reference whatsoever to additional increases in a casino clerk's assigned areas of responsibility.

COMMENT: CANJ commented that the proposed six-month "sunset" provision will trigger an automatic Commission review of the amended rules whereupon appropriate modifications may take place.

RESPONSE: The Commission agrees that the introduction of the "revised supervision" concept should initially be subject to a specified time frame within which to evaluate the implementation of the new procedures. As adopted herein, the revised supervision provisions in subsections (d)-(f) will expire on September 16, 1992.

COMMENT: Bally's Park Place stated its support for the proposal, but suggested that the proposed 24-hour notice requirement for implementation of revised supervision should be reduced to 12 hours.

RESPONSE: The 24-hour notice provision in N.J.A.C. 19:45-1.12(e) will ensure adequate notice to the Commission staff without presenting any undue burden for the casino licensee. The adopted amendments also recognize that certain circumstances may arise which are emergent or are not otherwise reasonably anticipated, and permit less than 24 hours' notice in such cases.

COMMENT: Harrah's comments that the role of the pit boss has evolved over the years in Atlantic City, from being "the overseer of table games security" to being "the individual responsible for insuring that all casino patrons have the best experience while participating in the table games." Harrah's states further that the experiential levels of dealers and floorpersons allows the pit bosses to perform this function while maintaining game security.

RESPONSE: The adopted rules address this issue, permitting an increase in a pit boss' area of supervision to a maximum of 16 gaming tables, and eliminating any differentiation between pit boss supervision of craps and the other table games. Moreover, under a plan for revised supervision, a pit boss could supervise up to 24 table games.

COMMENT: Harrah's comments that revised supervision rules will allow casino licensees to operate more efficiently during those periods when standard staffing levels are unnecessary, for example, during slower periods such as opening and closing of the casino. Harrah's notes further that the exercise of sound business judgment will at other times dictate increases in the level of supervision based upon the level or volume of patron play, assuring both game security and customer service.

RESPONSE: The Commission agrees that the amended staffing rules allow casino management a beneficial degree of discretion in assigning table games staff in response to varying circumstances.

COMMENT: Resorts stated its support for the proposal, in that it provides for staffing levels which are "less burdensome" than those currently imposed by the Commission. Resorts comments that the original minimum staffing levels reflected "the extremely conservative approach taken by the Commission in the infancy of the casino industry," at a time when casino staffs were less experienced. However, Resorts contends that the issue of staffing "is an operational issue and not a regulatory issue," and therefore should not be regulated in any manner whatsoever by the Commission.

RESPONSE: The Casino Control Act expressly directs the Commission to promulgate rules prescribing the methods of operation of table games as well as employee and supervisory tables of organization and responsibility. N.J.S.A. 5:12-70(f) and (j). The adoption herein addresses the casino industry's need for some flexibility in staffing, while fulfilling the Commission's statutory mandate to ensure public confidence and trust in the credibility and integrity of the regulatory process and of casino operations.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

19:45-1.12 Personnel assigned to the operation and conduct of gaming and slot machines

(a) Each casino licensee shall be required to employ the personnel herein described in the operation of its casino, regardless of the position titles assigned to such personnel by the casino licensee in its approved jobs compendium. Functions described in this section shall be performed only by persons holding the appropriate license and position endorsement required by the casino licensee's approved jobs compendium to perform such functions, or by persons holding the appropriate license and position endorsement required by the casino licensee's approved jobs compendium to supervise persons performing such functions, subject to the limitations imposed by N.J.A.C. 19:45-1.11(a).

(b) The following personnel shall be used to operate the table games in an establishment:

1. (No change.)

2. Dealers shall be the persons assigned to each craps, baccarat, blackjack, roulette, minibaccarat, red dog, sic bo and big six table to directly operate and conduct the game.

3.-4. (No change.)

5. Floorperson shall be the second level supervisor assigned the responsibility for directly supervising the operation and conduct of a craps game, and the first level supervisor assigned the responsibility for directly supervising the operation and conduct of a baccarat, blackjack, roulette, sic bo, minibaccarat, red dog or big six game.

6. Pit boss shall be the third level supervisor assigned the responsibility for the overall supervision of the operation and conduct of a craps game and the second level supervisor assigned the responsibility for the overall supervision of the operation and conduct of a blackjack, roulette, minibaccarat, big six, sic bo, red dog or baccarat game.

7.-8. (No change.)

(c) Each casino licensee shall maintain the following standard levels of staffing:

1. One casino clerk shall be assigned to not more than 24 gaming tables;

2. One dealer shall be assigned to each baccarat, blackjack, roulette, minibaccarat, sic bo, red dog and big six table;

3. Three dealers shall be assigned to each craps table;

4. One boxperson shall be assigned to each craps game;

5. One floorperson shall supervise:

i. Not more than four blackjack, roulette, minibaccarat, sic bo, red dog or big six tables, or any combination thereof; or

ii. Not more than two craps tables; or

iii. Not more than one baccarat table;

6. One pit boss shall supervise not more than 16 gaming tables.

(d) Notwithstanding the provisions of (c) above, a casino licensee may implement a plan for revised supervision by floorpersons or pit bosses, provided that each casino licensee shall at all times maintain a level of supervision which ensures the proper operation and effective supervision of all table games in the casino. In any plan for revised supervision:

1. One floorperson may supervise not more than six blackjack, roulette, minibaccarat, sic bo, red dog or big six tables, or any combination thereof; ***or***

2. One floorperson may supervise not more than two craps tables or not more than one baccarat table; and

3. One pit boss may supervise not more than 24 gaming tables.

(e) The casino manager or shift manager shall notify the *[principal inspector]* ***Commission and the Division*** no later than 24 hours in advance of implementing or changing any plan for revised supervision, provided, however, that notice may be provided less than 24 hours in advance in circumstances which are emergent or may otherwise not reasonably be anticipated. Such notice shall include, without limitation, the following information:

1. The pit number and configuration of any pit affected;

2. The type, location and table number of any table affected;

3. The standard staffing level required for the gaming table or tables and the proposed variance therefrom;

4. The start date and time, and the duration, of the revised supervision; and

5. The basis for the decision to revise the number of supervisory personnel, which shall include any relevant factors which demonstrate that proper operation and effective supervision of the affected gaming tables will be maintained, including, as applicable, a showing:

i. That the revised supervision is justified by a reduced volume of casino play at the specified times and gaming tables;

ii. That the particular dealers or supervisors assigned to the affected tables possess a degree of skill and experience indicative of sufficient ability to operate the affected tables with revised supervision, in which case a record of the personnel assigned to such tables during the period or revised supervision shall be maintained;

iii. That a reduced number of gaming tables will be operating in the affected pits, which are in a configuration to ensure proper supervision and operation; or

iv. Any other facts or circumstances which establish that a revision in the number of supervisory personnel is appropriate.

(f) The *[principal inspector]* ***Commission*** may, at any time upon 12 hours notice, direct that the plan for revised supervision shall be terminated and that the licensee shall maintain standard staffing levels as defined in (c) above.

(g) The provisions of (d), (e), and (f) above shall expire *[at the end of the sixth calendar month following the effective date of those subsections]* ***on September 16, 1992***.

Recodify existing (c)-(d) as (h)-(i) (No change in text.)

(a)

CASINO CONTROL COMMISSION

Accounting and Internal Controls
Slot Machines and Bill Changers; Location; Movements

Adopted Amendment: N.J.A.C. 19:45-1.38

Proposed: October 7, 1991 at 23 N.J.R. 2920(a).
Adopted: February 19, 1992 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: February 21, 1992 as R.1992 d.121, **without change.**

Authority: N.J.S.A. 5:12-63(c).

Effective Date: March 16, 1992.
Expiration Date: March 24, 1993.

Summary of Public Comments and Agency Responses:
COMMENT: The Division of Gaming Enforcement, Sands Hotel and Casino, Trump Taj Mahal Associates, Marina Associates, and the Casino Association of New Jersey support the proposed amendment as published.
RESPONSE: Accepted.
COMMENT: TropWorld Casino and Entertainment Resort (TropWorld) objects to the proposed amendment as published. TropWorld contends that it is unnecessary to have both the slot shift manager and the lead technician sign the Machine Movement Log verifying that the slot machines and/or bill changers were correctly moved. TropWorld proposes that only the lead technician or the lead technician's supervisor sign the Machine Movement Log.
RESPONSE: The Commission rejects the commenter's proposal. The slot shift manager is the supervisor responsible for the operation of all slot machine activities during his or her shift. The lead technician is only responsible for repairing, maintaining and moving slot machines. In order to maintain the integrity over slot operations, it is believed that the slot shift manager should sign as the supervisor on duty and the lead technician should sign representing the people who actually moved the slot machines or bill changers.

Full text of the adoption follows.

19:45-1.38 Slot machines and bill changers; location, movements
(a) Each casino licensee shall file with the Commission a floor plan of the casino which identifies each slot machine and bill changer on the casino floor by a location number in accordance with N.J.A.C. 19:45-1.37(a)7. Any alterations to such floor plan shall not become effective until approved in writing by the Commission. A revised floor plan containing such alterations shall be filed with the Commission within 24 hours of the alteration.
(b) No slot machine or bill changer shall be removed from, or returned to, a location in the casino or moved from one location to another without the prior written approval of the Commission.
(c) Once a slot machine or bill changer has been placed in the casino, all movements of that machine and/or bill changer from or to a location shall be recorded by a slot department member in a machine movement log which shall include the following:
1.-3. (No change.)
4. The location to which the slot machine and/or bill changer was moved; and
5. The signatures of the slot shift manager and the lead technician verifying the movement of the slot machine and/or bill changer.
(d)-(f) (No change.)

(b)

CASINO CONTROL COMMISSION

Gaming Equipment
Blackjack Table; Physical Characteristics

Adopted Amendment: N.J.A.C. 19:46-1.10

Proposed: December 16, 1991 at 23 N.J.R. 3732(a).
Adopted: February 19, 1992 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: February 21, 1992 as R.1992 d.122, **without change.**

Authority: N.J.S.A. 5:12-63(c) and 70(f).

Effective Date: March 16, 1992.
Expiration Date: April 28, 1993.

Summary of Public Comments and Agency Response:
COMMENT: Marina Associates, Sands Hotel, Casino and Country Club and the Division of Gaming Enforcement support the proposed amendment, as published.
RESPONSE: Accepted.

Full text of the adoption follows.

19:46-1.10 Blackjack table; physical characteristics
(a) (No change.)
(b) The cloth covering the blackjack table shall have imprinted thereon the name of the casino and shall have specific areas designated for the placement of wagers. Such betting areas shall not exceed seven in number.
(c) (No change.)
(d) Each blackjack table shall have a drop box and a tip box attached to it with the location of said boxes on the same side of the gaming table, but on opposite sides of the dealer, as approved by the Commission.

(c)

CASINO CONTROL COMMISSION

Rules of the Games
Blackjack; Wagers

Adopted Amendment: N.J.A.C. 19:47-2.3

Proposed: November 18, 1991 at 23 N.J.R. 3436(a).
Adopted: February 19, 1992 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: February 21, 1992 as R.1992 d.123, **without change.**

Authority: N.J.S.A. 5:12-69, 70f and 100e.

Effective Date: March 16, 1992.
Expiration Date: April 28, 1993.

Summary of Public Comments and Agency Responses:
COMMENT: The Sands Hotel, Casino & Country Club and the Division of Gaming Enforcement submitted comments in general support of the proposed amendment.
RESPONSE: The Commission agrees, as evidenced by the adoption herein.

Full text of the adoption follows.

19:47-2.3 Wagers
(a)-(e) (No change.)
(f) After each round of play is complete, the dealer shall collect all losing wagers and pay off all winning wagers. All winning wagers made in accordance with (a) above shall be paid at odds of 1 to 1, with the exception of standard blackjack, which shall be paid at odds of 3 to 2. Notwithstanding any other provision of this subsection, a casino licensee may, in its discretion, offer one or more of the following payout odds for winning wagers made in accordance with (a) above, provided that the casino licensee complies with the notice requirements set forth in N.J.A.C. 19:47-8.3:
1.-4. (No change.)
(g)-(l) (No change.)

ENVIRONMENTAL PROTECTION AND ENERGY

(a)

ENVIRONMENTAL REGULATION—LAND USE REGULATION ELEMENT

Request for Public Comment and Notice of Public Hearings

Freshwater Wetlands Protection Act Rules Statewide General Permits

N.J.A.C. 7:7A-9.2(a)

Take notice that the Department of Environmental Protection and Energy (the "Department") is soliciting public comment concerning the issuance of Statewide General Permits under the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 through 30 (the "Act").

On February 19, 1991, the Department proposed amendments to its regulations implementing the Act, N.J.A.C. 7:7A (the "1991 amendments"). Amendments to N.J.A.C. 7:7A-9.2(a) added several new Statewide General Permits and amended existing Statewide General Permits (listed below), as authorized by the Act at N.J.S.A. 13:9B-23(c). This provision of the Act authorizes the Department to issue general permits for categories of activities if the Department satisfies certain requirements, including conducting an environmental analysis.

Some commenters believed that the environmental analyses done by the Department at the time it proposed the general permits were not, in certain instances, made readily available during the comment period. Because the Department wishes to fully involve the public in all aspects of program development and implementation, the Department has delayed the operative date of the adopted general permits and is inviting additional public input regarding the general permits based upon the environmental analyses. The operative date for these permits will be delayed until June 14, 1992.

The environmental analyses concerning the following Statewide General Permits are available for review:

1. Construction of Underground Utility Lines, N.J.A.C. 7:7A-9.2(a)2.
2. Additions to Existing Residences, N.J.A.C. 7:7A-9.2(a)8.
3. State or Federally Funded Roads, N.J.A.C. 7:7A-9.2(a)9.
4. Minor Road Crossing Fills, N.J.A.C. 7:7A-9.2(a)10.
5. Stormwater Outfall and Conveyance Structures, N.J.A.C. 7:7A-9.2(a)11.
6. Minor Dredging Activities for Lake Maintenance or Restoration, N.J.A.C. 7:7A-9.2(a)13.
7. Monitoring and Testing Devices, N.J.A.C. 7:7A-9.2(a)14.
8. Maintenance, Repair and Reconstruction of Dam Structures, N.J.A.C. 7:7A-9.2(a)18.
9. Construction of Recreational and Fishing Docks, or Piers on Pilings, Cantilevered or Floating Piers, and Public Boat Ramps, N.J.A.C. 7:7A-9.2(a)19.
10. Bank Stabilization Activities in State Open Waters, N.J.A.C. 7:7A-9.2(a)20.
11. Construction or Installation of Above-Ground Structures Associated with Utility Line Construction, N.J.A.C. 7:7A-9.2(a)21.
12. Placement of Bulkheads Adjacent to Human-Made Lagoons, N.J.A.C. 7:7A-9.2(a)24.
13. Repair of Alteration of Malfunctioning Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:7A-9.2(a)25.

To submit written comments, or to obtain a copy of the environmental analyses, please contact:

Samuel A. Wolfe, Esq.
Office of Legal Affairs
Department of Environmental Protection and Energy
CN 402
Trenton, New Jersey 08625-0402

A public hearing will be held on:

Friday, April 3, 1992 at 10:00 A.M.
Department of Transportation
Multi-purpose Room
1035 Parkway Avenue
Trenton, NJ 08625

The Department will accept comments until April 15, 1992. The Department will review all written comments and all comments made at the public hearing that raise new concerns based on the environmental analyses. Based upon this additional public comment, the Department will take one of the following actions with respect to each of the Statewide General Permits in question:

- Proposed amendments to the Statewide General Permit;
- Propose to repeal the Statewide General Permit; or
- Allow the Statewide General Permit to become operative as adopted.

Before the Statewide General Permits become operative, the Department will publish a notice stating the action it will take. The notice will also summarize and respond to the relevant public comment concerning N.J.A.C. 7:7A-9.2(a), other than those comments which raise issues already addressed in the adoption document.

(b)

ENVIRONMENTAL REGULATION—LAND USE REGULATION ELEMENT

Freshwater Wetlands Protection Act Rules

Adopted Amendments: N.J.A.C. 7:7A-1 through 17

Proposed: February 19, 1991, at 23 N.J.R. 338(a).
Adopted: February 14, 1992, by Scott A. Weiner, Commissioner, Department of Environmental Protection and Energy.
Filed: February 14, 1992 as R.1992 d.117, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).
Authority: N.J.S.A. 13:9B-1 et seq., N.J.S.A. 58:10A-1 et seq., and 33 U.S.C. 1251 et seq.
DEPE Docket Number: 002-91-01.
Effective Date: March 16, 1992.
Operative Date: March 16, 1992 provided, however, that N.J.A.C. 7:7A-9.2(a) shall become operative June 14, 1992.
Expiration Date: March 16, 1997.

Summary of Hearing Officer Recommendations and Agency Response:

On February 19, 1991, the Department of Environmental Protection and Energy (Department) proposed amendments and new rules at N.J.A.C. 7:7A. The Department held public hearings concerning the amendments and new rules on March 7, 1991 in Trenton, New Jersey; on March 12, 1991 in Bridgeton, New Jersey; and on March 19, 1991 in Basking Ridge, New Jersey. The Department accepted written comments through April 20, 1991.

Scott A. Weiner, Commissioner of the Department, presided at one of the hearings. Susan Lockwood and Ernest Hahn of the Land Use Regulation Element in the Department presided over the other two hearings, and consulted with the Commissioner regarding the testimony presented at the hearings. The Commissioner has considered all comments made at the hearings, and the rule as adopted reflects that consideration.

Interested persons may inspect the public hearing record, or obtain a copy upon payment of the Department's normal copying charges, by contacting:

Samuel A. Wolfe, Esq.
Office of Legal Affairs
Department of Environmental Protection and Energy
401 East State Street
CN 402
Trenton, New Jersey 08625-0402

Summary of Public Comments and Agency Responses:

This adoption amends the May 16, 1988, July 3, 1989 and July 17, 1989 adopted rules.

The Department has adopted the changes proposed to the definition section (N.J.A.C. 7:7A-1.4), the standard conditions for Statewide general permits (N.J.A.C. 7:7A-9.5), review of applications (N.J.A.C. 7:7A-12) and enforcement (N.J.A.C. 7:7A-15) in order to assure that the State's program is at least as stringent as the program implemented by the United States Army Corps of Engineers (ACOE) pursuant to the Clean Water Act. These amendments are necessary in order for the State to pursue assumption of the permit jurisdiction exercised by the ACOE under section 404 of the Federal Act, as mandated by the

Freshwater Wetlands Protection Act (Act), N.J.S.A. 13:9B-1 et seq., at N.J.S.A. 13:9B-27.

Based on the comments received to date, the Department has adopted, with minor changes, seven of the nine Statewide general permits which were proposed by the Department. These Statewide general permits address the maintenance dredging of lakes, repair of dams, the construction of recreational and fishing docks or piers, the placement of materials for bank stabilization, the construction or installation of new utility lines, the placement of bulkheads adjacent to human-made lagoons and the repair or alteration of malfunctioning individual subsurface sewage disposal systems. The proposed Statewide general permits for regional stormwater detention basins, and regulated activities resulting from the construction or reconstruction of affordable housing have not been adopted. In addition, the proposed condition requiring mitigation for certain general permits has not been adopted.

However, because commenters stated that the environmental assessments done by the Department at the time it proposed the general permits were not, in certain instances, made readily available during the comment period, and because the Department wishes to fully involve the public in all aspects of program development and implementation, it has delayed the operative date of the general permits adopted and has published a public notice in this issue of the New Jersey Register inviting additional public input on the general permits based upon the environmental assessments. The Department will accept only comments based on the environmental assessments and will not consider comments already made or comments on general permits not adopted. During the comment period, the Department will conduct a public hearing and accept written comments. Based upon a full consideration of the comments received in writing and during the public hearing, the Department will determine whether to either propose amendments to the general permits, or permit the adopted general permits to become operative. After the close of the comment period, a second notice will be published and will include responses to all comments other than those that raise issues already addressed in this adoption, and a statement regarding any further action to be taken on the general permits by the Department.

The Department has also adopted several changes to improve operational efficiency based on the Department's experience in implementing the program. For example, the Department has adopted the combined section on the standards for granting individual freshwater wetlands and open water fill permits (N.J.A.C. 7:7A-3) and the reorganized section on letters of interpretation (N.J.A.C. 7:7A-8) with minor amendments and clarifications. However, the proposal to delete the references to "waivers" and "prohibited activities" in transition areas has not been adopted and these terms have been reinstated throughout the rules. In addition, while some of the proposed changes to the exemption section (N.J.A.C. 7:7A-2.7) have been adopted as proposed, the proposed change which would have afforded municipal exemptions to "property" has been deleted. The Department determined, with the advice of the Attorney General, that this provision was inconsistent with the exemption provisions of the Act. Because a rule properly implementing the Act's exemption for projects based on municipal approvals would require substantive changes, a definition of "project" will be reproposed elsewhere in this volume or in a future New Jersey Register.

Finally, the proposed administrative standards for review of Water Quality Certificates pursuant to the Federal Clean Water Act (33 U.S.C. 1251 et seq.) have not been adopted with these rules but will be reproposed in the future with substantive changes.

The following persons submitted written comments or made oral comments at a public hearing:

Name—Affiliation

Alaimo, Richard
Alaimo Group
Amon, James
D & R Canal Commission
Antonelli, James
Henderson and Bodwell
Archibald, Jeffrey
Arnold, Adeline
Astarita, Kelly
New Jersey Assoc. of Realtors
Badolato, Denise
Bakelaar, Wilma
Barnes, Stephen
Berson, Bernard
NJ Society of Municipal Engineers
Boettler, Albert
Dupont
Bontje, Michael
B. Laing Associates
Booth, Marilyn
Atlantic Electric
Brase, William
Mercer County Soil Conservation District
Braun, Stephen
Comprop Inc.
Brokaw, J. Staats
Brokaw DeRiso Associates, Inc.
Brown, Valerie
NJ State Bar Assoc.
Bucknam, Robert
Archer & Greiner
Bunn, Patrick
Four-H Builders, Inc.
Burlas, Mark
Byers, Michele
NJ Conservation Foundation
Bzik, Robert
Somerset County Planning Board
Chomsky, Martin
Assoc. Executive of Mosquito Control Work in NJ
Christiano, John
Clayton, Amy
Cohansey, Inc.
Cleary, William
NJ Concrete & Aggregate Assoc.
Coakley, Kevin
Collon, Jean
Compton, Glenn
Brick Twp. Environmental Commis.
Connell, Patrick
Connolly, William
State of NJ, Department of Community Affairs
Cunningham, E.L.
Jersey Central Power & Light Co.
Czarnowski, Barbara
Dasilva, George
FMC Corporation
Day, Clifford
U.S. Dept. of the Interior
Fish and Wildlife Service
Decereo, Joseph
Atmostemp Inc. Heating & Cooling
De Riso, John
Browkaw De Riso Assoc., Inc.
Derose, Cynthia
West Essex Investment Corp./Dev. Fin. Corp.
Desrochers, Connie
Sandoz Pharmaceuticals Corp.
Dimone, Vince
Donato, Michele
Doyle, John
New Jersey General Assembly
Dubinski, Barry
Enviro-Resource, Inc.
Eardley, Robert
Smokey Run Townhomes
Elasasser, Ruth
Epstein, William
Builders Association of Northwest Jersey
Fair, Abigail
Association of NJ Environmental Commissions
Feinberg, William
Felsen, Virginia
S. Belmar Environmental Comm.
Ferriero, Paul
Yannaccone Associates Inc.
Fiorletti, Armand
County of Union, New Jersey
Foelsch, William
NJ Recreation & Park Assoc. Freeholders
Fretz, L. H.

Furey, Peter
NJ Farm Bureau
Galetto, Jane Morton
Citizens United to Protect the Maurice River and its Tributaries
Garofalo, Edna
Green, Bill
Sierra Club Loantaka Group
Greene, Amy
Environmental Consultants, Inc.
Grigis, Gladys
Grisewood, Kenneth
Shrewsbury Twp. Environmental Commission
Hamilton, Leonard
Helwig, A. Carl
Pureland Industrial Complex
Hicks, David
Office of the County Engineer—Warren County
Hoffman, Blanche
Old Bridge Environmental Commission
Holzappel, George
Township of Wayne
Holzmann, Leslie
Hoover, Michael
Center Square Real Estate Development
Hopkins, Doug
Environmental Defense Fund
Horn, Jeffrey
National Association of Industrial and Office Parks
Isaacson, Franklyn
Jasek, Borivoj
NJ State Assoc. of County Engineers, Inc.
Jones, Anita
Cyanamid
Jurist, Melissa
Karen, Robert H.
New Jersey Builders Assoc.
Keeler, Bruce
Somerset County Park Commission
Keenan, John
Environmental Evaluation Group
Kibler, Lynden
Township of Middletown
Kinsey, David
Kirkham, Wendell
Pro Soil Investigations, Inc.
Klingsporn, Barbara
Koch, Nancy
Kruse, William
Middlesex County Planning Board
Krygin, Lydia
Amgre Associates
Krygin, Lydia
Niam Corp.
Lane, Richard
Ocean County Engineering Dept.
Lennon, Marilyn
Paulus, Sokolowski & Sartero Inc.
Lombardo, Laura
Longchamp, Leon
Feist & Feist Realty Corp.
Luscombe, Eric
Luz, Carl
Bedminster Environmental Commis.
Lynn, Les
Township of West Milford
MacCombie, Barbara
Somerset County Board of Chosen Freeholders
MacDonald, Mrs. James
Mager, Wendy
Stony Brook-Millstone Watershed Association
Mahan, Gail
Martin, Daniel
Pennoni Associates
Martin, James
Office of the Engineer—Hunterdon County
Martindale, Eric
Mathews, William
Morris County Planning Board
Mathis, Norman
Somerset County, Department of Public Works
McDowell, Robert
NJDEP/Div. of Fish, Game and Wildlife
McGarrity, Margaret
Township of Byram
Meiser, Kenneth
Alliance for Affordable Housing
Messer, Edith
Metiernan, Edward
Hannoch Weisman
Michaels, Robert
Keller & Kirkpatrick
Monmouth County Friends of Clearwater, Inc.
Morey, Steven
Pennoni Associates
Morison, Charles
Holmdel Township
Morogue, Helen
Morrow, Lanie
Morton-Galetto, Jane
DEPE/DFGW—Endangered & Nongame Species Comm.
Moser, Richard
Township of Medford
Munz, Kathleen
Musante, Gail
Mutinsky, Joseph
Centrex Real Estate Corp., NJ Division
Nelson, Diane
O'Brien, Michael
Atlantic Audubon Society
Oakland, Lee E.
Lacey Twp. Environmental Commission
Ogden, Maureen
New Jersey General Assembly
Olson, William
Najarian Associates, L.P.
Opalski, Douglas
Council on Affordable Housing
Owen, Mary
Page, Amy
Palsa, Thomas & Linda
Pantel, Glenn
Shanley & Fisher
Parson, Anne
Parsippany-Troy Hills Citizens for Responsible Government
Perikenis, Louisa
Pizzi, Gerry
Plumsted Environmental Comm.
Potter, Marie
Mayor East Hampton Township
Pouliot, Amy
Professional Real Estate Brokers
Pouliot, Gregory
Pouliot Incorporated and Affiliates
Pryd, Belva
Greenwich Environmental Comm.
Pryor, Joseph
NJ Society of Professional Engineers
Race, Samuel
State of NJ/Dept. of Agriculture
Renna, Mark
Louis Berger & Associates, Inc.
Ricci, Florence
Township of Evesham
Ricciardi, Albert
Pennoni Associates
Riepe, Barbara
Township of Scotch Plains, NJ
Risilia, David
Dead Coastal Society
Robinson, Arthur
Glendon Development, Inc.

Roma, Patrick
NJ General Assembly
Roman, Les
Resource Services North, Inc.
Romanik, Peter
Joseph L. Lomax & Associates, Inc.
Ryder, John
Van Note-Harvey Associates
Savoie, Philip
Schindel, Louis
Schlieder, Quentin
Morris County Park Commission
Schuber, William
County of Bergen
Sekula, Jr., Edward
Lake Musconetcong Regional Planning Board
Shershinger, Howard
Township of Berkeley Heights
Shinn, Roxane
Shissias, James
PSE&G
Siebert, Lynn
Siletti, Karen L.
Silver, Susan
State of NJ/Dept. of Public Advocate
Smith, Kay
Township of Moorestown
Standsky, Joanne
Township of Montgomery, County of Somerset
Sterner, Diane
Non-Profit Affiliated Housing
Network of New Jersey
Stewart, Roger
NJ Chapter of the Sierra Club
Stochel, Jr., Walter
Strait, Kenneth
Cumberland County Environmental Health Task Force
Stroh, Constance
Upper Rockaway River, Watershed Association
Taylor, Josh
Tempel, Alice
Borough of South Plainfield
Trinks, Bess
Turek, Peter
CECNJ
Uhrig, Jerry
Environmental Commission, Borough of Mountain Lakes
Van Wagner, Richard
New Jersey Senate
Vento, Joseph
Glendale Builders, Inc.
Veverka, Alan
D.W. Smith Associates
Viola, Theresa
CAREZ
Voeltz, William
Walnut, A. Jerome
Ocean County Environmental Agency
Wander, Sharon
Wander Ecological Consultants
Warner, Lauren
Manchester Township, Environmental Commission
Weaver, Deborah
Langan Engineering
Wheat, Douglas
Great Swamp Watershed Assoc.
Williams, Robert
Land Dimensions Engineering
Yanai, Ester
Zahn, F. Howard
State of NJ/Dept. of Transportation
Zingis, John
Maser Sosinski & Associates, P.A.

A summary of the comments, and the Department's responses, follows:

General

(1) COMMENT: The proposed additional general permits should be deleted as they will result in possible major losses of wetland habitats for threatened and endangered species (Friends of Endangered Species, Wildlife and Endangered Species, Inc.).

RESPONSE: Prior to issuing a new general permit, the DEPE must conduct an environmental analysis of the possible adverse environmental impacts of the permitted activity. The analysis reviews potential impacts to vegetation in the wetland ecosystem, to threatened and endangered species habitats, to flood storage capacity and the natural hydrologic characteristics of the wetland ecosystem, and to water quality. A new general permit is only issued when the finding is made that the adverse environmental impacts to all of these components will be minimal both separately and cumulatively. Please note that the proposed changes to the existing general permits and the proposed new general permits will not become operative for 90 days from the date of this issue of the New Jersey Register to allow the Department to take further public comments on the general permits based on the environmental assessments.

(2) COMMENT: Due to the length and level of complexity of these regulations, a second level of revised proposed amendments should be published prior to publishing a final version (Brokaw DeRiso Associates, Inc.).

RESPONSE: In recognition of the length and complexity of the proposal, the Department provided a 60-day comment period to review this document which is double the statutorily required 30-day comment period. In addition the Department has provided extensive opportunities for input into the drafting of these regulations through the Division's various advisory groups. The additional expenditure in time and resources necessary for publishing a second level of revised proposed amendments is unwarranted.

(3) COMMENT: The DEPE should provide fact-finding meetings for wetlands permits as they are more effective than hearings because they allow open communication between all involved parties (Passaic River Coalition).

RESPONSE: The rules as adopted herein have significantly expanded the opportunity for public comment and input into the decision making process by increasing notice requirements and the opportunity for public hearings. These are sufficient to facilitate access to decision makers and to make the process "open."

(4) COMMENT: The DEPE incorrectly uses the Federal Manual for Identifying Jurisdictional Wetlands to base wetland delineations on hydric indicators found in dredge spoils, presence of old dikes, improperly or incompletely graded fills and pockets of standing water (Michael Hyland).

RESPONSE: The DEPE delineates wetlands based on three parameters: hydrology, soils, and vegetation as mandated by the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., (Act). The Manual addresses atypical situations such as those described, and the Department used the guidance provided to interpret hydric indicators in these cases.

(5) COMMENT: The rules should be amended to recognize the different functional value of different wetlands and to regulate them accordingly. We urge you to recognize that some wetlands are the result of manmade activities. We think this category of wetlands is only marginally important and should not be regulated in the same fashion as naturally occurring wetlands (New Jersey Farm Bureau).

RESPONSE: The Department does review each wetland to determine its resource classification as is required by the Act. As a result of this determination, manmade wetlands such as detention facilities, ditches and man-made swales, will receive an ordinary classification. This designation in turn gives them a reduced level of protection under the Act, making them eligible for fill and alteration under several general permits, and giving them no buffer (transition area) protection.

(6) COMMENT: In order to streamline the Freshwater Wetlands program, permit applications should be classified into categories which prioritize the potential for adverse environmental impacts. Application categories might consist of major and minor classifications based on size and location with respect to FW1 receiving streams or downstream priority wetlands. Minor projects would need to comply with less rigorous provisions than major projects because of the potential for less adverse impacts (Somerset County Park Commission).

RESPONSE: The existing regulations do incorporate a categorization of applications based on environmental impacts: projects with minor wetlands impacts often qualify for Statewide general permits, while those

with major impacts must apply for individual permits. Applications for Statewide general permits must show compliance with a limited number of conditions, which is much less rigorous than the provisions that must be met in order to receive an individual permit.

(7) COMMENT: Two commenters demanded that the State enact stringent controls that protect the State's natural resources and stated that the proposal would significantly weaken the protection of New Jersey's already shrinking natural resources (Plumsted Township Environmental Commission; Township of Middletown Environmental Commission).

RESPONSE: The Department disagrees with the commenter's assertion that these amendments would weaken the protection of New Jersey's natural resources. While the amendments make changes to the Department's rules necessary for New Jersey's assumption of the 404 program, clarify the existing rules, and establish new general permits, the Department believes that the amendments do so in a manner consistent with the legislative intent to protect the State's wetland resources. The Department also has eliminated provisions which could have been construed as impairing the protection of wetlands.

(8) COMMENT: The Department should be consistent with the U.S. Army Corps of Engineers (ACOE) in implementing the ACOE policy on prior converted croplands (Pennoni Associates Inc.)

RESPONSE: The Department agrees with the concept set forth in the ACOE's regulatory guidance letter 90-7 regarding prior converted croplands. The guidance letter sets forth the concept that croplands that have been extensively altered to the point that they are effectively drained, no longer meet the hydrology criteria to fulfill the three-parameter approach to identify wetlands, and should no longer be regulated. However, this letter instructs the ACOE to rely on mapping of prior converted wetlands prepared by the Soil Conservation Service. These maps are generally based on cropping history and not on a field investigation to confirm the alteration of hydrology. Therefore, since the Department is mandated by the Act to use the three-parameter approach to identify wetlands, the Department cannot make a blanket decision to adopt this policy but must review each of these areas on a case by case basis.

(9) COMMENT: Is the State arranging for the Soil Conservation Service (SCS) to map Prior Converted Wetlands in the State of New Jersey (Louis Berger & Associates)?

RESPONSE: The SCS has inventoried the extent and location of prior converted wetlands in the State of New Jersey. Since many of the Service's calls on prior converted wetlands are based on the crop success and not the extent to which an area is effectively drained, the Department will use them as a reference only. The definitive determination will be based on actual field investigations.

(10) COMMENT: Will the Department follow the guidance provided by the ACOE in their Regulatory Guidance Letters and Memoranda of Agreement after the State assumes the Federal 404 Program (Louis Berger & Associates)?

RESPONSE: The Department will review each regulatory guidance letter as it is published and make a determination if the guidance is consistent with the goals and intent of the Act and how it affects the terms of delegation.

(11) COMMENT: The Department should initiate discussions with the ACOE regarding the proposed changes to the Nationwide Permit program, so that the State program is consistent with the Federal program. It appears that the Federal program will be more stringent than the State program (Pennoni Associates).

RESPONSE: The Department has initiated discussions with the ACOE on the Nationwide permit proposal. The State program, while striving to be consistent, must first meet the requirements of the Act. After discussions with the ACOE and the EPA, the Department believes that its program will remain more stringent than the Federal program even with the proposed amendments to the Federal program. This conclusion is based on the fact that the Department's scope of regulated activities is more comprehensive and that the permitting standards under the Act are more stringent than under the Federal Act.

(12) COMMENT: The Department should work to strengthen protection for the State's threatened wetlands and to resist any new assaults on New Jersey's natural areas (Sierra Club, Environmental Commission Haworth Planning Board, Student Action Volunteers for the Environment from Stockton State).

RESPONSE: The Department's rules have been designed to carry out the Act's mandate to provide for the protection of the State's wetland resources from random, unnecessary or undesirable alteration or disturbance.

(13) COMMENT: I feel that there should be economic recompense to the landowner for any and all lands that are deemed environmentally sensitive (Andre Lippi, Thomas Galbiati).

RESPONSE: N.J.S.A. 13:9B-3 and 16 provide criteria for identifying freshwater wetlands and transition areas in which specified activities are regulated. The Act provides no authority, nor appropriations for the Department to provide "recompense for any and all lands that are deemed environmentally sensitive" according to N.J.S.A. 13:9B-3 and 16. However, N.J.S.A. 13:9B-22 provides that should a court of competent jurisdiction determine that a certain activity of the Department "constitutes a taking of property without just compensation, the court shall give the Department the option of compensating the property owner for the full amount of the lost value, condemning the affected property pursuant to the provisions of the "Eminent Domain Act of 1971," P.L.1971, c. 361 (C. 20:3-1 et seq.), or modifying its action or inaction concerning the property so as to minimize the detrimental effect to the value of the property."

(14) COMMENT: There appear to be inconsistencies between the Rules on Coastal Zone Management and Freshwater Wetlands Protection Act Rules regarding wet burrow pits. The former allow filling and construction in wet burrow pits and the latter do not. These rules should be consistent (Pennoni Associates).

RESPONSE: While the Department strives to make rules consistent from one program to the next, this is not always possible because of different statutory mandates. Regardless of the substantive permitting standards under CAFRA (N.J.S.A. 13:19-1 et seq.), The Wetlands Act (N.J.S.A. 13:9A-1 et seq.) of 1970, and the Waterfront Development Act (N.J.S.A. 12:5-3), the filling of wet burrow pits is a regulated activity pursuant to the Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.) and these standards are limiting.

(15) COMMENT: There should be some language in the regulations pertaining to mapped coastal wetlands versus freshwater wetlands. Specifically, we are concerned about those areas that are tidal wetlands yet are upslope and just outside the mapped coastal wetlands line. There has to be some discussion pertaining to map accuracy standards and the leeway that will be given by the DEPE when interpreting a mapped coastal wetland (Pennoni Associates).

RESPONSE: Based on legal advice from the Attorney General's office, the proposed rules will be amended upon adoption to state that the definition of freshwater wetlands will include those areas which are not defined as coastal wetlands pursuant to the Wetlands Act of 1970. When the Department makes jurisdictional determinations in the field the limitations of map accuracy are taken into consideration.

(16) COMMENT: The Department should include an index for this rule (Pureland).

RESPONSE: When the rules are adopted, the Department will prepare a "clean" version (showing all of the adopted text and eliminating underlining, stars and brackets) with an index. In addition, as published in the New Jersey Administrative Code at N.J.A.C. 7:7A, the rules are indexed.

(17) COMMENT: A matrix should be prepared by the Department to show the shortest and longest approval time frame for various permits. This will enable an applicant to make sound economic judgments. Without such a matrix, the time value of money and its economic impact is ignored (Pureland).

RESPONSE: While this is a good idea it does not warrant treatment in the Department's administrative rules because the review period of a project is directly related to the clarity of information provided by the applicant, complexity of the project and the types of permits required. As part of a pre-application meeting, the Department will help the applicant in this determination. In addition, data concerning average review times by year for each of the permit categories administered by the Department's Land Use Regulation Element are available upon request.

(18) COMMENT: Why is this rule not subject to the 90-day review (Portland)?

RESPONSE: Ninety-day review of construction permits is mandated by the 90-Day Law, N.J.S.A. 13:10-25 et seq., for a specified list of DEPE permits and approvals that does not include the Act. During enactment of the Act, this issue was reviewed, but the Legislature determined not to subject the Department review of FWPA permits to the 90-Day Law, in part, because of Federal involvement in the review process.

(19) COMMENT: This regulation once corrected and adopted should be implemented by County Government because staff is closer to the regulated wetlands and response time is quicker, counties will review

applications without the parochial interests that local municipalities might have, and counties have more local knowledge and support of their planning department and local soil conservation districts. The State DEPE would concentrate its efforts on keeping the counties in compliance thus precluding the need to grow the Department into an inefficient monster. By comparing one county's implementation with another a system of checks and balances would be established thus guaranteeing a fair, well administered and environmentally sound program (Pureland).

RESPONSE: Although the Legislature considered such a structure during the drafting of the legislation, the Act as adopted mandates that the Department develop and administer the rules for this program and, in fact, preempts local regulation of wetlands, State open waters and transition areas.

(20) COMMENT: The document is written from a legal perspective and allows subjective interpretation making it difficult to use (Pureland).

RESPONSE: Though the commenter has not referred to any particular provisions which cause concern, the Department has used plain language whenever possible throughout the rule and has established objective standards.

(21) COMMENT: All applications should be prepared under the direction and seal of a licensed professional engineer because this will ensure the technical quality of the application, ensure the accountability of the preparer of the application, save the department substantial staff time because staff can rely on the analysis and calculations of an expert, and reduce the timeframe freeing staff for other tasks (Pureland).

RESPONSE: The Department has intentionally avoided requiring that applications be prepared by licensed professionals to minimize the cost to the regulated public. However, even those applications currently prepared by a licensed professional engineer must be reviewed in detail by the Department. Department staff makes every effort to assist applicants in preparing their own applications whenever possible through pre-application meetings.

(22) COMMENT: Past rules have been changed in the middle of the year by department staff. How can this be prevented in the future (Pureland)?

RESPONSE: Rules have only been amended in response to court decisions or within the framework of a rule proposal, in accordance with the Administrative Procedure Act, N.J.S.A. 54:14B-1 et seq., (APA), as necessary to provide clarification, adopt new general permits, etc.

(23) COMMENT: What recourse, other than a court of law, does an applicant have when the Department knowingly changes records or establishes a discriminatory policy (Pureland)?

RESPONSE: The applicant should simply bring the matter to the attention of the appropriate Department Manager, Administrator or Director.

(24) COMMENT: The rule provides no grandfather clause. Special consideration should be given to applicants who have commenced development before the institution of the wetlands laws and expended significant dollars on design, approvals, and infrastructure. For example, a cost basis of $10,000 per acre should be the standard (Pureland).

RESPONSE: The Act at N.J.S.A. 13:9B-4, and the rules at N.J.A.C. 7:7A-2.7 and 2.8, expressly provide exemptions from certain permit requirements for projects in the advanced planning stages.

(25) COMMENT: The DEPE should provide sufficient accommodation for activities proposed in wetlands by municipalities and counties (Somerset County Planning Board, Somerset County Park Commission).

RESPONSE: The Act mandates the protection of the State's wetland and open water resources regardless of the current or proposed ownership. However, the Department makes every effort to realize the importance of public works projects and takes this into consideration, through the determination of public interest, for example, during the decision process, pursuant to N.J.A.C. 7:7A-3.5.

(26) COMMENT: We are most concerned with the sections of the proposal that cover the exemptions process and feel that exemptions should not be held valid unless a developer can prove that: 1. Their application correctly delineates wetland areas; 2. An environmental impact study detailing endangered or threatened species habitat, ground water recharge, recreational values, etc. has been submitted; 3. The developer has made every attempt to discover and bring to the attention of the appropriate governmental agency any and all problems that would or should prevent him from developing the site; and 4. No hazardous waste sites or other contamination exists on the sites slated for development. Regardless of the need for more housing and economic growth, developers should not be allowed to destroy our natural resources for personal profit at our and our children's expense (Stephen A. Barnes and Karen L. Siletti).

RESPONSE: The Act mandates that a limited class of projects receive exemptions based upon timely preliminary site plan or subdivision application or approval, pursuant to the Municipal Land Use Law (MLUL) (N.J.S.A. 40:55D-1 et seq.) or Federal approvals pursuant to the Federal Clean Water Act of 1977 (33 U.S.C. 1251 et seq). The Act does not allow the Department to further consider the environmental impacts of these projects when issuing an exemption.

(27) COMMENT: The Department should provide guidance to municipalities concerning the demarcation of transition areas and wetlands because many municipalities require dedication of conservation easements around these areas (Yannaccone Associates).

RESPONSE: Without site specific information the Department cannot make a decision regarding the resource value classification of the wetland and subsequent transition area width. The Act at N.J.S.A. 13:9B-16 and the rules at N.J.A.C. 7:7A-6 do, however, provide guidance for determining resource value. A copy of all site specific determinations is transmitted to the township clerk, planning board and environmental commission, as well as the county planning board.

(28) COMMENT: The National Wetlands Policy Forum (NWPF) recommends the management and creation of wetlands by watersheds. This policy should be adopted statewide. The present wetlands program is poorly conceived and many people believe that they rejected most recommendations of the NWPF. The existing program falls way short of the goals set forth by this committee (Professional Soil Investigations).

RESPONSE: The Act does not provide the Department with the authority to manage and create wetlands by watersheds. It should be noted that the Act is touted by EPA as perhaps the best and most effective law in the country for wetlands protection. The State receives calls on a daily basis from other states looking for a model to follow when formulating their own laws for wetlands protection.

(29) COMMENT: It was the recommendation of the National Wetlands Policy Forum to encourage the preservation and enhancement of wetlands, and increase incentives for the wise management and protection of wetlands in private ownership. Instead of encouragement and incentive, New Jersey prefers to fine, penalize, and harass all who violate its illogical rules. The restrictive rules have resulted in considerable resentment among landowners, corporations and agribusiness toward the department and their policies (Professional Soil Investigations).

RESPONSE: The Department is encouraging the preservation and enhancement of wetlands in the manner dictated by the Act and in other statutes. DEPE has conducted several cooperative programs with Rutgers and the State's Department of Community Affairs, as well as provided speakers to many public and private agencies to educate the public about the benefits of wise management and protection of wetlands. The method of wetland protection in the State, including permitting, fines and penalties, are specified in the Act. However, the State has provided incentives for conservation through the New Jersey Conservation Restriction and Historic Preservation Restriction Act (N.J.S.A. 13:8B-1 et seq.). This Act directs that any deed restriction or easement to preserve land shall be considered by local assessors when determining full values of any lands, therefore providing tax relief. The Department's rules to implement the Act are just one mechanism to effect protection of the State's natural resources. The Department is the current recipient of a Federal Wetland Conservation Planning grant which will allow the Department to formulate many non-regulatory tools for wetland protection as well as to more effectively guide resource management efforts of State, local and private entities.

(30) COMMENT: The New Jersey Freshwater Wetland Protection Act and Rules offer no incentive for the preservation and enhancement of wetlands. I am unable to locate in the rules where a landowner can legally create a wetland of any kind without violating the Act (Professional Soil Investigations).

RESPONSE: The creation of a wetland from an upland is not a regulated activity and therefore would not be a violation of the Act. The State has provided incentives for conservation through the New Jersey Conservation Restriction and Historic Preservation Restriction Act (N.J.S.A. 13:8B-1 et seq.). This Act directs that any deed restriction or easement to preserve land shall be considered by local assessors when determining full values of any lands, therefore providing tax relief. Lastly, the options for mitigation include enhancement of existing degraded wetlands.

(31) COMMENT: Cranberry and blueberry growers have been curtailed in meeting the demands for their products and aquaculture

is out of the question. These activities should be allowed by the rules (Professional Soil Investigation).

RESPONSE: The Department disagrees. The Department, in response to suggestions from cranberry growers, has entered into an agreement with the Army Corps of Engineers to facilitate cranberry growing in the State. Further, aquaculture is a water-dependent activity and thus would not be automatically prohibited in wetlands. To date, the Department has had no requests or applications for aquaculture in freshwater wetlands.

(32) COMMENT: A moratorium on state freshwater wetlands subdivision exemptions should be declared immediately in order to correct the decision of the Attorney General which has set back wetlands protection 20 years (Township of Byram).

RESPONSE: The Department does not have the statutory authority to impose a moratorium. Further, since this proposal went to print (February 19, 1991), the Attorney General issued a clarification on the exemption issue (April 19, 1991). As a result, all exemptions issued after December 14, 1990 were reevaluated, some of which were modified or revoked. The Department continues to work with the Attorney General to further clarify the exemption language and, therefore, a moratorium would not be appropriate.

(33) COMMENT: Many of the proposed amendments to the regulations weaken the wetlands protection program and further delay New Jersey's ability to assume the Federal program. Assumption of the Federal program is critical as exemptions based on municipal applications and approvals will become void (Lake Musconetcong Regional Planning Board).

RESPONSE: Many of the proposed amendments are required by EPA in order to meet all requirements for assumption. An example is the inclusion of a definition of "waters of the United States" at N.J.A.C. 7:7A-1.4. The remainder of the Department's rules have been designed to carry out the Act's mandate to provide for the protection of the State's wetland resources in as predictable and consistent a manner as possible.

(34) COMMENT: Three commenters are opposed to any proposed amendments that would dilute or weaken the basic intent of the Act, endanger wetlands and permit their destruction (Ms. Edith Messer, Atlantic County Audubon Society, Township of Montgomery Environmental Commission).

RESPONSE: The proposed rules reflect considerable input from government agencies and the regulated public concerning administration of the Act. The rules represent the mandate to protect wetlands through the implementation of a predictable and efficient system for regulatory decision making.

(35) COMMENT: The DEPE should work toward a more efficient organizational structure to improve the time frames for responses to wetlands permits. The addition of an increased number of general permits, an increase in the mitigation requirements, and an increase in the notice requirements will not result in streamlining of the process because they must be administered by the NJDEPE (Center Square Real Estate Development Company).

RESPONSE: The DEPE is working toward a more efficient organizational structure. The Department is sensitive to the need to improve time frames for decisions on wetlands permits. Actions are underway in the areas of organizational structure, administrative practice, office automation and rule construction which will collectively result in more efficient permit processing. Data from 1990 evidenced significant over 1989 and further efficiencies are anticipated in 1991.

(36) COMMENT: As it exists now, the subjectivity of the Department as a whole permeates their decisions to such an extent that the response to an application becomes more affected by the Department's opinion or feeling, rather than the actual content or merits of the application itself (Center Square Real Estate Development Company/Pureland).

RESPONSE: The Department disagrees. The Department's decisions comport with the Act and adopted administrative rules implementing the Act. As questions arise the Department makes frequent requests for legal advice to the Attorney General to assure that all decisions are consistent with the Act on which they are based.

(37) COMMENT: Many of the suggested modifications of the regulations go well beyond the scope and intent of the law for which the regulations were created to enforce. Much time and money will be spent in litigation of these proposals unless they are modified to reflect the law, and not used as an attempt to go beyond the agreed upon legislation created to implement New Jersey's wetland program.

RESPONSE: The Department disagrees with the commenter's assertion. The proposed rules have been amended to reflect legal counsel and the rules as adopted are consistent with the statutory mandate.

(38) COMMENT: In considering proposed amendments, it is my fervent hope that the marvelous way in which wetland systems help to save mankind from its greedy and reckless use of "real estate" will be the primary factor in deciding not to weaken the present rule. The ecosystems which filter toxins and moderate weather are vital to all living things **including** builders and developers (South Belmar Environmental Commission).

RESPONSE: The Department's rules have been designed to carry out the Act's mandate to provide for the protection of the State's wetland resources for random, unnecessary or undesirable alteration or disturbance.

(39) COMMENT: An undesirable escape exists from the subject rules. That escape is the exemption of many planned projects that are grandfathered by submittal of their plans prior to the Act. In lieu of such exemption, expeditious review of permit applications should be prioritized for those earlier plans where work in question is not yet underway or can be reasonably changed to conform to the Freshwater Wetlands Act Rules. Otherwise, much destruction of freshwater wetlands will continue. The State is now in a position to be able to prevent this (Atlantic County Audubon Society).

RESPONSE: The Act mandates that certain limited classes of projects receive exemptions and does not allow the Department to substitute expeditious permit reviews, or to consider the environmental impacts of these projects when issuing an exemption.

(40) COMMENT: I am concerned about recent developments that erode the Freshwater Wetlands Protection Act. Since its passage, this Act has been continually weakened by court rulings, and the recent decision by the Attorney General is directly opposed to the original intention of this legislation. Wetlands are vital to the health of the planet and since colonial times, 54% of United States wetlands have been lost. Wetlands constitute 19% of the state's land and are vital for hosting one of the largest bird migrations of any state. No longer can we allow the profits of a few to harm the earth for all (Gail Mahan).

RESPONSE: While the Department has fought attempts to use the courts to weaken the Act, the Department is subject to the courts' decisions. In addition, since this proposal went to print (February 19, 1991), the Attorney General issued a clarification on the exemption issue (April 19, 1991). As a result, all exemptions issued after December 14, 1990 were reevaluated, some of which were modified or revoked.

(41) COMMENT: The efforts by the members of the DEPE staff are appreciated and should be rewarded especially if we can hold the line and assure all of us—young and old alike—of an adequate water supply forever. It can be done (Louis E. Schindel).

RESPONSE: The Department acknowledges this comment in support of the rule modifications and the efforts of its staff in implementing the rules.

(42) COMMENT: The Department should not amend the Act to allow developers to fill and destroy portions of existing wetlands to suit their projects. Since the Act was passed, there has been a wealth of follow-up data proving time and time again that the preservation of wetlands is vital, not only to water quality but to wildlife. Have construction lobbies, developers, and special interests forced us to rethink our original value of wetlands? Have special interests convinced the Department that they are the sole cure for the state's economic ills and that they should be allowed to build anything anywhere (John J. Cristiano)?

RESPONSE: The Department has not rethought the value of wetlands, and remains committed to their preservation. The Department's rules have been designed to carry out the Act's mandate to provide for the protection of the State's wetland resources.

(43) COMMENT: We wish to affirm our organization's support for wetlands protection and its concern that the protection hitherto afforded by the Act and regulations not be weakened. The Act offers the potential, if enthusiastically interpreted and enforced, to halt the destruction of a critical enviromental resource of crucial importance to water quality for all citizens of New Jersey. Strong regulations will help to achieve that goal (Stoney Brook-Millstone Watershed Association Issues Committee).

RESPONSE: The Department is making every effort allowable under the Act, to design regulations which carry out the Act's mandate to protect the State's wetland resources.

(44) COMMENT: Add my name to the many who appall the amendments that would affect wetlands Statewide. Our City of Hackensack is already overdeveloped, and we need whatever space can be safeguarded such as Borg's Woods (Mrs. Edna Garafalo).

RESPONSE: The Department is making every effort allowable under the Act, to design regulations which carry out the Act's mandate to protect the State's wetland resources.

(45) COMMENT: The Department has proposed a drastic increase in permit fees. The Department states that the increased fees will place the program's cost on those who derive economic benefit from the program instead of placing the cost on all taxpayers. Since the increased costs of development are always ultimately passed on to the consumer, the taxpayers will bear the cost of the increased fees (Archer and Greiner).

RESPONSE: A State-run program may either derive its funding from the Legislature through the collection of taxes, or by directly charging those seeking a service, through fees. Fee collection affects only those consumers who choose to live in the developments requiring permits for impacts to natural resources, while general tax collection impacts all taxpayers. Therefore, fee collection is the preferred method of funding. The proposed fee schedule reflects actual costs to administer the program.

(46) COMMENT: My opinion is that no land should be abused to satisfy the greed of one person. Our country is being destroyed! I was tormented by buyers who wanted my beautiful land in New Gretna to build on. I sold it instead to the Government as part of the Forsythe Wildlife Refuge. People here who love their land can do the same (Mrs. James C. MacDonald).

RESPONSE: The Department's rules have been designed to carry out the Act's mandate to provide for the protection of the State's wetland resources from random, unnecessary or undesirable alteration or disturbance. The Department's rules to implement the Act are just one mechanism to effect protection of the State's natural resources. The State also provides incentives for conservation through the New Jersey Conservation Restriction and Historic Preservation Restriction Act (N.J.S.A. 13:8B-1 et seq.). This Act directs that any deed restriction or easement to preseve land shall be considered by local assessors when determining full values of any lands, therefore providing tax relief. The Department is the current recipient of a Federal Wetland Conservation Planning grant which will allow the Department to formulate many non-regulatory tools for wetland protection as well as to more effectively guide resource management efforts of state, local and private entities.

Subchapter 1. General Information

N.J.A.C. 7:7A-1.1 Scope and authority

(47) COMMENT: It is noted in this subsection that these regulations now govern the issuance of Water Quality Certifications pursuant to the Water Pollution Control Act. The rules for Water Quality Certificates should not be included in the regulations for the Freshwater Wetlands Protection Act but should be a separate rule (Amy S. Greene Environmental Consultants).

RESPONSE: Based on the review of the comments and on legal advice received from the Attorney General's office, Subchapter 4, Water Quality Certification, has not been adopted and will be reproposed with substantive changes in the future.

(48) COMMENT: The rule should be modified to delete all references to the Water Quality Certificate program. The Senate and Assembly clearly did not intend to authorize the inclusion of any part of the Water Pollution Control Act into the Freshwater Wetlands Protection program (Mark Burlas).

RESPONSE: Based on the review of the comments and on legal advice received from the Attorney General's office, Subchapter 4, Water Quality Certification, has not been adopted and will be reproposed with substantive changes in the future.

N.J.A.C. 7:7A-1.4 Definitions

(49) COMMENT: This section should include definitions for "farm, normal farming, silviculture, ranching practices, ongoing" (N.J. Farm Bureau).

RESPONSE: "Ongoing" is part of the term "established, ongoing" and is already defined in this section. The rule has been amended to provide a definition for silviculture." The Act at N.J.S.A. 13:9B-27 mandates that the Department pursue the assumption of the 404 program. The Federal regulations at 40 CFR Part 233-404 State Program Regulations, governing state assumption of the 404 program requires that "Any approved State program shall, at all times, be conducted in accordance with the requirements of the Act (Federal Act) and of this part. While States may impose more stringent requirements, they may not impose and less stringent requirements for any purpose." Based on this requirement the Department is not prepared at this point to provide definitions for farm, normal farming, or ranching practices since these terms are used in the Federal Act in the exemption provisions and it may result in a contravention to the Federal Transfer Regulations by adopting definitions that are less stringent than the Federal interpretation.

(50) COMMENT: The definition of "acid producing deposits" should include a source or a listing of the geologic formation names of these deposits (Amy S. Greene, Environmental Consultants, N.J. Builders Assocation).

RESPONSE: The suggested amendment has not been made. Instead, the Department has adopted the reference at N.J.A.C. 7:7A-9.3(c)4, where acid soils are discussed, to inform the regulated public of the appropriate section of the Flood Hazard Area Control Act regulations, N.J.A.C. 7:13-5.10, which lists the names of the geologic formations.

(51) COMMENT: The rule should be modified to include a source for the listed best management practices manuals (N.J. Builders Association).

RESPONSE: The rule will not be amended to include the source of best management practice manuals since they are available from widely varying sources and their availability is updated frequently. If an applicant has questions or needs copies of a particular manual, they should contact the Department for this information. Currently, the only topics covered by manuals are mosquito management (which is available from the Department) and soil erosion and sediment control (available from the Soil Conservation Service). The Department is in the process of formulating a "Best Management Practices" Stormwater Management Manual and updating the Stream Encroachment Technical Manual. As these manuals are developed, the Department will provide a list to interested parties upon request.

(52) COMMENT: The word "neighboring" needs to be clarified in the definition of "adjacent" because this could affect one's ability to obtain a Statewide general permit. For example, does neighboring mean 100 feet, 500 feet, or within the same watershed? To eliminate discrepancy, a numerical value should be considered (Resource Services North, Inc., N.J. Society of Professional Engineers, Mark Burlas).

RESPONSE: The definition of "adjacent" was deleted upon adoption because it added undue confusion. The applicability of Statewide general permit no. 6 is governed by the language adopted at N.J.A.C. 7:7A-9.2(a)6 which states that the permit shall be applicable for regulated activities in a freshwater wetland or State open water which is not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream. The inclusion of the term "adjacent" in this definition was determined to serve no constructive purpose. The deletion of this term will also eliminate the confusion regarding the definition of "neighboring."

(53) COMMENT: The word "neighboring" as discussed in the definition of "adjacent" needs to be elaborated upon (Pennoni Associates).

RESPONSE: The defintion of "adjacent" was deleted upon adoption because it added undue confusion. The applicability of Statewide general permit no. 6 is governed by the language adopted at N.J.A.C. 7:7A-9.2(a)6 which states that the permit shall be applicable for regulated activities in a freshwater wetland or State open water which is not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream. The inclusion of the term "adjacent" in this definition was determined to serve no constructive purpose. The deletion of this term will also eliminate the confusion regarding the definition of "neighboring."

(54) COMMENT: The definition of "adjacent" appears to protect wetlands that are separated by man-made features and have diverse property owners. This is a monumental change in the law and results in wetlands regulations applying to properties by definition and not by the presence of wetlands. This is unfair and unreasonable (Pureland).

RESPONSE: The definition of "adjacent" was deleted upon adoption because it added undue confusion. The applicability of Statewide general permit no. 6 is governed by the language adopted at N.J.A.C. 7:7A-9.2(a)6 which states that the permit shall be applicable for regulated activities in a freshwater wetland or State open water which is not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream. The inclusion of the term "adjacent" in this definition was determined to serve no constructive purpose.

(55) COMMENT: The term "adjacent", as proposed, is extremely ambiguous and all-encompassing. We suggest defining adjacent to mean "bordering or contiguous". This is consistent with the common usage of the word, and will provide an objective standard which will provide developers with predictability (Archer and Greiner, NAIOP).

RESPONSE: The definition of "adjacent" was deleted upon adoption because it added undue confusion. The applicability of Statewide general permit no. 6 is governed by the language adopted at N.J.A.C. 7:7A-9.2(a)6 which states that the permit shall be applicable for regulated activities in a freshwater wetland or State open water which is not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream. The inclusion of the term "adjacent" in this definition was determined to serve no constructive purpose.

(56) COMMENT: Definitions of the terms "application" and "approval" should be included in the rule. To ensure consistency, the DEPE should adopt the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., (MLUL) definition of application and preliminary approval (Plumsted Township Environmental Commission; Township of Montgomery Environmental Commission; Lake Musconetcong Regional Planning Board; Township of West Milford Environmental Commission; Greenwich Environmental Commission; Lynn Siebert; Walter Stochel Jr.; Lacey Township Environmental Commissions, Endangered and Nongame Species Advisory Committee, Public Advocate of New Jersey, Borough of South Plainfield Environmental Commission, New Jersey Conservation Foundation, ANJEC, Great Swamp Watershed Association, Citizens United to Protect the Maurice River and its Tributaries, Inc., Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, Passaic River Coalition, N.J. Audubon Society).

RESPONSE: The Department in responding to this comment assumes that these definitions are being requested in the context of exemptions based on applications to and approvals by the municipality. Based on this assumption, the rule has been amended to provide clarification by defining the terms "application for development" and "preliminary approval" at N.J.A.C. 7:7A-1.4, which are taken verbatim from the Municipal Land Use Law at N.J.S.A. 40:55D-3 and N.J.S.A. 40:55D-6, respectively.

(57) COMMENT: Definitions of the terms "applicant" and "Agency of the State" would be beneficial (Amy S. Greene Environmental Consultants).

RESPONSE: The rule has been amended to provide clarification by defining the terms "applicant" and "agency of the State" in this section.

(58) COMMENT: The definition of "best management practices" should reference the long standing practice used by the U.S.D.A. Soil Conservation Service and the Agricultural Experiment Station of Rutgers to develop measures that support agriculture while protecting human health and safety (N.J. Farm Bureau).

RESPONSE: It is unclear if the commenter is referring to a specific manual. If so, the correct title should be submitted to the Department for inclusion on the listing that the Department will maintain on "Best Management Practices" manuals. The manuals listed in this definition were included as examples and were not intended as an inclusive list. The definition of "best management practices" has been amended to clarify that the listed manuals are only a partial listing and that an applicant should contact the Department for the most updated list since existing manuals will be updated and new manuals will continue to be developed in the future.

(59) COMMENT: We commend the Department on the inclusion of "A Manual of Freshwater Wetland Management Practices for Mosquito Control in New Jersey" in the definition of "BMP".

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(60) COMMENT: Since the term "compelling public need" is only used at N.J.A.C. 7:7A-3.4(a)1 we recommend that the term be defined within the relevant section for clarity (NAIOP).

RESPONSE: This term is used in various subchapters throughout the rules and, therefore, for ease of use, the Department has placed this definition in section N.J.A.C. 7:7A-1.4.

(61) COMMENT: The rules should be amended to include a definition of "component of freshwater wetland ecosystem" that describes an eligible component to include habitats of rare, threatened, endangered and declining species located within the watershed tributary to the freshwater wetland (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: There are only two sections of the rules that refer to a "component of the freshwater wetland ecosystem": subchapter 6, which states that transition areas are an integral "component of the freshwater wetland ecosystem," and subchapter 14, which states that a land donation may be appropriate provided that the land is a valuable "component of the freshwater wetland ecosystem." The commenter's suggested definition is inappropriate in the first reference and will unnecessarily narrow the term in the second reference. Therefore, the rule will not be amended to include the suggested definition.

COMMENT: Several commenters objected to the definition of "contiguous." They had the following comments:

(62) The definition of "contiguous" should exclude those adjacent properties which are separated by substantial manmade structures especially if these structures were constructed prior to July 1, 1988 or if preliminary municipal approval was received prior to July 1, 1988 for their construction (Langan Engineering);

(63) The definition of "contiguous" is too broad. Roads and other human made structures are real and should be acknowledged because they have an effect on hydrology (Joseph Lomax & Associates);

(64) The definition of "contiguous" is unclear, nebulous and weak. Properties are not contiguous if they are separated by man-made barriers, (roads) and legal boundaries (other property) (Pennoni Associates);

(65) The definition "contiguous" appears to protect wetlands that are separated by man-made features and have diverse property owners. This is a monumental change in the law and results in wetlands regulations applying to properties by definition and not by the presence of wetlands. This is unfair and unreasonable (Pureland);

(66) The definition of "contiguous" is ambiguous and should include a distance limitation, such as 50 feet. The extent of human made barriers of structures should have specific measurements or descriptions (Amy S. Greene Environmental Consultants, Eric Luscombe, N.J. Builders Association);

(67) The term "contiguous" is defined using the term "adjacent" and the term "adjacent" is defined with the term "contiguous"—this is circular (Amy S. Greene Environmental Consultants, NAIOP, Borough of South Plainfield Environmental Commission);

(68) The proposed definition of "contiguous" is contrary to its ordinary meaning. The proposed definition should be modified to mean only properties that share a common boundary or lot line. Alternatively, "contiguous" could be redefined to clarify that adjacent properties are contiguous unless they are separated by substantial human-made barriers or structures (greater than or equal to 50 feet). In no event should contiguous include lands that are in different watersheds (Archer and Greiner, NAIOP); and

(69) The addition of the phrase, "or legal boundary" adds confusion to an otherwise clear definition (N.J. Society of Professional Engineers).

RESPONSE: The term "contiguous" is used in the definition of "onsite" and this term is used to limit the applicability of multiple Statewide general permits at N.J.A.C. 7:7A-9.4. The rule was amended to ensure that the authorization of Statewide general permits "will cause only minimal adverse environmental impacts when performed separately," and, "will have only minimal cumulative adverse impacts on the environment" pursuant to the Act. The piece meal destruction of wetlands by a single landowner with extensive property holdings does not meet this objective. The cumulative impacts of a proposed development should be assessed and, if necessary, an individual permit should be obtained. The construction date and extent of human-made barriers or structures is irrelevant to a finding of no significant adverse impacts. Since the focus of this definition is on assessing adverse environmental impacts, separation by a physical boundary may have no bearing on individual or cumulative impacts. The definition of "onsite" which includes the term "contiguous" clearly states that the property must be owned by the same individual. The definition of "adjacent" will be removed from this rule because it added undue confusion.

(70) COMMENT: In describing "delegable waters" the term "adjacent wetlands" is included. The term "adjacent" as defined previously in the rule makes it impossible to describe "adjacent wetlands" (Pureland).

RESPONSE: The term "adjacent" has been deleted upon adoption. However, this term is critical in defining which "waters of the United States" are delegable to the state with assumption of the 404 program. The Department is working with the Army Corps of Engineers and the U.S. Environmental Protection Agency to define this term. The agreed upon definition will become part of the memorandum of Agreement (MOA) between all three agencies concerning the State's assumption of the 404 program. The MOA will be public document and will be available for review. Future amendments to the rules will include a definition of this term.

(71) COMMENT: In the context of the definition of "delegable waters" the Department states it will not assume jurisdiction over the entire length of the Delaware River. Does this include tributaries to the Delaware and where does the Department's jurisdiction start and stop (Pureland)?

RESPONSE: This definition only refers to the assumption of jurisdiction under the 404 program. Therefore, the Department will still retain jurisdiction under the Act but will share jurisdiction with the ACOE in these areas. The areas where the State will share jurisdiction along the Delaware include tributaries which meet the criteria at paragraph 1 of this definition.

(72) COMMENT: The definition of "delegable waters" excludes Water of the U.S. within the Hackensack Meadowlands. To be consistent, reference to the possible requirement for an open water fill permit in the Hackensack Meadowlands should be removed at N.J.A.C. 7:7A-2.8(a) (Amy S. Greene Environmental Consultants, N.J. Builders Association).

RESPONSE: The commenter is correct and the rule has been amended on adoption to delete the incorrect reference to the requirement for an open water fill permit in both the Hackensack Meadowlands and in areas under the jurisdiction of the Pinelands Commission since both of these areas are exempt from the Freshwater Wetlands Act in its entirety.

(73) COMMENT: Under the definition for "delegable waters" the Pinelands area should also be excluded from "delegable waters" since that area is exempt from the FWPA as is the Hackensack Meadowlands (Amy S. Greene Environmental Consultants, N.J. Builders Association).

RESPONSE: The definition of delegable does not come from the Act. The definition comes from the Federal regulations on assumption of the 404 program and is defined by the ACOE on the basis of tidal influence, navigability, and whether the water spans a state line. Therefore, waters in the Pinelands area are delegable and are subject to regulation under the Act to the extent that they constitute waters of the United States.

(74) COMMENT: The basis for excluding Greenwood Lake from "delegable waters" is not clear (Amy S. Greene Environmental Consultants).

RESPONSE: Since Greenwood Lake is an interstate lake (it crosses the border into New York State), it is not delegable.

(75) COMMENT: The term "Department" is used generously throughout the proposed rules. I'd like to see who is authorized to sign documents on behalf of the Department for various regulatory issues. This is important because staff decisions should be supervised for oversight (Pureland).

RESPONSE: Letters of Interpretation, General permits and transition area waivers are signed by the Region Section Chief. Exemption letters are signed by the Manager, and Individual permits are signed by the Administrator. While a particular member of the Department staff may be authorized to sign a document, staff decisions are subject to supervision, and the Department's management is accountable for decisions of its staff. These delegations and authority are pursuant to N.J.S.A. 13:1B-3 and/or 13:1B-4.

(76) COMMENT: In the definition of "discharge of dredged material" the DEPE should leave the reference to point sources since 404 jurisdiction is limited to point sources. If the proposed language remains intact, developers may be held responsible for sediment loads from stormwater flows. What is the rationale for this change (N.J. Builders Association)?

RESPONSE: The Federal regulations at 40 CFR Part 233-404 State Program Regulations, governing state assumption of the 404 program, requires that "Any approved State program shall, at all times, be conducted in accordance with the requirements of the Act (Federal Act) and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose." Based on this requirement the Department will adopt the proposed change in order to reflect the Federal language at 40 CFR Part 232.2(e), definition of "discharge of dredged material." The Department in practice will regulate discharges of erosional material into regulated areas to the extent that they result in a regulated activity pursuant to N.J.A.C. 7:7A-2.3, Regulated activities.

(77) COMMENT: We object to the deletion of the term "from any point source" (NAIOP).

RESPONSE: The Federal regulations at 40 CFR Part 233-404 State Program Regulations, governing state assumption of the 404 program requires that "Any approved State program shall, at all times, be conducted in accordance with the requirements of the Act (Federal Act) and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose." Based on this requirement, the Department will adopt the proposed change in order to reflect the Federal language at 40 CFR Part 232.2(e), definition of "discharge of dredged material." The Department in practice will regulate discharges of erosional material into regulated areas to the extent that they result in a regulated activity pursuant to N.J.A.C. 7:7A-2.3, Regulated activities.

(78) COMMENT: One commenter stated that the addition of the phrase "but is not limited to" to the definition of "discharge of fill material" obfuscates rather than clarifies the definition. Such an open ended statement is inappropriate in a regulatory document and should be deleted and reworded to provide more clarity to the rule (Leslie Holzmann).

RESPONSE: The Department added the phrase "but is not limited to" in order to make it clear that the list of examples is not intended to be exhaustive. The added phrase does not render the definition open ended. The term remains appropriately limited by the first sentence provided in the definition.

(79) COMMENT: Item 3 within the definition of "disturbance of the water level or water table" is beyond the scope of the Act. The proposed definition implies that the Department would be allowed to regulate activities located outside of wetlands and transition areas to potentially regulate all shallow wells in the State, regardless of location. This would require hydrologic studies before any activity such as basin design or well construction can occur (Pennoni Associates Inc., Enviro-Resource Inc.).

RESPONSE: The proposed language at N.J.A.C. 7:7A-2.3(a)2 has been deleted based on legal advice from the Attorney General's office. See response to Comment 236. However, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in wetlands.

(80) COMMENT: We object to the proposed definition of "disturbance of the water level or water table" which would allow regulation of activities outside of wetlands. This matter was settled in *NAIOP v. DEPE,* 241 *N.J. Super.* 145 (App. Div. 1990) *cert. denied,* 122 N.J. 374 (1990).

RESPONSE: The proposed language at N.J.A.C. 7:7A-2.3(a)2 has been deleted based on legal advice from the Attorney General's office. See response to Comment 236. However, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in wetlands.

(81) COMMENT: Regarding the definition of "disturbance of the water level or water table", regardless of a scientific basis which supports a 12 inch draw down limit, how is the Department or an applicant to determine the possibility of the consequence (Somerset County Planning Board)?

RESPONSE: The proposed language at N.J.A.C. 7:7A-2.3(a)2 has been deleted based on legal advice from the Attorney General's office. See response to Comment 236. However, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in wetlands.

(82) COMMENT: The definition of the "disturbance of the water level or water table" should be modified to indicate that a draw down of six inches is a regulated activity because a six inch drop in the water table is sufficient to alter the vegetation of many emergent wetlands (Wander Ecological Consultants).

RESPONSE: The results of an extensive literature search conducted by the Department indicates that the lowering of a water table in a wetland by eight inches will result in significant impacts to the vegetative community. While the proposed language at N.J.A.C. 7:7A-2.3(a)2 has been deleted based on legal advice from the Attorney General's office, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in wetlands. See response to Comment 236.

(83) COMMENT: In the definition of "disturbance of the water level or water table", it appears that a groundwater well would be a regulated activity. Is this true (U.S. Fish and Wildlife Service)?

RESPONSE: If the well is installed in wetlands, State open waters or transition area results in a documented drawdown in a wetlands, thereby altering the hydrology, it would be considered a regulated activity.

(84) COMMENT: We support the proposed addition to the rule concerning the definition of "disturbance of the water level or water table." In our opinion, this is a significant step toward inter-agency cooperation (Associated Executives of Mosquito Control Work in New Jersey).

RESPONSE: The Department acknowledges this comment in support of the rule proposal. However, the proposed language at N.J.A.C. 7:7A-2.3(a)2 has been deleted based on legal advice from the Attorney General's office. See response to Comment 236. The Department will

continue to regulate all documented drawdowns of the water table resulting from activities occurring in wetlands.

(85) COMMENT: The definition of "ditch" excludes "channelized or redirected, natural watercourses." However, in some cases watercourses altered in this way would meet the first part of the definition for a ditch. Streams which were altered years ago (i.e., before the Federal Section 404 program) can hardly be called or treated as natural systems. It would help the definition to add the qualifier "with bed and banks" after "depression" (Amy S. Greene Environmental Consultants).

RESPONSE: If the Department were to classify every watercourse which was altered before the effective date of the Federal Act as a "ditch," a large percentage of the State's surface water resources would fall into that category since human development has reshaped vast areas of the State. The Department agrees that the addition of the phrase "with bed and banks" would help to clarify this term and has amended N.J.A.C. 7:7A-1.4 accordingly in this adoption.

(86) COMMENT: The definition of "ditch" should include the channelization or redirecting of natural watercourses. Farmers, for decades, have redirected watercourses to maximize useable acreage. The fact that historical evidence may exist to support this does nothing to change the existing character of the streams that now function as manmade ditches. The definition as proposed will require extensive evaluation of soils by a registered soil scientist to determine if any prior channelization has occurred (Pennoni Associates).

RESPONSE: The definition of "ditch" is used for purposes of resource classification and for the applicability of general permit no. 7. The Department does not agree that because a watercourse has been altered that it is equivalent in resource value to a manmade ditch. Given the intense development pressure on this State, a conclusion that the alteration of natural streams work to convert them into "ditches," would result in the reclassification of most of the State's watercourses as "ditches." Since the determination of whether or not a watercourse is natural can be made by reviewing various map sources, the evaluation would not be so extensive as to be unwarranted. The Department acknowledges that watercourses and wetland environments throughout the State have historically been the subject of human manipulation. It is specifically for this reason that these areas must be distinguished from true "ditches," which by their nature, do not provide the full range of functions and values associated with wetlands and waters of the State.

(87) COMMENT: The term "redirected natural watercourses" as used in the definition of "ditch" is subjective and needs to be clarified. Based upon past experience with the Department, unless this term is clarified it will lead to confrontation in the field (Pureland, N.J. Society of Professional Engineers).

RESPONSE: The Department disagrees that the term is subjective. Whether a natural watercourse has been redirected will be objectively verifiable either by on-site observation, or by a review of the appropriate maps.

(88) COMMENT: The definition of "ditch" should include the greater than fifty acres drainage area limitation which is used in the "swale" definition. This limitation will reduce vagueness in application of this term (Brokaw Deriso Associates).

RESPONSE: The commenter's proposed amendment would limit the definition of ditch to only those features which drain less than 50 acres. This would unnecessarily narrow the definition by no longer regulating features that drain less than 50 acres. This limitation is not contained in the Act or in the Federal Act; therefore, this change will not be made.

(89) COMMENT: Roadside ditches should not be regulated areas because this regulation creates delays in road repairs necessary to provide safe driving conditions for motorists (Professional Soil Investigations).

RESPONSE: If a roadside ditch meets the definition of "waters of the United States" it must be regulated under the Act. However, the Department has authorized Statewide general permits for maintenance of all roadside ditches on a township or county basis that are good for five years to help avoid delays.

(90) COMMENT: The additional language proposed in the definition of "ditch" will cause undue confusion for the regulated community. While we appreciate the Department's efforts to clarify this definition, virtually any ditch could be said to channel or redirect a natural watercourse. Thus the definition seeks to invalidate the intent of the Act (NAIOP).

RESPONSE: The definition seeks to exclude altered, natural watercourses from inclusion with man-made ditches. Man-made "ditches" created in uplands cannot be construed as the redirection or channelization of a natural watercourse and therefore will be classified as "ditches," thus fulfilling the mandates of the Act to authorize up to one acre of fill in "a man-made drainage ditch," not an altered, natural watercourse.

(91) COMMENT: The definition of "ditch and swale" should conform to definitions and acceptable management practices developed by the U.S.D.A. Soil Conservation Service (SCS) if these terms apply to agricultural land (N.J. Farm Bureau).

RESPONSE: The definitions included in these rules are composed in response to the mandate of the Freshwater Wetlands Protection Act, while those used by the SCS originate from other laws and for other purposes. These terms define the scope of regulated features under the Act and may not necessarily conform to definitions under other law.

(92) COMMENT: Is cleaning an existing ditch, dredging in the context of the definition of "dredging" (Pureland).

RESPONSE: Yes, in certain cases the cleaning of an existing ditch will be considered "dredging."

(93) COMMENT: The definition of "EPA Priority Wetlands" suggests these wetlands have considerable resource value. Is this always the case (Pureland)?

RESPONSE: Any wetland included within the definition of "EPA Priority Wetlands" has considerable resource value. EPA Priority Wetlands are so designated because they meet several criteria. They provide unique habitat for fauna or flora; contain unusual or regionally rare wetland types; they are ecologically important and under threat of development; they are critical to protect water supplies; and they are valuable for providing flood storage capacity.

(94) COMMENT: The categories of wetlands included as "EPA Priority Wetlands" require refinements to ensure consistent application in the regulatory program. For example, the category of "sole source aquifer" should be deleted since they encompass a wide geographic range throughout the State and the application of this category by the Department has been inconsistent (Louis Berger & Associates Inc.).

RESPONSE: The EPA Priority Wetlands List was the subject of a public notice on May 7, 1990, and the public was given a 60-day comment period to make specific suggestions at that time. This process was initiated to enhance public input into this document. The comments received have been summarized and will be forwarded to U.S. Environmental Protection Agency (EPA) for their response and possible modification of this document. Until such time as the EPA modifies this document and notifies the Department of the changes, the Department will continue to use the current manual in identifying "EPA Priority Wetlands." Due to the extensive and unreasonable nature of the areas defined by the "sole source aquifer" the Department has not used this designation in identifying "U.S. EPA Priority Wetlands."

(95) COMMENT: The expansion of the definition of "EPA Priority Wetlands" to reference a particular map is a good idea in theory. However, the maps should be site specific (Connell, Foley and Geiser).

RESPONSE: The EPA Priority Wetlands List is produced by the EPA. While some EPA Priority wetlands are site specific, there are other types of EPA Priority wetlands which have been so designated because of regional and not site specific concerns.

(96) COMMENT: In the definition of "EPA Priority Wetlands" the DEPE should clarify that these wetlands only include those that have been adopted by the EPA and the DEPE through the rulemaking process (N.J. Builders Association, NAIOP).

RESPONSE: The EPA Priority Wetlands List is the responsibility of the EPA; how it is produced is governed by Federal laws and implementing regulations. It is beyond the jurisdiction of the State to promulgate this EPA document. The Department made the EPA Priority Wetlands List the subject of a public notice on May 7, 1990, and the public was given a 60-day comment period to make specific suggestions at that time. This process was initiated to enhance public input into this document. The comments received have been summarized and will be forwarded to U.S. Environmental Protection Agency (EPA) for their response and possible modification of this document. Until such time as the EPA modifies this document and notifies the Department of the changes the Department will continue to use the current manual in identifying "EPA Priority Wetlands" as mandated by the Act at N.J.S.A. 13:9B-23.

(97) COMMENT: The definition of "EPA Priority Wetlands" should be modified to include the following phrase, "designated by EPA pursuant to (CITE APPROPRIATE SECTION OF THE C.F.R.)" (NAIOP).

RESPONSE: The U.S. Environmental Protection Agency has not promulgated this document in the Federal Register; however, its use is specifically mandated by the Act at N.J.S.A. 13:9B-23.

(98) COMMENT: We strongly support the promulgation and publication of this important regulatory tool (EPA Priority Wetlands) for conservation (N.J. Audubon Society).

RESPONSE: The Department acknowledges the support of the commenter; however, it should be noted that this list has not been formally promulgated as a rule. The EPA Priority Wetlands List was the subject of a public notice on May 7, 1990, and the public was given a 60 day comment period to make specific suggestions at that time. This process was initiated to enhance public input into this document. The comments received have been summarized and will be forwarded to U.S. Environmental Protection Agency (EPA) for their response and possible modification of this document. Until such time as the EPA modifies this document and notifies the Department of the changes the Department will continue to use the current manual in identifying "EPA Priority Wetlands."

(99) COMMENT: The definition of "fill" should be amended to include pilings (Public Advocate of New Jersey).

RESPONSE: In order to facilitate assumption of the 404 program, as mandated at N.J.S.A. 13:9B-27, these rules were drafted to reflect the Section 404(b)1 guidelines to the extent possible. Therefore, pilings, which do not constitute fill thereunder, were not included under the definition of fill at N.J.A.C. 7:7A-1.4. From a practical application of the regulatory program, this does not make a difference since the placement of pilings is clearly a regulated activity listed at N.J.A.C. 7:7A-2.3(a)4, distinct from the "dumping, discharging or filling with any materials" listed at N.J.A.C. 7:7A-2.3(a)3.

(100) COMMENT: The definition of "freshwater" should not be deleted from the regulations, particularly if the intent is to attempt to regulate coastal wetlands under this Act (New Jersey State Bar Association, Hannoch Weisman).

RESPONSE: The definition of "freshwater(s)" was deleted because it was not used anywhere in the rules. Please note that the definition of "freshwater wetland" has not been deleted.

COMMENT: Several individuals and groups said that the definition of "freshwater wetland" needs clarificaton because:

(101) In the proposed definition, freshwater wetlands include tidally influenced wetlands and this does not conform with the intent of the Act because in the Act the Legislature "finds and declares that the State has acted to protect coastal wetlands" (Mark H. Burlas, Sandoz Pharmaceuticals Corporation, AES Corporation, N.J. Builders Association);

(102) Tidally influenced wetlands which were not mapped should be reevaluated and brought under CAFRA jurisdiction, not the Freshwater Wetlands Protection Act (Act) (Mark H. Burlas, Sandoz Pharmaceuticals Corporation);

(103) Regulatory overlap will occur should tidally influenced wetlands be allowed to be incorporated into the Freshwater Wetlands Protection Act further stressing the already burdensome regulatory procedure and review process (Mark H. Burlas and Sandoz Pharamceutials Corporation);

(104) The Legislature clearly intended the Act to take jurisdiction over all freshwater wetlands and did not address provisions to cover those wetlands which are saline and/or tidal wetlands and are not covered under the Wetlands Act of 1970 (NJ Chapter National Association of Industrial and Office Parks [NAIOP], N.J. State Bar Association, Connell, Foley & Geiser);

(105) Any attempt to fill the gap caused by the omission of some coastal wetlands from mapping under the Coastal Wetlands Act should be corrected by legislation (NJ Chapter National Association of Industrial and Office Parks, N.J. State Bar Association);

(106) It is unclear whether including tidally influenced wetlands in the definition of freshwater wetlands conforms with the intent of the Act (Resource Services North, Inc.);

(107) Tidal wetlands are already regulated under the Wetlands Act of 1970 and that Act contains provisions for amending promulgated maps and they should be used as intended (Environmental Evaluation Group);

(108) If DEPE wishes to extend their jurisdiction by regulating these tidally influenced wetlands, they should do it by amendment to the Wetlands Act of 1970 since tidal wetlands are already regulated in a different manner than freshwater wetlands (Amy S. Greene Environmental Consultants, Inc., N.J. Builders Association);

(109) If the State tries to take jurisdiction over the infill lagoon area properties with tidally influenced wetlands not shown on the 1970 Wetlands Mapping, it will result in a severe financial hardship and jeopardize the investment of the owners of these properties (Patrick J. Connell, N.J. Builders Associaton); and

(110) There are no provisions in the Federal regulations that would allow the state to assume Section 10 jurisdiction if the program is delegated to the state (N.J. Builders Associaton);

RESPONSE: The definition of "freshwater wetland" contained within the Act refers to areas that meet certain hydrology, hydrophytic vegetation and soil conditions and does not exclude areas based on salinity or tidal regime. The Act at N.J.S.A. 13:9B-4(c) does, however, exempt "areas regulated as a coastal wetland pursuant to [the Wetlands Act of 1970]."

The Wetlands Act of 1970 (N.J.S.A. 13:9A-1 et seq.) defines "coastal wetlands" as those areas occuring south of the Raritan Bay to Cape May then north up the Delaware Bay, that are now or were formerly connected to tidal waters whose surface is at or below an elevation of one foot above local extreme high water, and which may contain the designated plant species.

There are clearly areas that are tidally influenced and are saline in nature that do not fall under the definition of a tidal wetlands under the 1970 Wetlands Act. Because these wetlands are included in the definition of wetlands under the Act and are not regulated as coastal wetlands, the Department may properly regulate these areas under the Act. Moreover, distinctions among wetland types are somewhat artificial and arbitrary. Wetland systems associated with tidal waters form a continuum with freshwater wetland maritime environments. Clearly in enacting the Freshwater Wetlands Protection Act, it was the intent of the Legislature to "take vigorous action" to protect all wetlands not otherwise regulated as coastal wetlands. See N.J.S.A. 13:9B-2. It is absurd, for instance, to attribute to the Legislature the intent to leave unprotected tidal wetlands along the Hudson River that are tidal but not regulated as a coastal wetland because the Wetlands Act of 1970 excludes areas north of Raritan Bay.

Based on legal advice from the Attorney General's office regarding this statutory provision, proposed rules will be amended upon adoption to state that the definition of freshwater wetlands will include those areas which are not defined as coastal wetlands pursuant to the Wetlands Act of 1970. This will exclude from regulation under the Act any wetlands that the Legislature chose to regulate under the Wetlands Act of 1970. The Department promulgated coastal wetlands maps between 1970 and 1973, and again between 1982 and 1984, for an approximate total of 1000 maps. The Department will reevaluate coastal wetland maps at some time in the future depending on financial constraints.

The commenter should note that there are many classes of projects and geographic areas that are not regulated by the Coastal Area Facilities Review Act (N.J.S.A. 13:19-1 et seq.) (CAFRA). Projects that involve wetlands and fall under the jurisdiction of either CAFRA or Waterfront Development Law (N.J.S.A. 12:5-3) will be required to meet the wetlands policy pursuant to the Coastal Permit Program rules (N.J.A.C. 7:7) that implement these statutes.

No regulatory overlap will occur as a result of this provision since the Act clearly exempts "areas regulated as a coastal wetland pursuant to P.L. 1970, c.272 (C. 13:9A-1 et seq.)."

The Department does not believe that this provision will increase the financial burden of an applicant. In addition, the Legislature in its findings and declarations stated that "in order to advance the public interest in a just manner the rights of persons who own or possess real property affected by this Act must be fairly recognized and balanced with environmental interests; and that the public benefits arising from the natural functions of freshwater wetlands, and the public harm from freshwater wetlands losses, are distinct from and may exceed the private value of wetlands areas."

This provision is not related to the assumption of the 404 program nor does it involve the delegation of Section 10 waters. Rather, the Department is implementing the Legislative intent that, with the passage of the Freshwater Wetlands Protection Act, all wetlands within the State will receive protection under State law.

(111) COMMENT: The State should not regulate tidally influenced wetlands in lagoon developments because these wetlands are fragmented, marginal and of low value when compared to the continuous unaltered wetlands that surround them (Patrick Connell).

RESPONSE: The Act mandates the protection of all wetlands regardless of "value." Based on legal advice from the Attorney General's office, the proposed rules will be amended upon adoption to state that the definition of freshwater wetlands will include those areas which are not defined as coastal wetlands pursuant to the Wetlands Act of 1970. In situations where wetlands in tidal lagoons do not meet the definition of coastal wetlands pursuant to the Wetlands Act of 1970, these wetlands will be regulated according to the adopted rules.

(112) COMMENT: The State should not extend its freshwater wetlands jurisdiction to tidally influenced wetlands within filled lagoon developments because the caseload of the Bureau of Regulation will substantially increase as will the caseload of the Office of Legal Affairs due to an increase in the number of appeal requests (Patrick Connell).

RESPONSE: The Department does not decide on the proposal or adoption of rules based on the potential caseload or number of appeal requests. Rather, the rules are written to reflect the mandates and the intent of the Act. If a provision involves legal issues the Department will seek the advice of the Attorney General's office and will base its decision on their input.

(113) COMMENT: A definition for "high water line" should be included in this document. This definition should be consistent with the USACOE definition that states it is the elevation of the 2.3 year flood elevation (Pennoni Associates).

RESPONSE: The Department agrees that a definition of "high water mark," referenced at N.J.A.C. 7:7A-9.2(a)10, is needed. Therefore, the rule has been amended at N.J.A.C. 7:7A-1.4 to reflect this clarification.

(114) COMMENT: In the definition of "hydric soils" the statement "or other soils exhibiting hydric characteristics identified through field investigations" is a very broad statement. It is recommended that the Department remove this statement from the proposed amendments and substitute it with the phrase "and any other soil that meets the definition of a hydric soils as defined by the National Technical Committee for hydric soils sponsored by the Soil Conservation Service." This will give precise criteria for what is a hydric soil and what is not and will not open to debate the question of soils exhibiting hydric characteristics (Environmental Evaluation Group, N.J. Builders Association, NAIOP).

RESPONSE: The Department agrees that a clarification is necessary to identify the guidelines that will be followed by the staff in applying this criteria. However, the rule will not be amended as suggested to limit only those areas that meet the definition of hydric soils. Rather, the definition at N.J.A.C. 7:7A-1.4 has been amended to state that staff will apply the criteria, regarding the use of hydric soils in the field, contained within the 1989 Federal Manual for Delineating and Identifying Jurisdictional Wetlands.

(115) COMMENT: One commenter suggested that the definition of "hydric soil" be amended to read as follows: "Also, the wet phase of somewhat poorly drained soils . . ." (Enviro-Resource Inc.).

RESPONSE: The Department will not make the suggested amendment; instead, the rule has been amended to include a reference to the hydric soils criteria section in the 1989 Federal Manual for Delineating and Identifying Jurisdictional Wetlands.

(116) COMMENT: The inclusion of the statement "or other soils exhibiting hydric characteristics identified through field investigations" anticipates that the State employees are qualified to make this judgment. The definition of hydric soils should remain consistent with the unified Federal Manual (Pennoni Associates).

RESPONSE: As previously stated, the language will be amended to reference the 1989 Federal Manual for Delineating and Identifying Jurisdictional Wetlands and the definition of hydric soils criteria provided therein.

(117) COMMENT: The definition of the term "hydric soils" should not be modified to include the phrase "or other soils exhibiting hydric characteristics identified through field investigation", as mottling in soils due to the previous hydric condition can persist for long periods of time after the hydric conditions have disappeared (New Jersey State Bar Association, Hannoch Weisman, AES Corporation).

RESPONSE: The rule has not been amended as suggested; however, the definition of "hydric soils" has been amended upon adoption to clarify that the Department will use the criteria as described in Part III of the Federal Manual to identify hydric characteristics.

(118) COMMENT: Existing "prior to the Act" undrained soils should not be listed as hydric in the definition of "hydric soils." The "wetphase" of some soils should be classified. This definition is ambiguous as written (Pureland).

RESPONSE: The definition of "hydric soils" clearly includes soils in their undrained condition, which is totally different from the commentor's mistaken reading of "undrained soils." Further, the Act provides no exemption based on hydrologic conditions of the soil prior to the effective date of the Act. Therefore, the rule will not be amended as suggested.

(119) COMMENT: A definition for "impervious surface" would be beneficial along with a list of types of impervious surfaces (e.g., pool, paved road, etc.) (Amy S. Greene Environmental Consultants).

RESPONSE: The Department will continue to use the common meaning of this term used at N.J.A.C. 7:7A-7.4(f). In addition, examples have been added to the rule in the definition of "redevelopment" at N.J.A.C. 7:7A-1.4 as suggested.

(120) COMMENT: "Individual Water Quality Certification" and "Individual Freshwater Wetlands Permit" should be defined (Amy S. Greene Environmental Consultants).

RESPONSE: Since the rules governing the issuance of Water Quality Certification have not been adopted the Department has not added a definition of Individual Water Quality Certification upon adoption. The rules have been amended at N.J.A.C. 7:7A-1.4 to include a definition of "individual permit."

(121) COMMENT: There should be a definition for "infill development" (Enviro-Resource Inc.).

RESPONSE: N.J.A.C. 7:7A-2.5(c), which used the term "infill development," has been deleted upon adoption. N.J.A.C. 7:7A-7.2(e)3 and 7.3(d)3, which made reference to "infill residential development," have also been deleted upon adoption. Therefore, there is no longer the need to define these terms.

COMMENT: Several individuals or groups were concerned about the proposed definition of "isolated wetlands or state open waters." They made the following comments:

(122) The definition should include those wetlands and open waters which may be artificially drained by a stormsewer system but which are otherwise isolated (Langan Engineering, N.J. Builders Association);

(123) The phrase "connected to" needs to be clarified so that the reader knows whether groundwater flow is considered to be an acceptable means of connection (Resource Services North Inc., Amy S. Greene Environmental Consultants, Mark H. Burlas, Sandoz Pharmaceuticals Corporation);

(124) The term "connected to" needs clarification to describe whether a wetland which drains overland and not through a defined channel is a regulatory connection (Amy S. Greene Environmental Consultants);

(125) It is not clear whether the Department is including stormwater pipes as a means of connection. Stormwater pipes are not surface water tributary systems because they are not on the surface. This definition must be clarified to specifically state whether stormwater pipes are a source of connection (Environmental Evaluation Group);

(126) The definition continues to be unclear and potentially inconsistent with the intent of the legislature. We suggest that the definition be modified to read, "means a freshwater wetland or State open water which does not have a surface connection to a surface water tributary system discharging into a lake, pond, river, stream or other surface water feature" (Archer and Greiner);

(127) The definition should be modified to include the following language, "means a freshwater wetland or state open water which does not have a regulated surface connection to a surface water tributary . . ." (NAIOP);

(128) The addition of "State open waters" confuses this definition (N.J. Society of Professional Engineers);

(129) The definition should be amended to state, "Isolated wetlands or State open waters means a freshwater wetland or State open water which is irreversibly and permanently isolated, and is not connected to a surface or groundwater tributary system discharging into a lake, pond, river, stream or other surface water feature." Small wetland areas often provide needed floodwater controls and are capable of fulfilling vital wetland functions in urban and suburban areas where they are most commonly encountered. With proper management and protection, many of these wetlands with their functions can be restored and enhanced (New Jersey Conservation Foundation);

(130) For clarity, this definition of "isolated wetlands" should be distinguished from those isolated wetlands defined for purposes of classification. Bogs should be specifically excluded from this definition and should be inserted in the definition of "special aquatic sites." In addition, State open waters should be defined separately (ANJEC, Great Swamp Watershed Association); and

(131) Bogs and prime aquifer recharge wetlands should be excluded from the definition of "isolated wetlands" and thus should not be eligible for elimination under Statewide General Permit no. 6 (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rule has been amended to provide the following clarification. The term "connected to" within the definition of "isolated wetlands or State open waters" includes all surface connections whether regulated or not, as well as connections by way of stormwater or drainage

pipes. "Connected to" does not include a groundwater connection nor does it include overland flow unless there is evidence of scouring or erosion. To further clarify the definition, the rule will be amended to state that it includes both "isolated wetlands" and "isolated State open waters." The potential for reconnecting an isolated wetland will not be taken into consideration in the context of this definition. To meet the definition of "ordinary resource value wetlands" the term isolated is further modified at N.J.A.C. 7:7A-2.5(c). Therefore, a bog would have to meet additional criteria in order to be classified as ordinary resource value. Since bogs and prime aquifer recharge wetlands are classified as "wetlands" they are already, by definition, "special aquatic sites." However, this does not prohibit the issuance of a permit or authorization of a Statewide general permit or Nationwide permit under either this Act or the Federal Act.

(132) COMMENT: It is unclear how State open waters would not be connected to a surface water tributary system (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: It is not uncommon for ponds and reservoirs to be located in upland areas with no surface water connection.

(133) COMMENT: The definition of "Letters of Interpretation" has been greatly improved and made more clear (Amy S. Greene Environmental Consultants, N.J. Builders Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(134) COMMENT: We support the proposed amendment to the definition of "linear development" (ANJEC, Great Swamp Watershed Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(135) COMMENT: The proposed modification of the definition of "linear development" is unfair to the regulated public and prohibited by the Act because it will prevent the regulated public from accessing internal upland portions of their properties. Improvements within a development "such as utility lines and internal circulation roads" should not be excluded from the definition of linear development (Langan Engineering, N.J. Society of Professional Engineers, Enviro-Resource Inc.).

RESPONSE: The Department disagrees with the assertion that the modification will prevent the regulated public from accessing internal upland portions of their property. The definition of "linear development" has been modified specifically to include only roads and utility lines necessary to access upland sites. Internal circulation roads and utility lines are part of an overall development and may be modified to avoid unnecessary impacts to wetlands and transition areas.

(136) COMMENT: The added statement "improvements within a development such as utility lines, pipes, or internal circulation roads" in the definition of "linear development" is unacceptable and an unnecessary addition which is inconsistent with the rule found at N.J.A.C. 7:7A-7.4. It should not matter if linear development is part of a larger planned development (Environmental Evaluation Group).

RESPONSE: The definition of "linear development" has been modified specifically to include only roads and utility lines necessary to access upland sites. This change was necessary to exclude internal circulation roads and utility lines as they are part of an overall development plan and may be modified to avoid unnecessary impacts to wetlands and transition areas. This definition of "linear development" is not inconsistent with N.J.A.C. 7:7A-7.4 as this section specifically references this definition.

(137) COMMENT: The proposed change to the definition of "linear development" which would exclude certain improvements within a development as being classified as a linear development, disregards the fact that infrastructure for most types of development, large or small scale, is linear in nature due to accepted engineering standards associated with infrastructure. It is unreasonable to define linear development based upon whether it occurs within or between developments. In addition, this change in the definition goes beyond the statute which includes a specific definition for linear development (see N.J.S.A. 13:9B-3, Definitions). The law does not contain the language proposed by the Department. It is recommended that the proposed change to the definition of "linear development" be eliminated (Paulus Sokolowski and Sartor, New Jersey State Bar Association; Hannoch Weisman, NAIOP).

RESPONSE: The Act states that the basic function of a linear development is to "connect two points." Therefore, the term refers to major land uses such as highways, railroads, utilities and transmission lines where the opportunity for realignment is limited as opposed to the internal layout of a development. The Department has clarified this point with the adopted amendment.

(138) COMMENT: It is unclear how linear developments within a development differ from "linear development" as defined. This definition is arbitrary, capricious and discriminatory and the commenter questions whether this definition is legal. On many occassions linear developments within a development affect in a positive way, the community outside the development with respect to traffic, fire protection, waste and sewer service (Pureland).

RESPONSE: The Act states that the basic function of a linear development is to "connect two points." Therefore, the terms refers to major land uses such as highways, railroads, utilities and transmission lines where the opportunity for realignment is limited as opposed to the internal layout of a development. The Department has clarified this point with the adopted amendment.

(139) COMMENT: The proposal to delete "drives" from the definition of "linear development" is inconsistent with the Act. It is important to realize that access to an area to be developed may not be a "dedicated" road and would be referenced as a private road or drive. Therefore, to avoid unnecessary restriction on access the term "drive" should be reinstated (Brokaw Deriso Associates).

RESPONSE: The Department agrees and the rule has been amended to include this clarification at N.J.A.C. 7:7A-1.4.

(140) COMMENT: The definition of "linear development" excludes "improvements within a development such as utility lines or pipes, or internal circulation roads." It is unclear whether this exclusion is meant to exclude new public roads and utilities installed to service a development currently under construction, or only improvements to a private, existing development or site. If the former is true, why should these new roads be excluded since they could service the public as through streets just like any other roadway. This exclusion could significantly affect the options for developers and place the requirements of the FWPA at odds with township requirements (Amy S. Greene Environmental Consultants, N.J. Builders Association).

RESPONSE: The roads that would be constructed to provide through service would be connecting two points and would therefore meet the definition and would not preclude any options on the possible alternative alignments for these roads.

(141) COMMENT: The department needs to provide a rationale for reducing the "major discharge" limit of wetlands or state open waters from 10 to 5 acres (Enviro-Resource Inc. & Amy S. Greene Environmental Consultants, N.J. Department of Agriculture, N.J. Builders Association).

RESPONSE: The proposed limit of five acres at N.J.A.C. 7:7A-1.4 and 12.2 will be adopted as proposed. This figure was agreed to by both the Department and the EPA because the EPA indicated that the original 10 acre limit was too high. Further, during the review of this rule with EPA, they indicated that the Federal regulations for assumption require that they reserve the option to review impacts of any size. Therefore, the rule will also be amended to state that EPA may request to review any project regardless of the size of the discharge.

(142) COMMENT: The definition of "major discharge" should not be changed since the existing ACOE permit program provides for a Nationwide permit to discharge material into 10 acres of waters (Atlantic Electric).

RESPONSE: The definition of "major discharge" is presented in response to comments made by EPA for the purposes of assumption of the 404 Program. It is in no way related to the Nationwide permit program. The Department notes, however, that discharges of one to 10 acres are subject to more rigorous Federal review and may in fact require an Individual 404 permit.

(143) COMMENT: Before the DEPE changes the definition of "major discharge" it should await the January 13, 1992 adoption of the Nationwide permit program (NAIOP).

RESPONSE: The definition of "major discharge" is presented in response to comments made by EPA for the purposes of assumption of the 404 Program. It is in no way related to the Nationwide permit program.

(144) COMMENT: The reasoning for including "State open waters" in the definition of "mitigation" is unclear. If a ditch is present in a farm field for the sole purpose of irrigation or drainage, and that ditch is now filled for construction of a housing development, of what benefit is there for constructing a new ditch? The function or ecological value of the original ditch is now obsolete. On many sites, suitable areas for constructing replacement open waters may be nonexistent. For these

reasons, State open waters can not be treated similarly to wetlands in regards to mitigation/creation (Amy S. Greene Environmental Consultants).

RESPONSE: Generally, non-tidal drainage and irrigation ditches excavated on dry land are not regulated as State open waters and therefore, mitigation would not apply. For those waters that are not wetlands and that qualify as Waters of the U.S. and State open waters, in order to assume the 404 program, the Freshwater Wetlands Protection Act rules must be at least as stringent as the federal program. In the 404(b)1 guidelines at 40 CFR 230.75, Actions affecting plant and animal populations, (d) states that "habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat." Since these guidelines apply to all waters of the U.S., which include State open waters, these rules must reflect this requirement.

(145) COMMENT: Reference to "State open waters" in the definition of "mitigation" should be deleted. There is no statutory authority to require mitigation for State open waters (NAIOP).

RESPONSE: The Federal regulations at 40 CFR Part 233-404 State Program Regulations, governing state assumption of the 404 program, requires that "Any approved State program shall, at all times, be conducted in accordance with the requirements of the Act (Federal Act) and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose." The Act at N.J.S.A. 13:9B-27 states that the Department shall take all appropriate action to secure the assumption of the 404 program. The 404(b)1 guidelines at 40 CFR 230.75, Actions affecting plant and animal populations, (d) states that "habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat." Since these guidelines apply to all waters of the U.S., which include State open waters, these rules must reflect this requirement.

(146) COMMENT: The definition of "onsite" should be clarified by specifically stating that land under the same ownership but separated by a road is still "onsite" (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rules as proposed already address the commenters' concern. The definition of "onsite" uses the term contiguous which is defined to include adjacent properties even if they are separated by human-made barriers or structures or legal boundaries. This definition clearly includes roads.

(147) COMMENT: One commenter agreed that the date of July 1, 1988 should be added to the definition of on-site so that it includes all contiguous properties under common ownership as they existed at that time (Langan Engineering).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(148) COMMENT: The reference to transfer of property ownership subsequent to July 1, 1988 in the definition of "on-site" should be removed because it should not matter whether or not the properties merged subsequent to that date (Langan Engineering).

RESPONSE: The rule was amended to ensure that the authorization of Statewide general permits "will cause only minimal adverse environmental impacts when performed separately," and, "will have only minimal cumulative adverse impacts on the environment" pursuant to the Act. The change suggested by the commenter would allow circumvention of the intent of the Act by allowing the potential merger of properties for which Statewide general permit authorizations were granted and the subsequent application for and approval of additional Statewide general permits for this "new" property.

(149) COMMENT: We support the proposed addition of the July 1, 1988 date for determining onsite, however, we disagree that this definition should also include those properties that were merged subsequent to that date (N.J. Builders Association).

RESPONSE: The Department acknowledges the comment in support of the rule. However, the rule was amended to ensure that the authorization of Statewide general permits "will cause only minimal adverse environmental impacts when performed separately," and, "will have only minimal cumulative adverse impacts on the environment" pursuant to the Act. The change suggested by the commenter would allow circumvention of the intent of the Act by allowing the potential merger of properties for which Statewide general permit authorizations were granted and the subsequent application for and approval of additional Statewide general permits for this "new" property.

(150) COMMENT: The definition of "onsite" coupled with "contiguous" as defined previously is extremely misleading. Properties two miles apart but under the same ownership could be affected by this definition. Once again a single owner under this definition will be treated differently then multiple owners and this is discriminatory (Pureland).

RESPONSE: Since "contiguous" is defined as "adjacent properties," reason dictates that properties two miles apart would not be included in this definition. Further, the Act mandates that Statewide general permits be issued when an activity "will cause only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment" and, "will cause only minor impacts on freshwater wetlands." The piece-meal destruction of wetlands by a single landowner with extensive property holdings does not meet this objective. Similarly situated persons are treated equally, that is, all single landowners are treated equally. The cumulative impacts of a proposed development should be assessed and, if necessary, an individual permit should be obtained.

(151) COMMENT: The definition of "onsite" is legally unacceptable because it results in penalizing subsequent owners of large properties in a way that the Legislature never envisioned. There is absolutely no statutory basis for perpetually assuming common ownership of property in this manner (Archer and Greiner, NAIOP).

RESPONSE: The Act mandates that Statewide general permits be issued when an activity "will cause only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment" and, "will cause only minor impacts on freshwater wetlands." The piece meal destruction of wetlands within a watershed by a single landowner with extensive property holdings does not meet this objective. Therefore, landowners in this situation should assess the cumulative impacts of their proposed development and should apply for an individual permit.

(152) COMMENT: The definition of "permit" uses the word permit to define itself. Perhaps rephrasing as "permit means an authorization ..." would be better (Amy S. Greene Environmental Consultants, N.J. Builders Association).

RESPONSE: The Department agrees and the rule at N.J.A.C. 7:7A-1.4 will be amended to state, "permit means an approval ..."

(153) COMMENT: The revised definition of "pilings" has lost its meaning as generally understood and now includes foundations, rafts and boats. This definition should be reworded (Leslie Holzmann).

RESPONSE: The definition was amended to include pilings to be used as foundations. This definition does not include any reference to rafts or boats.

(154) COMMENT: A definition of the word "project" should be added to this subsection (Plumstead Township Environmental Commission, Township of Holmdel Environmental Commission; Township of Montgomery Environmental Commission, Lake Musconetcong Regional Planning Board, Township of West Milford Environmental Commission, Greenwich Environmental Commission, Lynn Siebert, Walter Stochel Jr., Lacey Township Environmental Commission, Endangered and Nongame Species Advisory Committee, Public Advocate of New Jersey, Leonard Hamilton, Borough of South Plainfield Environmental Commission, New Jersey Conservation Foundation, Citizens United to Protect the Maurice River and its Tributaries, Inc., Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, Passaic River Coalition).

RESPONSE: The Department agrees with the commenters' concern. However, the rule at N.J.A.C. 7:7A-1.4 has not been amended as suggested upon adoption since the department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department is proposing a definition of "project" which can be found elsewhere in this issue of the New Jersey Register.

(155) COMMENT: The DEPE should review permitted activities on a project basis instead of on a property basis. Projects would then be classified as activities that can stand alone such as having independent access and that are in no way tied to another activity (N.J. Builders Association).

RESPONSE: This would not allow the Department to assess the cumulative impacts of a development as required by the Act and the Federal Act.

(156) COMMENT: "Project" should be defined as, "a specific land use proposal, documented on plans prepared for municipal review under the MLUL which includes, but it not limited to, the use and configuration of all buildings pavement and structures, and the extent of all activities associated with the proposal" (N.J. Audubon Society, ANJEC, Great Samp Watershed Association, Environmental Defense Fund, Environmental Commission Haworth Planning Board).

RESPONSE: The Department agrees that a definition of "project" is necessary within this rule. However, the rule at N.J.A.C. 7:7A-1.4 has not been amended as suggested upon adoption since the department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department is proposing a definition of "project" which can be found elsewhere in this issue of the New Jersey Register.

(157) COMMENT: The definition of "property" indicates a site defined by lots and blocks. This effectively excludes roadways or easements which do not have a lot and block. A "property" should be a specific area defined by a deed or similar such description and would then inclde all potential "properties" within these regulations (Amy S. Greene Environmental Consultants N.J., Builders Association).

RESPONSE: The Department agrees and the rule at N.J.AC. 7:7A-1.4 will be amended to reflect rights of way as described by a deed. As "right-of-way" is merely a different description of a parcel and only applies to those parcels which are not described by block and lot, this amendment provides clarification rather than a substantial change.

(158) COMMENT: The definition of "property" should be deleted. The word is self explanatory and has no special meaning in the statute (New Jersey Conservation Foundation, ANJEC, Great Swamp Watershed Association).

RESPONSE: The term "property" if not defined may be open to various interpretations and therefore this definition will be retained.

(159) COMMENT: The definition of "redevelopment" should be revised to include the construction of structures or improvements on or below impervious surfaces legally existing in the transition area prior to July 1, 1989 (Langan Engineering, N.J. Builders Association).

RESPONSE: The Department agrees that these types of construction activities will not result in substantial impacts to the adjacent wetlands and the rule at N.J.A.C. 7:7A-1.4 will be amended to include construction of structures below paved surfaces.

(160) COMMENT: The definition of "redevelopment" is overly narrow because it may exclude some existing development on pervious surfaces. The definition should also include underground "utility" construction (New Jersey State Bar Association).

RESPONSE: The construction of structures below paved surfaces has been added to this definition. However, construction on pervious surfaces has been excluded because, unlike activities on impervious surfaces, these activities will result in the loss of the area's ability to serve as a remediation and filtration area.

(161) COMMENT: One commenter expressed support for the inclusion of the term "redevelopment" because it acknowledges the limited value of lawfully existing impervious surfaces in transition areas (Van Note Harvey Associates).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(162) COMMENT: We support the definition of "redevelopment" (Amy S. Greene Environmental Consultants, NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(163) COMMENT: I support the definition of "regulated activity" because it includes prohibited activities (Eric Luscombe).

RESPONSE: Based on the comments received and advice from the Attorney General's office, the charges from "prohibited" to "regulated" and from "waiver" to "permit" will not be adopted. This decision is based on the explicit language of the Act.

(164) COMMENT: The rules should include a definition of "State agency" (Patrick Sheppard).

RESPONSE: A definition of "agency of the State" has been added to the rules at N.J.A.C. 7:7A-1.4.

(165) COMMENT: A definition of "significant change" should be added to the rule to help in determining whether there is in fact a new project that is not exempt from regulation (N.J. Audubon Society).

RESPONSE: "Significant change" is defined at N.J.A.C. 7:7A-2.7(e).

(166) COMMENT: The definition of "State open waters" should be more explicit. Does it include Waters of the United States (Leslie Holzmann)?

RESPONSE: "State open waters" is a subset of "waters of the United States." This definition has been clarified in the rules at N.J.A.C. 7:7A-1.4.

(167) COMMENT: The proposed change to the definition of "State open waters" is sufficiently vague to the degree that it will cause arbitrary determinations by Department staff. Either the current definition should be retained as written, or a new much more descriptive one should be proposed (Consulting Engineers Council of New Jersey, Hunterdon County Engineer).

RESPONSE: The previously adopted definition incorrectly equated "State open waters" with "delegable waters." This definition has now been corrected by adopting the definition proposed on February 19, 1991. It should be noted that the changes to the definition will in no way change the current implementation of the regulations.

(168) COMMENT: The proposed definition of "State open waters" as manifested in the provisions associated with isolated wetlands, letters of interpretation, mitigation, and permits represents an unnecessary expansion of the Department's jurisdiction over questions relating to surface drainge. It is certain to promote numerous complaints from aggrieved property owners, developers, municipalities and others. (Consulting Engineers Council of New Jersey, AES Corporation).

RESPONSE: It is unclear from the comment just how the proposed amendment "represents an unnecessary expansion ... to surface drainage." However, the proposed change to this definition does not in any way expand the Department's authority since the Act has always provided protection for all waters of the United States in New Jersey.

(169) COMMENT: The definition of "State open waters" set forth in these sections are not consistent, and introduce additional ambiguity by virtue of defining "State open waters" to mean, in part, "those waters of the State" while not providing any definition as to what constitutes "those waters of the State" (Shanley and Fisher).

RESPONSE: The Department has clarified this definition in the rule by eliminating the reference to waters of the State and instead refers to waters of the United States within the boundary of the State or subject to its jurisdiction.

(170) COMMENT: The definition of "State open waters" contains unnecessary ambiguity. The Department's efforts to retain jurisdiction over certain water features such as artificial settling basins and "water filled depressions ... incidental to construction activity" is unnecessarily expansive. The Department presents no evidence that such waters serve any significant ecological function worthy of protection. The Department should use this revised rule to establish clear policies concerning circumstances when it will assert its "case-by-case" jurisdiction over open waters (Hannoch Weisman).

RESPONSE: The Federal regulations at 40 CFR Part 233-404, State Program Regulations, governing state assumption of the 404 program requires that "Any approved State program shall, at all times, be conducted in accordance with the requirements of the Act (Federal Act) and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose." The Act at N.J.S.A. 13:9B-27 states that the Department shall take all appropriate action to secure the assumption of the 404 program. This definition reflects the current Federal definition and is necessary to pursue assumption of the 404 program. Any attempt to narrow this jurisdiction will thwart this process, Neither the Act or the Federal Act direct an assessment of the ecological value of a given State open water before it is regulated. The Department establishes its jurisdiction upon the circumstances revealed during a field review. Factors considered during a review include drainage area, potential impacts to adjacent waters, and habitat.

(171) COMMENT: If the regulations are adopted as proposed they should be retitled the "Freshwater Wetlands and State Open Water Protection Act Rules". The present name does not reflect the full content of this document, nor does it acknowledge the parity between Freshwater Wetlands and State Open Waters which is contained in the proposed revisions (Consulting Engineers Council of New Jersey).

RESPONSE: The title will not be changed since the existing title eminates directly from the title of the Act and changing the title would result in more confusion than clarification.

(172) COMMENT: Provisions for mitigation should not be extended to "State open waters". These and other rules (i.e., flood hazard area regulations) are already broad enough to safeguard the environment and the public from the potential detrimental effects of disturbance in "surface water features" (Consulting Engineers Council of New Jersey).

RESPONSE: In order to assume the 404 program, the Freshwater Wetlands Protection Act rules must be at least as stringent as the Federal program. In the 404(b)1 guidelines at 40 CFR 230.75, Actions affecting plant and animal populations, (d) states that, "habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat." Since these guidelines apply to all waters of the U.S., which include state open waters, these regulations must reflect this requirement.

(173) COMMENT: The proposed definition of "State open waters" refers to "those waters of the United States that are not wetlands." What is meant by "waters of the State" (Enviro-Resource Inc.)?

RESPONSE: This definition has been clarified to eliminate the reference to waters of the State and instead refers to waters of the United States within the boundary of the State or subject to its jurisdiction.

(174) COMMENT: The definitions of "State open waters and Federal open waters" are not defined so that one can picture what they are and separate jurisdictions. How do these terms affect agriculture (N.J. Farm Bureau)?

RESPONSE: "Waters of the United States" is a broad term (see the definition in the rule as adopted in this notice of adoption) that is applied nationwide. Within New Jersey, "waters of the United States" are divided into "wetlands," those waters of the U.S. meeting the three-parameter approach, and "State open waters," those waters of the U.S. that do not meet the three-parameter approach. Ongoing agriculture within these areas are afforded various exemptions under both State and Federal law.

(175) COMMENT: As published, the definition of "State open waters" remains vague and open for interpretation. This definition should have a drainage area associated with it. A drainage area of one-quarter square mile should be established because at this point within a watershed a run-off conveyance stream reaches a level where it is important enough to be regulated. Between 50 and 150 acres, the Stream Encroachment Regulations should be sufficient to restrict negative impacts. Whether such a definition may be in conflict with the present definition of "Waters of the United States" should not be a deterrent to clarify this issue within the State regulations because the definition of "Waters of the United States" requires change also (Brokaw Deriso Associates).

RESPONSE: The change suggested by the commenter would narrow the definition in a manner which would hinder assumption of the 404 program. As described above, "State open waters" is a broad term defining the non-wetlands portion of the extent of waters of the United States. It would also be inappropriate to add a drainage area to the definition as this limitation is not included in the Federal definition.

(176) COMMENT: Does the DEPE intend to regulate irrigation ponds, stock watering ponds, settling basins, and water ponding in dredge spoil areas as State open waters (Cumberland County Environmental Health Task Force)?

RESPONSE: This definition is being adopted to facilitate assumption of the 404 program. The Department's jurisdiction is broken down into wetlands that meet the three-parameter approach and other waters that meet the definition of waters of the United States. If the areas listed above meet the definition of waters of the United States and are not wetlands they will be regulated as State open waters.

(177) COMMENT: The definition of "State open waters" is still unclear. Encroachment upon a "State open waters" is a regulated activity and requires a permit, but other landscape features, such as ephemeral streams, gullies and rills, are not regulated and can be repaired, shaped, and maintained to control erosion. Without clear definitions, landowners are not certain whether they can repair conservation practices that reduce erosion or install other best management practices without a permit. It is possible that if left unattended a gully could become a source of sediment and a regulated activity (Professional Soil Investigations).

RESPONSE: Because of the diversity of features included in the definition of State open waters, it is impossible to inventory every type of feature and the extent of regulation on each one. Therefore, before a person makes any decisions regarding whether a water feature is regulated, they should contact the Department for information. At that time the Department will address the specific feature and provide guidance on whether an activity is regulated and if so, what types of permits are available. The commenter should note that the Department does regulate landscape features such as ephemeral streams, gullies and rills, and they cannot be repaired, shaped, and maintained to control erosion without the appropriate permits.

(178) COMMENT: "State open waters" should be defined as a watercourse which has a watershed area of 10 acres or more. When calculating the runoff from a small watershed, for the construction of a farm pond, the rule of thumb is 10:1. The watershed area must be sufficient to generate enough runoff to fill the pond and maintain a constant water level. Vegetative cover and percent of slope come into play in the calculations. To maintain a pond of one acre in size requires approximately 10 acres runoff water. Therefore, it is logical to use 10 acres as the minimum watershed for a "State open water" (Professional Soil Investigations).

RESPONSE: As described above, "State open waters" is a broad term defining the non-wetlands portion of the extent of regulatory authority pursuant to the Freshwater Wetlands Protection Act. The change suggested by the commenter would narrow the definition in a manner which would prevent assumption of the 404 program.

(179) COMMENT: The definition of "State open waters" refers to "waters of the United States", but "waters of the State" is never defined. A better definition for "State open waters" would be "those waters of the United States that are not wetlands. . .". Waters of the United States has been added to the definition section, seemingly for this purpose (Amy S. Greene Environmental Consultants, N.J. Builders Association, Cumberland County Environmental Health Task Force).

RESPONSE: This definition has been clarified to eliminate the reference to waters of the State and instead refers to waters of the United States within the boundary of the State or subject to its jurisdiction.

(180) COMMENT: We object to the proposed definition of "State open waters" and the rules should be modified to reinstate the original language (NAIOP).

RESPONSE: The Freshwater Wetlands Protection Act provides the authority at N.J.S.A. 58:10A-6 for the State to regulate waters as well as wetlands. This section of the Act and the requisite sections in the rules were necessary in order for the State to pursue assumption. The previously adopted definition incorrectly equated "State open waters" with "delegable waters." This definition has now been corrected. It should be noted that the changes to the definition will in no way change the current implementation of the regulations.

(181) COMMENT: "Freshwater" should be inserted before the word "wetlands" in the definition of State open water (ANJEC).

RESPONSE: It is unnecessary to distinguish between freshwater and tidal wetlands in this definition since both are "wetlands" and not "State open waters."

(182) COMMENT: What is the DEPE's rationale for proposing the deletion of the defined term "substantial or extraordinary hardship" (N.J. Builders Association)?

RESPONSE: The term was not deleted. Rather, the definition was moved to N.J.A.C. 7:7A-7.2(g) and 7.3(f) and explained there in greater detail.

COMMENT: Several individuals and groups were concerned about the proposed amendments to the definition of "swale." They made the following comments:

(183) The definition of "swale" should be amended to eliminate the 50 foot width limitation. This limitation was established by the Soil Conservation Service to limit extremely wide channels carrying shallow depths of flow. Roughness coefficients were the primary basis for establishing this SCS design constraint, but do not form the basis for establishing the size of existing conveyance channels (William Voeltz);

(184) The definition of "swale" should be amended to eliminate the 50 foot width limitation as many important wetlands could be filled (CAREZ);

(185) We support the revised definition of "swale." The proposed clarification is appropriate (Langan Engineering, NAIOP, N.J. Audubon Society);

(186) There is a conflict between the definition of a "swale" and what DEPE has endorsed as BMPs for mosquito control (Associated Executives of Mosquito Control Work in New Jersey);

(187) The definition of "swale" is confusing and conflicting. It is inappropriate to limit the definition of a swale to those which are not part of a larger wetlands complex. Swales are natural features in the landscape that lead to natural wetland complexes. This language will greatly reduce the number of swales eligible for a general permit or for being classified as ordinary resource value. (Environmental Evaluation Group);

(188) "Swales" which form as natural features that were eroded into uplands and convey surfacewater to wetlands should be considered ordinary resource value. (Environmental Evaluation Group);

(189) The definition of "swale" should be changed to make clear that small erosional gullies do not constitute a "bed and bank" for the purposes of the definition. Very wide swales often have a slight gully in the middle since the natural tendency of water is to channelize (Amy S. Greene Environmental Consultants, N.J. Builders Association);

(190) It is not clear from the definition of "swale" how a "linear topographic depression" which conducts water from an upland to a larger wetland area or which drains "within" the wetland complex, but is it considered an "undulation"? The definition should clarify that a swale can still be connected to another wetland (Amy S. Greene Environmental Consultants, N.J. Builders Association, Louis Berger & Associates);

(191) It would be useful to have a minimum length for a "swale" as well as the width. A length of 25 foot minimum seems reasonable (Amy S. Greene Environmental Consultants);

(192) The maximum width of 50 feet proposed for the definition of "swale" is excessive since the obvious intent of the definition is to exclude parts of wetlands complexes. The typical concept of a "linear topographic depression" is a feature that does not exceed 20-25 feet in width (Amy S. Greene Environmental Consultants);

(193) Limiting the definition of a swale to 50 feet is arbitrary. The Department should refer to a physical geography textbook for an acceptable definition. The 50 foot criteria should be removed from this definition. (Environmental Evaluation Group and Pennoni Associates);

(194) The definition of "swale" requires clarification to make it clear whether a swale is a wetland with appropriate vegetation, soils, and hydrology or whether it is a water of the United States (Louis Berger & Associates);

(195) As written, the definition of "swale" implies that swales form or were constructed for a purpose and that it is impossible for a naturally occurring feature to be included in this definition. The definition should be reworded to "a swale is a natural or human made feature, which has formed or was constructed in uplands, that conveys surface water runoff from surrounding upland areas" (Louis Berger & Associates);

(196) The definition of "swale" should not exclude intermittent streams, which, in some cases, can and should be considered to be swales (New Jersey State Bar Association);

(197) The definition of "swale" is so restrictive that many existing swales no longer meet the definition (N.J. Society of Professional Engineers);

(198) The definition of "swale" should limit it to no more than 10 feet wide (ANJEC, Great Swamp Watershed Association, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission); and

(199) Under this definition, and considering the $250.00 general permit fee, there is a certainty that the DEPE will not field inspect wetlands classified as swales by developers (Great Swamp Watershed Association).

RESPONSE: The proposed amendments to the definition of "swale" are in response to requests for more predictable standards for field identification.

The proposed 50 foot limit was based on the Department's best professional judgement on which features should qualify as being a swale because their loss should result in only a minimal adverse environmental impact as mandated by the Act. This limit will include the majority of human made swales and many natural features. To further increase this limit would open many natural features to alteration under Statewide general permit no. 7 and therefore be inconsistent with the intent of the Act to allow only deminimus impacts under this permit. The above comments request changes to increase, decrease and eliminate the 50 foot width limitation. On balance, the 50 foot limit is a fair and reasonable interpretation of this provision of the Act and therefore it will be adopted as proposed.

So long as a swale is in uplands and does not connect two wetland complexes, the proposed language does not exclude a swale which feeds into a wetlands complex.

If a feature meets the definition of a swale, and is not exceptional resource value, then it will be classified as ordinary resource value.

This definition of swale does not conflict with the one found in the BMPs for mosquito control because the definitions are used for distinct and separate purposes.

The determination of whether small erosional gullies constitute bed and banks for the purposes of this definition will be determined on a case-by-case basis in the field. Due to the variability of topography, a swale can be of any length and it would be inappropriate to set a length limit. The rule has been clarified upon adoption to state that a swale is a wetland feature meeting the three-parameter approach. The definition clearly includes both natural and constructed swales that were formed "to convey" water. Intermediate streams with distinguishable bed and banks carry significant amounts of water and therefore are excluded from this definition. Unless a previous Letter of Interpretation was conducted for the site, all authorizations for Statewide general permit no. 7 are field inspected. The fee charged for an LOI is based on the approximate cost of reviewing submitted materials, conducting onsite inspections, and issuing a final decision. To the extent review fees are insufficient, the Department will propose appropriate fee changes.

(200) COMMENT: The definition of "threatened and endangered species" is incomplete because it excludes rare plant species. The State endangered plant list (N.J.A.C. 7:5C-5.1) should be incorporated into this definition since all other State and Federal lists are referenced. The Act does not indicate that the Legislature intended to exclude State endangered plants from recognition (Amy S. Greene Environmental Consultants).

RESPONSE: The Department has been advised by the Attorney General's office that because of the absence of this list or any provisions for adding new lists in the Act at N.J.S.A. 13:9B-7(d), the State endangered plant list can not be included in the definition.

(201) COMMENT: The term "USFWS" (United States Fish and Wildlife Services) should be added to the definitions (Amy S. Greene Environmental Consultants).

RESPONSE: This definition has been added.

COMMENT: Several individuals and groups commented on the proposed definition of "waters of the United States." They made the following comments:

(202) Erosion channels less than two feet wide and six inches deep created by poor soil management practices should not be considered "waters of the United States" because it may encourage regulation of these features by other regulatory organizations (William Voeltz);

(203) The definition should include erosional channels in upland areas only if they are connected to wetlands or other defined watercourses (Henderson & Bodwell);

(204) The additional language goes beyond what the Federal Government uses for this definition. Specifically numbers 3 (vi-vii), 5, and 7 should be removed. (Joseph Lomax & Associates);

(205) The definition should not include item No. 7, erosional channels up to two feet wide and six inches deep because this size limitation is arbitrary and will prevent a proper repair of erosion problems where the department's objective ought to be correcting the unstable soil condition. Language such as "which have not been stabilized by vegetation and continue to be actively eroding" should be added to the definition for clarity (Environmental Evaluation Group, N.J. Concrete and Aggregate Association);

(206) The definition at item No. 7 which refers to erosional swales should include the phrase, "on an average basis" (NAIOP);

(207) What criteria will the DEPE use to determine abandonment of a mining operation? Abandonment should be based on whether or not an approval for the activity remains valid, the time between renewal of approvals for the activity, the reclamation or restoration of a site, and an appropriate period of inactivity due to market conditions. We suggest a five year lapse in operations is appropriate (N.J. Concrete and Aggregate Association);

(208) Under this definition an intermittent stream is regulated. Since by definition, there "is not a present flow of water" in such a stream, it is questionable whether these areas should be regulated. There should be a definition limiting the extent of intermittent streams. An erosional channel less than two feet wide and six inches deep is insignificant. And erosional channel six feet wide and four feet deep may be insignificant. As written this definition is unreasonable (Pureland);

(209) The definition is a poorly defined term both in the Federal regulations and State regulations. It is suggested that a drainage basin of 320 acres should be the upstream limit of jurisdiction (Brokaw Deriso Associates);

(210) The definition allows the DEPE too much discretion (Somerset County Planning Board);

(211) The water bodies discussed under the definition at item 7 examples one through six should not be considered "waters in the United States" under any circumstances (Brokaw Deriso Associates);

(212) Inclusion of the entire definition of "waters of the United States" is very beneficial. However, the size of erosional gullies excluded from Waters of the US is too small. Severe erosion could result in gullies that are much deeper than six inches or are shallow, but wider than two feet, depending on the soil characteristics. Therefore, all erosional gullies in uplands that result from poor soil management practices should be excluded. This should include ephemeral streams that only carry water during severe storm events (Amy S. Greene Environmental Consultants, Mercer County Soil Conservation District);

(213) Does the phrase "less than two feet wide and six inches deep in upland areas resulting from poor soil management practices" apply to agriculture or are normal ongoing farming, silviculture and ranching practices exempt (N.J. Farm Bureau);

(214) We question the reservation to determine on a case by case basis that agricultural drainage ditches, irrigation ponds and irrigated areas may be "waters of the U.S." There seems to be no logic in classifying erosional channels greater than six inches deep by two feet

wide as "waters of the U.S.." Further, the correction of such erosion problems is directly related to the programs of the Department and should not be subject to some special permit by DEPE (N.J. Department of Agriculture, N.J. Builders Association);

(215) The citation for the Federal definition should be presented in the rule (Louis Berger & Associates);

(216) The definition states in part that "non-tidal drainage and irrigation ditches excavated from dry land" are generally not considered to be "waters of the United States." As such, would highway drainage ditches excavated on dry land be regulated under this definition by the State or Federal Government (Louis Berger & Associates)?

(217) Why does the DEPE limit itself to "non-tidal drainage and irrigation ditches," when this is not part of the federal definition (NAIOP)?

(218) The definition includes wet areas of all scales which might be used as habitat for birds or to irrigate crops. Many farmers have problems from migratory birds and would not encourage their habitat. Also regulating irrigation ponds is unworkable because agriculture in New Jersey is more dynamic and diverse than in other parts of the country (N.J. Farm Bureau);

(219) The definition, specifically 3iv, v, and vi, should not be adopted until criteria are provided for classifying such waters. In addition, what is the basis for including waters used to irrigate crops (N.J. Department of Agriculture)?

(220) In the definition the use of the words "generally" and "is reserved to determine on a case by case basis" is arbitrary and capricious and will effectively increase the acreage of wetlands, cost of reviews, and grossly impact small individuals, farmers, and small businesses. In particular none of the items 1-6 could ever conceivably be a water of the U.S. Further the language is expanded to include wetlands as waters of the U.S. (N.J. Society of Professional Engineers); and

(221) In the definition, the phrase "would be used" as habitat for threatened or endangered species, migratory birds, etc. is too vague. The rule should be modified to refer instead to the habitats determined by the U.S. Department of Interior, pursuant to the Endangered Species Act of 1973 (JCP&L).

RESPONSE: The Department has amended the rule to include the complete Federal definition of "waters of the United States" including clarifying language found under the "Response to Comments and Explanation of Changes," 40 CFR Part 232.2(q) and (r) for two reasons. First, the language reflects the practice and jurisdiction that the Department has exercised since the beginning of the program. Second, the Department was required to amend the rule to be consistent with the Federal definition in order to carry out the mandate to pursue the assumption of the 404 program. The federal regulations at 40 CFR Part 233-404 State Program Regulations, governing state assumption of the 404 program, requires that "Any approved State program shall, at all times, be conducted in accordance with the requirements of the Act (Federal Act) and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose."

The previous rules contained an incomplete definition. This definition provides comprehensive guidance on which features will be considered waters of the United States.

The Federal definition as written may include all erosional channels as waters, "the use, degradation, or destruction of which could affect interstate or foreign commerce." Therefore, for clarity and predictability, the Department has proposed criteria for determining when erosional channels may be considered regulated features. This general guideline is necessary because erosional channels can occur throughout the state in varying topographic situations including farm fields, oil fields, woodlands etc., and include both stabilized and unstabilized conditions. It should be noted that erosional channels exceeding this regulatory threshold are not automatically regulated as waters of the United States, but will be reviewed on a case by case basis.

The rule will not be amended to include the language "on an average basis" since the suggested language would result in the inclusion of features that are narrow for extended distances and then widen to create significant features.

In cases where the erosional channel is not connected to another surface water feature it is not likely that it would be considered a water of the United States.

The Department will determine abandonment on a case by case basis. In order to determine whether a construction or excavation operation has been abandoned, the Department will look toward the absence of such activities, finding in such cases that abandonment has occurred unless presented with creditable evidence to the contrary of intent to continue such operation. For example, the presentation of a signed contract to sell material at a point in the future would adequately demonstrate the intent to continue operation.

The rule will not be amended to include a 320 drainage area limit since this criteria has no bearing on potential environmental impact.

The definition will not be amended to exclude "ephemeral streams" since the Federal definition specifically includes "intermittent streams" which are distinguished from "ephemeral streams." This definition applies to all waters of the United States. It does not, however, address whether the modification of these features is exempt from regulation, for example under an established ongoing farming operation.

Highway drainage ditches constructed from dry land and not meeting the three parameter approach for identifying wetlands would not normally be regulated as waters of the United States.

Because of the wide variety of situations that may fall within this definition, the clauses "generally" and "the right is reserved to determine on a case by case basis" are included in this assessment of whether a water feature meets the criteria at paragraph 1 through 7 (determination of whether particular watercourses, not previously defined, are considered Waters of the U.S.). Finally, the language regarding habitate for threatened or endangered species and migratory birds is consistent with the language designated in the Federal Endangered Species Act.

Subchapter 2. Applicability

General

N.J.A.C. 7:7A-2.1 Jurisdiction

(222) COMMENT: Shouldn't this section read at N.J.A.C. 7:7A-2.1(b) "a person proposing to engage in a regulated activity **within freshwater wetlands** shall apply to the Department for a Statewide general permit authorization or a freshwater wetlands permit, and a person proposing to discharge dredged or fill material into State open waters shall apply to the Department for a **Statewide general permit authorization or** an open water fill permit". (Enviro-Resource Inc.).

RESPONSE: The rules at N.J.A.C. 7:7A-2.1(b) have been amended as suggested to provide clarification.

(223) COMMENT: Are application fees paid by developers also paying for the applications from State agencies? If not, please explain how the processing of applications are being paid (N.J. Builders Association).

RESPONSE: Since the reorganization of the Department and the elimination of the "Bureau of Freshwater Wetlands," the review of applications under the Act is carried out by a staff being funded from various sources. These sources included Federal monies, State general tax revenues, and permit fees. The amount of money allocated from sources other than permit fees is more than adequate to cover the processing of applications from State agencies.

(224) COMMENT: The rule at N.J.A.C. 7:7A-2.1(b) should be amended to read as follows, "Except when an activity is authorized under Statewide general permit No. 25 for repair or alteration of septic systems, a person ..." This will avoid confusion that development under the Board of Health is not regulated (ANJEC, Great Swamp Watershed Association).

RESPONSE: The rule has been amended upon adoption to delete the reference to the board of health at N.J.A.C. 7:7A-2.1 to be consistent with amendments to the application procedures for applicants seeking authorization for a general permit no. 25 at N.J.A.C. 7:7A-9.5.

(225) COMMENT: The rule at N.J.A.C. 7:7A-2.1(e) should be modified to include the following language, "the DEPE shall advise the applicant whenever joint permits are required" (N.J. Society of Professional Engineers).

RESPONSE: The Department has and will continue to inform the applicant when, based on the information provided by the applicant to the Department, multiple permits are required for a proposed project. This advice will be given during preapplication conferences or the initial review of a permit application. Beyond this action, the applicant must accept responsibility for compliance with all applicable laws. However, while the Department encourages the submittal of joint permit applications, the Act does not allow the Department to require "joint permits" and therefore the rule will not be amended.

(226) COMMENT: We support the proposed language at N.J.A.C. 7:7A-2.1(e). In fact the changes conform to the modifications suggested by NAIOP in our original comments (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rules amendments.

(227) COMMENT: The DEPE has failed to incorporate the NAIOP court decision into the revised subchapter 2 (AES Corporation, Hannoch Weisman).

RESPONSE: There are no provisions in subchapter 2 where it would be appropriate to incorporate any portions of the NAIOP court decision. Since the commenter has not mentioned a specific aspect of the decision which he or she feels is missing, the Department cannot respond with any greater specificity.

N.J.A.C. 7:7A-2.3 Regulated activities

N.J.A.C. 7:7A-2.3(a)2

COMMENT: Several groups and individuals commented on the proposed provision to regulate the diversion of the water level or water table pursuant to N.J.A.C. 7:7A-2.3(a)2. They had the following comments:

(228) Expansion of regulated activities to include those activities outside of wetlands that disturb the water level by 12 inches or more inside of wetlands are not authorized by the statute (Enviro-Resource, Inc., Mark H. Burlas, Sandoz Pharmaceutical Corporation, New Jersey State Bar Association, Keller and Kirkpatrick, Langan Engineering, New Jersey Builders Association, New Jersey Chapter of the National Association of Industrial and Office Parks, Somerset County Department of Public Works; form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(229) Langan Engineering and the New Jersey Builders Association stated that the rule does not identify the types of activities which are potentially regulated and there is no way to know that an activity is regulated until after it occurs and results in the draw down or diversion as specified;

(230) The New Jersey Society of Professional Engineers commented that the Department should define disturbance of water level or water table to the extent of draw down to the same extent as to increase of the water table. This provision would appear to prohibit pumping operations from existing ponds;

(231) Resource Services North, Inc. questions whether it was the intent of the Act to regulate activities that occur in uplands located outside a transition area;

(232) Mark H. Burlas, Sandoz Pharmaceuticals Corporation and Pennoni Associates Inc. asked for clarification that only activities that are occurring within the wetland and associated transition areas are regulated under this program, through a well, situated beyond the transition area may have a minor impact on the wetland;

(233) New Jersey Concrete and Aggregate Association stated that this section has broad impacts on surficial mining operations, many of which excavate much deeper than the water table. They question whether a mining operator must prove that deep excavations on the uplands of the site are not affecting wetlands offsite and wonder what is the geographic scope of this section;

(234) Brokaw DeRiso Associates, Inc. stated that to regulate draw down in a clear and concise manner, there should be a distance relative to a potentially effected wetlands included as part of the description;

(235) It is unclear whether this type of activity merely includes placing of ditches or swales or other such diversion systems within the wetland or whether activities such as grading and road construction in nearby uplands will also be regulated. Further, in order to determine whether the diversion of water does constitute a regulated activity, a quantitative assessment should be required including drainage calculations showing the volume of surface runoff to a wetland under pre- and post-development conditions (Amy S. Greene Environmental Consultants, Inc.); and

(236) Mark H. Burlas and Sandoz Pharmaceuticals Corporation stated that the hydrological testing methodologies which NJDEPE will accept for determination of the drawdown of the water table or water level must be defined.

RESPONSE: The Department has been advised by the Attorney General's office that the Act does not generally provide the authority to require permits for activities outside of wetlands. Pursuant to N.J.S.A. 13:9B-3, "regulated activity" means any of the following activities in a freshwater wetland (emphasis added). This prefatory language is unambiguous and must be read as an integral part of the definition of each regulated activity that follows, including "the drainage or disturbance of the water level or water table." See also N.J.S.A. 13:9B-8(a) ("a person proposing to engage in a regulated activity in a freshwater wetland may request a letter of interpretation"). Based on this legal advice, the proposed provision will not be adopted. However, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in wetlands. Moreover, the Department may choose, on a case by case basis to apply to the courts for injunctive or other relief in the case of intentional diversion of waters from wetlands in order to circumvent the Act and violate its protections. Under these circumstances, the Department would argue that it has the implied authority to stop activities, even if outside a wetland in order to effectuate the purposes of the Act.

(237) COMMENT: The State Soil Conservation Committee stated that this section could potentially restrict use of impounded water for agricultural irrigation since water levels will drop when pumping occurs. This could be clarified by adding, "except for the use of water for agricultural or horticultural purposes."

RESPONSE: The proposed language at N.J.A.C. 7:7A-2.3(a)2 has been deleted based on legal advice from the Attorney General's office. See response to comment 236. However, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in wetlands. Ongoing farming activities are exempt from the Act and therefore, the continued use of impounded water for irrigation will not be regulated.

(238) Professional Soil Investigations, Inc. stated that activities constructed outside the wetland area to control runoff, sedimentation and erosion such as diverting water to grass waterways, diversion terraces, storm water systems and detention basins, impact the hydrology flowing into a wetland area. Therefore, it is essential that wetlands be managed by watersheds or ecosystems.

RESPONSE: The Department agrees and the rules have been designed to accomplish the goal of managing impacts to wetlands on a watershed basis to the extent practicable under the authority of the Act.

(239) COMMENT: Louis Berger & Associates, Inc. stated that under this provision, it would be possible to drain most of the wetlands in New Jersey to a sufficient degree that the areas would no longer be subject to regulation under the Act because of the lack of wetland hydrology and lack of hydric soil.

RESPONSE: The proposal was designed to regulate major drawdowns and diversions outside of the wetlands which result in the lowering of the water table in the wetlands. Due to legal advice from the Attorney General's office, this proposed provision has been deleted. See response to Comment 236. However, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in wetlands.

(240) COMMENT: Wander Ecological Consultants stated that a permanent draw down of greater than 12 inches appears sufficient to alter the vegetation of many emergent wetlands and suggests that six inches would be a more reasonable limit.

RESPONSE: The results of an extensive literature search conducted by the Department indicates that the lowering of a water table in a wetland by eight inches will result in significant impacts to the vegetative community. While the proposed language at N.J.A.C. 7:7A-2.3(a)2 has been deleted based on legal advice, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in wetlands. See response to Comment 236.

(241) COMMENT: The Upper Rockaway Watershed Association and Borough of Mountain Lakes Environmental Commission believe that this paragraph should be revised to require regulation of alterations of hydrology of wetlands which would result in the elimination of the wetlands by drying it up. They state that, as proposed, this activity would eliminate many wetlands from being regulated despite the fact that a drawdown of this magnitude would result in changes of species composition through the alteration of water levels.

RESPONSE: If direct impacts (change in water level, change in the characteristic of the vegetation, etc.) are observed that are the result of a drawdown of less than eight inches, as a result of activities in regulated areas, the Department will regulate those activities as mandated by the Act.

(242) COMMENT: The rule at N.J.A.C. 7:7A-2.3(a)2 should be amended to include all drawdowns of the watertable in a wetland and not only drawdowns of greater than 12 inches because even a small change in water level could adversely affect wildlife, wetland vegetation, or other wetland functions. Drawdown should be considered on a site-by-site basis (Leonard W. Hamilton, Public Advocate of New Jersey, ANJEC, Great Swamp Watershed Association, CAREZ, N.J. Audubon Society).

RESPONSE: The commenters are correct, and, therefore, if direct impacts (change in water level, change in the characteristic of the vegetation, etc.) are observed that are the result of a drawdown occurring in regulated area, the Department will regulate those activities as mandated by the Act.

(243) COMMENT: The N.J. D.E.P. Endangered and Nongame Species Advisory Committee suggests that since significant changes in water table levels can have adverse effects on threatened and endangered species, draw downs of less than 12 inches should be carefully evaluated before approval to assure that they do not negatively affect threatened and endangered species.

RESPONSE: The commenter is correct and, therefore, if direct impacts (change in water level, change in the characteristic of the vegetation, etc.) are observed that are the result of activities in a regulated area, the Department will regulate those activities as mandated by the Act.

(244) COMMENT: The Citizens United to Protect the Maurice River and Its Tributaries, Inc., views the additional provision regulating diversion of surface or subsurface waters as positive but they believe that limiting ot to 12 inches jeopardizes wetland areas.

RESPONSE: The Department acknowledges this comment in support of the rule proposal. The results of an extensive literature search conducted by the Department indicates that the lowering of a water table in a wetland by eight inches will result in significant impacts to the vegetative community. While the proposed language at N.J.A.C. 7:7A-2.3(a)2 has been deleted based on legal advice from the Attorney General's office, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in a regulated area. See response to Comment 236.

(245) COMMENT: The N.J. Department of Transportation and the New Jersey Concrete and Aggregate Association questioned whether the temporary alteration of surface or subsurface waters is considered a regulated activity.

RESPONSE: The Department will only regulate an activity when it results in impacts stated at N.J.A.C. 7:7A-2.3 such as an observable change in the characteristic of the vegetation or the alteration of the water level during critical times of the year.

(246) COMMENT: The Associated Executives of Mosquito Control Work in New Jersey stated that the 12-inch draw down concurs with the mosquito control wetland management practices. They find this contradictory, however, with exclusion of a swale within a wetland complex.

RESPONSE: The Department acknowledges this comment in support of the rule proposal. The results of an extensive literature search conducted by the Department indicates that the lowering of a water table in a wetland by eight inches will result in significant impacts to the vegetative community. While the proposed language at N.J.A.C. 7:7A-2.3(a)2 has been deleted based on legal advice from the Attorney General's Office, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in regulated areas. The definition of swale does not conflict with the one found in the BMPs for mosquito control because the definitions are used for distinct and separate purposes.

(247) COMMENT: The N.J. D.E.P. Division of Fish, Game and Wildlife supports the addition of language to regulate the diversion of surface or well diversions that result in a 12 inch drawdown in the wetlands because such regulation would help protect against subtle adverse impacts to wetlands and give additional guidance to the water allocation program.

RESPONSE: The Department acknowledges this comment in support of the rule proposal. The results of an extensive literature search conducted by the Department indicates that the lowering of a water table in a wetland by eight inches will result in significant impacts to the vegetative community. While the proposed language at N.J.A.C. 7:7A-2.3(a)2 has been deleted based on legal advice from the Attorney General's office, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in regulated areas. See response to Comment 236.

(248) COMMENT: The N.J. D.E.P. Endangered and Nongame Species Advisory Committee supports the addition of language to regulate the diversion of surface or well diversions that result in a 12 inch drawdown in the wetlands because such regulation would help protect threatened and endangered species against changes in water table levels.

RESPONSE: The Department acknowledges this comment in support of the rule proposal. However, the results of an extensive literature search conducted by the Department indicates that the lowering of a water table in a wetland by eight inches will result in significant impacts to the vegetative community. While the proposed language at N.J.A.C. 7:7A-2.3(a)2 has been deleted based on legal advice from the Attorney General's office, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in regulated areas. See response to Comment 236.

(249) COMMENT: The Cumberland County Environmental Health Task Force supports the regulation of diversion or disturbance of the water level or table because it will preclude the intentional draining of wetlands for purposes of circumventing the Act.

RESPONSE: The Department acknowledges this comment in support of the rule proposal. However, the results of an extensive literature search conducted by the Department indicates that the lowering of a water table in a wetland by eight inches will result in significant impacts to the vegetative community. While the proposed language at N.J.A.C. 7:7A-2.3(a)2 has been deleted based on legal advice from the Attorney General's office, the Department will continue to regulate all documented drawdowns of the water table resulting from activities occurring in regulated areas. See response to Comment 236.

(250) COMMENT: N.J.A.C. 7:7A-2.3(c) which discusses activities that are not considered to result in the alteration of the character of a freshwater wetland should be expanded to include the deminimus impact activities such as the filling of tire ruts (± 10 square feet) (Langan Engineering).

RESPONSE: It is unclear why anyone would pursue the filling of minor tire ruts in wetlands if they were following best management practices to minimize impacts. In the unlikely event that tire ruts would result in a determination that the character of a freshwater wetland has been altered, their repair wil be a regulated activity.

(251) COMMENT: We oppose the deregulation of the activities at N.J.A.C. 7:7A-2.3(c) (Save Our Swamp).

RESPONSE: The Department agrees that it is improper to not require a permit for the activities at N.J.A.C. 7:7A-2.3(c)3 because this activity involves the discharge of dredge and fill and would result in the alteration of the character of a wetland. Therefore, the rule has been amended on adoption to delete the placement of water level or monitoring devices from this section. However, the Department proposed these amendments and has retained the other activities in this section to eliminate the regulation of activities which clearly have no impacts, or in the worst case have de minimus impacts on wetlands. Therefore, these amendments in no way contravene the intent of the Act.

(252) COMMENT: The ban on the use of motorized tools for surveying or wetlands investigation activities at N.J.A.C. 7:7A-2.3(c)1 is unreasonable as surveyors often use powered cutting tools in heavy brush. As long as the width of disturbance is controlled and vehicles are not used, it seems to make little difference how the vegetation is cut. (Wander Ecological Consultants, Atlantic Electric).

RESPONSE: The Department agrees that the intent of the amendment was to ban the use of wheeled or tracked equipment such as tractors with brush hogs an bull dozers. The proposal has been amended on adoption so as not to prohibit the use of motorized hand held equipment.

(253) COMMENT: The rule at N.J.A.C. 7:7A-2.3(c)1 should be modified to eliminate the three-foot width limitation. Further, to clearly prohibit one from maintaining distinct boundary lines is arbitrary and capricious (N.J. Society of Professional Engineers).

RESPONSE: The basis for determining that certain limited surveying activities are not regulated is based on the fact that they will not result "in the destruction of plant life which would alter the character of a freshwater wetlands." An increase in the limit of disturbance or the permanent maintenance of the allowed clearing may result in alteration to the character of the wetlands and, therefore, the Department will not adopt this suggested amendment to the proposal.

(254) COMMENT: We recommend that the routine maintenance of vegetation within existing ROWs be deregulated because it does not alter the character of the wetland (Atlantic Electric).

RESPONSE: As stated during earlier rule adoptions and during meetings with various utility companies, if utility lines are maintained at a minimum of once a year then the Department would not consider the activity regulated since it is unlikely that it would alter the character of the wetland. However, since utility lines are maintained on a five to 10 year rotational schedule and will destroy the maturing scrub/shrub or sapling communities with their associated habitat values thus reducing them to herbaceous communities, their maintenance is considered a regulated activity. The commenter should be aware that the Department

has worked with municipalities and utility companies to issue a Statewide general permit no. 1, effective for five years, to maintain entire ROWs within their jurisdiction.

(255) COMMENT: We recommend that the clearing of vegetation for navigational aids and markers should be deregulated (PSE&G).

RESPONSE: If the Department can make a finding that a class of activities will result in no impacts or only deminimus impacts which would not result in an alteration of the character of the wetland, certain activities will not be classified as regulated. The commenter should provide the Department with further information on the referenced types of activities. This information will be evaluated to determine whether these activities will be considered regulated.

(256) COMMENT: The limitation of 10 square feet for the placement of water level or monitoring devices is unrealistic. The disturbance limit should be increased to 100 square feet without the requirement for a permit (Langan Engineering).

RESPONSE: The rules at N.J.A.C. 7:7A-2.3(c) and 9.2(a)14 have been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters.

(257) COMMENT: The placement of water level or monitoring devices discussed at N.J.A.C. 7:7A-2.3(c)3 needs to be changed to clarify whether 10 square feet of disturbance is allowed per monitoring well or for the whole project (Van Note Harvey Associates).

RESPONSE: The rules at N.J.A.C. 7:7A-2.3(c) and 9.2(a)14 have been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters.

(258) COMMENT: The rules should be amended at N.J.A.C. 7:7A-2.3(c)3 to increase the allowed area of disturbance for water level or monitoring devices to provide for installation of groundwater monitoring wells (Cumberland County Environmental Health Task Force).

RESPONSE: The rules at N.J.A.C. 7:7A-2.3(c) and 9.2(a)14 have been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters.

(259) COMMENT: The addition of N.J.A.C. 7:7A-2.3(c) is beneficial and helps reduce the regulatory burden of performing minor activities (Amy S. Greene Environmental Consultants).

RESPONSE: The Department acknowledges this comment in support of the rule proposal. However, the rules at N.J.A.C. 7:7A-2.3(c) and 9.2(a)14 have been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters.

(260) COMMENT: We support the deregulation of fish and wildlife harvesting activities such as traps and duck blinds as proposed (DEPE Division of Fish, Game and Wildlife, N.J. Recreation and Park Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(261) COMMENT: We support the deregulation of water level or monitoring devices which do not alter the character of a wetland as proposed (N.J. Recreation and Park Association).

RESPONSE: The Department acknowledges this comment in support of the rule proposal. However, the rules at N.J.A.C. 7:7A-2.3(c) and 9.2(a)14 have been amended to delete the proposed alllowance for the placement of devices disturbing less than "one square yard" of wetlands or waters.

(262) COMMENT: The rules at N.J.A.C. 7:7A-2.3(c)1, 2 and 3 should be deleted as deregulating these activities will jeopardize assumption of the Federal 404 program. An expedited general permit review could address regulation of these activities (ANJEC, Great Swamp Watershed Association).

RESPONSE: The clarification of what constitutes a regulated activity will not hinder the assumption of the 404 program since these activities at N.J.A.C. 7:7A-2.3(c)1 and 2 do not constitute deposition of dredge and fill. However, the rules at N.J.A.C. 7:7A-2.3(c)3 and 9.2(a)14 have been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters.

(263) COMMENT: Although we support the Department's efforts to avoid the unnecessarily intrusive impacts of the Act's expansive definition of "regulated activity," the proposed additions to N.J.A.C. 7:7A-2.3(c) are fatally flawed. The Department cannot redefine "regulated activity." The placement of temporary structures for harvesting fish or wildlife falls within the plain meaning of the term "filling with any materials" and therefore must be a regulated activity. Further, the Department cannot seriously contend that there is a relevant distinction between vegetation which is altered by "motorized tools" and vegetation which is altered by hand tools. To avoid such an obviously strained and impermissible reading of the Act, the Department should simply adopt a Statewide General Permit authorizing all regulated activities which have de minimus impacts to freshwater wetlands. This permit should not attempt to arbitrarily restrict the type of activity and should be available without notice to the Department. This permit should authorize up to 1,000 square feet of impact to wetlands as of right (Hannoch Weisman, NAIOP).

RESPONSE: The Department has simply clarified a category of activities at N.J.A.C. 7:7A-2.3(c)1 and 2 which will not "result in the alteration of the character of a freshwater wetland" and which will not result in the discharge of dredge or fill. However, the rules at N.J.A.C. 7:7A-2.3(c) and 9.2(a)14 have been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters. In addition, since it is inconsequential whether vegetation is removed by hand or by using a motorized tool, the language of the rule will be amended to clarify that hand-held motorized tools may be used to comply with this section. Finally, the Department will not adopt a Statewide general permit as the commenter suggested because a blanket finding cannot be made that any activity that would disturb up to 1,000 square feet will cause only "minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the enviroment," and "will cause only minor impacts on freshwater wetlands," as stated in the Act.

N.J.A.C. 7:7A-2.4 Designation of freshwater wetlands

(264) COMMENT: Does DEPE intend to maintain a far more restrictive approach to regulating wetlands than the Federal agencies by not accepting regulatory guidance letter 90-7 which clarifies "normal circumstances" in the definition of wetlands? The changes put forth by this guidance letter are the result of scientific studies and input from universities and commissions. If DEPE does not adjust their wetland program to conform with the Federal agencies they should adopt a separate wetland delineation manual (Professional Soil Investigations).

RESPONSE: The ACOE guidance letter defines the term "normal circumstances" for use in identifying and delineating wetlands in farmed areas. If the area qualifies as "prior converted" according to the U.S. Department of Agriculture, the assumption is made that the hydrology has been permanently altered and, therefore, the area no longer meets the three-parameter approach for wetland classification. The State, however, must meet the requirements of the Act when regulating wetlands in New Jersey. Therefore, only those lands which do not meet the three-parameter approach will not be designated as a wetland regardless of their current land use type. The Department, in discussing this issue with the ACOE and the U.S. Department of Agriculture, specifically questioned whether or not hydrology has been permanently removed in lands being classified as "prior converted" and therefore the altered hydrology will be considered the "normal circumstance" for the area. The answer was "not in all cases." Therefore, the Department must review each case in order to determine whether a property listed as "prior converted" continues to meet the three-parameter approach for the purposes of determining the State's wetland jurisdiction.

(265) COMMENT: One commenter supports the reference to the Federal Manual at N.J.A.C. 7:7A-2.4(a) because it makes clear that the purpose of the regulations is to protect significant wetland values (Brokaw DeRiso Associates).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(266) COMMENT: The phrase "include but not limited to" should be eliminated in the reference to the "National List of Plant Species that Occur in Wetlands" because it conflicts with N.J.A.C. 7:7A-2.4(a) which indicates that the Federal Manual is to be utilized for wetland identification and delineation. The Federal Manual indicates that recognized hydrophytes are listed on the "National List of Plant Species that Occur in Wetlands" and does not include the referenced phrase (Langan Engineering).

RESPONSE: The Act at N.J.S.A. 13:9B-25b, mandates that "the Department shall adopt, in consultation with the EPA, a list of vegetative species classified as hydrophytes, as defined in section 3 of this Act, indicative of freshwater wetlands and consistent with the geographical regions of the State." Therefore, the State must retain its ability to recognize State species for identifying wetlands which may not occur on the Federal list and therefore has not changed the rule upon adoption.

(267) COMMENT: Two commenters stated that the phrase "include but not limited to" which modifies the reference to the "National list of Plant species that occur in wetlands" in N.J.A.C. 7:7A-2.4(d) obfuscates rather than clarifies the use of this reference. Such an open

ended statement is inappropriate in a regulatory document and should be deleted and reworded to provide more clarity to the rule (Leslie Holzmann, Consulting Engineers Council of New Jersey, NAIOP).

RESPONSE: The Act at N.J.S.A. 13:9B-25b, mandates that "the Department shall adopt, in consultation with the EPA, a list of vegetative species classified as hydrophytes, as defined in section 3 of this Act, indicative of freshwater wetlands and consistent with the geographical regions of the State." Therefore, the State must retain its ability to recognize State species for identifying wetlands which may not occur on the Federal list and the rule has been amended accordingly.

(268) COMMENT: The phrase "include but not limited to" which modifies the "National List of Plant Species that Occurs in Wetlands" at N.J.A.C. 7:7A-2.4(d) should not be included because this list is the only list available which designates plant species in wetlands and therefore, those who delineate wetlands are necessarily limited to it. It is not wise to allow other lists of indicator classifications to be used since it is quite possible that they may conflict (Amy S. Greene Environmental Consultants).

RESPONSE: The Act at N.J.S.A. 13:9B-25b, mandates that "the Department shall adopt, in consultation with the EPA, a list of vegetative species classified as hydrophytes, as defined in section 3 of this Act, indicative of freshwater wetlands and consistent with the geographical regions of the State." Therefore, the State must retain its ability to recognize State species for identifying wetlands which may not occur on the Federal list and the rule has been amended accordingly.

(269) COMMENT: We object to the language at N.J.A.C. 7:7A-2.4(d) that would allow for plant species not listed on the national list to be classified as wetlands vegetation. This is contrary to what the Federal manual says and may have the effect of identifying a plant as a wetland species. The rule should be modified to delete the phrase, "include but not limited to" (N.J. Builders Association).

RESPONSE: The Act at N.J.S.A. 13:9B-25b, mandates that "the Department shall adopt, in consultation with the EPA, a list of vegetative species classified as hydrophytes, as defined in section 3 of this Act, indicative of freshwater wetlands and consistent with the geographical regions of the State." Therefore, the State must retain its ability to recognize State species for identifying wetlands which may not occur on the Federal list and the rule has been amended accordingly.

(270) COMMENT: The revisions to N.J.A.C. 7:7A-2.4(e) establishing the Freshwater Wetlands Map and Inventory are inconsistent with N.J.S.A. 13:9B-25c of the Act. The act requires the NJDEPE to develop freshwater wetlands maps for regulatory purposes. Changing the purpose of the maps to informational contradicts the Act (Leslie Holzmann, PSE&G, Somerset County Planning Board).

RESPONSE: The Department disagrees with the commenters' interpretation of the Act. The Act at N.J.S.A. 13:9B-25c directs the Department to "develop a functional, complete and up to date composite freshwater wetlands map and inventory ... at a scale suitable for freshwater wetlands regulatory purposes." The change in the language is meant to clarify that these maps are to be used as a tool to provide information regarding wetlands which may or may not be used in the regulatory process. The statutory clause "for freshwater wetland regulatory purposes" merely modifies the preceding word "scale," rather than directing the purpose of such mapping and inventory activities. If the intent of this provision was to require that these maps define the Department's regulatory jurisdiction, the Act would have included provisions similar to those in the Wetlands Act of 1970 (N.J.S.A. 13:9A-1 et seq.) for promulgating each wetlands map as a rule.

(271) COMMENT: The NJDEPE Freshwater Wetlands Maps should include a note which explicitly states that "[W]where conflicts exist, a wetland boundary confirmed through a Letter of Interpretation supersedes these information-only maps" (Langan Engineering).

RESPONSE: When the wetlands maps are distributed, an informational pamphlet is included with each map and states, "The maps however, are not a regulatory tool. To make development or land preservation decisions about a specific site, particularly if it is in or adjacent to a wetlands polygon, people are urged to first contact the Department ...."

(272) COMMENT: The rule at N.J.A.C. 7:7A-2.4(e) should be modified to include the following language "to provide guidance for freshwater wetlands general informational purposes. These maps do not supersede wetland delineations which have been accepted and approved by DEPE for a specific site" (NAIOP).

RESPONSE: The suggested clarifying language appears in the adoption.

(273) COMMENT: One commenter questioned the legality of the proposed change contained at N.J.A.C. 7:7A-2.4(e). They argue that Freshwater Wetlands maps are supposed to be developed by the Department for freshwater wetlands regulatory (not informational) purposes. They also are concerned that changing the words "will develop" to "is developing" indicates that the DEPE does not have a set time frame or firm commitment to completion of the necessary freshwater wetlands mappings (Consulting Engineers Council of New Jersey).

RESPONSE: The change in the language is meant to clarify that these maps are to be used as a tool to provide information regarding wetlands which may or may not be used in the regulatory process. If the intent of this provision was to require that these maps define the Department's regulatory jurisdiction, the Act would have included provisions similar to those in the Wetlands Act of 1970 (N.J.S.A. 13:9A-1 et seq.) for promulgating each wetlands map as a rule. In addition, the change in language to "is developing" is to inform the public that the maps are indeed in process. To date, approximately 50 percent of the State has been mapped and, to the extent funds continue to be made available, it is anticipated that the remainder of the State will be mapped by 1993.

(274) COMMENT: N.J.A.C. 7:7A-2.4(e) should be amended to eliminate reference to periodic distribution of maps to the county clerk or register of deeds and mortgages in each county. Just make them "Available to the county clerk ...." (Enviro-Resource Inc.).

RESPONSE: The reference will remain as proposed in order to comply with the Act.

(275) COMMENT: Where are the completed Statewide Wetlands Maps? The Department has not completed its assigned task to map wetlands yet it is proposing rules that will be affected by that mapping (Pureland).

RESPONSE: To date, approximately 50 percent of the State has been mapped and, to the extent funds continue to be made available, it is anticipated that the remainder of the State will be mapped by 1993. The requirements to complete the wetland mapping inventory and pursue assumption of the 404 program (which is the main purpose for the proposed amendments) are separate mandates in the Act. The mapping program is dependent upon available funding and the commenter should again note that these maps are not for regulatory purposes. The Act does not require that the mapping program be completed before the Department pursues assumption of the 404 program and therefore these tasks are occurring simultaneously.

(276) COMMENT: The degree of wetland detail on the Freshwater Wetlands Maps and the degree of regulation do not correspond or equate. If a wetland is too small to show on a wetland map (1:12,000) how can it have significant wetland function and value that it requires preservation (Professional Soil Investigation)?

RESPONSE: The scale at which the Department chose to map wetlands was not based only on a consideration of whether all wetlands of "significant function and value" would be present at a large enough scale to be mapped. Rather, the choice of a map scale was based on practicability, that is, the funding available both for flying and for the production of photo products, the desire to produce a map that is compatible with existing map scales and that can easily be incorporated into the Geographic Information System (the Department's computerized graphic database), and the desire to have a practical tool for field use. For example, while it may have been desirable to produce a map at a scale of 1:100, the cost and the number of products necessary to cover the entire state would be prohibitive. Those criteria are independent of the significance of any wetland. Therefore, it should not be assumed that because a wetland is too small to be mapped at the chosen map scale that it is any less environmentally significant.

(277) COMMENT: Tiny wet areas which are unable to show cartographically on the freshwater wetlands maps (1:12,000) seldom have significant value and function as a wetland, even if they are part of a tributary system. Can the taxpayer afford protection of a wetland area too small to direct a wetland scientist to its location (Professional Soil Investigation)?

RESPONSE: Mapping convention and scale of the freshwater wetlands maps make it impossible to show polygons less than one acre in area. The Department disagrees with the commenter's contention that all wetlands that are less than one acre in size are of no value since these areas are often habitat for threatened and endangered species, provide flood storage protection, provide for aquifer recharge, and provide water filtration for both surface and ground waters as do other larger wetlands.

(278) COMMENT: Originally, Assemblywoman Maureen Ogden recommended $1,000,000 be appropriated to develop the wetland maps for New Jersey. Thus far, the Department has spent $4,000,000 and completed two counties. What is the projected cost of the complete set of wetlands maps (Professional Soil Investigation)?

RESPONSE: The total cost of the mapping contract is $4.2 million and to date the Department has expended half this amount and completed 50 percent of the mapping for the State.

(279) COMMENT: In what instances can the wetland maps be used in preparing letters of interpretation as stated at N.J.A.C. 7:7A-2.4(f) (Professional Soil Investigation)?

RESPONSE: The wetland maps can be used to make presence/absence determinations and to direct applicants to potential areas suitable for a footprint of disturbance letter of interpretation (see N.J.A.C. 7:7A-8.2(a)2). They are also used by business persons in assessing relative value of property and pursuing land purchase options. Alternatively, they are a significant tool for environmental commissions and other local officials in conducting inventories of critical resources.

(280) COMMENT: In the rules at N.J.A.C. 7:7A-2.4(f), does the DEPE intend to undertake exact delineation of every wetland in the State (Borough of South Plainfield Environmental Commission)?

RESPONSE: Exact delineations are only undertaken for parcels of land in which there is some particular interest, such as for potential development. As an applicant desires site specific information, he or she together with the Department shall conduct a site specific wetland delineation.

N.J.A.C. 7:7A-2.5 Classification of freshwater wetlands by resource value

COMMENT: Several comments were received regarding the title of N.J.A.C. 7:7A-2.5. They were:

(281) The Act does not provide for transition areas to state open waters. Therefore, the inclusion of "State open waters" in the heading of this subsection is inappropriate (Amy S. Greene Environmental Consultants, N.J. Builders Association, NAIOP);

(282) There is an important distinction between freshwater wetlands and State Open Waters. However, the Department proposes to use the same resource value determination and require transition areas adjacent to State Open Waters as they presently do for freshwater wetlands. We feel that it is inappropriate and that, therefore, the reference to State Open Waters should be deleted. (Consulting Engineers Council of New Jersey, Enviro-Resource Inc.); and

(283) State open waters should not be included in the discussion of resource value classifications since open waters are not subject to transition areas (Langan Engineering).

RESPONSE: The reference to "State open waters" in the title of N.J.A.C. 7:7A-2.5 was a typographical error and has been deleted on adoption. Since the title of the section itself contains no substantive regulatory provision, the change does not affect the substance of the rule.

(284) COMMENT: The term "tributary" at N.J.A.C. 7:7A-2.5(b)1 used in the context of describing the extent of exceptional resource value wetlands makes this category of wetlands too broad and open for interpretation. The specific location of the subject activity relative to its distance from the identified FW-1 or FW-2 trout production waters should be incorporated into the definition. Unless this clarification is made all means of water conveyance up to a point where a drop of water hits the top of the most remote ridgeline could fall into this classification (Brokaw Deriso Associates).

RESPONSE: The Act mandates that tributaries to FW-1 and FW-2 trout production waters receive an exceptional resource value classification. Therefore, so long as there is a surface water connection between a wetland and an FW-1 or FW-2 trout production water, that wetland will be classified as exceptional resource value.

(285) COMMENT: In the case of a residential development where homes are located on both sides of a natural depression, would each lot be found to have wetlands of ordinary value, pursuant to N.J.A.C. 7:7A-2.5(c) (Borough of South Plainfield Environmental Commission)?

RESPONSE: If the depression meets the three parameter approach and is classified as wetlands, does not meet the criteria pursuant to N.J.A.C. 7:7A-2.5(b), and if more than 50 percent of the area within 50 feet of the wetland boundary is covered by houses and lawns, these wetlands would be classified as ordinary.

(286) COMMENT: Isolated wetlands larger than 5,000 square feet should be classified as ordinary resource value if they are part of a larger non-wetland tract, which surrounds the wetland and the upland is approximately 10 times the size of the wetland (Pureland).

RESPONSE: The Department has no basis to conclude that there is any correlation between the circumstances cited by the commenter and the resource value of the wetland. Therefore, this change will not be made on adoption.

(287) COMMENT: Isolated wetlands which are a part of farm fields under cultivation should be considered ordinary resource value or be considered non-wetlands (Pureland).

RESPONSE: If an area contains hydric soils, hydrology, and a predominance of hydrophytic vegetation, it meets the criteria and is classified as a wetland pursuant to State law and the Federal manual. Further, wetlands in farm fields may provide a wide variety of functions and values including flood abatement, aquifer recharge, and filtration for surface and ground waters. Therefore, the Department can not determine that all wetlands in farm fields are of ordinary resource value or do not require the added protection provided by a transition area. The Act does, however, provide more liberal disturbance standards for isolated wetlands.

(288) COMMENT: The inclusion of tidally influenced wetlands is beyond the jurisdiction of the Act. The Wetlands Act of 1970 allows the DEPE to map tidal wetlands. Exclusion of tidal wetlands should be corrected through remapping under the 1970 Act (NAIOP, Resource Services North Inc.).

RESPONSE: The Wetlands Act of 1970 (N.J.S.A. 13:9A-1 et seq.) defines "coastal wetlands" as those areas occurring south of the Raritan Bay to Cape May then north up the Delaware Bay, that are now or were formerly connected to tidal waters whose surface is at or below an elevation of one foot above local extreme high water, and which may contain the designated plant species. The definition of "freshwater wetland" contained within the Act refers to areas that meet certain hydrology, hydrophytic vegetation and soil conditions and does not exclude areas based on salinity or tidal regime. Based on the definition of "coastal wetlands" and "freshwater wetland" there are clearly areas that are tidally influenced and are saline in nature that are not regulated by the 1970 Wetlands Act and are regulated by the Act. Statutory distinctions among wetland types are somewhat artificial and arbitrary. Wetland systems associated with tidal waters form a continuum with freshwater wetland maritime environments. For example, there are tidal wetlands along the Hudson River that are not exempt from the Act because the Wetlands Act of 1970 excludes areas north of Raritan Bay.

Based on legal advice from the Attorney General's office, the proposed rules will be amended upon adoption to state that the definition of freshwater wetlands will include those areas which are not defined as coastal wetlands pursuant to the Wetlands Act of 1970.

(289) COMMENT: We object to the definition of isolated wetlands including tidally influenced wetlands because not all tidally influenced wetlands are freshwater wetlands (N.J. Association of Realtors, Save Our Swamp).

RESPONSE: Based on advice from the Attorney General's office, the Department has decided to delete the provision of the rule at N.J.A.C. 7:7A-2.5(c)1i.

(290) COMMENT: The proposed relaxation of buffer requirements at N.J.A.C. 7:7A-2.5(c)1i on lagoon lots by allowing wetlands to be given an ordinary resource value is applauded (Environmental Evaluation Group).

RESPONSE: The Department acknowledges this comment in support of the rule proposal. However, based on advice from the Attorney General's office the Department has decided to delete the provision of the rule at N.J.A.C. 7:7A-2.5(c)1i.

(291) COMMENT: The criteria for "infill development" at N.J.A.C. 7:7A-2.5(c)1i is far too restrictive to allow this relaxed buffer standard to apply in all but a few situations on lagoon lots. For example, if there are nine lots within 200 feet of a property, seven would have to be developed to meet the test. The 75 percent figure should be lower (40-50 percent) or eliminated because this criteria is not environmentally based (Environmental Evaluation Group, N.J. Builders Association).

RESPONSE: Based on advice from the Attorney General's office, the Department has decided to delete the provision of the rule at N.J.A.C. 7:7A-2.5(c)1i.

(292) COMMENT: The definition of "isolated wetlands" for classification purposes at N.J.A.C. 7:7A-2.5(c)1i should be further expanded to encompass wetlands along the shoreline of human made lakes in areas of infill development. This situation is almost exactly analogous to the proposed rule regarding tidally influenced wetlands on human-made

lagoons. This change would provide relief to owners of tiny lakefront lots in Northern New Jersey. This change is necessary since a 50 foot transition area extending from a fringe of wetland along the shoreline often makes these 50 by 100 foot lots unbuildable. Considering that these are artificial environments, they are heavily impacted by human use. They are also impacted by effluent from outdated septic systems. There are few undeveloped shoreline lots remaining which would install modern septic systems. The additional impact to the wetlands of allowing the development of these transition areas by classifying the wetlands as isolated (and thereby of ordinary resource value) would be negligible. (Wander Ecological Consultants).

RESPONSE: Based on advice from the Attorney General's office, the Department has decided to delete the provision of the rule at N.J.A.C. 7:7A-2.5(c)1i.

(293) COMMENT: In the definition of "isolated wetlands" the Act differentiates between isolated and non surface water tributary system wetlands. It was the intention of the enabling legislation to provide a mechanism for encroachment of nonsurface water tributary systems (general permit no. 6). The state cannot void this portion of the Act without legislative action (Pennoni Associates).

RESPONSE: In order to more closely mirror the language in the Act, the rule at N.J.A.C. 7:7A-9.2(a)6 has been amended upon adoption to delete the reference to "isolated wetlands." The language adopted at N.J.A.C. 7:7A-9.2(a)6 states that Statewide general permit no. 6 shall be applicable for regulated activities in a freshwater wetland or State open water which is not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream.

(294) COMMENT: As relates to N.J.A.C. 7:7A-2.5(c)1i, what is an "upland lot"? Does this mean that if only one adjacent lot is upland (and the rest are wetland) that the criteria for "infill development" will be met? Does the entire lot have to be free of wetlands to be considered an "upland" lot (Enviro-Resource Inc)?

RESPONSE: Based on advice from the Attorney General's office, the Department has decided to delete the provision of the rule at N.J.A.C. 7:7A-2.5(c)1i.

(295) COMMENT: Under N.J.A.C. 7:7A-2.5(c)1i isolated wetlands which are influenced by tidal activity, especially below NGVD elevation 10, adjacent to bays may not be considered "isolated" in the spirit of Army Corp regulations because they are not considered headwater wetlands. This reference may be misleading giving an individual the impression that these defined wetlands may be filled with only a Statewide general permit (Maser Sosinski & Associates).

RESPONSE: Based on advice from the Attorney General's office, the Department has decided to delete the provision of the rule at N.J.A.C. 7:7A-2.5(c)1i.

(296) COMMENT: The definition of isolated wetlands at N.J.A.C. 7:7A-2.5(c)1i is confusing because technically tidal wetlands are connected to a larger waterbody. The definition is also contradictory to sections of the Federal program (Maser Sosinski & Assoc.).

RESPONSE: Based on advice from the Attorney General's office, the Department has decided to delete the provision of the rule at N.J.A.C. 7:7A-2.5(c)1i.

(297) COMMENT: The rule at N.J.A.C. 7:7A-2.5(c)1ii(1) (lawns) and (2) maintained landscaping) should be deleted as it will be too easy to circumvent the rules by mowing a transition area meadow (Franklyn Isaacson).

RESPONSE: Mowing a transition area without a waiver/permit is a violation of the Act and therefore the rule amendment does not represent a loophole to avoid regulation. However, the rule has been amended in the adoption to clarify that the surrounding land uses must have been existing prior to the effective date of the Act or were permitted under the Act. This "limiting revision" makes clear that those activities which have occurred illegally will not be considered to affect the classification under this section, and is not, therefore, a substantial change.

(298) COMMENT: "Development" as discussed at N.J.A.C. 7:7A-2.5(c)1ii should also include gravel or stone parking/storage areas and roads, heavily disturbed unpaved unvegetated areas used for parking or material storage and legally placed fill on an unimproved lot (Wander Ecological Consultants).

RESPONSE: The proposal has been amended on adoption to include gravel or stone parking/storage areas and roads. However, unimproved surfaces such as those heavily disturbed, unpaved areas and legally placed fill on unpaved lots described above, would revegetate if their use was discontinued. Therefore, the Department has not made the suggested change with respect to such unimproved surfaces.

(299) COMMENT: The procedure for determining if a wetland is "50 percent surrounded by development" at N.J.A.C. 7:7A-2.5(c)1ii is very useful and removes the subjectivity inherent without this clear definition (Amy S. Greene Environmental Consultants).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(300) COMMENT: The rule at N.J.A.C. 7:7A-2.5(c)1ii(4) should not include railroad ROWs to classify a wetland as ordinary. Many ROWs are not currently being used for rail travel and they are important environmental areas (Manchester Township Environmental Commission, Franklyn Isaacson).

RESPONSE: The rule has been clarified on adoption to specify that only active railroad ROWs will meet this criteria.

(301) COMMENT: N.J.A.C. 7:7A-2.5(c)1iii would be clearer if it read "For the purposes of this subsection, development must occupy more than 50 percent of the area within 50 feet of the wetland boundary in order for the wetland to meet the criterion of more than 50 percent surrounded by development" (Wander Ecological Consultants).

RESPONSE: The rule has been amended on adoption to include the suggested clarifying language.

(302) COMMENT: The proposed 50 foot wide swath discussed at N.J.A.C. 7:7A-2.5(c)iii is unrealistic in determining whether a wetland is more than 50 percent surrounded by development. This wording would allow nothing more than the elimination of the typical 50 wide wetland buffer around an isolated wetland. The area of investigation for this criteria should be expanded to two hundred feet (Langan Engineering).

RESPONSE: This section deals with the classification of "ordinary resource value wetlands" and would result in the elimination of the 50 foot intermediate transition area. The Department has limited the investigation to 50 feet since this is the potential transition area for freshwater wetlands of other than exceptional resource value. It is the Department's determination that if a wetland is surrounded by a largely intact buffer, this wetland will most likely have the functions and values which other wetlands provide and therefore the wetland should be classified as intermediate resource value.

(303) COMMENT: The definition of "development" at N.J.A.C. 7:7A-2.5(c)1iii, as it pertains to isolated wetlands, is significantly skewed towards small properties. Large lots such as property that contains borrow pits or farm fields with a small isolated wetland within it, may consist of two or three hundred acres. It would be impossible to have development within 50 feet of the wetland boundary that would meet the definition of more than 50 percent surrounded by development. I do not understand any sound basis for using this definition of development within 50 feet. This provision is contrary to the intent of the Act (Environmental Evaluation Group, NAIOP, N.J. Concrete and Aggregate Association).

RESPONSE: This provision is aimed at those landscapes with intense development right up to the "edge" of the wetlands. This development is usually in the form of small properties where the habitat value and functions are minimal and piecemeal buffers are not particularly meaningful. In addition, this section deals with the classification of "ordinary resource value wetlands" and would result in the elimination of the 50 foot intermediate transition area. The Department has limited the investigation to 50 feet since this is the potential transition area for wetlands which are not exceptional resource value. Since the Legislature determined that, "it is in the public interest to establish a program for the systematic review of activities in and around freshwater wetland areas designed to provide predictability in the protection of freshwater wetlands," and that "certain isolated wetlands," but not all isolated wetlands, shall be classified as "ordinary," this section is not contrary to the intent of the Act.

(304) COMMENT: The proposed rule at N.J.A.C. 7:7A-2.5(c)1iii should be modified to read as follows: "Development during the two years prior to or upon July 1, 1989", or "Development subsequent to July 1, 1989 but not later than the date of application." This modification will forestall using a long span of time to increase the percent development until it exceeds the 50 percent criterion (Franklyn Isaacson).

RESPONSE: The rule has been amended in the adoption to clarify that the surrounding land uses must have been existing prior to the effective date of the Act or were permitted under the Act.

(305) COMMENT: The restriction of ordinary wetlands to isolated wetlands of 5000 square feet which must also be surrounded by 50 percent development as discussed at N.J.A.C. 7:7A-2.5(c)1iii is far too restrictive of a definition because it is contrary to the intent of the Act and because drainage ditches and swales are used to determine that a

wetland is not isolated and therefore, does not qualify as ordinary resource value. The 50 percent criteria should be eliminated as it eliminates almost all small pockets of wetlands from the ordinary resource value category (Brokaw Deriso Associates).

RESPONSE: Since the Legislature determined that, "it is in the public interest to establish a program for the systematic review of activities in and around freshwater wetland areas designed to provide predictability in the protection of freshwater wetlands", and that "certain isolated wetlands" but not all isolated wetlands shall be classified as "ordinary," this section conforms to the intent of the Act. The commenter has failed to state why he or she believes the restriction is contrary to the intent of the Act. The Department has made the finding that this subset of isolated wetlands are of minimal environmental value and therefore meet the criteria for an ordinary resource value classification.

(306) COMMENT: For purposes of N.J.A.C. 7:7A-2.5(c)1iii, the investigation should not be limited to an area within 50 feet of the wetlands boundary. What if the size of an undeveloped lot results in a greater than 50 foot distance between an isolated wetland and development (Enviro-Resource Inc.)?

RESPONSE: The Department has limited the investigation to 50 feet since this is the potential transition area. If the wetland is not 50 percent surrounded by development, it would not be classified as ordinary resource value but would be intermediate.

(307) COMMENT: The rule at N.J.A.C. 7:7A-2.5(c)1iii should clarify the phrase "shall be investigated" to identify who the investigator should be and what the expanded level of investigation should cover. Additionally, the area to be investigated should be expanded to 200 feet to be consistent with the rule at N.J.A.C. 7:7A-2.5(c)1i (JCP&L).

RESPONSE: Since the Department is responsible for wetlands classification, the Department will ultimately review and inspect the area to determine whether it meets the criteria. This language is provided to inform the public as to how this determination is being made and to make the process consistent and predictable. In addition, based on advice from the Attorney General's office, the Department has decided to delete the provision of the rule at N.J.A.C. 7:7A-2.5(c)1i.

N.J.A.C. 7:7A-2.6 Designation of State open waters

(308) COMMENT: The reference to "wetlands" in this section should be changed to "freshwater wetlands" since no definition exists for "wetlands" in these regulations (Langan Engineering).

RESPONSE: The rule was clarified on adoption to reflect that the definition of waters of the U.S. can be found at N.J.A.C. 7:7A-1.4. The definition of wetlands can be found at the same cite as the definition of "freshwater wetlands." Therefore, the reference to "wetlands" will remain unmodified by the term "freshwater."

(309) COMMENT: The definition of State open waters as contained in this section is different than that referenced in the definition section. There is a need to be precise in defining which areas are regulated. (Enviro-Resource Inc., Amy S. Greene Environmental Consultants, N.J. Builders Association).

RESPONSE: The definition here and at N.J.A.C. 7:7A-1.4 has been clarified and made consistent in the adoption.

(310) COMMENT: The definition of "State open waters" and "waters of the United States" must be clarified and simplified so they can be easily understood by a high school graduate. Otherwise the avalanche of attorneys that have migrated to the process associated with implementation of these regulations will continue to increase (Brokaw Deriso Associates).

RESPONSE: The rule has been clarified to define "State open waters" and "waters of the United States" in a consistent manner. Anyone who has difficulty understanding the definitions can contact the Department for assistance.

(311) COMMENT: The definition of State open waters should be amended to read "... those delegable waters of the United States that are not freshwater wetlands" (NAIOP).

RESPONSE: The suggested change will not be made. "Waters of the United States" is a broad term (see the definition in the rule text in this notice of adoption) that is applied nationwide. Within New Jersey, "waters of the United States" are divided into "wetlands," those waters of the United States meeting the three-parameter approach, and "State open waters," those waters of the United States that do not meet the three-parameter approach. The previously adopted definition incorrectly equated "State open waters" with "delegable waters." This definition has now been corrected. It should be noted that the changes to the definition will in no way change the current implementation of the rules.

N.J.A.C. 7:7A-2.7 Activities exempt from permit requirements

(312) COMMENT: What objective reason would preclude adding "the operation and maintenance of existing public facilities by public agencies on land owned or controlled by the public agency" as an exempt activity? What changes are necessary in federal or state law to create this exemption (Somerset County Park Commission).

RESPONSE: The State Attorney General has addressed this matter and has limited exemptions to those found in the Act. The exemption that the commenter proposes is not in the Act nor is it in the Federal Act. Changes would be necessary to both laws in order to allow additional exemptions.

(313) COMMENT: The rules should be amended to exempt drainage control projects required to correct flooding problems that pose a hazard to the public health and safety on county roads and facilities. The Act in N.J.S.A. 13:9B-32 amends C. 58:10A-6 to specifically exempt "uncontrolled nonpoint source discharges composed entirely of stormwater runoff ..." (Middlesex County Planning Board).

RESPONSE: The Act at N.J.S.A. 13:9B-32 states that "the Commissioner may, by regulation, exempt the following categories of discharge ..." However, the State must also consider the Federal requirements for assumption of the Federal 404 program and since these activities are not automatically exempt from the necessity of obtaining a 404 permit, the State cannot exempt them. It should be noted however, that there are general permits such as a general permit no. 1 for maintenance of existing facilities, general permit no. 11 for the construction of new outfall structures and general permit no. 7 for the modification of swales and ditches, which may facilitate these activities. Further, the decision to grant or deny an Individual permit is based in part upon consideration of whether the activity is in the "public interest."

(314) COMMENT: The limitations placed on exemptions for farming and forestry activities at N.J.A.C. 7:7A-2.7(a) has been changed to apply to "any regulated activities" as opposed to just the deposition of dredged or fill material thereby eliminating the construction of farm ponds from the exemption. This change is inconsistent with the Act (N.J.S.A. 13:9B-4a) because formerly an excavated pond that involved no fill in wetlands would qualify for exemption. Also the reference to transition areas should be deleted (Wander Ecological Consultants, NAIOP)

RESPONSE: The rule has been amended on adoption to more closely tract the language of the Act at N.J.S.A. 13:9B-4e.

(315) COMMENT: Can a farmer actively manage badly disturbed and overgrown wet woodland for firewood or develop it into a hydric nursery to raise wetland native trees and shrubs (N.J. Farm Bureau).

RESPONSE: The management of a wetland woodlot and the removal of firewood are considered exempt activities so long as a forest management plan which addresses the planned activities in the wetlands has been prepared for the woodlot and has been approved by the State forester. Since the development of a hydric nursery is not an **ongoing** silvicultural activity, this would be a regulated activity and would not be exempt from the Act.

(316) COMMENT: Can a farmer work with fish and wildlife experts to develop in his wetland acres the necessary structures to encourage hunting as a way to reduce serious deer depredation on his other acres and to bring in additional income (N.J. Farm Bureau)?

RESPONSE: So long as a farmer is only building blinds and stands for hunters pursuant to N.J.A.C. 7:7A-2.3(c)2, and is not engaging in any other regulated activities, these activities can be pursued in the wetlands.

(317) COMMENT: N.J.A.C. 7:7A-2.7(b)2 should be amended as follows: "farming, ranching or silviculture" as opposed to "... silviculture purposes" (Enviro-Resource Inc.).

RESPONSE: The rule has not been amended as suggested but instead was amended to read, "farming, ranching or silvicultural purposes ..."

(318) COMMENT: The deletion of the term "established ongoing" is contrary to the Act and the Federal regulations and should be reinstated (Public Advocate of New Jersey, USEPA Region II, ANJEC, Great Swamp Watershed Association).

RESPONSE: The deletion of this term was a word processing error, and was not intentional. The term has been reinstated in the adoption.

(319) COMMENT: The Act provides no prohibition on the exemptions for "normal farming, silviculture, and ranching activities" unless these activities involve the discharge of dredge or fill material. Further the limiting definition of drainage as minor is ultra vires and should be deleted (NAIOP).

RESPONSE: The rule will be amended on adoption to more closely tract the language of the Act at N.J.S.A. 13:9B-4e. However, the require-

ment that drainage be minor in order to qualify under this exemption is taken directly from the Federal rules of the Regulatory Programs of the Corps of Engineers, specifically, 33 CFR Part 323.4 and the Federal regulations at 40 CFR Part 233-404 State Program Regulations, governing state assumption of the 404 program and therefore is necessary for assumption of the 404 program.

(320) COMMENT: The phrase "bringing an area into a use to which it was not previously subject" is contrary to the 1983 New Jersey Right to Farm Act which gave commercial farmers the right to "clear woodlands . . . install and maintain vegetative and terrain alterations and other physical facilities for water and soil conservation and surface water control in wetland areas" (N.J. Farm Bureau).

RESPONSE: The cited language is prefaced at N.J.S.A. 4:1C-9 with the limitation "which conforms to . . . all relevant Federal or State statutes or rules and regulations adopted pursuant thereto and which does not post a direct threat to public health and safety . . ." Further, the Senate Natural Resources and Agriculture Committee Statement to Senate, No. 854—L.1983, c.31, the Right to Farm Act, expresses the legislative intent to "mitigate unnecessary constraints on essential farming practices [only] if consistent with relevant Federal and State law, and nonthreatening to public health and safety . . ." The Right to Farm Act expressly recognizes that certain traditional farming activities may be contrary to Federal and State law and does not authorize these activities. Consequently the limitations placed on "bringing an area into a use to which it was not previously subject" under the Act is not inconsistent with the Right to Farm Act because these limitations arise from relevant Federal and State law specifically addressing the protection of wetlands.

(321) COMMENT: The term "previously subject" at N.J.A.C. 7:7A-2.7(a) is too subjective and needs to be defined. The rule should be amended to clearly state that only the discharge of dredge or fill materials into waters of the United States constitute a change in use (N.J. Department of Agriculture).

RESPONSE: The rule will be amended on adoption to more closely tract the language of the Act at N.J.S.A. 13:9B-4e. However, the term "into a use to which it was not previously subject" is taken directly from the Federal rules of the Regulatory Programs of the Corps of Engineers, and the federal regulations at 40 CFR Part 233-404 State Program Regulations, governing state assumption of the 404 program specifically, 33 CFR Part 323.4 and therefore is necessary for assumption of the 404 program.

(322) COMMENT: The phrase "and do not constitute a change in use" which was added to the exemption for farm ponds at N.J.A.C. 7:7A-2.7(b)2 is unclear, overly restrictive and as proposed would not pertain to new farming operations. This contravenes the intention of N.J.A.C. 7:7A-2.7(b) which specifies that properties "which have received or are eligible for a farmland assessment" should qualify for this exemption (Wander Ecological Consultants).

RESPONSE: The exemptions described at N.J.A.C. 7:7A-2.7(b), as mandated by the Federal Act, pertain only to ongoing operations. This change is not overly restrictive for ongoing operations where a new pond can be installed in an existing farmed area.

(323) COMMENT: Do exemptions run with the land even though the ownership of a farm may change (N.J. Farm Bureau)?

RESPONSE: Yes, as long as the farming operation is established prior to the effective date of the Act and is ongoing the exemption will run with the land even though ownership may change.

(324) COMMENT: The wording of the Act at N.J.S.A. 13:9B-4a, which discusses exemptions from the Act, does not include "transition areas," therefore these words should not be added to the conditions of the exemption for the construction of farm roads or forest roads at N.J.A.C. 7:7A-2.7(b)3 (Wander Ecological Consultants).

RESPONSE: The rule will be amended on adoption to more closely tract the language of the Act at N.J.S.A. 13:9B-4e, and to delete the reference to transition areas.

(325) COMMENT: The requirement at N.J.A.C. 7:7A-2.7(b)3 to remove any fill placed for forestry roads is inappropriate because these roads are needed for fire protection, future access, and intermediate harvesting of products. The roads and fill associated with them should only be required to be removed once the land use changes from forestry to another use (Land Dimensions Engineering).

RESPONSE: As the intent of the amendment was to prevent the forestry exemption from being used to circumvent the normal permitting process for access roads for other land uses, the rule has been amended on adoption to clarify this point and not require the removal of roads or fill until there is a change in land use.

(326) COMMENT: Since the roads for farming and forestry activities are to be built following best management practices to assure that the flow and circulations patterns of freshwater wetlands are not impaired, it could do more harm than good to remove the access road. Further in the next harvesting cycle the process would be repeated thus creating more unnecessary disturbance. Therefore this rule should not be adopted (N.J. Department of Agriculture).

RESPONSE: As the intent of the amendment was to prevent the forestry exemption from being used to circumvent the normal permitting process for access roads for other land uses, the rule has been amended on adoption to clarify this point and not require the removal of roads or fill until there is a change in land use.

(327) COMMENT: At N.J.A.C. 7:7A-2.7(b)3 who will develop the BMPs for construction of farm and forest roads (N.J. Farm Bureau)?

RESPONSE: The Department's Land Use Regulation Element in conjunction with the Department's Division of Parks and Forestry, and the N.J. Department of Agriculture is currently developing the BMPs. To the extent that the developed BMPs constitute a rule under the Administrative Procedures Act (N.J.S.A. 52:14B-1 et seq.) (APA) the Department will adopt them in accordance with the procedures of the APA when finalized.

(328) COMMENT: The phrase "any other wetland" should be deleted from N.J.A.C. 7:7A-2.7(b)1i(5) in the third sentence where it modifies activities which are not considered to be minor drainage. This phrase is misleading (Pureland).

RESPONSE: The Department does not agree. This statement makes it clear that minor drainage activities may not affect the wetland being directly impacted nor any other hydrologically connected wetland. Therefore, the phrase remains in the adoption.

N.J.A.C. 7:7A-2.7(d)1 and 2

(329) COMMENT: Grandfathering provisions must be established to clarify which projects will be subject to the new set of rules and amendments once they are adopted. This is important for projects which may require mitigation under the new rules (Langan Engineering).

RESPONSE: In general, the provisions contained in the amended rules will become effective upon adoption and will replace the previously adopted rules. If the Department includes special provisions for "grandfathering" from specific portions of the rules, those provisions will be included at the specific cites. Finally, the Department has decided not to adopt the provisions for requiring mitigation for certain general permits.

(330) COMMENT: Creating an exemption based on having obtained a preliminary approval that was conditioned on obtaining state and federal permits for wetland impacts is inappropriate (Passaic River Coalition).

RESPONSE: The Act at N.J.S.A. 13:9B-4d was specific in providing exemptions to projects with municipal approvals and did not exclude those approvals with conditions.

COMMENT: Fifty-one individuals or groups objected to the proposed substitution of the word "property" for "project" for various reasons. The reasons they cited are:

(331) I am totally opposed to the reasoning, documentation and conclusion that the Attorney General reaches in his formal opinion #3. The Attorney General's memorandum flies in the face of both legal reasoning and logic. Why would I, as the prime sponsor of this legislation have worked 4½ years for the passage of a bill that exempted most of the wetlands? The Act itself refers to the word project, and during the course of many revisions before the bill became law, the word "property" was changed to the word "project" to emphasize that the intent was to exempt well defined projects and not properties (Assemblywoman Maureen Ogden);

(332) The exemption should apply only to a particular project, not the entire property (Holmdel Environmental Commission, Parsippany-Troy Hills Citizens for Responsible Government, Inc, Manchester Township Environmental Commission);

(333) The Freshwater Wetlands Protection Act (Act) explicitly states that projects are exempt, not properties and by substituting the word "property", all areas subdivided between 1976 and 1988 will be exempt, resulting in the protection of very few wetlands (Upper Rockaway River Watershed Association, CAREZ Citizens Group, Borough of Mountain Lakes Environmental Commission, Borough of Mountain Lakes Environmental Commission);

(334) The Act explicitly states that projects are exempt, not property (Township of Montgomery, Gerry Pizzi, Dr. Lynn L. Siebert, West Milford Township Environmental Commission, Lake Musconetcong Re-

gional Planning Board, Lacey Township Environmental Commission, New Jersey Conservation Foundation, Citizens United to Protect the Maurice River and its Tributaries, Inc., Public Advocate of New Jersey, NJDEPE Endangered and Nongame Species Advisory Committee, Great Swamp Watershed Association, Association of New Jersey Environmental Commissions (ANJEC), Environmental Defense Fund, U.S. Dept. of Interior Fish and Wildlife Service, Plumsted Township Environmental Commission, Morris County Park Commission, N.J. Audubon Society);

(335) Since the Act does not define "project" or indicate that the word has a special meaning for purposes of the statute, the word "project" must be given its ordinary and well understood meaning which, in the context of subdivision or site plan applications, is a proposed development and the placement of buildings on land (Public Advocate of New Jersey);

(336) The Attorney General's opinion, while stating that the statutory use of the word "project" was not meant to limit the scope of the exemption, also implies that the exemption applies only to that portion of the "project" directly approved under the municipal approval. It is therefore unclear whether in cases where no additional MLUL approvals are needed, the subdivision approval would result in the complete exemption of the property or the prjoect in question. Further, when individual site plan approvals are required subsequent to the exempting subdivision, it is unclear if the additional activities approved through the site plan are also exempt (Langan Engineering);

(337) Exemptions for applications made before the June, 1988 deadline should be made for specific, detailed projects only (Leonard W. Hamilton);

(338) The word "property" should not be used since the original legislation specifically used the word "project" to indicate that the project not the property is exempt (Borough of South Plainfield, Moorestown Township Environmental Advisory Committee, Public Advocate of New Jersey);

(339) The word "property" should not be used since the intent of the legislation was to exempt projects or portions of projects for which significant money and energy had already been invested, not the entire property (Sierra Club, Moorestown Township Environmental Advisory Committee, Kathleen Munz, Gladys J. Grigis, Laura Lombardo, Jean Collon, Tewksbury Township Environmental Commission, L.H. Fretz, Denise M. Badolato, Gail Musante, Barbara Czarnomski, Josh Taylor, Jeff Archibald, Michael J. Musanti, Vince Dunne, Helen Monague, Lanie F. Morrow, Cumberland County Environmental Health Task Force, Public Advocate of New Jersey, Environmental Defense Fund, N.J. Audubon Society);

(340) The phrase "property for which subdivision applications have received preliminary approvals" is too limited because the exemption would be limited to subdivisions and may exclude commercial properties which go directly to the preliminary site plan approval phase without having to have a subdivision. Instead language should be added to state, "After the expenditure of significant funds, planning and time, ongoing development projects within a property are exempted provided the expenditure of significant funds, planning and time has been continuois and ongoing prior to July 1, 1988" (Mark H. Burlas, Sandoz Pharmaceuticals Corporation);

(341) The exemption language, as proposed, would result in the exemption of large areas of wetlands and result in increased flooding and water quality degradation (Morris County Park Commission);

(342) The exemption language, as proposed, would result in the exemption of 80 percent of the State's wetlands (Nancy Koch, Mary H. Owen, Bess N. Furness, Public Advocate of New Jersey);

(343) Changing the language from "project" to "property" is inconsistent with the Attorney General's decision where he stated that "... the word "project" is no more than a common sense recognition that local land use approvals are sought because they are a necessary predicate to the construction of something tangible, regardless of whether it is styled a project, a plan, a scheme, a development, a structure or by some other similar descriptive phrase," while Webster's New World Dictionary defines property as "a thing or things owned ... Land or real estate owned. A specific piece of land or real estate." Thus, "project" refers to an activity, while "property" refers to a specific piece of land and these are not the same (Moorestown Township Environmental Advisory Committee);

(344) The proposed change from "project" to "property" would result in the exemption of an entire parcel when the plan for approval only involved a relatively small section of the total parcel and left the remainder for future planning (Moorestown Township Environmental Advisory Committee, Environmental Defense Fund);

(345) The level of wetlands protection, as a result of the proposed language change will result in a level of wetlands protection that is weaker than before the Act was passed because the Act preempts municipalities from regulating and protecting wetlands (Bryam Township Environmental Commission and form letters from: Gladys J. Grigis, Laura Lombardo, Jean Collon, L.H. Fretz, Denise M. Badolato, Gail Musante, Barbara Czarnomski, Josh Taylor, Jeff Archibald, Michael J. Musanti, Vince Dunne, Helen Monague, Lanie F. Morrow, Ruth Elansser, Melissa Jurist);

(346) The level of wetlands protection, as a result of the proposed language change will result in a level of wetlands protection that is weaker than before the Act was passed because prior to the passage of the Act, programs such as Stream Encroachment and the Coastal Areas Facility Review Act subjected projects affecting wetlands to more intensive review. However, as a result of the National Association of Industrial and Office Parks (NAIOP) court decision, the scope of review under these other programs has been limited regardless of whether the projects are exempt from the Act (Citizens United to Protect the Maurice River and its Tributaries, Inc., NJDEP Endangered and Nongame Species Advisory Committee);

(347) The proposed language change will negatively affect protection for threatened and endangered species because as a result of the National Association of Industrial and Office Parks (NAIOP) court decision, the scope of review for threatened and endangered species under other programs such as Stream Encroachment has been limited regardless of whether the projects are exempt from the Act (Citizens United to Protect the Maurice River and its Tributaries, Inc., DEPE Endangered and Nongame Species Advisory Committee);

(348) The proposed subdivision exemption contravenes the declared purpose of the Act which is to take "vigorous action to protect the State's inland waterways and freshwater wetlands." By removing the vast majority of freshwater wetlands from the protection of the Act, the regulation demolishes the very purpose of the Act (Public Advocate of New Jersey);

(349) The Attorney General recognized in his opinion that the Legislature meant to free ongoing development projects from the requirements of the Act. Therefore, an applicant must first demonstrate that a "project" was before the local authorities before he should be entitled to coverage under the Act's exemptions (Public Advocate of New Jersey); and

(350) While the Attorney General's opinion stated that the NJDEP exceeded its discretion by requiring evidence of a project, NJDEP could propose other appropriate and less drastic possible solutions to its approach for screening applications for exemptions (Environmental Defense Fund).

RESPONSE: Based on the many comments received on the appropriateness of substituting the word "property" for "project," and the advice of the Attorney General, the Department has not adopted the proposed change. In addition, the Department acknowledges that a definition of "project" should be incorporated into this rule. However, the rule has not been amended upon adoption since the Department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department is proposing a definition of "project" which can be found elsewhere in this issue of the New Jersey Register.

(351) COMMENT: Hannoch Weisman Counsellors at Law supported the Department's proposal to change the exemption langauge from "project" to "property."

RESPONSE: The Department acknowledges this comment in support of the rule proposal. However, based on the many comments received on the appropriatness of substituting the word "property" for "project," and the advice of the Attorney General, the Department has not adopted the proposed change. In addition, the Department acknowledges that a definition of "project" should be incorporated into this rule. However, the rule has not been amended upon adoption since the Department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department is proposing a definition of "project" which can be found elsewhere in this issue of the New Jersey Register.

(352) COMMENT: NAIOP and the New Jersey Chapter of the Building Owners and Managers Association (BOMA) support the Department's proposed change from "project" to "property" because it accurately reflects the Attorney General's opinion.

RESPONSE: The Department acknowledges this comment in support of the rule proposal. However, based on the many comments received on the appropriateness of substituting the word "property" for "project," and the advice of the Attorney General, the Department will not adopt

the proposed change. In addition, the Department acknowledges that a definition of "project" should be incorporated into this rule. However, the rule has not been amended upon adoption since the Department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department is proposing a definition of "project" which can be found elsewhere in this issue of the New Jersey Register.

(353) COMMENT: There are some projects which received preliminary approvals prior to the August 1, 1976 effective date of the Municipal Land Use Law (MLUL) and that these projects should also be exempt if the approvals are still active (Keller and Kirkpatrick Consulting Engineers, Michael Hyland).

RESPONSE: The Act clearly states at N.J.S.A. 13:9B-4d(1), "projects for which preliminary site plan or subdivision applications have received preliminary approvals from the local authorities pursuant to the MLUL. . ." are eligible for exemption. In addition, this matter has been decided in the Appellate Division of the Superior Court of New Jersey *In Re Stemark Associates/Request to Vacate Exemption Letter Denial,* decided March 20, 1991.

(354) COMMENT: Environmental Evaluation Group asks for a clarification regarding whether subdivision refers to a major or minor subdivision approval.

RESPONSE: The Attorney General's Formal Opinion No. 3 (1990) Reprise, dated April 19, 1991, clearly states that the exemption applies only to major divisions.

N.J.A.C. 7:7A-2.7(d)2

COMMENT: Eight groups using a form letter, and several other individual and groups objected to the requirement that an application submitted prior to June 8, 1987 must be approved to qualify for an exemption. They cited the following reasons:

(355) The requirement is contrary to the language set forth in the statute (The New Jersey State Bar Association, Wander Ecological Consultants, New Jersey Builders Association and form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(356) An applicant needs to know as soon as possible whether a project will be exempt because it makes no sense to go through the municipal process and then have to redesign when the DEPE determines that the exemption cannot be granted (The New Jersey State Bar Association, New Jersey Builders Association);

(357) The Department should only require, as a condition of the exemption, that the approving resolution be submitted to the Department when granted by the municipal authority (The New Jersey State Bar Association, New Jersey Builders Association);

(358) The vast majority of local authorities will not grant approval until all permits are obtained and this results in a potential conflict if DEPE will not grant an exemption until municipal approval is obtained (Resource Services North, Inc., Wander Ecological Consultants, Mark H. Burlas, Sandoz Pharmaceuticals Corporation);

(359) The wording here should be "and subsequently deemed complete" since there can be some confusion as to what constitutes a submittal (Wander Ecological Consultants); and

(360) Conditioning the exemption on final approval may take years and can disrupt financing and interfere with the municipal planning process (Form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp).

RESPONSE: The Department acknowledges that this exemption is based on a submittal to the appropriate municipal authorities by June 8, 1987. However, implicit in this is the requirement that the project later be approved. To suggest otherwise would be to attribute to the Legislature the unreasonable intent to exempt projects, the applications for which have been withdrawn or denied. The Appellate Division rejected this as a statement of the Legislature's intent in *In Re Stemark,* 247 *N.J. Super.* 13, 20 (App. Div. 1991). Indeed, the court cited approvingly the changes proposed to N.J.A.C. 7:7A-2.7(d)2. *Id.* at 20, n. 7. However, in order for an applicant to proceed with obtaining other required approvals and/or financing, the Department will issue a letter stating that an application for preliminary approval was filed prior to June 8, 1987 and that the application will qualify the project for an exemption upon receipt of preliminary approval from the municipality, provided that it meets all other criteria under this subsection. The rules have been amended on adoption to reflect this clarification and to specify what documentation will be required for the Department to make this funding (see N.J.A.C. 7:7A-2.9(b)4ii(1)). Any municipality concerned about the final determination of the project's exemption status can require an exemption letter as a condition of final approval.

(361) COMMENT: The term "project" at N.J.A.C. 7:7A-2.7(d) is being used without a specific definition. It will be valuable for this term to be defined, especially in light of the judicial debate over exemptions (Amy S. Greene Environmental Consultants).

RESPONSE: The Department agrees with the commenters' concern. However, the rule has not been amended as suggested upon adoption since the Department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department is proposing a definition of "project" which can be found elsewhere in this issue of the New Jersey Register.

(362) COMMENT: N.J.A.C. 7:7A-2.7(d)3 seems to remove the activity exemption from the Act under ACOE Nationwide permits based on submissions made to the ACOE prior to June 10, 1988. They should remain in the regulations since there is no assurance that everyone who submitted prior to June 10 has acted on those exemptions as yet (New Jersey State Bar Association).

RESPONSE: The adoption does not affect this exemption. The rule at N.J.A.C. 7:7A-2.7(d)3 continues to refer only to Individual ACOE permits while the rule at N.J.A.C. 7:7A-2.7(g) refers to Nationwide approvals.

(363) COMMENT: The Upper Rockaway River Watershed Association and the Environmental Commission of the Borough of Mountain Lakes stated that by proposing to void an exemption when there is a proposed change in land use or a change that would result in additional wetlands impacts on a parcel which had previously received subdivision or site plan approval, the Department has set up a condition under which the property owner of unregulated, vacant or improved lands classified as exempt from the Act, may drain wetlands, strip them of vegetation, fill them and alter their ecology to such an extent that when a plan is submitted for approval, there will be no wetlands left.

RESPONSE: The activities being described are in most cases regulated pursuant to the Federal Clean Water Act. Therefore, these activities, regardless of exemption status would require Federal approval, and undertaking them without these approvals may constitute a violation of the Federal Act. Further, if these areas were not scheduled for disturbance as part of an approved preliminary subdivision or site plan approval, there may be a basis at the municipal level for undertaking enforcement action for these unauthorized activities.

(364) COMMENT: The New Jersey Conservation Foundation strongly supports the addition of the language which clearly defines what is considered a change in the application because it is consistent with the Municipal Land Use Law (MLUL) (N.J.S.A. 40:55-D-1 et seq.), will provide reliability for applicants and municipal governing bodies, and will provide greater protection to freshwater wetlands.

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(365) COMMENT: We support the proposed amendment which would rescind a project exemption if the approved site or subdivision plan for the project is changed in a manner that alters the land use or which increases the impacts on wetlands. Since the purpose of the exemption is to allow projects to continue if they were well along in the design, planning and financing stages by the effective date of the Act, any significant change in the project should remove the project site from its exempt status (The Public Advocate of New Jersey, N.J. Audubon Society).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(366) COMMENT: The Public Advocate of New Jersey recommends that since changes in the projects covered by site plans and subdivision plans could adversely affect the environment but not require an amended application before the local planning authority, the definition of "significant change" should be defined as a change in land use, **or** an increased impact on freshwater wetlands or transition area, **or** the need for a new or amended application.

RESPONSE: The Department is unaware of the type of changes to a plan that the commenter has suggested would adversely affect the environment while not needing approval through either a new or amended application to the municipal authority. The Department believes that the categories of activities which could result in increased impacts to wetlands, open waters or transition areas include changes to

the design or layout of a development, or changes in the use of a development. Both of these categories of activities would require action by the municipal authority and therefore, the rule has not been amended as suggested.

COMMENT: Eight groups using a form letter and several independent individuals or groups objected to the proposed language change which states that activities would no longer be exempt if significant changes are made to the approved site or subdivision plan which would result in a change in land use or increased wetland, State open water or transition area impacts. They cited the following reasons:

(367) The rules at N.J.A.C. 7:7A-2.7(e) should void an exemption, if a project requires the submittal of a new application, but should remain exempt if only an amended application is required (Manchester Township Environmental Commission);

(368) The rules should clarify by whom the new approval is required, i.e., municipality, or county (New Jersey Concrete and Aggregate Association, Environmental Evaluation Group, Langan Engineering);

(369) The proposed additional standards are not consistent with Formal Opinion No. 3 of 1990 wherein Attorney General Del Tufo advised the Department that this provision was intended by the Act to exempt projects without regard to land use approvals or any other project design considerations (New Jersey Concrete and Aggregate Association, NAIOP, Environmental Evaluation Group, Archer & Greiner);

(370) The proposed language is unnecessarily restrictive. It is not unusual for a project to undergo a change in land use to meet changing economics, market demands and zoning requirements. Unless a change would result in a material and adverse impacts to wetlands the exemption should remain unchanged (Mark H. Burlas, Sandoz Pharmaceuticals Corporation, New Jersey Association of Realtors, New Jersey Builders Association, and form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(372) The proposed language is unnecessarily restrictive and beyond the scope of the purposes of the Act (Keller & Kirkpatrick, Hannoch Weisman);

(373) The proposed language is unnecessarily restrictive and beyond the scope of the Act specifically N.J.S.A. 13:9B-4(d) (Archer and Greiner);

(374) The Department's proposal demonstrates a disregard for established land use planning concepts and legal principles since townhouse condominiums, single family houses and apartment buildings all constitute residential land use and it is impermissible to discriminate between the various species of this genus (Hannoch Weisman);

(375) The proposed additions rely heavily on an analysis of land use concerns, which are irrelevant under the Act. The Department provides no authority for such analysis (Hannoch Weisman);

(376) A change in land use might only impact the activities within a building or structure and have no impact at all on the site and its surroundings (Keller & Kirkpatrick);

(377) The fact that resubmittal/approval of new or amended preliminarily approved site and subdivision plans could occur does not mean that significant changes have occurred that should negate exemption (William F. Voeltz);

(378) This provision is an attempt to regulate development under the guise of environmental protection, at the expense of other critical public policy needs such as providing affordable housing (New Jersey Association of Realtors);

(379) The Department's attempt to define "any impact" on wetlands, open waters or transition areas as a substantial change is arbitrary and capricious (NAIOP);

(380) Projects which have a change in use which would decrease impacts on wetlands should either be exempt or at least not discouraged because an owner may change the use in a way which would have greater benefit to the public and/or less impact to wetlands and unless easily approved, such a change would not be made (Brokaw Deriso Associates, Inc.);

(381) A significant change in land use on a project should be limited to when the proposed change would result in increased impacts to freshwater wetlands, State open waters, or transition areas (Enviro-Resource, Inc.);

(382) If the township requires a change in the plans which then requires an amended application, is the exemption still voided? (Amy S. Greene Environmental Consultants, Inc.);

(383) The two criteria [(e)1, 2)] should be joined by an "and" rather than an "or" because the critical issue is whether the change in land use would result in a greater impact on the wetlands, not just what the change in land use is (Amy S. Greene Environmental Consultants, Inc.);

(384) DEPE should establish a formal in-house policy that allows modifications to a project to occur without jeopardizing any exemptions (Pennoni Associates Inc.);

(385) The proposed amendments would revoke exemptions for a post-July 1, 1988 site plan or subdivision amendment even where that amendment does not void the preliminary approval, does not result in a change in land use, represents a minor modification of pre-July 1, 1988 approved plans, and involves wetlands fill allowed under a Nationwide permit. This is harsh and will deprive the benefit of exemption for many projects whose owners have expanded substantial sums in reliance on the existing regulations (Shanley & Fisher);

(386) If adopted, the proposed exemption regulations should not apply to post-July 1, 1988 amendments obtained before the adoption of the newly proposed regulations (Shanley & Fisher);

(387) The existing regulations which state that the amendment does not void the pre-July 1, 1988 approval and require submittal of a new application are sufficient (Shanley & Fisher);

(388) In lieu of the proposed two prong test, a substantial change would be deemed to have occurred only when a project which originally qualified for a Nationwide permit would require an Individual permit as a result of the change (Hannoch Weisman, NAIOP);

(389) The only change that should void an exemption is a change in wetlands impacts because a change in land use may have a positive impact on wetlands (NJ State Bar Association); and

(390) The definition of a change in land use should be revised to specify a change from a residential use to a non-residential use (Langan Engineering);

RESPONSE: The rule has been adopted as proposed with minor amendments.

The proposed rule modified existing N.J.A.C. 7:7A-2.7(e) which states that projects are no longer exempt if significant changes are made which would void the approval and require a new or amended application. The Appellate Division upheld this provision in *Matter of Freshwater Wetlands Rules, 228 N.J. Super.* 516, 525 (App. Div. 1989). The adopted changes are based on the same premise—presumably approved by the Court—as the former rule, namely, that when significant changes are made to an exempted project that would require further application and approval procedures before the local planning board, it is a different project than the Act intended to protect. After reviewing submitted comments and discussing the matter with the AG's office, the Department has decided not to adopt the proposed deletion of the language that voids an exemption if the approval is void. The change was made in order to continue the Department's current procedure of voiding exemptions for projects with municipal approvals that have been voided beause the basis for the exemption no longer exists. The adopted modification, to this section which deems that a significant change has been made if the change would require submittal or approval of a new or amended application, even if the local approval has not been "voided," reflects the fact that the MLUL does not require that approvals be avoided before an amended application is required, and indeed, in practice, this is generally not done.

One commenter suggested that, contrary to both the old and the newly adopted rules, exemptions should be void only where new applications are required. However, the MLUL does not provide a standard for when a new as opposed to amended application must be submitted. Consequently, in the Department's administrative experience, depending on the planning board involved, substantial changes may in one instance require a new application where in another, they require an amended application. See N.J.S.A. 40:55D-49. This leads to treating projects similarly situated differently for the purposes of whether their exemptions remain valid. This also leaves the exempted status of projects in the hands of the local planning board even though the determination of whether a project remains exempt should be made by the Department as the State agency charged with the implementation of the Act.

It is, therefore, proper to consider whether a project is the subject of an amended application in determining whether it continues to be exempt. However, this inquiry cannot end there, given that to void exemptions any time an amended application is required, no matter how minimal the change, would disrupt the balance the legislation struck in the exemptions between the rights of property owners and the protection of critical environmental resources (see N.J.S.A. 13:9B-2). The general

criteria adopted in the rule to determine what constitutes a "significant change" to a project that is the subject of a new or amended application properly reflects both the environmental aims of the Act and the legislature's purpose in providing the exemptions, that is, "to exempt from the Act applicants whose proposals were well underway, who had spent substantial amounts of time, effort and money..." *A.R. Criscuolo and Assoc., Inc. v. N.J. Department of Environmental Protection,* 249 *N.J. Super.* 290 (App. Div. 1991).

Several commenters suggested that the proposal is not in keeping with the Attorney General's advice in Formal Opinion No. 3 and Formal Opinion No. 3: Reprise. However, that advice specifically left open the "question of whether a substantial change in a project which has either gained preliminary approval or for which an application for which preliminary approval was timely filed would result in the loss of wetlands regulation exemption" (see Formal Opinion No. 3: Reprise, p. 6). The commenters are, therefore, apparently referring to the AG's advice that when an exemption is based on a preliminary subdivision application or approval it is clearly improper for the Department to limit the exemption to specific structures and their specific location, because these locations are not generally dictated by a subdivision approval. However, the AG's advice recognizes that a subdivision approval is sought for a particular "economic development." It also recognizes that preliminary applications and approvals represent that point in the approval process at which it could be assumed that a substantial investment has been made in a specific economic development. By providing an exemption for projects with applications and approvals prior to the effective date of the Act, the Legislature plainly intended to exempt economic developments for which substantial investment had been made prior to the effective date of the Act. If the economic development changes so significantly as to require another application and approval, the same assumption cannot be made regarding substantial investment in the reformulated development. The rule is, therefore, consistent with the broad principles identified by the AG to be applied when interpreting the exemption provision.

For the above reasons, the Department disagrees with the contention that this provision is unnecessarily restrictive, harsh and beyond the scope of the Act.

The Department does not agree that voiding an exemption upon a change in "land use" and citing a change from single family houses to multi-family units as an example is inappropriate or discriminatory since design requirements, and project layout are vastly different between these types of residential development. Therefore, this provision has not been amended to specify that a significant change will only be considered to have occurred upon a change from a residential use to a non-residential use.

The Department agrees that the need for a new or amended approval in itself does not constitute a "significant change." Further, the Department has not defined a significant change as "any impact" on wetlands, open waters or transition areas. This provision has been clarified to show the Department's isntent that *de minimus* increases in impacts to freshwater wetlands, State open waters, or transition areas will not void an exemption. This criteria shall apply regardless of whether the amendment to the plans is necessitated by municipal requirements.

It is not clear to the Department how this provision sacrifices "other public policy needs" as one commenter contends as it properly implements the statutory exemption that achieves a balance between the rights of the property owners and the environment.

Finally, the Department has not amended the rule to define a substantial change as occurring when a project goes from needing a nationwide permit to requiring an Individual permit from the Army Corps of Engineers since this provision addresses the muncipal exemption which is independent of the Federal program for permitting wetland encroachments.

(391) COMMENT: It is common for mining operations that phased approvals are periodically required by the appropriate agencies on a site as successive portions of it are mined. If exempt, an entire property to be mined should continue to be exempt (New Jersey Concrete and Aggregate Association);

RESPONSE: The Attorney General's Formal Opinion No. 3 reprise states, "Accordingly, the Municipal Land Use Law exemptions run only to that portion of a tract of land which is the physical location of the proposed economic development project for which preliminary major subdivision or site plan approval was granted or was sought." Therefore, unless the entire property received preliminary major subdivision or site plan approval prior to July 1, 1988, the entire property is not exempt.

(392) COMMENT: It is unclear why the exemption for a Nationwide Permit activities at N.J.A.C. 7:7A-2.7(g) and 2.9(b)6i has been deleted. This exemption is still being used (Amy S. Greene Environmental Consultants, N.J. Builders Association).

RESPONSE: The exemption has not been deleted. The information listed at N.J.A.C. 7:7A-2.7(g) has been moved to application requirements for exemptions at N.J.A.C. 7:7A-2.9(b)6i to accommodate those requests for this exemption which are still outstanding. The information deleted at N.J.A.C. 7:7A-2.9(b)6i referred to submittals to the ACOE which had not yet been completed by the ACOE at the time the request for exemption was made to the Department. At this time, the ACOE has completed reviewing all requests made prior to June 10, 1988 and therefore this part of the section is no longer needed.

(393) COMMENT: N.J.A.C. 7:7A-2.7(g) should state that exemptions for Nationwide permits will be allowed upon the submission of proof that a federal permit was approved prior to July 1, 1988. Application for a Nationwide permit prior to June 10, 1988 without approval prior to July 1, 1988 should not be the basis for allowing an exemption (Holmdel Township Environmental Commission, Township of Montgomery Environmental Commission, Lake Musconetcong Regional Planning Board, Lynn Siebert, Lacey Township Environmental Commission, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, Save Our Swamp, Public Advocate of New Jersey, ANJEC, Great Swamp Watershed Association).

RESPONSE: The Department has not made the suggested change. At the time the rules were adopted in 1988, the Department agreed with the ACOE to set the time limit of June 10, 1988 for submittal of information for authorization under a Nationwide permit. The Department made this agreement because previously it was unnecessary for many regulated activities to submit any paperwork to the ACOE in order to legally proceed under a Nationwide permit. It was the Department's rules which created the need for these additional submittals. It should be noted that this provision has been moved to N.J.A.C. 7:7A-2.9.

(394) (COMMENT) Since many ACOE permits are now subject to renewal, every effort should be made to assure that the original application for an ACOE permit was for a valid project and not justd a concept, and automatic renewal should not occur (Passaic River Coalition).

RESPONSE: ACOE Nationwide permits are for activities, not projects. Therefore, so long as an activity meets the requirements for an ACOE authorization, it is issued regardless of whether the project, of which the activity is a part, was a concept or final project. Therefore, so long as the Department agrees with the ACOE's determination that the activity continues to meet the requirements for the permit and the ACOE renews the permit authorization, the exemption will be renewed for the subject activity.

N.J.A.C. 7:7A-2.7(i)

COMMENT: Eight groups using a form letter and seven individuals or groups independently objected to the voiding of exemptions upon assumption and stated:

(395) Voiding of exemptions upon delegation is unfair to those applicants who have proceeded with projects relying in good faith upon the exemption received by the Department (Alliance for Affordable Housing, Enviro-Resource, Inc., New Jersey Builders Association, Mark H. Burlas and Sandoz Pharmaceuticals Corporation and form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp.);

(396) Voiding of exemptions upon delegation is inconsistent with the September 7, 1989 decision of the Appellate Division of the New Jersey Superior Court that invalidated the five year limitation on the duration of exemptions (N.J. Concrete and Aggregate Association, Enviro-Resource, Inc., Environmental Evaluation Group, New Jersey Builders Association, Mark H. Burlas and Sandoz Pharmaceuticals Corporation and form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centrex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp.);

(397) Lending institutions will not honor or make loan commitments due to the uncertainty of this language (New Jersey Builders Association and form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon De-

velopment, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp.);

(398) The Army Corps does not require this voiding of exemption for delegation (New Jersey Builders Association, Mark H. Burlas and Sandoz Pharmaceuticals Corporation and form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp.);

(399) The EPA does not require this voiding of exemption for delegation (Mark H. Burlas and Sandoz Pharmaceuticals Corporation);

(400) Applicants should simply be required to demonstrate compliance with the Federal 404 program at the time of delegation. (New Jersey Builders Association, Mark H. Burlas and Sandoz Pharmaceuticals Corporation and form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corps.);

(401) There is no valid reason to require United States Corp of Engineers authorization for exempt projects prior to July 1, 1988 as stated in N.J.A.C. 7:7A-2.7(i). Authorization should instead be required prior to State assumption of the 404 permit program (Amy S. Greene Environmental Consultants).

(402) Voiding exemptions except those which had valid Army Corps permits makes no sense. If DEPE's concern is that an applicant be exempt both from New Jersey and Army Corps jurisdiction the criteria should be that prior to delegation, all required Army Corps of Engineers approvals be obtained (New Jersey State Bar Association);

(403) The loss of exemption upon delegation violates the Act. The legislature clearly intended that projects which are exempt remain exempt so long as the approvals on which they were based are still valid, including local approvals (New Jersey State Bar Association, Environmental Evaluation Group);

(404) The loss of exemption upon delegation violates the Act. The Department, upon delegation, must regulate these projects solely in accordance with the Federal Act. The statute states that the Department may not require transition areas upon renewal of a permit issued pursuant to the Federal Act and contemplates renewal applications to NJDEP following delegation (NAIOP, Archer & Greiner; Connell, Foley & Geiser);

(405) It is a difficult and cumbersome process to complete projects within a given time frame in New Jersey (Enviro-Resource, Inc.);

(406) Instead of voiding exemptions, the DEPE should implement a program parallel to the existing Federal regulations for those projects which qualify for exemption under this subchapter (Langan Engineering);

(407) Voiding of exemptions is contrary to Attorney General Del Tufo's opinion which interpreted the intent of the Act (Langan Engineering, Archer & Greiner, N.J. Concrete and Aggregate Association);

(408) There is no legislative authority to void all exemptions upon assumption (Pennoni Associates Inc.);

(409) Voiding of exemptions will add extreme burden and costs to small individuals and farm owners (New Jersey Society of Professional Engineers); and

(410) Voiding of exemptions will only cause a mad scramble by the people who hold these exemptions to perform the work exempted even though they may not want to at that time, and this may cause unnecessary environmental damage (Eric S. Luscombe).

RESPONSE: The Act at N.J.S.A. 13:9B-27 states that the Department shall take all appropriate action to secure the assumption of the 404 program. The Federal regulations at 40 CFR Part 233-404 State Program Regulations, governing state assumption of the 404 program requires that "Any approved state program shall, at all times, be conducted in accordance with the requirements of the Act (Federal Act) and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose." The Federal regulations do not provide exemptions from the Federal Act based on municipal approvals. Therefore, upon assumption of the 404 program, the State will regulate all projects except for those with valid ACOE permits obtained prior to July 1, 1988.

The Department does not believe that the voiding of exemptions is unfair. Since the rules were adopted in 1988, there has been ample notice to applicants that exemptions would be void upon assumption of the 404 program and subsequently they have had several years to complete their projects. In addition, the Department will allow the completion of buildings, structures or other improvements which are already in "advanced stages of construction," on the date of assumption. The Department will be proposing a definition of "advanced stages of construction". This proposal can be found elsewhere in this Register or in a future Register.

The voiding of exemptions upon assumption was, moreover, upheld by the Appellate Division in *Matter of Freshwater Wetlands Rules,* 238 *N.J. Super.* 516 (App. Div. 1989). In that case the Appellate Division rejected a challenge by the New Jersey Builders claiming that the Legislature intended that upon assumption the State only apply the Federal permitting standards rather than the more stringent State standards (including transition area standards) to exempted projects.

The Department notes that it has revised N.J.A.C. 7:7A-2.7(i) upon adoption, to clarify that all exemptions from permit and transition area requirements based upon municipal approvals will be voided as of the date the Department assumes jurisdiction over the Federal 404 program. In the proposal, N.J.A.C. 7:7A-2.7(i) had referred only to exemptions under 2.7(d)1 and 2; a reference to 2.7(f) was inadvertently omitted. This clarification is consistent with the Department's position upheld in *Matter of Freshwater Wetlands Rules, supra,* and with the Department's explanation of N.J.A.C. 7:7A-2.7 in public hearings on the proposal.

Several commenters assert that lending institutions will not grant loan commitments due to the uncertainty of this language, which has been adopted since 1988. It would seem logical that speculators in this position would have redesigned their projects by this date to remove this uncertainty and secure financing.

The Department acknowledges that the Act states that the Department may not require transition areas as a condition of renewal of any Federal permit issued prior to the effective date of the State Act and N.J.A.C. 7:7A-2.7(i) properly implements the statutory language.

The Attorney General's Formal Opinion No. 3 (1990) did not address this issue.

This provision does not address ongoing farming operations because, unlike projects with local land use applications and approval, ongoing farming operations are generally exempt from Federal Section 404 permitting requirements. It is not necessary, therefore, for the State to apply the requirements of the State assumed 404 program to these operations upon assumption. Thus, ongoing farming operations will generally remain exempt as of the date of assumption.

The only applicants who may experience "extreme burden" as a result of this provision, will be those who own property which is unbuildable due to the presence of regulated areas under the State administered 404 program. Project owners will have had at least four years to build their projects with notice that certain exemptions will expire upon assumption. Clearly, the Legislature's mandate that the Department regulate exempted projects if necessary for assumption was an attempt to balance the "rights of persons who own or possess real property . . . with environmental interests," (see N.J.S.A. 13:9B-2).

(411) COMMENT: The proposed deletion of the requirement at N.J.A.C. 7:7A-2.7(f) for projects not subject to the jurisdiction of the U.S. ACOE and the subsequent expansion of the transition area exemptions is contrary to the Act and should be reinstated. If the AG wishes to lend a helping hand to favor developers by declaring this not to be the "intent" of the legislature, then I suggest that the Act be revised accordingly (CAREZ, Public Advocate of New Jersey, New Jersey Conservation Foundation, ANJEC, Great Swamp Watershed Association).

RESPONSE: This section has not been amended upon adoption. In the Appellate Court case *In the Matter of Appeal of Adoption of N.J.A.C. 7:7A-1.4 (Definition of "Documented Habitats for Threatened and Endangered Species" and "Swale"), 7:7A-2.5(b)(2), and 7:7A-2.7(f),* 240 *N.J. Super.* 224 (App. Div. 1989), the Appellate Division found that all freshwater wetland regulations, including those for transition areas, became effective July 1, 1988. However, Judge Skillman dissented with the Appellate Court Opinion. Among other things the dissent reasoned that because, pursuant to the Act, the transition area regulations were not, in fact, effective prior to July 1, 1989, the majority's decision resulted in an impermissible, retroactive application of the transition area requirements to projects designed between July 1, 1988 and July 1, 1989. On April 9, 1990, the Supreme Court *(rev'd in part* 118 *N.J.* 552 (1989)) reversed the decision of the Appellate Division, "substantially for the reasons set forth in Judge Skillman's dissenting opinion." The Department has determined, based upon the advice of the Attorney General's office, although neither the Appellate Division nor the Supreme Court had before it the specific issue of whether projects subject to ACOE jurisdiction could also take advantage of this extra year, the reasoning employed by Judge Skillman and adopted by the Court is dispositive

of this issue. First, the Supreme Court held that July 1, 1989 is the effective date of the transition area requirements. Therefore, as further discussed in Judge Skillman's dissent, N.J.S.A. 13:9B-4(d)1 must be read differently depending on whether it is applied to the transition areas or the wetlands aspects of a project. Thus, as to transition area aspects of a project, subject to the ACOE jurisdiction, paragraph (d)1 will be read: "Projects in transition areas for which ... [a qualifying approval] is received prior to [July 1, 1989] ... shall be governed only by the Federal Act and shall not be subject to any additional or inconsistent substantive requirements of this Act."

Moreover, by not allowing projects subject to ACOE jurisdiction an extra year within which to get their approvals, the Department would be applying transition area requirements to those projects retroactively. In this way projects subject to ACOE jurisdiction cannot be distinguished from projects not subject to ACOE jurisdiction. By adopting the reasoning in Judge Skillman's dissent, the Supreme Court has already held that this is an unreasonable and improper interpretation of the Act.

(412) COMMENT: N.J.A.C. 7:7A-2.7(f) should be amended to reflect the AG's decision by inserting the words "or property" after the word project (NAIOP).

RESPONSE: The rule has not been amended as suggested. Based on the many comments received on the appropriateness of substituting the word "property" for "project," the Department has not adopted the proposed change. In addition, the Department acknowledges that a definition of "project" should be incorporated into this rule. However, the rule has not been amended upon adoption since the Department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department is proposing a definition of "project" which can be found elsewhere in this issue of the New Jersey Register.

(413) COMMENT: The rule should be amended at N.J.A.C. 7:7A-2.7(g) to substitute the word "projects" for "activities" (NAIOP).

RESPONSE: The Appellate Division upheld the Department's determination that Nationwide permit exemptions are limited only to the **activity** specified in the Nationwide permit in *A.R. Criscuolo and Associates Inc. Defined Benefit Pension Plan and Trust v. New Jersey Department of Environmental Protection, et al.* 249 *N.J. Super.* 290 (App. Div. 1991). Therefore, the language will not be amended.

(414) COMMENT: The rule at N.J.A.C. 7:7A-2.7(g) should be amended to require the expiration of exemptions based on Nationwide permits not acted on by November 1991 because the Nationwide permits will no longer be valid (Great Swamp Watershed Association).

RESPONSE: The expiration date of Nationwide permits is January 1992, not November 1991. To ensure consistency with the ACOE proposal 33 CFR Part 330.6(b), the Department will continue to honor exemptions based on Nationwide permits for activities which have commenced (that is, are under construction) or are under contract to commence in reliance upon a Nationwide permit issued prior to July 1, 1988.

(415) COMMENT: We strongly support the deletion of the language at N.J.A.C. 7:7A-2.7(g)1 and 2 as it will bring the rules into compliance wth the Act (ANJEC, Great Swamp Watershed Association).

RESPONSE: This language was not deleted and is in compliance with the Act at N.J.S.A 13:9B-4d(3). Rather it was moved to the application requirements section at N.J.A.C. 7:7A-2.9(b)6i.

N.J.A.C. 7:7A-2.8 Geographic areas exempted from freshwater wetlands permit requirement

(416) COMMENT: N.J.A.C. 7:7A-2.8(a) states that presently regulated activities in the geographic areas exempted from the Act "may" require an open water fill permit. The conditions under which activities will require various permits (specifically in the Pinelands and Hackensack Meadowlands) should be clarified (Amy S. Greene Environmental Consultants, NAIOP).

RESPONSE: The rule has been clarified on adoption by deleting the reference to "an open water fill permit" and to state when other permits may be required in these areas.

(417) COMMENT: The Act exempts the Hackensack Meadowlands and the Pinelands from regulation. If the DEPE must regulate these areas in order to assume the 404 program then the Act must be amended (NAIOP).

RESPONSE: The Act at N.J.S.A. 13:9B-6 clearly states that these areas are exempt from the Act, "except that the discharge of dredged or fill material shall require a permit issued under the provisions of the Federal Act, or under an individual and general permit program administered by the State under the provisions of the Federal Act and applicable State laws." Therefore, the Act does provide for the regulation of these areas upon assumption and there is no need for an amendment to the Act.

(418) COMMENT: The provisions at N.J.A.C. 7:7A-2.8(b) imply that tidal wetlands that are not mapped under the Wetlands Act of 1970 shall be regulated as freshwater wetlands and this is contrary to the intent of the legislature which only wanted to regulate freshwater wetlands (The New Jersey Builders Association, the New Jersey State Bar Association, NAIOP, Resource Services North, Inc.).

RESPONSE: The definition of "freshwater wetland" contained within the Act refers to areas that meet certain hydrology, hydrophytic vegetation and soil conditions and does not exclude areas based on salinity or tidal regime. The Act at N.J.S.A. 13:9B-4(c) does, however, exempt "areas regulated as a coastal wetland pursuant to [the Wetlands Act of 1970]."

The Wetlands Act of 1970 (N.J.S.A. 13:9A-1 et seq.) defines "coastal wetlands" as those areas occurring south of the Raritan Bay to Cape May then north up the Delaware Bay, that are now or were formerly connected to tidal waters whose surface is at or below an elevation of one foot above local extreme high water, and which may contain the designated plant species.

There are clearly areas that are tidally influenced and are saline in nature that do not fall under the definition of a tidal wetlands under the 1970 Wetlands Act. Because these wetlands are included in the definition of wetlands under the Act and are not regulated as coastal wetlands, the Department may properly regulate these areas under the Act. Moreover, distinctions among wetland types are somewhat artificial and arbitrary. Wetland systems associated with tidal waters form a continuum with freshwater wetland maritime environments. Clearly in enacting the Freshwater Wetlands Protection Act, it was the intent of the Legislature to "take vigorous action" to protect all wetlands not otherwise regulated as coastal wetlands. See N.J.S.A. 13:9B-2. It is absurd, for instance, to attribute to the Legislature the intent to leave unprotected tidal wetlands along the Hudson River that are tidal but not regulated as a coastal wetland because the Wetlands Act of 1970 excludes areas north of Raritan Bay.

Based on legal advice from the Attorney General's office regarding this statutory provision the rule will be amended upon adoption to state that the definition of freshwater wetlands will include those areas which are not defined as coastal wetlands pursuant to the Wetlands Act of 1970. This will exclude from regulation under the Act any wetlands that the Legislaure chose to regulate under the Wetlands Act of 1970. The Department promulgated coastal wetlands maps between 1970 and 1973, and again between 1982 and 1984, for an approximate total of 1000 maps. The Department will reevaluate coastal wetland maps at some time in the future depending on financial constraints.

The commenter should note that there are many classes of projects and geographic areas that are not regulated by the Coastal Area Facilities Review Act (N.J.S.A. 13:19-1 et seq.) (CAFRA). Projects that involve wetlands and fall under the jurisdiction of either CAFRA or Waterfront Development Law (N.J.S.A. 12:5-3) will be required to meet the wetlands policy pursuant to the Coastal Permit Program rules (N.J.A.C. 7:7) that implement these statutes.

No regulatory overlap will occur as a result of this provision since the Act clearly exempts "areas regulated as a coastal wetland" pursuant to P.L. 1970, c.272 (C. 13:9A-1 et seq.).

The Department does not believe that this provision will increase the financial burden of an applicant. In addition the Legislature in its findings and declarations stated that "in order to advance the public interest in a just manner the rights of persons who own or possess real property affected by this Act must be fairly recognized and balanced with environmental interests; and that the public benefits arising from the natural functions of freshwater wetlands, and the public harm from freshwater wetlands losses, are distinct from and may exceed the private value of wetlands areas."

This provision is not related to the assumption of the 404 program nor does it involve the delegation of Section 10 waters. Rather, the Department is implementing the Legislative intent that, with the passage of the Freshwater Wetlands Protection Act, all wetlands within the State will receive protection under State law.

N.J.A.C. 7:7A-2.9 Exemption letters

(419) COMMENT: All letters of exemption should be recorded by the Department according to county and municipality, lot and block, applicant, project name, and reason for exemption in a computer program (Passaic River Coalition).

RESPONSE: The Department's data base already includes all of the suggested information.

(420) COMMENT: The statement that letters of exemption are valid "for the duration of the approval upon which it was based" prolongs an exemption under improper circumstances. If a project takes longer than four or five years to begin, then extension of exemptions should not be permitted because it does not conform to the intent of the Act (Passaic River Coalition).

RESPONSE: In the decision of the Appellate Division in *Matter of Freshwater Wetlands Rules*, 238 *N.J. Super.* 516 (App. Div. 1989), the court concluded, "if the Legislature had wanted to put a time-limit on exemptions more stringent than the time-limits permitted by the MLUL, it would have specifically said so." Therefore, the Department cannot limit the duration of an exemption beyond that provided by the MLUL. The proposed language has been adopted.

(412) COMMENT: We support the increased submittal requirements as essential for the DEPE's review (ANJEC, Great Swamp Watershed Association).

RESPONSE: The Department acknowledges this comment in support of the rules amendments.

(422) COMMENT: In the rule at N.J.A.C. 7:7A-2.9(a) there is a high level of uncertainty in determining when the State will assume the 404 program. Therefore, for projects where a significant investment has been made based on the exemption, a provision could be made for extending exemption letters or a temporary grandfathering which might extend the exemption (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: Assumption of the Clean Water Act 404 program is stated as a goal of the Act at N.J.S.A. 13:9B-27. In addition, N.J.S.A. 13:9B-4 states, "the following are exempt . . . unless the USEPA's regulations providing for the delegation to the state of the federal wetlands program . . . require a permit for those activities . . . ." Persons with projects which are legally under construction on the date of assumption will be allowed to complete them. "Under construction" means projects that have completed construction of thee foundations of all proposed buildings onsite. In order for such improvements to be considered completed prior to the date of assumption, a valid building permit issued prior to that date and proof that the local construction official has completed the inspection listed at N.J.A.C. 5:23-2.18(b)1i(2) or 2.18(b)1i(3), inspection of the finished foundation, must be provided.

(423) COMMENT: In the rule at N.J.S.A. 7:7A-2.9(a), the word "or" should be inserted in the following sentence, "or if the approval upon which it was based becomes invalid for any reason" (Upper Rockaway River Watershed Association, Borough of Mounain Lakes Environmental Commission).

RESPONSE: The provision in question lists three circumstances in which the exemption letter will be void. The rule already contains the word "or" after the second such circumstance; therefore, it is unnecessary to insert an additional "or" after the first circumstance as suggested by the commenter.

(424) COMMENT: The rules should be amended to include the following: "Letters of exemption previously issued based on ACOE approval subsequent to July 1, 1988 are void if: Preliminary site plan or sudivision approval is denied by the local authorities; or Preliminary site plan or subdivision plan is different from that submitted to the ACOE and will result in an increase in environmental impact on wetlands or water quality, or result in changes to habitats of exceptional resource value wetlands or EPA priority wetlands (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The Department has interpreted that the commenter's concern refers to exemptions based on submittal of applications to the ACOE prior to June 10, 1988 and issued subsequent to July 1, 1988. Based on this interpretation, the Department believes that the rules already address the commenter's concern, without the need for the specific language which the commenter suggests. ACOE Nationwide permits are for activities, not projects. Therefore, so long as an activity meets the requirements for an ACOE authorization, it is issued regardless of whether the project, of which the activity is a part, received approvals from the municipality. However, if the project would result in increased impacts to wetlands which would exceed the limits of the authorized Nationwide permit, or would require an additional Nationwide permit not previously authorized, the exemption would be limited to those activities reviewed and approved by the ACOE as stated at N.J.A.C. 7:7A-2.7(g) and 2.9(b)6. Therefore, the suggested language will not be added to the rule.

(425) COMMENT: Amy S. Greene Environmental Consultants, Inc. asks whether there would be any grandfathering for projects which have received an approval from the Corps of Engineers after July 1, 1988 since these projects have also complied with the 404 pogram up to that date.

RESPONSE: The Act does not provide for grandfathering of projects which received ACOE approval after July 1, 1988, unless the application was submitted prior to June 10, 1988 and the applicable permit criteria are met. As of the date of assumption, activities covered by these permits will be required to comply with the State program.

(426) COMMENT: In the rule at N.J.A.C. 7:7A-2.9(b)1i, what means of certifying farmland assessment eligibility is acceptable (N.J. Farm Bureau)?

RESPONSE: The Department will accept a copy of a tax bill showing farmland assessment.

(427) COMMENT: Amy S. Greene Environmental Consultants, Inc. noted that there are no provisions in this section for requesting a transition area exemption.

RESPONSE: The Department has revised the rule upon adoption to add provisions at N.J.A.C. 7:7A-2.9(b)3 for requesting an exemption letter from transition area requirements.

(428) COMMENT: The proposed language at N.J.A.C. 7:7A-2.9(b)3i which requires folded plans should specify the sheet descriptions or names that must accompany the exemption request since large project plans encompass many sheets (NAIOP).

RESPONSE: This requirement was proposed to save file space. While it is not possible to specify sheet "names," since names vary from project to project, the applicant should be advised to provide all sheets necessary to show the entire layout of the project, including the location of all roadways, buildings to be constructed, detention facilities, etc., as submitted to or approved by the municipality. While detail sheets are not necessary, sheets showing environmentally sensitive areas together with the footprints for development should also be submitted to complete the file, if such sheets exist.

(429) COMMENT: A provision should be added to this section identical to that at N.J.A.C. 7:7A-9.6, allowing the applicant or other party to request an administrative hearing on any decision to issue or deny a request for an exemption letter. A 30-day time frame should be provided to file such requests identical to that at N.J.A.C. 7:7A-12.7 and exemption letters should state that they do not become effective for 30 days so that applicants do not quickly undertake an activity which may later be found not to be exempt (Wander Ecological Consultants).

RESPONSE: The rule has been amended on adoption to provide this clarification, at N.J.A.C. 7:7A-2.10. Upon direction from the Attorney General's office the Department has already been accepting requests for administrative hearings on exemption decisions. In contested cases where material and factual issues are in dispute, an administrative hearing has been granted.

(430) COMMENT: Since the requirement that a farming operation be ongoing has been deleted from N.J.A.C. 7:7A-2.7(b) it is unnecessary to retain here the requirement that an applicant for a farming exemption describe how long the operation in question has been ongoing (Wander Ecological Consultants).

RESPONSE: The deletion of the term "established ongoing" at N.J.A.C. 7:7A-2.7(b) was a word processing error, and was not intentional. The term will be reinstated.

(431) COMMENT: The requirement for approval of a subdivision approval submitted prior to June 8, 1987 as provided at N.J.A.C. 7:7A-2.7(d)2 is unwarranted. Therefore the requirements at N.J.A.C. 7:7A-2.9(b)4i and ii to submit proof of approval should be removed (Wander Ecological Consultants).

RESPONSE: These requirements will not be removed. However, the rule has been amended in the adoption at N.J.A.C. 7:7A-2.7(d)2 to state that if a project meets all criteria to qualify for an exemption, except that the project has not yet received municipal approval, the Department will issue a letter certifying that the application was filed prior to June 8, 1987 and that the project will receive an exemption letter upon receipt of preliminary approval from the municipality.

(432) COMMENT: A copy of a recorded subdivision or site plan would be simpler and a more cost effective method alternative to the method of documenting the local approval exemptions than those which are proposed at N.J.A.C. 7:7A-2.9(b)4 (Pureland).

RESPONSE: The suggestion the commenter makes would not provide the Department with sufficient information to make an exemption determination since the Department must verify what was specifically

approved by the municipality. The simple fact that an approval was received is not sufficient.

(433) COMMENT: N.J.A.C. 7:7A-2.9(b)4i requires that an application for subdivision approval submitted prior to June 8, 1987 be under continuous consideration from the time of submittal until final approval. The term "continuous" must be defined (Environmental Evaluation Group, N.J. Concrete and Aggregate Association, Amy S. Greene Environmental Consultants, N.J. Builders Association).

RESPONSE: The Department has revised the rule at N.J.A.C. 7:7A-2.9(b) on adoption to include a clarifying definition. "Continuous consideration" means that the application was either on the municipal board's agenda or was continued with the applicant's and the board's consent from the time of submittal until such time that a decision was made. An application that was withdrawn or received a final denial and was subsequently resubmitted is not considered to be under "continuous consideration."

(434) COMMENT: There should not be a requirement for an application to be under continuous consideration in order to comply with this exemption since it was not mandated by the Act (Amy S. Greene Environmental Consultants, N.J. Builders Association).

RESPONSE: N.J.S.A. 13:9B-4(d)2 provides an exemption for projects with applications for preliminary site plan or subdivision submitted prior to June 8, 1987, because it evidenced good faith attempts to get local approvals prior to the moratorium on building in wetlands instituted at that time. Implicit in this section is the requirement that the application remain viable. To suggest otherwise would be to attribute to the Legislature the unreasonable intent to exempt projects for which applications were withdrawn or even denied. The Appellate Division recognized this as an absurd result and cited approvingly the Department's then proposed N.J.A.C. 7:7A-2.7(d)2 that recognized an exemption under N.J.S.A. 13:9B-4(d)2 only where the qualifying application is "subsequently approved." *In re Stemark Assoc.*, 247 *N.J. Super* 13, 20 (App. Div. 1991). The requirement that an application be under continuous consideration, therefore, properly implements the language and intent of the Act.

(435) COMMENT: N.J.A.C. 7:7A-2.9(b)4i states that an application must be under continuous consideration from the time of submittal to final approval. For clarity, the word final should be modified to "preliminary" since this is the intent of the Act (Amy S. Greene Environmental Consultants).

RESPONSE: The reference has been changed in the adoption to "eventual preliminary approval."

(436) COMMENT: The rule at N.J.A.C. 7:7A-2.9(b)4i should be clarified to specify that the application be under continuous consideration by the planning board or board of adjustment (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: Since the planning board and board of adjustment are the only municipal boards with the authority to grant preliminary subdivision or site approval, it is unnecessary to specify these boards in the rule.

(437) COMMENT: N.J.A.C. 7:7A-2.9(b)6i(1) has been modified to indicate that DEPE may inspect a site to confirm the applicability of a nationwide permit prior to issuing an exemption. Since a letter from the applicant authorizing DEPE access to a site is required for an LOI, a similar letter should be required here. If the DEPE can exercise the police power of entry to verify Nationwide Permit applicability, then there is no need for an access permission letter for the LOI either (Amy S. Greene Environmental Consultants, N.J. Builders Association).

RESPONSE: The Department requires unconditional consent for access to be granted by the owner of the property in question for an LOI because this document is often requested by parties other than the owner. Exemptions requests are almost always submitted by the owner or their direct agent and therefore consent is implied.

(438) COMMENT: The rule at N.J.A.C. 7:7A-2.9(b)6i should be amended to require that an applicant for an exemption shall have submitted proof that a complete application including an accurate wetlands delineation and site plan were submitted to the ACOE prior to June 10, 1988 and that the activity received subsequent authorization. In addition, the rules should require that the DEPE inspect and confirm the wetlands delineation and that an inaccurate wetlands delineation will be the basis for denying or voiding an exemption. Subsequent switching of plans and moving of regulated activities should also void the exemption (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: Since this provision is based on a submittal to the ACOE, the ACOE makes the determination of what constitutes a "complete application." All exemptions based on these applications are conditioned by the ACOE to require that the wetlands delineation be field verified by the Department in order for the Nationwide permit authorization to be valid. In the cases where a field inspection identifies additional wetlands, so long as an activity continues to meet the requirements for an ACOE authorization, the ACOE authorization remains valid. However, if the project would result in increased impacts to wetlands which would exceed the limits of the authorized Nationwide permit, or would require an additional Nationwide permit not previously authorized, the exemption would be limited to those activities reviewed and approved by the ACOE as stated at N.J.A.C. 7:7A-2.7(g) and 7:7A-2.9(b)6.

(439) COMMENT: There should be no need to prove that an applicant received "subsequent authorization" at N.J.A.C. 7:7A-2.9(b)6 as this is not mandated by the Act (N.J. Builders Association).

RESPONSE: The Act at N.J.S.A. 13:9B-4d states that permit applications which have been approved prior to the effective date of the Act are exempt. Therefore, the Department is following the Act's mandate to exempt only approved permits.

(440) COMMENT: The rule should be amended to require the DEPE to invite the applicant and provide 48 hours notice prior to performing a site inspection (NAIOP).

RESPONSE: The scheduling of site inspections involves many factors including the size of the site, weather conditions and many other unpredictable circumstances. Therefore, while the Department makes every effort to accommodate interested applicants, the change that the commenter suggests would result in additional delays and a further complication of the site inspection process. Therefore, the rule will not be amended.

Subchapter 3. General Standards for Granting Individual Freshwater Wetlands and Open Water Fill Permits

(441) COMMENT: The addition of the word "individual" in the heading of this subchapter is applauded and helps clarify previous confusion regarding the scope of the chapter. (Environmental Evaluation Group).

RESPONSE: The Department acknowledges this comment in support of the amendment.

(442) COMMENT: The proposed rules do not address wetland policies pertaining to wet borrow pits. The Coastal Permit Program rules provide that the filling of wet borrow pits for construction is acceptable provided that certain conditions are met. However, the proposed amendments to the Act make no provision for the filling of such areas. We suggest that the two policies be made consistent (Archer and Greiner).

RESPONSE: While the Department strives to make rules consistent from one program to the next, these efforts must occasionally yield to inconsistent statutory mandates. Therefore, while under the Coastal Facility Review Act N.J.S.A. 13:19-1 et seq. (CAFRA), the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., and the Waterfront Development Act, N.J.S.A. 12:5-3, the filling of wet borrow pits is conditionally acceptable, such fill is a regulated activity pursuant to the Act and, therefore, permissable only under certain limited circumstances.

N.J.A.C. 7:7A-3.1 Requirements for granting individual freshwater wetlands and open water fill permits

(443) COMMENT: The Department should add language to N.J.A.C. 7:7A-3.1 indicating that large projects proposing a number of wetland impacts, all individually conforming to the Statewide General Permit standards and conditions (with the exception that total wetland impacts are over one acre), should be categorically acceptable toward the granting of an individual permit. Although the total impact area may cumulatively be over one acre, total project environmental impact may be less compared to the cumulative impact associated with numerous smaller scale projects developed on similar acreage (Paulus, Sokolowski and Sartor).

RESPONSE: The Department is directed by the Act to assess cumulative impacts under both Individual permits as well as under the Statewide general permit program. The suggestion that the rule be modified to approve all activities under a single project which qualify for Statewide general permits, regardless of total acreage, is inconsistent with the Act's mandate to assess all cumulative impacts of a project under the Individual permit process. In addition, the rule requirements for "stacking" multiple Statewide general permits state that the individual as well as cumulative limits must be met. Therefore, this change will not be made.

(444) COMMENT: It is not fair, reasonable, and in fact may be illegal to expect an owner to look at an alternative site to the one he purchased prior to the enactment of the Act in order to satisfy the alternative analysis required for an individual permit. An exemption for developments in progress prior to the adoption of the law should be provided (Pureland).

RESPONSE: The Department has not made the suggested change, because the exemption suggested by the commenter would be inconsistent with the Act. The Act provides exemptions for developments in progress at N.J.S.A. 13:9B-4. However, for projects that are not exempt from the Act, N.J.S.A. 13:9B-10 clearly states that "an alternative shall be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology and logistics in light of overall project purposes, and may include an area not owned by the applicant ..."

(445) COMMENT: The criteria of "no practical alternative" as stated at N.J.A.C. 7:7A-3.1 should be restated so as to allow more flexibility in balancing the impact of the proposed activities with other criteria that may also have a significant benefit to the public good. Examples might be certain Affordable Housing issues, sewerage treatment projects or expansion, or sewerage conveyance systems (Brokaw De Riso Associates).

RESPONSE: The standards for issuance of Individual permits already include, at N.J.A.C. 7:7A-3, a determination of whether the proposed activity is in the public interest.

(446) COMMENT: The rule at N.J.A.C. 7:7A-3.1(a) should explicitly state than any alternative must fulfill the basic purpose of the proposed project. Although the proposal implicitly supports such an interpretation, an explicit statement will avoid unnecessary confusion (Hannoch Weisman, AES Corporation).

RESPONSE: The Department has not made the suggested change, because the language at N.J.A.C. 7:7A-3.1(a), "in light of overall project purposes" and at N.J.A.C. 7:7A-3.1(a)2, "to fulfill the basic purpose of the proposed activity" adequately addresses this concern and reflects the exact language in the Act at N.J.S.A. 13:9B-10a.

(447) COMMENT: The criteria found in N.J.A.C. 7:7A-3.1 are subjective in nature, impossible to meet and has the effect of not granting any permits (N.J. Society of Professional Engineers).

RESPONSE: The language of the rule reflects the exact language in the Act at N.J.S.A. 13:9B-10. The Act clearly states that "an alternative shall be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology and logistics in light of overall project purposes, and may include an area not owned by the applicant ..." To date the Department has approved over 50 Individual permits.

(448) COMMENT: Application of the practicable alternative test and rebuttable presumption for water dependent activities is contrary to the Act at N.J.S.A. 13:9B-10 which establishes these tests for non-water dependent activities only (NAIOP).

RESPONSE: The Department disagrees with the commenter's assertion. The Act at N.J.S.A. 13:9B-9b states that the Department "shall issue a freshwater wetlands permit only if it finds that the regulated activity: (1) is water-dependent or requires access to the freshwater wetlands as a central element of its basic function, and has no practicable alternative ..." Further, the rules do not apply the rebuttable presumption to water-dependent activities, but, rather to non-water dependent activities at N.J.A.C. 7:7A-3.3(b).

(449) COMMENT: We support the alternatives test because wetlands avoidance should be a high priority (Passaic River Coalition).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

N.J.A.C. 7:7A-3.2 Requirements for water-dependent activities

(450) COMMENT: The rule should be amended to read, "The Department shall issue a freshwater wetlands or open water fill permit only if the proposed project or activity meets ..." This will provide clarity and consistency (ANJEC).

RESPONSE: This section makes reference to both projects and regulated activities but in differing contexts. An applicant proposes to conduct a regulated activity as a part of a proposed project. The entire project is subject to an alternatives analysis and in addition, the regulated activity is reviewed for water-dependency. Since the suggested language would not provide any additional clarity or consistency, it will not be included in the adoption.

N.J.A.C. 7:7A-3.3 Requirements for non-water dependent activities

(451) COMMENT: A reference to the requirement for an open water fill permit should be added to N.J.A.C. 7:7A-3.3(c) to be consistent with other parts of the rule (Amy S. Greene Environmental Consultants).

RESPONSE: The rule has been clarified upon adoption to include a reference to open water fill permits.

(452) COMMENT: What is the DEPE's rationale for deleting the explanation for practicable alternative (N.J. Builders Association)?

RESPONSE: The explanation for practicable alternative has not been deleted. Rather, it was moved to N.J.A.C. 7:7A-3.1.

N.J.A.C. 7:7A-3.4 Non-water dependent activities in freshwater wetlands of exceptional resource value or in trout production waters

(453) COMMENT: There is no statutory basis for extention of the "compelling public need" component to trout production waters. The Act uses trout production criteria to classify tributary wetlands for which N.J.S.A. 13:9B-10 adds the public need test but regulations cannot classify the waters as exceptional (NAIOP, Hannoch Weisman).

RESPONSE: The Department is not classifying trout production waters as exceptional resource value since there is no attempt to provide transition areas to these waters. However, the Act in designating wetlands which "discharge into FW-1 waters and FW-2 trout production waters and their tributaries" as exceptional resource value has by implication identified trout waters as being worthy of added protection. Therefore, when the Department considers allowing the filling of these waters, it must apply similar standards.

(454) COMMENT: We are concerned with the subjective nature of "compelling public need." What is the criteria for establishing this determination and isn't protection of trout production waters in itself a compelling public need (Bedminster Environmental Commission, Morris County Planning Board)?

RESPONSE: The definition of compelling public need can be found at N.J.A.C. 7:7A-1.4 and is very specific and does not include a reference to trout production waters. Compelling public need is a criteria which relates to the review of a project, not to the value of the resource. In amending the rules in this fashion, the Department is requiring that the proposed project meet a level of public need that exceeds the public need for protecting the resource.

N.J.A.C. 7:7A-3.5 Standard requirements for all regulated activities in freshwater wetlands and state open waters

(455) COMMENT: The term "probable" should be added after "historic" at N.J.A.C. 7:7A-3.5(a)8 and 9.3(b)5 (USEPA Region II, USEPA Headquarters).

RESPONSE: The rules will be changed on adoption as suggested to make this provision consistent with the Federal requirements.

(456) COMMENT: The standard condition at N.J.A.C. 7:7A-3.5(a)8 and 9.3(b)5 (Standards and conditions for all Statewide general permit(s) authorizations) states that "before or during the course of authorized work" if a historic property is encountered, then the permittee shall notify the Department and proceed as directed. Does this mean that even before an application is submitted, the applicant will get feedback regarding the need for a cultural resources survey? How will the public know if all applicants are being treated consistently by the Department regarding this issue? Furthermore, what is the Department's justification for linking the disturbance of wetlands with impacts to historic sites (Environmental Evaluation Group, N.J. Builders Association)?

RESPONSE: Historic resources can consist of obvious structures as well as cultural resource sites (for example, prehistoric native American sites) which are less obvious. Therefore, when there are possible impacts on known resources (for example, a site contains evidence of a historic cemetary), the consultation should happen before construction begins. If the resource is encountered during construction, consultation with the Department must occur during construction. The permittee should inform the project review person as to the nature of the discovery. The regulatory staff will then consult with the Office of State Historic preservation to determine what steps must be taken in order to allow the permittee to complete the regulated activity. Such steps may include requiring an archaeological survey to determine the extent of the site, requirements for completing the regulated activity without further disturbance to the site, etc. The rule requirement to assess impacts to probable historic properties exists in the Federal 404 program (see 33 C.F.R. 325.2(b)(3)) and must be a part of the State's rules in order to pursue the assumption of the 404 program.

(457) COMMENT: The proposed rule change at N.J.A.C. 7:7A-3.5(a)8 and 9.3(b)5 (Standards and conditions for all Statewide general permit(s) authorizations) should be discussed in further detail. As proposed this change will serve to halt development that is subject to potential candidacy for eligibility on the National Register. If the Department intends to consider review of such projects affected by this determination, more detailed language should be provided to describe an appropriate course of action to be taken by an applicant in the event that a potential historic site is encountered (Pennoni Associates).

RESPONSE: Historic resources can consist of obvious structures as well as cultural resource sites (for example, prehistoric native American sites) which are less obvious. Therefore, when there are possible impacts on known resources (for example, a site contains evidence of a historic cemetary), then consultation should happen before construction begins. If the resource is encountered during construction, consultation with the Department must occur during construction. The permittee should contact the project review person and discuss the nature of the discovery. The regulatory staff will the consult with the Office of State Historic preservation to determine what steps must be taken in order to allow the permittee to complete the project. Such steps may include requiring an archaeological survey to determine the extent of the site, requirements for completing the project without further disturbance to the site, etc.

(458) COMMENT: We support the proposed rule at N.J.A.C. 7:7A-3.5(a)8 and 9.3(b)5 (Standards and conditions for all Statewide general permit(s) authorizations) which recognizes the importance of historic sites. However, the rule should be amended to include special provisions for the restoration of these sites which may require the disturbance of wetlands or transition areas (N.J. Recreation and Parks Association).

RESPONSE: Detailed, highly variable provisions for such restorations are best dealt with on a case by case basis.

(459) COMMENT: The proposed language at N.J.A.C. 7:7A-3.5(a)8 and 9.3(b)5 (Standards and conditions for all Statewide general permit(s) authorizations) concerning potential adverse effects to properties on, or eligible for listing on, the National Register of Historic Places is inappropriate because there is no relationship between the filling of wetlands and impacts to historic sites. The DEPE is exceeding the scope/definition of the term "in the public interest" under the Freshwater Wetlands program (JCP&L).

RESPONSE: The requirement to assess impacts to probable historic properties is required by the Federal 404 program (see 33 CFR 325.2(b)(3)) and is, therefore, a necessary part of the State program for assumption of the 404 program.

(460) COMMENT: The statement at N.J.A.C. 7:7A-3.5(a)8 and 9.3(b)5 (Standards and conditions for all Statewide general permit(s) authorizations), "and proceed as directed by the Department" should be deleted because it is not included in the federal regulations (NAIOP).

RESPONSE: The commenter is directed to 33 CRF 325.2(b)(3), which refers the applicant to the ACOE rules implementing the National Historic Preservation Act. These rules set up a similar procedure to that which will be employed by the Department as described in the response to the following comment.

(461) COMMENT: In order for the standard at N.J.A.C. 7:7A-3.5(a)8 and 9.3(b)5 (Standards and conditions for all Statewide general permit(s) authorizations) to be adhered to the Department should establish procedures for the applicant to document the existence of properties on the National Register which might be impacted by the activity and a procedure for review of this information by the State Historic Preservation Officer (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: Historic resources can consist of obvious structures as well as cultural resource sites (for example, prehistoric native American sites) which are less obvious. Therefore, when there are possible impacts on known resources (for example, a site contains evidence of a historic cemetery), the consultation should happen before construction begins. If the resource is encountered during construction, consultation with the Department must occur during construction. The permittee should contact the project review person and discuss the nature of the discovery. The regulatory staff will then consult with the Office of State Historic preservation to determine what steps must be taken in order to allow the permittee to complete the project. Such steps may include requiring an archaeological survey to determine the extent of the site, requirements for completing the project without further disturbance to the site, etc.

(462) COMMENT: N.J.A.C. 7:7A-3.5(a)9 (requiring compliance with the Flood Hazard Area Control Act) seems superfluous since it is covered under N.J.A.C. 7:7A-3.5(a)10 ("Is otherwise lawful") and therefore, should be deleted (Amy S. Greene Environmental Consultants, N.J. Builders Association, NAIOP).

RESPONSE: The condition at N.J.A.C. 7:7A-3.5(a)9 is much more specific than the condition at N.J.A.C. 7:7A-3.5(a)10. While this may appear to be merely redundant, the Department believes that the degree of inter-relatedness of these two programs merits this specification as an additional condition.

(463) COMMENT: What criteria will be used to determine whether a project is in the public interest as discussed at N.J.A.C. 7:7A-3.5(a)11i-vii (Environmental Evaluation Group, N.J. Builders Association, N.J. Concrete and Aggregate Association)?

RESPONSE: The criteria for determination of public interest can be found at N.J.A.C. 7:7A-3.5(a)11.

(464) COMMENT: We support the language at N.J.A.C. 7:7A-3.5(a)11vii (individual and cumulative impacts) (ANJEC, Great Swamp Watershed Association).

RESPONSE: The Department acknowledges this comment in support to the rule amendment.

(465) COMMENT: The proposed rule at N.J.A.C. 7:7A-3.5(a)11vii should be amended to include the following language, "The ecological value of freshwater wetlands and probable individual and cumulative impacts of the proposed activities in freshwater wetlands and transition areas on public health and fish and wildlife" (NAIOP).

RESPONSE: The suggested limitation has not been included in the adoption because the Act mandates the Department to assess a wide variety of impacts of the project as a whole without this limitation when determining compliance with the standards for issuance of an Individual permit. The rule at N.J.A.C. 7:7A-3.5(a)11vii has been amended upon adoption to include and define the term "project" to clarify this provision. The Department notes that the term is used in N.J.A.C. 7:7A-3.5, and throughout most of N.J.A.C. 7:7A, to include the use and configuration of all buildings, pavements, roadways, storage areas and structures, and the extent of all activities associated with those improvements. However, this common meaning of the term "project" does not apply to the use of that term in N.J.A.C. 7:7A-2.7(d), concerning exemptions based upon previously granted municipal approvals. For the purposes of N.J.A.C. 7:7A-2.7(d), the Department has proposed a definition of "project" which applies specifically to that provision. This proposal is published in this issue of the New Jersey Register.

Subchapter 4. General Standards for Granting Water Quality Certificates

Water Quality Certification

COMMENT: Several comments objected to the concept of and the provisions for Water Quality Certification. They had the following comments:

(466) The Freshwater Wetlands Protection Act does not grant DEPE authority to establish a regulatory program which will only apply to projects which do not require freshwater wetlands permits (AES Cohansey Inc., Connell, Foley & Geiser, Hannoch Weisman and Pennoni Associates);

(467) The proposed rules lack a provision for automatic issuance of a Water Quality Certificate for projects which receive Statewide General Permits (AES Cohansey Inc., New Jersey State Bar Association, Hannoch Weisman);

(468) This subchapter should be promulgated as a separate rule because it does not make sense to implement the Federal Clean Water Act amid freshwater wetlands regulations (New Jersey Association of Realtors, Mark H. Burlas, Sandoz Pharmaceuticals Corporation);

(469) The standards set forth are complex, with numerous requirements which are impossible to meet, for example, requiring that a proposed project will not cause or contribute to a significant degradation of ground or surface waters (New Jersey Association of Realtors);

(470) DEPE appears to be trying to circumvent the legislative process by proposing regulations that are not based on State law (New Jersey Association of Realtors);

(471) This process will add extensive costs, fees, and will cause tremendous economic hardship on individual homeowners, and single family residences as well as small businesses (New Jersey Society of Professional Engineers);

(472) The entire article should be rewritten as the language presumes the project or activity is of significant impact (New Jersey Society of Professional Engineers);

(473) The mechanism the Department has chosen to implement the WQC program goes beyond the Department's powers under either the Freshwater Wetlands Protection Act or the Federal WQC program (NAIOP, Archer & Greiner);

(474) The Department has no power to adopt the WQC program rules pursuant to the Freshwater Wetlands Protection Act since no specific authorization for adoption of these rules is contained in the act, and the proposed rules conflict in many ways with the Act itself (NAIOP);

(475) The WQC provisions should be deleted from these rules and more appropriate regulations should be proposed by the Division of Water Resources, since it is in a better position to determine if the effluent standards governed by the WQC program are being met (NAIOP);

(476) As drafted, the proposed WQC regulations go far beyond the contemplation of the federal Clean Water Act, which only requires a limited certification in connection with the application for any federal license or permit that the effluent limitations and water quality standards established pursuant to Sections, 301, 302, 303, 306, 307 of the Clean Water Act are not violated as a result of the proposed activity (NAIOP, Archer & Greiner);

(477) As drafted, the proposed WQC regulations appear to be an attempt by the Department to apply wetlands-based permitting standards to projects which are exempt from the Act. This is in direct conflict with the Appellate Division's decision, in the case brought by NAIOP, which recognized that the Department may not regulate wetlands aspects of exempt projects under the guise of other regulatory programs (NAIOP, Connell, Foley & Geiser);

(478) An activity specific WQC should only be required by the state where it falls within the Section 404 criteria. Activities which can be exempt from this requirement should be exempt. Any activity affecting less than one acre of wetlands could be given a blanket WQC to simplify the process and to balance the potential benefit achieved by a stricter requirement vs. the cost involved in the permitting process necessary to get a WQC for an activity less than one acre. This one acre criteria, would not result in any measurable loss of environmental protection (Brokaw DeRiso Associates, Inc.);

(479) The premise of the proposed WQC has nothing to do with "water quality" because an alternatives analysis should not be a substitute for qualitative data relative to water quality standards (Langan Engineering);

(480) Qualitative standards should be developd for WQCs and proposed independent of the freshwater wetlands rules (Langan Engineering);

(481) The Army Corps of Engineers (ACOE) presently administers permits for Open Water Fill projects under Section 404 of the Federal Water Pollution Control Act. The other provisions of the subchapter including a 180-day maximum review period and a non-specific mitigation program are reasons why the jurisdiction of WQC should stay with the ACOE and the 90-day review period should be adhered to (Consulting Engineers Council of New Jersey [CECNJ]);

(482) The Department should make the distinction that a 401 Water Quality Certificate should not be reviewed under the same guidelines as the 404 permit application. There should be separate standards for review and processing of permits within the Division. The intent of the 401 WQC program is to insure that fill used in the wetland will not have toxic or hazardous contaminants that have an adverse effect on water quality. The use of the fill is not a consideration. Therefore, the Division should set up guidelines and testing procedures for determining whether the types of fill to be used will generate toxic or hazardous pollutants, and which parameters are to be tested for (Pennoni Associates Inc.);

(483) The broad description of regulated activities under this chapter clearly exceeds that used by the ACOE which requires such certification only for the discharge of dredged or fill material from a point source. Therefore, the proposed jurisdictional limits are an unwarranted and unjustified expansion of the Act rules and an unauthorized expansion of the Act's jurisdiction (Somerset County Department of Public Works);

(484) The proposed regulations resemble those for an Individual Wetland Permit. However, in light of the broader jurisdictional limits proposed for these regulations, WQC regulations would result in extension of the Act's jurisdiction to activities in uplands and non-wetland areas (Somerset County Department of Public Works); and

(485) The proposed standards are unclear, excessive, impossible to meet and should be promulgated as a separate rule proposal. Also the need for an alternative analysis and rebuttable presumption test to protect water quality is questionable (Archer & Greiner, and Form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc., Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp).

(486) The New Jersey Farm Bureau asks whether this section applies to farm operations since it is unclear to them whether farm ponds, ditches, or seasonal poorly drained parts of fields constitute "state open waters" or "waters of the United States".

(487) The New Jersey Department of Agriculture asks whether the jurisdiction under N.J.A.C. 7:7A-4.1 is in conflict with N.J.A.C. 7:7A-2.7(l)i, regarding minor drainage for ongoing agricultural activities, and whether all agricultural activities will now need to obtain a WQC.

(488) ANJEC and the Great Swamp Watershed Association support the inclusion of this chapter in the Freshwater Wetlands regulations because the proposed regulations comply with federal requirements for WQCs and their inclusion in the wetlands regulations provides applicants with easy reference.

(489) We maintain that the Department does not have the authority to require an Individual WQC for multiple Nationwide permits impacting more than one acre of Waters of the U.S. (N.J. Builders Association).

N.J.A.C. 7:7A-4.1 Jurisdiction

(490) The New Jersey Builders Association states that this section lists a number of DEPE permit programs to which a water quality certificate could be appended, and asks whether there are other programs that are not listed that may also need a WQC.

(491) The Cumberland County Environmental Health Task Force states that a provision for concurrent review with Waterfront Development permits should be included in this section as well as N.J.A.C. 7:7A-4.3(a) and 4.4(a).

(492) The New Jersey Society of Professional Engineers states that it is unclear when a WQC is required and that it appears that it is required for NJPDES permits, wetlands permits, letters of interpretation, waivers, and CAFRA permits.

(493) NAIOP states that pursuant to 33 U.S.C. 1341, a WQC is only required for a project requiring a federal license or permit for an activity which may result in a discharge into the navigable waters of the United States. The Department has broadened this requirement to include any waters.

(494) NAIOP states that considerations with respect to activities requiring permits under the Freshwater Wetlands Protection Act, the Wetlands Act of 1970, or CAFRA are not required for making the factual determination necessary pursuant to the federal Clean Water Act and therefore, any reference to these other programs in connection with WQCs should be eliminated.

(495) Members of the Pureland Industrial Complex comment that all construction and operations activities result ultimately in a discharge into "waters of the United States" unless one excludes on-site retention. They recommend the addition or the phrase, "direct discharge".

(496) Members of the Pureland Industrial Complex comment that at letter (e) the rule should read, "...If the decision is made to issue a permit, the WQC **shall** (instead of may) be appended to the permit."

(497) Hannoch Weisman states that the threshold level for permits (i.e., "may result in any discharge of any kind") is vague and unnecessarily expansive. They believe that the Department's authority is limited to activities which are likely to result in either unpermitted discharges or a violation of a water quality standard.

N.J.A.C. 7:7A-4.2 Standards for granting a Water Quality Certificate

N.J.A.C. 7:7A-4.2(a)

(498) The New Jersey Builders Association and Amy S. Greene Environmental Consultants, Inc. state that it is unclear here and also at N.J.A.C. 7:7A-4.4 when an applicant is supposed to follow the standards at N.J.A.C. 7:7A-3 and when the standards at N.J.A.C. 7:7A-9 must be followed.

(499) Amy S. Greene Environmental Consultants, Inc. comments that it would be clearer to include reference to Federal 404 permit in this section if it is intended to be included under "for projects not requiring any of the above described permits ...".

(500) Hannoch Weisman states that N.J.A.C. 7:7A-4.2(a)3 implies that projects which qualify for Statewide General permits may have to undergo a review of alternatives in order to obtain a WQC and is contrary to the Act and should be deleted.

(501) Hannoch Weisman states that at N.J.A.C. 7:7A-4.2(a)4, it is inappropriate to apply the most stringent applicable discharge standard to an entire project when multiple permits are required if the project satisfies the applicable antidegradation policy.

N.J.A.C. 7:7A-4.2(b)

(502) The practicable alternative test should not be required because the requirements are stringent and nearly impossible to meet especially when the regulations presume that a practical alternative to the project exists (The New Jersey Builders Association);

(503) The only appropriate standard for determining whether to issue a WQC is whether the proposed activity will comply with specific sections of the Clean Water Act. If it meets these requirements, the WQC must be issued. Therefore, consideration of alternatives, public need, the standards at (e) and (f), application procedures and review (N.J.A.C. 7:7A-4.3, 4.4) are beyond the scope of permissible regulation by the Department both under state and Federal statutes (NAIOP, Archer and Greiner);

(504) It is not fair, reasonable and in fact may be illegal to expect an owner to look at an alternative site to the one he purchased prior to the enactment of the Act. There should be an exemption for developments in progress prior to the adaptation of the law (Pureland Industrial Complex);

(505) As written, all projects except those with an on-site retention including any and all alternatives, excluding those with onsite retention would require WQC. This is not the intent and should be rewritten (Pureland Industrial Complex);

(506) Because of the additional requirements to demonstrate compelling public need or that the denial of the permit would impose an extraordinary hardship on the applicant for discharges to exceptional resource value wetlands, few if any of these permits will ever be issued (The New Jersey Builders Association);

(507) The finding of no practicable alternative to the proposed project is not a water quality standard and may not be implemented or enforced under Section 401 of the Federal Clean Water Act (New Jersey State Bar Association); and

(508) The whole section on WQCs, like the section on Individual permits, seems to be written so as to make it impossible for a permit to be granted. The section should be rethought as a separate issue (Eric S. Luscombe).

N.J.A.C. 7:7A-4.2(d)1

(509) The New Jersey Builders Association asks how the Department plans to define "general region".

N.J.A.C. 7:7A-4.2(f)3

(510) The Morris County Planning Board and the Township of Bedminster Environmental Commission request clarification on the standard condition which states, "Will not result in the likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of the U.S. Department of the Interior or the Secretary of the U.S. Department of Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, 16 U.S.C. 1531 et seq." They ask how many lists of qualifying species there are and which agency administers which list.

(511) In order to comply with the state's anti-degradation policy, the word "significant" should be deleted before the word degradation at N.J.A.C. 7:7A-4.2(f)7 (Passaic River Coalition).

N.J.A.C. 7:7A-4.3 Application procedures

(512) Amy S. Greene Environmental Consultants, Inc. says that references in (b) and (c) should be to N.J.A.C. 7:7A-9.5 which is the section on application procedures.

(513) The New Jersey State Bar Association comments that the state is without statutory authority to assess application fees, civil administrative penalties and fines for WQCs.

(514) The State of New Jersey Department of Agriculture notes that the method of sedimentation control is a required submission and suggests that the Soil Erosion and Sediment Control Act be referenced in this section.

N.J.A.C. 7:7A-4.4 Review of applications

(515) The New Jersey Builders Association commented that Federal regulation allows the states a 60-day review period which can be extended by the district engineer for up to one year. What will be the review period for a WQC in the State of New Jersey?

(516) Members of Pureland Industrial Complex state that 180 days for review is an uncommonly long period of time to review as opposed to design or construct. If subjectivity were removed and if technical rules were clearly established, a review period of two days could be sufficient.

(517) Somerset County Department of Public Works feels that the proposed 180-day review period is excessive and unjustified, since it would only begin after an application is judged to be technically and administratively complete. A maximum period of 30 days should be adopted.

N.J.A.C. 7:7A-4.5 Mitigation

(518) NAIOP states that the Department has no power to require mitigation in connection with the issuance of a WQC because all that is required is a factual determination that the proposed activity will not cause a violation of specified Federal statutory requirements. If these requirements are met, there will be no need for mitigation.

(519) Somerset County Department of Public Works requests that the Department present the legal basis for requiring mitigation for projects which only require a WQC.

(520) The New Jersey Department of Agriculture asks why mitigation is a requirement for all WQCs, Freshwater Wetlands Permits, State open water fill permits and certain Statewide general permits.

(521) Dupont states that the apparent requirement for mitigation for any activities that require a WQC, even in the event that the activities have been exempted according to N.J.A.C. 7:7A-2.7, appears to be a contradiction.

N.J.A.C. 7:7A-4.6 Civil administrative penalties and requests for adjudicatory hearings

(522) NAIOP states that because the Federal WQC requirements only mandate that the Department make a specific factual determination, there can be no basis for a finding that there has been a WQC violation. Therefore this section should be deleted.

(523) The New Jersey State Bar Association states that the proposed provision for civil administrative penalties and requests for adjudicatory hearings should be merged into one central section for penalties and requests for hearings. The other subchapters should be merged as well.

RESPONSE: Based on the review of the above comments and on legal advice received from the Attorney General's office, it is the Department's intent to make extensive substantive changes to subchapter 4. In particular, the Department intends to coordinate the proposal of Water Quality Certificate regulations with the amendment of the Surface Water Quality Standards, N.J.A.C. 7:9, in order to have a fully integrated program consistent with State and Federal law concerning WQC requirements. Therefore, pursuant to N.J.A.C. 1:30-4.3, the Department will repropose subchapter 4 with substantive changes in the future.

Subchapter 5. Emergency Permits

N.J.A.C. 7:7A-5.1 Emergency permits

(524) COMMENT: A listing of all emergency permits should be made available to the public upon request. In addition the word "emergency" should be defined in the definition section (Passaic River Coalition).

RESPONSE: Emergency permits are published in the DEPE Bulletin as are all permits. The term "emergency" is only used to refer to permits which are issued under the conditions described at N.J.A.C. 7:7A-5.1(a) and therefore no further definition is necessary.

(525) COMMENT: We oppose deletion of the word "temporary" in reference to emergency permits (ANJEC, Great Swamp Watershed Association).

RESPONSE: The word "temporary" has not been deleted.

(526) COMMENT: We support the additional language "or severe environmental degradation" (JCP&L, ANJEC, Great Swamp Watershed Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(527) COMMENT: The provision at N.J.A.C. 7:7A-5.1(b)2 implies that mitigation is required for all emergency permits. Additional language should be added to this subsection to clarify that certain general permit activities that are carried out under emergency permits may not require mitigation (Langan Engineering, N.J. Builders Association).

RESPONSE: The commenters are correct and the language has been clarified in this section in the adoption to refer to mitigation for only those activities which require mitigation pursuant to an Individual permit.

(528) COMMENT: There is no scientific reason for the requirement of mitigation at N.J.A.C. 7:7A-5.1(b)2 (NAIOP).

RESPONSE: The circumstances supporting the issuance of a temporary emergency permit do not automatically make mitigation necessary. The Department has revised the rule upon adoption to make it clear that mitigation is necessary in connection with a temporary emergency permit only if it concerns activities which would require mitigation under an Individual permit. Activities carried out pursuant to an emergency permit can involve a wide variety of impacts, both temporary and permanent, to the State's wetlands, open waters and transition areas. Therefore, the Department must have the ability to require mitigation for these impacts once they occur.

(529) COMMENT: The second reference to "restoration" in N.J.A.C. 7:7A-5.1(b)2 should be replaced with the word "mitigation" (Environmental Evaluation Group, ANJEC, Great Swamp Watershed Association).

RESPONSE: "Restoration" is just one of the several forms that mitigation may take. The second reference to "restoration" does indeed refer to restoration activities only and does not include all mitigation activities. Therefore, the requested change has not been made to the adoption.

(530) COMMENT: N.J.A.C. 7:7A-5.1(d) states that "notification shall be sent and mailed". It is unclear when a letter could be sent but not mailed. This sentence should be modified to read "or mailed" or maybe just "shall be mailed" (Amy S. Greene Environmental Consultants, N.J. Builders Association).

RESPONSE: The commenter is correct. To clarify the provision, the adoption has been rewritten to read "shall be mailed."

N.J.A.C. 7:7A-5.2 Obtaining an emergency permit

(531) COMMENT: The rules should be amended to allow the notification of the Department using an emergency facsimile telephone number (NAIOP).

RESPONSE: The nature of an emergency permit makes it imperative that there be direct phone discussions between the applicant and the Department. If the applicant wishes to submit written follow-up information via a facsimile machine, this can be discussed during the phone conversation and the Department will provide a facsimile number at that time.

(532) COMMENT: In N.J.A.C. 7:7A-5.2(d) and (e) it is not clear why the term "permit" was changed to "approval" since the type of authorization is still called a "permit" throughout subchapter 5 (Amy S. Greene Environmental Consultants, N.J. Builders Association).

RESPONSE: The Department is distinguishing between the issuance of a verbal "approval" and the issuance of an actual emergency "permit." In the introductory subsections, the discussion is relatively general while in subsections (d) and (e) the rules specifically address the verbal "approval" of emergency activities and the subsequent issuance of a written "permit."

Subchapter 6. Transition Areas

(533) COMMENT: There are nine pages of regulations covering transition areas. Transition areas are not even wetlands. Why are they given such protection under the law? What authority does the DEPE have to impose transition areas around wetlands (Professional Soil Investigations, Inc.)

RESPONSE: In its findings and declarations, the legislature stated, "the Legislature therefore determines that in this State, where pressures for commercial and residential development define the pace and pattern of land use, it is in the public interest to establish a program for the systematic review of activities in and **around** freshwater wetlands areas ..." (emphasis added). Further, the Act dedicates several sections to the protection of transition areas at N.J.S.A. 13:9B-16, 17 and 18. Therefore, the Act provides the authority for the DEPE to impose transition areas around wetlands.

N.J.A.C. 7:7A-6.2 Prohibited activities in transition areas

(534) COMMENT: The rule at N.J.A.C. 7:7A-6.2(b)2i should be amended to include utilities placed within the right-of-way but outside of the paved cartway (Pureland Industrial Complex, Atlantic Electric).

RESPONSE: The area outside of the paved cartway has been excluded because unlike activities on impervious surfaces, these activities will result in the loss of the area's ability to serve the functions and values of a transition area. Therefore, the rule will not be changed.

(535) COMMENT: The rule at N.J.A.C. 7:7A-6.2(b)2i should be modified to include the following phrase, "under a currently serviceable existing impervious or gravel surface" (NAIOP).

RESPONSE: The list of examples of minor and temporary activities that are not regulated has been supplemented under this proposal. However at this time, the Department cannot make the finding that the construction of utilities lines under **any** impervious surface would not result in a significant impact to the adjacent wetlands. In addition graveled areas may continue to serve as remediation and filtration areas. Therefore, the Department cannot make the finding that the construction of utilities lines under gravel surfaces would not result in a significant impact to the adjacent wetlands. The suggested changes have not been made.

(536) COMMENT: We support the rule at N.J.A.C. 7:7A-6.2(b)2i (Amy S. Greene Environmental Consultants, Inc., JCP&L).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(537) COMMENT: The rule at N.J.A.C. 7:7A-6.2(b)2i should be clarified to read "of utility lines and poles over, under, or paralleling a previously authorized ..." roadway (JCP&L).

RESPONSE: The area outside of the paved cartway has been excluded because unlike activities on impervious surfaces, these activities will result in the loss of the area's ability to serve the functions and values of a transition area. Therefore, the rule will not be changed.

(538) COMMENT: Please clarify what the Department's intent is at N.J.A.C. 7:7A-6.2(c). It is unclear whether the exemptions for nationwide permits and municipal approvals prior to July 1, 1989 are affected by the proposed changes in this section (N.J. Builders Association).

RESPONSE: This provision was amended to clarify that an exemption based on a valid ACOE Nationwide permit exempts only the authorized activity in the wetlands and access through the transition area in order to conduct work under the Nationwide permit. Projects receiving municipal approvals issued between July 1, 1988 and July 1, 1989 are exempt from the transition area requirements and are unaffected by this change.

(539) COMMENT: The placement of utilities in transition areas is minor and temporary, and should not be restricted to paved roadways. Instead, non-regulated activities should be broadened to include gravel, filled, etc. roadways (Van Note-Harvey Associates).

RESPONSE: The list of examples of minor and temporary activities that are not regulated has been supplemented under this proposal. However at this time, the Department cannot make the finding that the construction of utilities lines under **any** impervious surface would not result in a significant impact to the adjacent wetlands. In addition graveled areas may continue to serve as remediation and filtration areas. Therefore, the Department cannot make the finding that the construction of utilities lines under gravel surfaces would not result in a significant impact to the adjacent wetlands. The suggested changes have not been made.

N.J.A.C. 7:7A-6.3 Determination of transition areas due to the presence of freshwater wetlands on adjacent property

(540) COMMENT: The amended rule at N.J.A.C. 7:7A-6.3(b)4i and 5i should be clarified to refer to the property boundary instead of the wetland line (Wander Ecological Consultants, Amy S. Greene Environmental Consultants, Inc., NJ Concrete and Aggregate Association).

RESPONSE: The commenter is correct since this section instructs applicants on how to comply with transition area requirements without delineating exceptional resource value wetlands. Therefore, the rule has been clarified on adoption to reference "property boundaries" instead of "wetlands boundary."

(541) COMMENT: The proposed requirement at N.J.A.C. 7:7A-6.3(b)6 that property owners provide written notice pursuant to Regulatory Appendix B to enter adjacent lands is burdensome and perhaps illegal (Hannoch Weisman, AES Cohansey, Inc., NJ Concrete and Aggregate Association, N.J. Society of Professional Engineers).

RESPONSE: The rule, as proposed, already addresses the commenter's concern by deleting Appendix B and the reference to Appendix B in N.J.A.C. 7:7A-6.3(b)6.

(542) COMMENT: In the rule at N.J.A.C. 7:7A-6.3(b)6 "neighboring property owners" and "adjacent land owners" may not be the same thing. We recommend that only adjacent property owners within 200 feet of the regulated activity be notified (JCP&L).

RESPONSE: The reference to "neighboring" has been replaced with "adjacent" to clarify this provision. However, this section will not be amended to only require notice of those property owners within 200 feet of the regulated activity since regulated activities that may not be within 200 feet of adjacent landowners, conducted within large parcels, may

result in impacts to those adjacent owners. Therefore, it is necessary to provide them with sufficient notice.

(543) COMMENT: We support the deletion of the "Right of Entry Agreement" (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(544) COMMENT: If the rule at N.J.A.C. 7:7A-6.3 requires that an applicant document the presence or absence of wetlands on adjacent properties, it should find a legal means of providing the applicant with access to these sites. Otherwise, this requirement represents an arbitrary and capricious denial of the use of the applicant's property (Brokaw DeRiso Associates, Inc.).

RESPONSE: There are many cases where entry into neighboring lands is helpful or necessary for compliance with Federal or State law. Since it is the applicant who will derive the benefit from obtaining access to the adjacent parcels, it is appropriate that the responsibility for determining the presence or absence of wetlands on adjacent properties remain with the applicant. If the applicant has difficulty in obtaining access to adjacent properties, the Department has provided a setback option so that the applicant can ensure compliance. In addition, there are many cases where a presence/absence determination would reveal that there are no freshwater wetlands in the immediate area. In addition, the Department has provided a letter of interpretation for a footprint of disturbance in which the Department conducts the investigation and does not require the applicant to provide information about adjacent properties.

(545) COMMENT: We support the amendment at N.J.A.C. 7:7A-6.3(b)6 which provides a form of notice that advises adjacent property owners that DEPE has the right to inspect their properties. This is a good provision which takes the burden off the applicant to determine the transition areas from off site wetlands (New Jersey State Bar Association, N.J. Recreation and Parks Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(546) COMMENT: The proposed language change at N.J.A.C. 7:7A-6.3(b)6 is an improvement over the existing regulations since it takes the burden off the applicant to determine the transition area from off-site wetlands. Nevertheless, this procedure may still create unnecessary objection from neighboring property owners for nothing more than a wetlands delineation or resource classification (NJ Builders Association).

RESPONSE: The commenter may be correct. However, the Department will make every effort to inform adjacent property owners about the Department's responsibility to enforce this Act.

(547) COMMENT: The rule at N.J.A.C. 7:7A-6.3(b) should be changed to delete the phrase (b)1-7 and replace it with (b)1-6 (NAIOP).

RESPONSE: There is no reference to (b)1-7 at N.J.A.C. 7:7A-6.3(b)6. Further, the reference at N.J.A.C. 7:7A-6.3(c) has already been amended.

(548) COMMENT: In the rule at N.J.A.C. 7:7A-6.3(b)6 regarding permission from property owners for site inspections, it appears as if the DEPE no longer feels that permission from a property owner is required to conduct a field inspection. If this is the case, upon what legal basis do they draw the right (Somerset County Planning Board)?

RESPONSE: The notice requirements at N.J.A.C. 7:7A-7.6(a) have been amended and require that the applicant inform the adjacent landowners that the Department may conduct a limited field investigation on their land. Pursuant to N.J.S.A. 13:1D-9, and N.J.S.A. 13:9B-21m, the Department has the authority to enter properties and conduct site inspections, which authority will only be exercised consistent with any overriding Fourth Amendment limitations.

(549) COMMENT: The rule should be amended to allow for an applicant to send one notification letter for multiple applications submitted simultaneously (Amy S. Greene Environmental Consultants, Inc., NJ Builders Association).

RESPONSE: The rule at N.J.A.C. 7:7A-7.6(a)7 has been amended on adoption to clarify that an applicant may send one notification letter for multiple applications submitted simultaneously.

Subchapter 7 Transition Area Waiver

N.J.A.C. 7:7A-7.1 General Provision

COMMENT: Several commenters objected to the proposed changes which would delete the word "waiver" and instead use "permit" and would refer to "prohibited" activities as "regulated" in the transition area. They had the following comments:

(550) The definition of "permit" is inconsistent with the Act because it includes "prohibited activities in transition areas". The definitions and wording of the Act should be followed strictly (Leslie Holzmann);

(551) The substitution of "permit" for "waiver" appears to be more than a change in semantics. For example, the proposed modification of N.J.A.C. 7:7A-9.4(c) includes transition areas in the total permissible one acre of disturbance which may be authorized by a combination of statewide general permits. Based on the changed terminology, this one acre limitation might now include areas of transition are averaging. Therefore, it is suggested that the Department retain the current terminology of "waiver" rather than the proposed use of "permit" (Archer and Greiner, NAIOP);

(552) The substitution of "permit" for "waiver" appears to be more than a change in semantics. The Act provides for "waivers" for prohibited activities, which are distinct from the Act's definition of regulated activities. Since the Act's inception, the Department has implemented the transition area requirements using the terminology of "waiver" and "prohibited activities." In addition, court cases interpreting the Act have used this terminology. For the sake of clarity and consistency, it is suggested that the Department retain the current terminology of "waiver" rather than the proposed use of "permit" (Public Advocate of New Jersey, U.S. Fish and Wildlife Service, New Jersey Conservation Foundation, Passaic River Coalition);

(553) The change from "prohibited" to "regulated" completely modifies the language. It appears that DEPE wishes to regulate all activities, not just the ones that are prohibited (N.J. Society of Professional Engineers);

(554) The definition of "regulated activity" is inconsistent with the Act because it includes "prohibited activities in transition areas" (Leslie Holzmann, NAIOP); and

(555) The change from "waiver" to "permit" and "prohibited" to "regulated" gives more latitude to the applicant than the citizen (Save Our Swamp).

RESPONSE: The Department made this proposal in an effort to simplify the language and the number of different terms used throughout the rules. However, due to the concerns regarding differences in the shades of meaning of the terms "permit" and "waiver," and "prohibited" and "regulated," the Department has determined not to adopt this amendment.

(556) COMMENT: This subchapter should contain a provision such as that at N.J.A.C. 7:7A-9.6 allowing the applicant or other party to request an administrative hearing on any transition area permit. In addition, transition area permits should state that they do not become effective for 30 days, so that the applicant does not act on information that is the subject of an appeal (Wander Ecological Consultants).

RESPONSE: The rule has been amended upon adoption to include the opportunity to request a hearing on any department decision concerning a transition area waiver at N.J.A.C. 7:7A-7.8. The rule at N.J.A.C. 7:7A-7.8 references N.J.A.C. 7:7A-12.7, which provides for a "stay" by the Commissioner. Therefore, there is no need for a 30-day "ineffective" period.

(557) COMMENT: The requirement for deed restrictions at N.J.A.C. 7:7A-7.1(g) for all transition area permits, including transition area averaging permits, is ultra vires and outside the scope of the Act. Freshwater wetlands and transition areas are protected by the Act. Therefore, deed restrictions will not increase the protection of these areas. Furthermore, wetlands and transition areas are dynamic resources, and the Department's rules are subject to change and reinterpretation. Accordingly, in the future, property owners are likely to be burdened with deed restrictions which no longer reflect the true extent of wetlands or then-current law. This approach may also constitute a regulatory taking without just compensation. This proposal is contrary to N.J.S.A. 13:8A-24 which provides that all lands acquired by the State must be acquired in the name of the State by the exercise of eminent domain or otherwise and shall require the payment of just compensation. N.J.S.A. 13:8A-12 defines "lands" to include any interest, rights or conservation easements (Archer and Greiner; Hannoch Weisman, AES Cohansey, Inc., Mark H. Burlas, Sandoz Pharmaceuticals Corporation, NAIOP, DuPont).

RESPONSE: All transition area waivers are issued only after the Department makes the finding that modifying the transition area will have no "substantial impact" on the associated wetland. Therefore, it is necessary to restrict the modified area upon issuance of this waiver, giving notice to all interested parties, present and future, through an approved deed restriction in order to maintain the terms and conditions upon which this finding was made. Further a careful reading of N.J.S.A.

13:9B-24 will disclose that the payment of just compensation is not required in all cases of land acquisition by the State. An applicant is not precluded from requesting that the Department adjust the deed restriction in the future if it is believed that it no longer represents an accurate representation of the modified transition area boundary.

(558) COMMENT: We support the exemption of linear development from the requirement of deed restricting the transition area. This requirement would directly conflict with the Board of Public Utilities Statute to site new facilities or add existing lines to the maximum extent possible in the same ROW (JCP&L).

RESPONSE: The Department acknowledges this comment in support of the rule amedment.

(559) COMMENT: The Department should also be aware that wetlands lines can change as a function of time and that the rules should address pending property transfers. The rules should also provide that where there is a change in the location of a wetlands over time, the Department can approve a change in the legal description of the area of the deed restriction (NJ Builders Association).

RESPONSE: The rule addresses pending property transfers by requiring that the restriction be added to the deed and "shall run with the land and be binding upon the applicant and the applicant's successors in interest in the premises or in any part thereof." An applicant can request that the Department adjust the deed restriction if it is believed that it no longer represents an accurate representation of the modified transition area boundary.

(560) COMMENT: The requirements which must be satisfied to obtain the Department's approval at N.J.A.C. 7:7A-7.1(g) should be stated. Furthermore, the provision which renders the permit ineffective until the deed restriction is recorded is unduly burdensome because many recording offices have significant backlogs which are beyond the applicant's control (Hannoch Weisman).

RESPONSE: The Department has sample deed restriction language available which will be distributed to applicants receiving approved transition area permits in order to demonstrate to the applicant the components that are necessary to "obtain the Department's approval." Though the recording offices may have significant backlogs, a person can hand deliver the deed restriction to the recording office (along with the recording fee), and obtain proof that the document has been accepted for recording. Therefore, the rule will be amended on adoption to require proof that the deed restriction has been recorded, or proof of acceptance for recording.

(561) COMMENT: Wetland delineations are only good for five years and the regulations are subject to change. Therefore the requirement of a deed restriction may inadvertently supersede changing regulations and onsite conditions (Van Note-Harvey Associates, N.J. Society of Professional Engineers).

RESPONSE: An applicant can request that the Department adjust the deed restriction if it is believed that it no longer represents an accurate representation of the modified transition area boundary.

(562) COMMENT: The rule at N.J.A.C. 7:7A-7.1(g) requires a deed restriction for all transition area permits. The Department should utilize a standard deed restriction form (New Jersey State Bar Association, NJ Builders Association).

RESPONSE: The Department will provide a sample deed restriction so the applicant will know what is necessary to satisfy this condition. However, this has not been made a part of the adoption since the applicant is not required to use this exact language.

(563) COMMENT: At N.J.A.C. 7:7A-7.1(g), conditioning a permit on a "prior recording" does not make sense—if a deed restriction is already recorded (presumably before applying for the permit), there is no need for a condition (Wander Ecological Consultants).

RESPONSE: The language will be clarified to state, "Every approved transition area waiver ... shall be conditioned on the recording of a Department-approved deed restriction of activities which may be undertaken in the transition area. Prior to construction, the deed restriction shall be recorded in the office of the clerk of the county or through the register of deeds and mortgages in which the premises are situated."

(564) COMMENT: The DEPE should provide the rationale for requiring deed restrictions on modified transition areas (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: All transition area waivers are issued only after the Department makes the finding that modifying the transition area will have no "substantial impact" on the associated wetland. Therefore, it is necessary to restrict the modified area upon issuance of this waiver, giving notice to all interested parties, present and future, through an approved deed restriction, in order to maintain the terms and conditions upon which this finding was made. Further, in the case of an averaged transition area, it would not be immediately apparent to a future property owner, where the bounds of the compensation area or reduced transition area are since the averaging could have occurred in many different ways. This could lead to possible violations in the transition area.

(565) COMMENT: The rules should also clarify that a deed restriction can be recorded at any time prior to the commencement of construction (NJ Builders Association).

RESPONSE: As stated above, the language has been clarified to state that the deed restriction must be recorded "prior to construction."

(566) COMMENT: The Department's foresight in exempting the deed restriction requirement for Special Activity Permits is applauded (NJ Concrete and Aggregate Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(567) COMMENT: Why are deed restrictions required for transition areas but not for Statewide general permits? This is another way that the rules encourage impacts to wetlands by making it easier to obtain a general permit (Wander Ecological Consultants).

RESPONSE: It is not clear to the Department what the commenter's question is asking. The issuance of a Statewide general permit authorization results in the permanent elimination or modification of wetlands. Upon completion of this activity there would be no use for a deed restriction since the resource will have been eliminated. A transition area waiver, however, results in a modified transition area, not the elimination of the transition area. Therefore, it is necessary to restrict the remaining resource to maintain the terms and conditions of the approval of the modified transition area.

(568) COMMENT: In the rule at N.J.A.C. 7:7A-7.1(g), while it is reasonable and appropriate to state that "no regulated activities will occur in the modified transition area unless [approved by] the Department", it is not fair to require an alternatives analysis for activities which otherwise meet the conditions and requirements of Department transition area permits (NJ Builders Association).

RESPONSE: All transition area waivers (other than those for hardship) are issued only after the Department makes the finding that modifying the transition area will have no "substantial impact" on the associated wetland. Therefore, if this previously agreed-upon modified transition area is again proposed for modification, and the terms and conditions upon which the prior finding was made are altered, it may only be done under the conditions specified at N.J.A.C. 7:7A-7.1(g) since the previous finding of no substantial impact may no longer be applicable. Under these conditions it is highly unlikely that a further modified transition area would continue to serve the functions and values pursuant to N.J.A.C. 7:7A-6.1(b). Therefore, the Department is requiring a demonstration of no practicable alternatives or a demonstration of compelling public need before it will approve further modification of the transition area in order to fulfill the mandate of the Act to ensure the continued viability of the transition area.

N.J.A.C. 7:7A-7.2 Exceptional resource value freshwater wetlands: standards for transition area width reduction

(569) COMMENT: We support the rule at N.J.A.C. 7:7A-7.2(a) which will allow the reduction of the transition area to an exceptional resource value wetlands to less than 75 feet in selected circumstances (New Jersey State Bar Association, NJ Builders Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(570) COMMENT: The language at N.J.A.C. 7:7A-7.2(a) which will allow the reduction of the transition area to an exceptional resource value wetlands to less than 75 feet is contrary to the language of the Act. Exceptional resource value transition areas are crucial corridors for many obligate wetlands species. From a habitat protection standpoint, this weakens one of the strongest portions of the law and is likely to result in abuses. This permit should be granted only as a last resort to avoid wetlands degradation (Endangered and Nongame Species Advisory Committee, N.J. Audubon Society).

RESPONSE: The Department does not deny that it is very important to maintain a minimum 75-foot buffer adjacent to exceptional resource wetlands and will not grant such reductions easily. However, situations have arisen where an applicant could apply for and receive a permit to conduct a regulated activity within the actual boundary of an exceptional resource value freshwater wetlands but could not receive a waiver to conduct the activity completely outside of the wetlands but within 75 feet of the wetland boundary. Therefore, as the commenter has

suggested, only in those cases where an activity "would meet the standards for granting a freshwater wetlands permit" in an exceptional resource value wetland will a transition area be reduced to below 75 feet. Consequently, this provision furthers the intent of the Act, in many cases by actually removing the proposed activity from the exceptional resource value wetland.

(571) COMMENT: In the rules at N.J.A.C. 7:7A-7.2(a), allowing reduction of the 150-foot buffer around exceptional resource value wetlands should be strictly limited. The optimum buffer of 300 feet was whittled down to 150 feet as a major concession during negotiations to pass the Act (Lake Musconetcong Regional Planning Board and Dr. Lynn L. Siebert, N.J. Audubon Society).

RESPONSE: The Act specifically allows for a range of transition areas from 150 to 75 feet adjacent to exceptional resouce value wetlands and from 50 to 25 feet adjacent to intermediate resource value wetlands at N.J.S.A. 13:9B-16, and further reductions of these transition area widths pursuant to averaging plans at N.J.S.A. 13:9B-18(b). However, the Department has proposed standards to assure that proposed activities in reduced transition areas "would have no substantial impact on the adjacent freshwater wetland."

(572) COMMENT: Since all exceptional resource value wetlands have either threatened or endangered species habitat or trout production waters a reduction will always result in a substantial impact. Therefore, the conditions for allowing a reduction should be those at subsection (e), tidally influenced, and subsection (g), hardship (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The previously adopted rules do allow reductions of transition areas for exceptional resource value wetlands associated with tributaries to trout production waters using the matrix pursuant to N.J.A.C. 7:7A-7.2(c). In addition, reductions of the standard transition area are granted through a case by case review pursuant to N.J.A.C. 7:7A-7.2(g). Transition area reductions are also granted based on a finding of hardship pursuant to N.J.A.C. 7:7A-7.2(f). However, in order to grant a reduction for a specific type of activity, the Department must make a finding that these activities, if allowed, will have no substantial impact on the adjacent wetland. This finding cannot be made for all regulated activities involving "infill" situations adjacent to exceptional or intermediate resource value wetlands. Finally, based on the comments received and legal advice provided by the Attorney General's office (see response to Comment 110) the Department will delete upon adoption the proposed provisions at N.J.A.C. 7:7A-7.2(e) and 7.3(d).

(573) COMMENT: In the rules at N.J.A.C. 7:7A-7.2(a) concerning reductions in the 150 foot buffer, we strongly oppose the reduction of buffers around any New Jersey Wetlands (Sierra Club, Loantaka Group).

RESPONSE: The Act specifically allows for a range of transition areas from 150 to 75 feet adjacent to exceptional resource value wetlands and from 50 to 25 feet adjacent to intermediate resource value wetlands at N.J.S.A. 13:9B-16, and further reductions of these transition area widths pursuant to averaging plans at N.J.S.A. 13:9B-18(b). However, the Department has proposed standards to assure that proposed activities in reduced transition areas "would have no substantial impact on the adjacent freshwater wetland."

(574) COMMENT: The condition regarding EPA Priority Wetlands has been removed from the rules at N.J.A.C. 7:7A-7.2(c), 7.3(c) and 7.4(e). We strongly recommend that wetlands meeting the criteria of EPA Priority Wetlands continue to be identified and that this designation, or one of equal worth designated by the DEPE remain as a standard disallowing transition width reduction (Morris County Planning Board, Passaic River Coalition).

RESPONSE: The Department has determined that in certain instances greater regulatory flexibility is necessary in dealing with transition area reduction proposals than the current rules allow. The determination of EPA priority does not affect the resource classification of the wetland. The Department will continue to carry out the intent of the law by denying any reduction plan which does not result in a transition area which does not maintain the functions and values pursuant to N.J.A.C. 7:7A-6.1 and 6.2.

(575) COMMENT: It should not be a problem at N.J.A.C. 7:7A-7.2(c)4 to disturb acid soils provided that proper mitigation measures and proper construction techniques are implemented immediately upon disturbance of acid soils. Prohibiting a transition area waiver for areas known to contain acid soils is unnecessary as these deposits can properly be handled without causing any damage to the environment (NJ Concrete and Aggregate Association, NJ Builders Association).

RESPONSE: If acid producing deposits are disturbed, there is the potential for serious impacts to an adjacent wetlands and surface waters. In addition to provisions which must be made on the site to handle these impacts, all precautions, including maintaining the largest transition area allowable by law, must be taken. Therefore, the rule will not be changed.

(576) COMMENT: The rule at N.J.A.C. 7:7A-7.2(c)6iii does not allow the construction or expansion of a wastewater treatment plant or septic system if it is located within 150 feet of an exceptional resource value wetlands or within 100 feet of an intermediate resource value wetlands. The 100 foot limitation used for intermediate resource value wetlands is excessive since 50 feet is the maximum transition area. Secondly, an upgrading of a water treatment plan or septic system should be encouraged based on the relative benefit to water quality. The DEPE should only prohibit a reduction in cases where wastewater system expansions are for the purpose of adding capacity. The DEPE should provide the scientific rationale for this limitation (Amy S. Greene Environmental Consultants, Inc., NAIOP, New Jersey State Bar Association, Enviro-Resource Inc., NJ Builders Association, Mark H. Burlas, Sandoz Pharmaceuticals Corporation).

RESPONSE: The rule at N.J.A.C. 7:7A-7.2(c)6iii does not prohibit the construction or expansion of a wastewater treatment plant or septic system in these locations. Rather, the standard transition area cannot be reduced based on the criteria at N.J.A.C. 7:7A-7.2(c)6iii if these activities occur as described. While the Department acknowledges that in some cases of a system upgrade there will be beneficial impacts to water quality, the Department cannot categorically make the finding that these benefits will outweigh the negative impacts associated with the loss of the standard transition area. The Department has addressed this issue in several ways. In cases where a septic system is failing, a Special Activity Waiver is available to the applicant in order to facilitate the correction of the system (see N.J.A.C. 7:7A-7.4(e)). In cases where a wastewater system will be expanded onto a previously existing impermeable surface, a Special Activity Waiver for "redevelopment" activities is available (see N.J.A.C. 7:7A-7.4(f)). However, in all other circumstances where a system will be constructed or expanded into the standard transition area, the applicant has the option of pursuing a reduction by demonstrating no substantial impact on a case by case basis pursuant to N.J.A.C. 7:7A-7.2(g), or a reduction on the basis of hardship pursuant to N.J.A.C. 7:7A-7.2(f). The rule has been amended, however, to state that the maximum distance from intermediate wetlands to be considered pursuant to this subsection will be 50 feet, consistent with both the maximum transition area width and the minimum required separation distances pursuant to Chapter 9A, Standards for Individual Subsurface Sewage Disposal Systems (N.J.A.C. 7:9A-1.1).

(577) COMMENT: The rule at N.J.A.C. 7:7A-7.2(c)6iii which prohibits the expansion or correction of an existing onsite septic may cause undue hardship and ultimately abandonment of property (N.J. Society of Professional Engineers).

RESPONSE: The rule at N.J.A.C. 7:7A-7.2(c)6iii does not prohibit the expansion or correction of an onsite septic. Rather, it prohibits the construction or expansion of a system within 150 feet of an exceptional resource value wetland or within 50 feet (as clarified on adoption) of an intermediate resource value wetland. Correction of an onsite septic has been provided for through a Statewide general permit and Special Activity Waiver at N.J.A.C. 7:7A-9.2(a)25 and 7:7A-7.4(e) respectively.

(578) COMMENT: The rules at N.J.A.C. 7:7A-7.2(e) and 7.2(g) that will allow expansion of what constitutes extraordinary hardship further compromises the intent of the Act. Specifically this clause deals with only the applicant's return on the property and erroneously omits potential impacts to threatened and endangered species (Endangered and Nongame Species Advisory Committee).

RESPONSE: The rules at N.J.A.C. 7:7A-7.2(e) and 7.2(g) do not constitute an expansion of what constitutes extraordinary hardship and are consistent with the Act. Rather, the rule at N.J.A.C. 7:7A-7.2(e) describes certain specific circumstances when the Department will consider a reduction of the standard transition area. The rule at N.J.A.C. 7:7A-7.2(g) is an in-depth explanation of what is to be considered when an applicant claims extraordinary hardship since the Act requires the Department to reduce the transition area "provided that (1) the proposed activity would have no substantial impact on the adjacent freshwater wetland **or** (2) the waiver is necessary to avoid a substantial hardship to the applicant caused by circumstances peculiar to the property" (emphasis added). Therefore, a determination of potential impacts to threatened and endangered species is not a factor in the determination of extraordinary hardship.

(579) COMMENT: At N.J.A.C. 7:7A-7.2(e)2 the phrase "which will become their residence" is much too restrictive and should be deleted (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: Based on the comments received and legal advice provided by the Attorney General's Office (see response to Comment 110) the Department will delete upon adoption the proposed provisions at N.J.A.C. 7:7A-7.2(e) and 7.3(d) since the Department will no longer be regulating wetlands that meet the definition of coastal wetlands pursuant to N.J.S.A. 13:9A-1 et seq.

(580) COMMENT: The rule at N.J.A.C. 7:7A-7.2(e)3 provides for transition area reductions for infill lots adjacent to tidal wetlands. We feel that if this specific case is going to be favored, then others like small lake front lots in lakefront areas should be given similar treatment (Wander Ecological Consultants).

RESPONSE: In order to grant a reduction for a specific type of activity, the Department must make a finding that these activities, if allowed, will have no substantial impact on the adjacent wetland. This finding cannot be made for all regulated activities involving "infill" situations adjacent to exceptional or intermediate resource value wetlands. Based on the comments received and legal advice provided by the Attorney General's office the Department will delete upon adoption the proposed provisions at N.J.A.C. 7:7A-7.2(e) and 7.3(d). See response to Comment 579.

(581) COMMENT: The rule at N.J.A.C. 7:7A-7.2(e)3i should specify what percentage of uplands qualifies a lot as an "upland" lot (Wander Ecological Consultants).

RESPONSE: Based on the comments received and legal advice provided by the Attorney General's office the Department will delete upon adoption the proposed provisions at N.J.A.C. 7:7A-7.2(e) and 7.3(d). See response to Comment 579.

(582) COMMENT: The rules at N.J.A.C. 7:7A-7.2(e)3ii and 7.3(f)2ii should specify which "lots" the Department is referring to, those within 200 feet, or those applying for reductions. In addition, what is the rationale for requiring adjacency to a paved road (Wander Ecological Consultants)?

RESPONSE: Based on the comments received and legal advice provided by the Attorney General's office, the Department will delete upon adoption the proposed provisions at N.J.A.C. 7:7A-7.2(e) and 7.3(d). See response to Comment 579.

(583) COMMENT: The word criteria at N.J.A.C. 7:7A-7.2(e)3ii and 7.2(g)2 should be singular, criterion (Wander Ecological Consultants).

RESPONSE: Based on the comments received and legal advice provided by the Attorney General's office, the Department will delete upon adoption the proposed provisions at N.J.A.C. 7:7A-7.2(e) and 7.3(d). See response to Comment 579.

(584) COMMENT: The rules at N.J.A.C. 7:7A-7.2(g)2 and 7.3(f)2 require the applicant to demonstrate that it is impossible to sell the subject lot or purchase adjacent property to create a buildable lot. This waiver threshold may, as a matter of law, constitute an impermissible taking and should be eliminated. Further, this provision should be expanded to all types of development to qualify for hardship waivers (Hannoch Weisman).

RESPONSE: The cited provisions provide applicants with an opportunity to demonstrate the existence of an extraordinary hardship warranting the issuance of a transition area waiver where the property in question does not have any beneficial use if used for its present use or developed as authorized under the Act and these rules. Where the applicant cannot demonstrate the absence of beneficial use, no "impermissable taking" can be found. The commenter is also directed to N.J.S.A. 13:9B-22 to view the options available to the Department upon a judicial determination of a taking. Further, the rules do provide a test for waivers based on extraordinary hardship for property other than residential at N.J.A.C. 7:7A-7.2(f)1i and 7.2(f)1ii.

(585) COMMENT: The rules at N.J.A.C. 7:7A-7.2(g)2 and 7.3(f)2 should not be limited to residential properties. If property of any kind is unbuildable due to the presence of transition areas, it meets the test of extraordinary hardship (NAIOP).

RESPONSE: The test of extraordinary hardship for property other than residential remains unchanged and can be found at N.J.A.C. 7:7A-7.2(g)1i and 7.2(g)1ii.

(586) COMMENT: The rule at N.J.A.C. 7:7A-7.2(g)2 defining extraordinary hardship should include a reduction below 75 feet in order to be consistent with the proposed amendments at N.J.A.C. 7:7A-7.2(a) (New Jersey State Bar Association).

RESPONSE: The difference in the two provisions cited by the commenter result from the different issues addressed by each provision. For this reason, the suggested change is not appropriate. N.J.A.C. 7:7A-7.2(a) provides that a transition area adjacent to an exceptional resource value wetland can be reduced to a width of less than 75 feet, if the activity proposed for the transition area would be eligible for a permit if conducted in the exceptional resource value wetland itself. An analogous change to N.J.A.C. 7:7A-7.2(f)2 would provide for a transition area to be reduced to a width less than 75 feet if the activity in question would meet the standards for granting a freshwater wetlands permit based on hardship. However, neither the Act nor the Department's rule provide for the granting of a freshwater wetlands permit based on hardship.

(587) COMMENT: At N.J.A.C. 7:7A-7.2(g)2i and v, "owned by the applicant" should be changed to "owned by the same owner" since the applicant is not always the owner (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: An applicant is either the owner or a designated agent for the owner. Therefore, it is unnecessary to change the language of the rules.

(588) COMMENT: At N.J.A.C. 7:7A-7.2(g)2i, the date should be July 1, 1989 not 1988 to be consistent with the date when the transition area regulations were adopted (NJ Concrete and Aggregate Association, NJ Builders Association).

RESPONSE: The public received sufficient notification of the standard width of transition areas and the criteria for a reduction based on hardship with the enactment of the statute on July 1, 1987. Therefore, any subdivisions which created unbuildable lots due to the presence of transition areas were created at risk with this knowledge. Therefore, the date will not be changed.

(589) COMMENT: "Fair market value" at N.J.A.C. 7:7A-7.2(g)2iii should be defined particularly with regard to possible multiple uses of a site. Consideration of fair market value for a mining parcel must be based upon an evaluation of the market value of the minerals present as well as what might be a possible secondary use after completion of mining. Is this based on the lot being buildable or unbuildable? We object to a rule that purports to give hardship relief but in practice could be financially devastating (Wander Ecological Consultants, N.J. Society of Professional Engineers, NJ Concrete and Aggregate Association).

RESPONSE: The Department will use the definition of "fair market value" found in, "The Appraisal of Real Estate," published by the American Institute of Real Estate Appraisers, eighth edition, p.33. "Fair market value" is defined as the most probable price in cash, terms equivalent to cash, or in other precisely revealed terms for which the appraised property will sell in a competative market under all conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self interest, and assuming that neither is under duress. Fundamental assumptions and conditions presumed in this definition are: (1) buyer and seller are motivated by self interest; (2) buyer and seller are well informed and are acting prudently; (3) the property is exposed for a reasonable time on the open market; (4) payment is made in cash, its equivalent or in specified financing terms; (5) specified financing, if any, is the financing actually in place or on terms generally available for the property type in its locale on the effective appraisal date; (6) the effect, if any, on the amount of market value of atypical financing, services, or fees shall be clearly and precisely revealed in the appraisal report. Therefore, mineral interests, and an estimation of future potential uses may all be considerations in the determination of "fair market value" depending upon the parties involved.

Finally, the Legislature in its findings and declarations stated that "in order to advance the public interest in a just manner the rights of persons who own or possess real property affected by this Act must be fairly recognized and balanced with environmental interests; and that the public benefits arising from the natural functions of freshwater wetlands, and the public harm from freshwater wetlands losses, are distinct from and may exceed the private value of wetlands areas."

(590) COMMMENT: The rules at N.J.A.C. 7:7A-7.2(g)2vi and 7.3(f)2vi should be clarified to indicate what is required to satisfy this criterion. Does the applicant have to approach organizations, and if so how many? A more reasonable alternative to the conditions at N.J.A.C. 7:7A-7.2(g)2iv and vi would be to require demonstration (for example, copy of a written contract) that the property was listed for sale (as an unbuildable lot) with a licensed realtor for a specified period of time (for example, six months) and could not be sold (Wander Ecological Consultants).

RESPONSE: The proposal will not be amended on adoption as suggested. The definition of "fair market value" includes an evaluation of site potential and, therefore, it is not appropriate to require that the property be listed as "unbuildable." In addition, the definition includes the assumption that the lot has been offered for sale for a "reasonable time." This is more appropriate than setting a fixed time period since the determination of a "reasonable time" will depend on current economic conditions. The rule has been amended on adoption to indicate that the Department will provide the applicant with a list of conservation organizations which they can contact.

N.J.A.C. 7:7A-7.3 Intermediate resource value freshwater wetlands: standards for transition area width reduction

(591) COMMENT: The Department needs to provide the rationale for allowing a reduction for "infill development" (Enviro-Resource Inc).

RESPONSE: Based on the comments received and legal advice provided by the Attorney General's office, the Department will delete upon adoption the proposed provisions at N.J.A.C. 7:7A-7.2(e) and 7.3(d). See response to Comment 579.

(592) COMMENT: We support the deletion of the previous N.J.A.C. 7:7A-7.3(c)1, EPA priority wetlands (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(593) COMMENT: There is no matrix presented at N.J.A.C. 7:7A-7.3 (Pureland Industrial Complex).

RESPONSE: The rule at N.J.A.C. 7:7A-7.3 do not make reference to a matrix.

(594) COMMENT: The rule at N.J.A.C. 7:7A-7.3 should not redefine the term "property" (Pureland Industrial Complex).

RESPONSE: This section does not include a redefinition of the term "property."

(595) COMMENT: The hardship criteria at N.J.A.C. 7:7A-7.3 should stand on its own and will not be subject to past permitting otherwise it is discriminatory (Pureland Industrial Complex).

RESPONSE: If the property was subject to a previous permitting action which allowed use of the subject property then beneficial use of the property has been allowed and a hardship is absent.

(596) COMMENT: At N.J.A.C. 7:7A-7.3, is "infill residential" being treated differently than "infill industrial/commercial" and if so why (Pureland Industrial Complex)?

RESPONSE: Yes, the Department has made a blanket finding that for a limited class of activities involving the construction of residential dwellings in an infill situation that a reduction in the width of the transition area will not result in substantial impact to the adjacent wetlands. The Department cannot make the finding that the construction of commercial/industrial facilities will not result in substantial impacts to the adjacent wetlands because of the wide variety of facilities that could occur and the attendant features associated with such facilities, such as parking lots, drives which must facilitate a higher level of traffic then those associated with single family residential dwellings, etc.

(597) COMMENT: At N.J.A.C. 7:7A-7.3(d)7, the reference to (c)2 is not clear and should refer to N.J.A.C. 7:7A-1.4 (Wander Ecological Consultants).

RESPONSE: Based on the comments received and legal advice provided by the Attorney General's office, the Department will delete upon adoption the proposed provisions at N.J.A.C. 7:7A-7.3(d). See response to Comment 579.

(598) COMMENT: The rules for buffer width reductions on man-made lagoon lots at N.J.A.C. 7:7A-7.3(d) are overly restrictive with no sound ecological basis. In particular, the in-fill criteria are too strict. The 75 percent developed figure is an arbitrary value which should be reduced or eliminated (NJ Builders Association).

RESPONSE: The previously adopted rules do allow reductions of transition areas for exceptional resource value wetlands associated with tributaries to trout production waters using the matrix pursuant to N.J.A.C. 7:7A-7.2(c). In addition, reductions of the standard transition area are granted through a case by case review pursuant to N.J.A.C. 7:7A-7.2(g). Transition area reductions are also granted based on a finding of hardship pursuant to N.J.A.C. 7:7A-7.2(f). However, in order to grant a reduction for a specific type of activity, the Department must make a finding that these activities, if allowed, will have no substantial impact on the adjacent wetland. This finding cannot be made for all regulated activities involving "infill" situations adjacent to exceptional or intermediate resource value wetlands. Finally, based on the comments received and legal advice provided by the Attorney General's office, the Department will delete upon adoption the proposed provisions at N.J.A.C. 7:7A-7.2(e) and 7.3(d). See response to Comment 579.

(599) COMMENT: The proposed new rules at N.J.A.C. 7:7A-7.3(f)2 for substantial hardship for single family residential lots are so onerous as to create a substantial hardship in themselves. The standards contain subjective requirements which experience has shown the Department generally interprets as strictly as possible thereby minimizing approvals. This is likely to be misinterpreted as readily achievable by small lot owners who can least afford the expenses of pursuing false hopes (NJ Builders Association).

RESPONSE: The Department does not agree that these standards are subjective. Although the Department has expanded the language in this section specifically to ease the restrictive nature of the hardship criteria no one should assume that a demonstration of hardship can be made where the criteria are not met. In accordance with the language at N.J.S.A. 13:9B-2, 16, and 18 of the Act, it is appropriate that strict standards are set for granting hardship waivers.

N.J.A.C. 7:7A-7.4 Special activities: Standards for granting transition area waiver

(600) COMMENT: The rule should be amended to allow a reduction or elimination of the standard 50-foot transition area adjacent to an isolated wetlands. This waiver could be used if the applicant qualifies for, but elects not to use general permit no. 6 (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: There is no need to amend the rule as suggested. The Department will issue a Statewide general permit no. 6 for projects that qualify. GPs also include a standard transition area waiver for access through the transition area to conduct the regulated activity in the wetlands. It is perfectly legitimate if an applicant chooses only to construct the project in access area and not to conduct regulated activities in the wetlands thereby reducing the project's impacts to wetlands.

(601) COMMENT: If the maintenance of fill is not included as a non-regulated activity, then Statewide general permit no. 1 should be included as a Special Activity Waiver (Wander Ecological Consultants).

RESPONSE: The Department considers maintenance of fill to be a non-prohibited activity at N.J.A.C. 7:7A-6.2(b)1i(8).

(602) COMMENT: We support the proposal at N.J.A.C. 7:7A-7.4(e)1i-iii (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(603) COMMENT: The rule at N.J.A.C. 7:7A-7.4(e)1 seems to indicate that you must provide mitigation for disturbance of upland transition areas. It is questionable whether the Act intended this (Mark H. Burlas, Sandoz Pharmceuticals Corporation).

RESPONSE: In order to make the finding that the proposed activity will not result in a substantial impact to the adjacent wetland, the Department relied on the findings and conditions in the environmental assessments for the adopted Statewide general permits. Therefore, in order to issue these waivers, all conditions of the Statewide general permit including mitigation where required must be met. However, based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement for certain GPs upon adoption.

N.J.A.C. 7:7A-7.4(e)3

COMMENT: Several individuals and groups, some using a form letter, objected to the requirement that the combined use of general permits for wetlands and Special Activity permits for general permit activities in transition areas be limited to a total of one acre of disturbance. They had the following comments:

(604) Limitation of one acre on total disturbance is unfair and not authorized by statute. This limitation is contrary to the Act which allows certain statewide general permits for activities up to one acre. The Act does not restrict activities for transition areas under these permits (New Jersey State Bar Association, New Jersey Builders Association and form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(605) The proposed one acre limit is contrary to the Statute which does not restrict transition area disturbances. If any limitation could be justified, it would be a limit of one acre for wetland disturbance and one acre for transition areas (Langan Engineering);

(606) The proposed one acre limitation for combining activities in wetlands and transition areas lacks scientific support. Further, it is counterproductive because it treats wetlands and transition areas equally (Hannoch Weisman, New Jersey Department of Transportation, AES Cohansey Inc., DuPont):

(607) Placing a one acre limit could greatly restrict development on large parcels or utility line projects with no corresponding environmental benefit. Limiting wetlands disturbance to one acre on a two acre lot while also restricting a 2000 acre parcel to one acre has never been very just and now this combined limit is even more biased against large sites. If a more equitable system can not be used (e.g., one acre disturbance for every 10 acres of the parcel), then limiting disturbance to one acre of wetlands and one acre transition area would be more reasonable for large projects (Amy S. Greene Environmental Consultants, Inc., Keller and Kirkpatrick, N.J. Department of Transportation);

(608) For large landowners with extensive wetlands, the restriction is unduly severe in proportion to the potential adverse impact on the wetlands. It would be more appropriate to authorize the disturbance under statewide general permit and require mitigation, as DEPE is proposing (DuPont);

(609) The combined acreage limitation unnecessarily duplicates regulation of activities addressed in 7:7A-9, General Permits. Activities in wetlands and transition areas should be regulated separately (Louis Berger & Associates);

(610) The limitation is overly burdensome and beyond the intent of the Act (Van Note-Harvey Associates);

(611) A total of one acre does not make sense nor is it fair or necessarily best for the environment. The interconnection of wetlands, the shape of wetlands, and the percentage of wetlands filled in addition to a total reasonable maximum should enter into this (Pureland Industrial Complex);

(612) This provision is counterproductive and will result in additional impacts to wetlands. Since a transition area waiver is automatically included as part of a GP, given the choice, a property owner will elect to conduct the regulated activity in the wetlands rather than in the transition area (NAIOP); and

(613) Holding an applicant to a total one acre of disturbance seems unnecessarily restrictive (Eric S. Luscombe).

RESPONSE: Comments received, and legal advice from the Attorney General's office, have stated that the Act mandates the granting of Statewide general permits nos. 6 and 7 for a total of one acre of wetlands or State open waters. Therefore, as proposed, the one acre limitation for combined GPs and transition area waivers, which would involve general permit nos. 6 and/or 7, would be improper. Therefore, the Department has decided to amend the proposed provisions for combining general permits and special activity waivers for general permit activities upon adoption. The rule has been amended to state that special activity waivers shall not be used to double the impact of a specific activity by combining the wetland and transition area impacts. For example, one minor road crossing must not exceed 0.25 acres of disturbance or 100 linear feet regardless of whether the crossing is entirely in wetlands and open waters, entirely in the transition area, or traverses both. The 0.25 acre limitation does not include the transition area that is necessary for access to a wetland crossing. For example, the Department will not approve an application that combines a minor road crossing (general permit no. 10) in the wetlands with a minor road crossing in the transition area (Special Activity Waiver no. 10) which results in a minor road crossing designed to cross 100 feet of wetlands and open waters, and then parallels the wetland for an additional 100 feet through the transition area. An additional example of this provision is that the Department will not approve an application for a single outfall structure that proposes to combine a general permit no. 11 and Special Activity Waiver no. 11 to place 20 cubic yards and disturb more than 0.25 acres (excluding access through the transition area). This limitation is necessary for these activities to comply with the findings of the environmental assessments prepared for activities authorized under Statewide general permits.

(614) COMMENT: The Upper Rockaway River Watershed Association and the Borough of Mountain Lakes Environmental Commission state that the allowance of one acre of combined disturbance could very well eliminate major wetland areas through the manipulation of ownership entities of contiguous properties. The Department should look at the wetlands ecosystem and the potential damage that could be caused by issuing of permits to other entities which affect the same wetland. Filling and alterations are not a right of the applicant. What kind of analysis has been done to document the approach that allows every site one acre of combined disturbance?

RESPONSE: The definition of "onsite" which limits the combined use of Statewide general permits will not allow the manipulation of ownership to destroy multiple acres of wetlands. Except for Statewide general permits nos. 6 and 7, the environmental assessments prepared for all other Statewide general permits specifically address cumulative impacts and the Act at N.J.S.A. 13:9B-23e requires that the Department reassess these impacts every five years.

(615) COMMENT: ANJEC and the Great Swamp Watershed Association support the provision which limits to one acre disturbances in both wetlands and transition areas because it complies with the Act's direction for vigorous protection of wetlands.

RESPONSE: The Department acknowledges this comment in support of the rule proposal. However, based on the comments received, and legal advice from the Attorney General's office, the Department has decided to amend the proposed provisions for combining general permits and special activity waivers for general permit activities upon adoption. The rule has been amended to state that special activity waivers shall not be used to double the impact of a specific activity by combining the wetland and transition area impacts. See the response to Comment 613.

(616) COMMENT: Placing a combined maximum of one acre of disturbance should reduce the impacts on wetland habitat. However, the Department should scrutinize the proximity of projects that may be having cumulative effects on contiguous wetlands areas and therefore exceeding the one acre of impact (Citizens United to Protect the Maurice River and its Tributaries, Inc., DEPE Endangered and Nongame Species Advisory Committee).

RESPONSE: Except for Statewide general permits nos. 6 and 7, the environmental assessments prepared for all other Statewide general permits specifically address cumulative impacts and the Act at N.J.S.A. 13:9B-23e requires that the Department reassess these impacts every five years.

(617) COMMENT: Langan Engineering thinks that it should be clarified that the one acre disturbance limit does not apply to redevelopment activities (N.J.A.C. 7:7A-7.4(f)) or transition area reductions and buffer averaging plans.

RESPONSE: The rule at N.J.A.C. 7:7A-7.4(f) specifically address the limitations for special activity waivers for general permit activities when combined with Statewide general permits. Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to amend the proposed provisions for combining general permits and special activity waivers for general permit activities upon adoption. The rule has been amended to state that special activity waivers shall not be used to double the impact of a specific activity by combining the wetland and transition area impacts.

(618) COMMENT: We support the rule at N.J.A.C. 7:7A-7.4(f) providing for a waiver based on redevelopment but it should be expanded to include underground utilities (New Jersey State Bar Association, NAIOP).

RESPONSE: Underground utilities satisfying the conditions of N.J.A.C. 7:7A-7.4(f)1 through 3 are eligible for a special activity permit for redevelopment.

(619) COMMENT: We object to the provision at N.J.A.C. 7:7A-7.4(f)3, requiring revegetation (NAIOP).

RESPONSE: The rule as written states that a portion of the developed transition area shall be revegetated "where practicable." The Department has encountered many situations where revegetation has been practicable and the applicant has agreed to revegetate. This revegetation is necessary to attempt to restore the functions and values of the transition area.

(620) COMMENT: Redevelopment activities should not be regulated at all in the transition area because redevelopment is not "acts or acts of omission" that adversely affect the transition area's ability to serve the values and function as stated in the Act (Amy S. Greene Environmental Consultants, Inc., NJ Builders Association).

RESPONSE: The criteria for issuing a transition area waiver is that an activity will have no substantial impact on the adjacent wetland. Redevelopment of a transition area has the potential for impacts which exceed those which the current development is imposing on the wetlands, for example, housing may have substantial impacts on adjacent wetlands as compared to the existing parking lot on which such redevelopment is proposed.

(621) COMMENT: DuPont believes that the use of transition area averaging appears to be subject to the overall one-acre limitation if any

use of a GP is proposed and this is inappropriate because averaging already involves compensation.

RESPONSE: The one acre limitation only refers to the combination of Special Activity Waivers for general permit activities and Statewide general permits themselves. It does not reference the standards for averaging. However, based on the comments received, and legal advice from the Attorney General's office, the Department has decided to amend the proposed provisions for combining general permits and special activity waivers for general permit activities upon adoption. The rule has been amended to state that special activity waivers shall not be used to double the impact of a specific activity by combining the wetland and transition area impacts.

(622) COMMENT: The rules at N.J.A.C. 7:7A-7.4(f)3 and 7.5(b) should be clarified to cite the proper section (N.J.A.C. (7:7A-7.5(c)) since N.J.A.C. 7:7A-7.5(d) has been deleted (Enviro-Resource Inc., Wander Ecological Consultants, NAIOP).

RESPONSE: The reference at N.J.A.C. 7:7A-7.4(f)3 is to deed restrictions and the rule has been amended upon adoption to reference N.J.A.C. 7:7A-7.1(g). The information at N.J.A.C. 7:7A-7.5(d) has been incorporated in N.J.A.C. 7:7A-7.5(b) so this reference will be deleted.

N.J.A.C. 7:7A-7.5 Transition area waivers, averaging plans: Standards for modifying the shape of a transition area

(623) COMMENT: Where is the drawing referenced at N.J.A.C. 7:7A-7.5(a) (Pureland Industrial Complex)?

RESPONSE: The drawing is located immediately before subchapter 8 at 23 N.J.R. 356.

(624) COMMENT: We support the rule at N.J.A.C. 7:7A-7.5(b) which provides for the extension of transition area averaging to property which is legally controlled by the applicant (N.J. Recreation and Parks Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(625) COMMENT: The drawing provided in Appendix A should be revised as it is misleading. The area of compensation represents greater than a 50 percent increase (Van Note-Harvey Associates).

RESPONSE: The diagram was included for illustrative purposes only and was never presented as being drawn to scale. Therefore, it is adopted as proposed. The required area of compensation will be equal to the area of impact.

(626) COMMENT: The rules for granting averaging plan waivers should more closely reflect the language in the Act at 13:9B-18b and should not be more restrictive (Brokaw DeRiso Associates, Inc.).

RESPONSE: The rule is not more restrictive than the language in the Act. The language in the Act states "that the averaging plan will result in a transition area consistent with subsection a of section 16 of this Act". The Department has crafted rules that will grant transition area averaging plans that will result in a transition area that will continue to serve the values and functions described at N.J.S.A. 13:9B-16a.

(627) COMMENT: For clarity, the new rule at N.J.A.C. 7:7A-7.5(b)1 should specify whether "if any" or "if all" of the following site conditions exist (NJ Builders Association).

RESPONSE: The Department will clarify the rule to state that "if any of the following site conditions . . .".

(628) COMMENT: The term "unfiltered" at N.J.A.C. 7:7A-7.5(b)1iii(3) is undefined. Are there conditions where untreated stormwater is acceptable? Was stormwater filtered before man occupied this planet (Pureland Industrial Complex)?

RESPONSE: Before approving any permits or waivers for construction in regulated areas, the Department shall require that any runoff that may include human induced pollutants be treated or filtered prior to discharge to reduced transition areas, wetlands or waters. Best management practices for treating stormwater distinguishes between water discharging from clean surfaces (for example, rooftops) and those from "dirty" sources (for example, parking lots). Stormwater did not have to be filtered before humans began discharging pollutants to surface water systems.

(629) COMMENT: Not allowing an averaging plan to be used for the purpose of constructing a new septic system could place extreme hardship on property owners or developers. Instead the rules could allow a septic system provided it is not located closer than 25 feet to an intermediate resource value wetland or 75 feet for an exceptional resource value wetland. Alternatively the rules could provide a special activity waiver with the condition that there is no feasible alternative onsite location (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: These rules were written to preserve the functions and values that transition areas provided to adjacent wetlands. The reduction of a transition area through an averaging plan specifically to construct a septic system closer to the wetland boundary has the potential to result in the introduction of pollutants into the adjacent wetlands and therefore is inappropriate. If the applicant can demonstrate hardship pursuant to N.J.A.C. 7:7A-7.2(f) and 7.3(e) than a waiver will be granted reducing the transition area to 75 feet and 25 feet respectively. It is important to distinguish this class of activities from repair and replacement of existing failing septic systems. In the case of new systems, the Department is attempting to prevent a pollution problem rather than control it after it becomes a problem. In the case of failing systems in place prior to the effective date of the Act, the Department has adopted a general permit for repair of these systems.

(630) COMMENT: A septic system should be allowed in the transition area by right. If the system is designed according to the strict criteria it will not result in any negative impacts (Brokaw DeRiso Associates, Inc., NJ Builders Association, Johnson Engineering).

RESPONSE: If the rules were amended to allow the transition area to be reduced to place a septic system closer to the wetland boundary it would be possible to place a septic system 20 feet from the boundary of an intermediate resource value wetland. Wetlands, by definition, will have a ground water table within 18 inches of the ground surface during the growing season. The Standards for Individual Subsurface Sewage Disposal Systems (N.J.A.C. 7:9A-1.1) require that a septic disposal field be a minimum of 100 feet from a reservoir (a surface water feature) or well (a deep groundwater feature). Therefore, since the rule governing septic standards indicate that there is still the need to preserve a buffer area to avoid potential impacts to adjacent ground and surface waters, it is appropriate for the Department to adopt this requirement as proposed.

(631) COMMENT: This language does not recognize an existing septic system which requires replacement as a new septic system under current septic law (N.J. Society of Professional Engineers).

RESPONSE: The Standards for Individual Subsurface Sewage Disposal Systems (N.J.A.C. 7:9A) do not require the replacement of existing functioning systems (see N.J.A.C. 7:9A-3.3). Further, if the system must be replaced because it is malfunctioning, the freshwater wetlands rules do accommodate replacement through a Statewide General Permit at (N.J.A.C. 7:7A-9.2(a)25, or a Special Activity Waiver at N.J.A.C. 7:7A-7.4(e).

(632) COMMENT: The rules at N.J.A.C. 7:7A-7.5(b)4ii(1) and (3) appear to contradict each other, since one prohibits any reduction in the transition area to less than 10 feet while the other allows it for a continuous distance of 100 feet. The rule should be modified to delete (1) (NAIOP, New Jersey State Bar Association, Enviro-Resource Inc., Amy S. Greene Environmental Consultants, Inc., N.J. Builders Association).

RESPONSE: The rule has been clarified to indicate that the Department will not approve an averaging plan that proposes to reduce the transition area to less than 10 feet, or to reduce it to 10 feet for a continuous distance of 100 linear feet or more. N.J.A.C. 7:7A-7.5(b)4ii(1) has not been deleted because it is essential to ensure the continued viability of the transition area.

(633) COMMENT: The rule at N.J.A.C. 7:7A-7.5(b)4i(7), which prohibits the construction of a stormwater facility within 20 feet of an intermediate resource value wetlands, is arbitrary and capricious. What is the rationale for this provision (NAIOP)?

RESPONSE: The construction of a stormwater management facility within 20 feet of the wetlands boundary will eliminate the natural functions and values of the transition area and therefore is contrary to the intent of the Act.

(634) COMMENT: The rule at N.J.A.C. 7:7A-7.5(b)4i(8) which limits averaging throughout the drainage basins of proposed National Wildlife Refuges is unreasonable and should be eliminated. At the very least this restriction should be eliminated for isolated wetlands (Wander Ecological Consultants, Mark H. Burlas, Sandoz Pharmaceuticals Corporation).

RESPONSE: Based on the pristine and sensitive nature of these areas, the Department has determined that the wetlands and surface waters of these areas merit the limitation on reducing the transition area to less than 25 feet for averaging plans. Further, an isolated wetland provides habitat and ground water quality protection within the drainage basin and therefore this limitation will not be eliminated for isolated wetlands.

(635) COMMENT: The rule at N.J.A.C. 7:7A-7.5(b)4i(8) which limits averaging throughout the drainage basins of proposed National Wildlife Refuges is unreasonable and should be eliminated. At maximum this provision should apply to wetlands immediately adjacent to and part of an existing National Wildlife Refuge (NAIOP).

RESPONSE: The Department has determined that the need to protect the wetlands and surface waters of these areas merits the limitation on reducing the transition area to less than 25 feet for averaging plans. Further, wetlands that are not immediately adjacent to National Wildlife Refuges provide habitat and ground water quality protection within the drainage basin. The Department disagrees that this protection should be extended to only parts of existing refuges. Therefore, the rule has not been amended to exclude future designated refuges.

(636) COMMENT: The DEPE should clarify the rule at N.J.A.C. 7:7A-7.5(b)4i(8) to indicate how an applicant can determine whether the area in question is part of an existing or proposed national wildlife refuge (N.J. Builders Association, Mark H. Burlas, Sandoz Pharmaceuticals Corporation).

RESPONSE: The rule has not been amended as suggested because listing the name of the refuges would not assist an applicant in determining the boundaries. In addition, there would be no way to list proposed refuges. The applicant should contact the U.S. Fish and Wildlife Service for the region in which the project is located if the applicant has reason to believe that an area may be in the drainage basin of a proposed refuge.

N.J.A.C. 7:7A-7.6 Application contents for transition area waiver

(637) COMMENT: The rules at N.J.A.C. 7:7A-7.6(a) requiring five copies of an application should be amended to be consistent with the rule at N.J.A.C. 7:7A-9.5 to require only three copies (N.J. Department of Transportation).

RESPONSE: The rule has been amended to require only three copies of the application materials to be consistent with applications for letters of interpretation and Statewide general permits.

(638) COMMENT: The rule at N.J.A.C. 7:7A-7.6(a)3 and 8.3(a)5 should be amended to require only **approximate** state plane coordinates for the center of the property (Enviro-Resource Inc., Louis Berger and Associates, Inc., N.J. Builders Association, N.J. Concrete and Aggregate Association, Mark H. Burlas, Sandoz Pharmaceuticals Corporation).

RESPONSE: The rule as written requires state plane coordinates for the approximate center of the property. The rule has been amended on adoption to require the accuracy of the coordinates to be within 50 feet of the property center.

(639) COMMENT: Instead of requiring State plane coordinates that may require extensive surveying, we recommend that the applicant be permitted to identify the site by interpolating latitude and longitude (NAIOP).

RESPONSE: The requirement for State plane coordinates has been retained in the adoption and is necessary in order for information to be compatible with the State's Geographic Information System (GIS). The compilation of information pertaining to the State's wetlands and wetland permits will provide the State with valuable data to be used in assessing the cumulative impacts of wetlands permits.

(640) COMMENT: The language at N.J.A.C. 7:7A-7.6(a)3 requiring state plane coordinates is burdensome and should be deleted (N.J. Society of Professional Engineers).

RESPONSE: The requirement for providing State plane coordinates involves minimal effort and should be completed for a minimum cost. Lay people with minimal training can make this determination. The Department wants this valuable information regarding wetland delineations and transition areas to be incorporated into the Geographic Information System in order to facilitate the assessment of cumulative impacts to wetlands and to make it more easily accessible to other agencies and to the public. Therefore, State plane coordinates are necessary and this requirement has been adopted.

(641) COMMENT: The rule at N.J.A.C. 7:7A-7.6(a)3 should be clarified to indicate which state plane coordinates will be required for linear projects (N.J. Department of Transportation).

RESPONSE: The rule will be amended to clarify that the applicant shall submit the State plane coordinates for the endpoints of those projects which are less than 2000 feet, and for those projects which are 2000 feet and longer, additional coordinates at each 1000 foot interval will be required.

(642) COMMENT: This proposed requirement is an excellent idea and will provide useful data in a format that will be easy and efficient for mapping purposes (Morris County Planning Board).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(643) COMMENT: The rule stating that a verified line be submitted for a transition area waiver at N.J.A.C. 7:7A-7.6(a)4 should be removed since an LOI is not required prior to submittal (Amy S. Greene Environmental Consultants, Inc.)

RESPONSE: The rules do not require that a verified line be submitted. The rule at N.J.A.C. 7:7A-7.6(a)4i clarifies the requirements for projects **if** a verified line has not been obtained by the applicant. Therefore, it is implicit that a verified line is not required. The rule remains as proposed.

(644) COMMENT: The rule at N.J.A.C. 7:7A-7.6(a)4i should be modified to remedy the situation where DEPE does not make its field inspection in a timely manner and as a result, time has been lost in reflagging and money spent (Pureland Industrial Complex).

RESPONSE: It is the Department's experience that if the property is flagged at the time the application is submitted, in the majority of situations reflagging will be unnecessary. Therefore, the proposal has not been amended.

(645) COMMENT: The language at N.J.A.C. 7:7A-7.6(a)4i should be amended to state, "pursuant to the requirements of an LOI" (N.J. Builders Association).

RESPONSE: This provision specifically addresses the situation in which the freshwater wetlands boundary has **not** been verified by a LOI. For this reason, adding the phrase suggested by the commenter would be contrary to the purpose of this provision.

(646) COMMENT: We support the rule at N.J.A.C. 7:7A-9.5(c) which modifies notification requirements for linear facilities. However, the rules should be amended at N.J.A.C. 7:7A-7.6(a)7, 8.3(a)9 and 11.1(b)9 to reflect these same requirements (N.J. Department of Transportation).

RESPONSE: The rule has been amended upon adoption to reflect this clarification at N.J.A.C. 7:7A-7.6(a)7 and 8.3(a)9. The requirements at N.J.A.C. 7:7A-11.1(b)9 have not been amended since these notice requirements are mandated by the EPA as a requirement for assumption of the 404 program.

(647) COMMENT: We support the rules at N.J.A.C. 7:7A-7.6(a)6 and 7, 8.3(a)8 and 9.5(b) and 11.1(b)9 which requires certified mail with return receipt as the standard notification. However, we suggest that a return receipt card signed by the receiver not be required as part of the process (N.J. Recreation and Parks Association, N.J. Builders Association, NAIOP, Archer and Greiner, Enviro-Resource Inc.).

RESPONSE: The rule at N.J.A.C. 7:7A-7.6(a)6 and 7 has been amended upon adoption to clarify that the white receipt or green card is acceptable as proof of certified mailing.

(648) COMMENT: In the rules at N.J.A.C. 7:7A-7.6(a)6 and 7, 8.3(a)8 and 9, 9.5(b) and 11.1(b)9, the notification and time period for Environmental Commissions, Planning Boards and other similar bodies to respond to any Freshwater Wetland Protection Act is grossly inadequate. Currently and proposed, the Act provides 15 days for the reviewing body to respond. In most cases this will not allow these bodies to respond to the greatest extent allowable due to the regular scheduling of meeting dates. For example, if an application is made to the DEPE on April 1 and the environmental commission does not meet regularly until the third Wednesday, April 17, they will be precluded the opportunity to provide comment. The recommendation is to extend the comment period on applications or requests up to 45 days after the date of submission (Maser, Sosinski and Associates).

RESPONSE: In addition to the 15 day time period afforded to those individuals and groups who receive notice (that is, municipal and county planning boards, the municipal clerk and construction official, the environmental commission, and all landowners within 200 feet), all interested persons have an additional 20 days after the publication of the notice of application in the DEPE Bulletin in which to submit comments and request a public hearing. Therefore, there is sufficient time for interested parties to provide pertinent information.

N.J.A.C. 7:7A-7.6(a)7

COMMENT: Several groups objected to the proposed deletion of county planning boards in the notice requirements for transition area waivers, letters of interpretation (N.J.A.C. 7:7A-8), Statewide general permits (N.J.A.C. 7:7A-9), individual freshwater wetlands and open water fill permits (N.J.A.C. 7:7A-3) and WQCs (N.J.A.C. 7:7A-4). They had the following comments:

(649) The notice is used to ensure that applicants for county approvals have the appropriate state approvals. The notice also helps the County determine if applicants are addressing wetlands protection goals. The

County further believes this notice is important for counties with active land development review committees and areawide water quality management planning responsibility (The Middlesex County Planning Board);

(650) Counties serve as a needed bridge between state and local governments (The Somerset County Planning Board);

(651) It is contrary to the Act at N.J.S.A. 13:9B-9 and 13:9B-17 (The Somerset County Planning Board);

(652) The county planning board is an important channel for county parks departments to keep informed of activities which may affect wetlands within their districts (New Jersey Recreation and Park Association, ANJEC, Great Swamp Watershed Association, Passaic River Coalition);

(653) Wetlands and transition areas are of regional importance and counties should be informed of applications affecting them (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission);

(654) Many county agencies are working toward entering wetlands information into GIS systems and notice is essential to assist them (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission);

(655) The opportunity for comment on a specific action is a valued option. In addition, the counties bear considerable responsibility to the public which perceives them as a liaison between local and state government, and as such, a source for information and explanation (Morris County Planning Board); and

(656) Public notification should be expanded, not curtailed. The county planning board has notified the county park commission of application filings which affect public parkland. In addition, the county park commission has submitted resource information to the Department to enable it to correctly identify wetland values (Morris County Park Commission).

RESPONSE: The Department has reconsidered the proposed deletion and will not adopt the proposed change. Therefore, county planning boards shall continue to be notified of requests for permits and waivers and letters of interpretation by the applicant.

(657) COMMENT: ANJEC, the Great Swamp Watershed Association and the Greenwich Environmental Commission support the addition of the municipal construction official to the list of entities to receive public notice.

RESPONSE: The Department acknowledges this comment in support of the amended rule.

(658) COMMENT: We support the removal of the county planning board from the list of required notifications (Wander Ecological Consultants).

RESPONSE: For the reasons stated in the comments above, objecting to the proposed deletion of county planning board notification, the Department has not adopted the proposed deletion.

(659) COMMENT: ANJEC comments that the word "Inland" was not included in the address at N.J.A.C. 7:7A-7.6(a)7v.

RESPONSE: "Inland" was purposely excluded from this address since a request may be directed to either the Bureau of Inland or Coastal Regulation. By sending requests to the Bureau of Regulation and including the county, the mail will be properly directed upon arrival at the Element.

(660) COMMENT: The rule at N.J.A.C. 7:7A-7.6(a)7v should be clarified to indicate that the activity is not to occur inside the municipal construction official (Enviro-Resource Inc.).

RESPONSE: The rule has been amended upon adoption to clarify this provision.

(661) COMMENT: Instead of the certified letter notifications required in subchapters 7, 8, 9 and 11, a newspaper notification should suffice (Johnson Engineering).

RESPONSE: This requested amendment would not ensure meaningful notice of potentially affected parties and, therefore, the change has not been made.

(662) COMMENT: The regulations at N.J.A.C. 7:7A-7.6(a)7v, 8.3(a)9iv, and 11.1(b)9vi describe the form of notice which an applicant is required to provide to other property owners in connection with submittal of applications for transition area permits, letters of interpretation, and Individual permits. In each case, the notice informs property owners of land located within two hundred feet that their property may be inspected and entered by the DEPE. There does not appear to be any legal basis for allowing what is clearly a trespass on these other properties located within two hundred feet of a subject site (Shanley and Fisher).

RESPONSE: The notice requirements at N.J.A.C. 7:7A-7.6(a) have been amended and require that the applicant inform the adjacent landowners that the Department may conduct a limited field investigation on their land. Pursuant to N.J.S.A. 13:1D-9 and N.J.S.A. 13:9B-21m, the Department has the authority to enter properties and conduct site inspections, in conformance with any overriding restrictions of the Fourth Amendment.

(663) COMMENT: The rules at N.J.A.C. 7:7A-7.6(a)7v and 8.3(a)9 should specify that the paragraph concerning site inspections should be included only in the notification letters going to adjacent landowners. Since this paragraph will generate intense concern among landowners the notice should include a DEPE phone number that they can call for information (Wander Ecological Consultants, Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: This letter will also serve to notify municipal and county officials that the Department may perform a site inspection within their jurisdiction and therefore the requirement of notification to the local authorities will not be deleted. Since the application may not have been received by the Department at the time the notices are received by the concerned landowners, the applicant or the applicant's agent would be the best contact for information.

(664) COMMENT: The rules at N.J.A.C. 7:7A-7.6(a)7v and 8.3(a)9 should delete the paragraph concerning comments to the Department and site inspections as the only thing that this will accomplish is to traumatize adjacent landowners (N.J. Society of Professional Engineers)

RESPONSE: The Department's objective with the proposed language is to assure public participation in the permitting process and to inform the adjacent landowners that the Department may conduct a limited field investigation on their land. This objective is best accomplished through the notification process and by soliciting information from concerned citizens on specific applications. Therefore, the language has not been deleted.

(665) COMMENT: The sample notice at N.J.A.C. 7:7A-7.6(a)7v, 8.3(a)9iv, and 11.1(b)9vi should be amended to read, "a four inch diameter" or "a four inch bore" hand auger (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The word "diameter" has been added in the sample notices in these sections to clarify the rule.

(666) COMMENT: Even though the 200-foot notice radius is customary for tax maps and legal notifications, there is no need to worry a landowner that is 200 feet away from a site since the limit of the wetlands jurisdiction is 150 feet from the wetlands boundary (Amy S. Greene Environmental Consultants, Inc., N.J. Builders Association, N.J. Department of Transportation).

RESPONSE: The Department disagrees with the commenter's suggestion that an adjacent landowner would not be interested in a project if it's outside the jurisdiction of the Act but within 200 feet of their property boundary. The Act at N.J.S.A. 13:9B-9a(2) specifies that landowners within 200 feet of the site be notified for wetland permits in order to facilitate concurrent notices with applications pursuant to the MLUL. Therefore it is appropriate to notify landowners within 200 feet of the property on which a regulated or prohibited activity is proposed.

COMMENT: Eight groups using a form letter and several other individuals or groups object to the provisions at N.J.A.C. 7:7A-7.6(a)6 (notice requirements) as well as those at N.J.A.C. 7:7A-7.7(h) to allow public hearings on transition area waivers and to require the applicant to bear the costs of the public hearing. They had the following concerns:

(667) An applicant desiring several letters and/or permits from the Division (e.g., a Letter of Interpretation [LOI], Statewide General Permit [GP], Individual Permit [IP], and Stream Encroachment Permit) would be required to notice for each of these requests, would have to notice each time a public hearing is to be held, and this would be in addition to notices required to meet Municipal Land Use Law (MLUL) requirements. These requirements are redundant, excessive, potentially costly, and too time consuming. In addition, for an applicant "that is the victim of an organized effort to stop their project," these requirements provide a continuous forum for any group or individuals opposed to a project. The purpose of the initial municipal hearing is to hear these objections (NAIOP);

(668) Allowing interested persons to request a public hearing and having the applicant pay for the costs places an unreasonable burden on the applicant because potentially anyone could request a public hearing, subjecting the applicant to unreasonable and unnecessary costs and delays in the application process. Instead the party requesting the hearing should be responsible for the cost of the hearing and show

reasonable cause for "interest" in the permit application (Enviro-Resource, Inc., N.J. Builders Association);

(669) This rule gives considerable discretion to interested persons whose motive may be to delay an activity or increase the expense of the applicant. The Department should determine if the application warrants a public hearing (Louis Berger & Associates, Inc., Eric S. Luscombe);

(670) The cost of the hearing should be borne by the state using moneys generated by the application fee (Pennoni Associates, Inc.);

(671) If third parties request a hearing and the hearing is granted, they should pay for it (New Jersey State Bar Association);

(672) The notice requirements are excessive, costly and redundant. In the case of a LOI, the applicant is merely making a request of the Department to verify a wetlands boundary. Since this is not the approval of a regulated activity, the traditional rationale for public notification does not apply. In the case of a GP, it is an additional unnecessary cost which a landowner should not have to bear and is also contrary to the Department's earlier published position on this issue (Archer & Greiner, Johnson Engineering);

(673) Allowance for public hearing upon request disrupts, delays, and complicates the review process despite the fact that the statute requires the Department to issue a permit decision within 90 days after submittal of a complete application (Form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, PA., NIAM Corp);

(674) Notification of adjacent property owners is an additional unneeded cost to be borne by the applicant and is in direct opposition to the Division's previous position (Pennoni Associates Inc.); and

(675) Written notice should only be required for properties within 200 feet of the regulated activity (JCP&L).

RESPONSE: The Department does not agree that this is a burdensome requirement and that the process will not result in producing any relevant information. An applicant applying for several permits from the Element as well as to the municipality need only provide one set of notices so long as it incorporates all of the requirements of each permit program for which approvals are sought. In addition, any public hearing to be held by the Department on an application will simultaneously address all regulatory aspects of the project and will not necessitate several separate hearings.

Since it is the applicant, and not the interested party providing additional information, who will derive the benefit of conducting the regulated or prohibited activity it is appropriate that he or she bear the cost of the hearing. The Department will grant hearings based on "the degree of public interest" in the application. Hearings pursuant to Department requirements differ from those pursuant to the MLUL because DEPE hearings focus on issues which are relevant to the appropriate state requirements; and often the hearing provides the Department with additional information that may not be otherwise forthcoming.

The Act has established a program that is fee supported thereby placing the cost of regulation on those who are deriving benefits from performing the regulated or prohibited activity. Since not every application will require a public hearing, it would be unfair to impose the cost of the public hearing upon those applicants for whom no public hearing is required and, therefore, this cost must be borne by the applicant.

The notification requirements for the wetlands permitting program is a legal notification consistent with the MLUL. Therefore, notice is required 200 feet from the property boundary. Finally, these rules implement a public mandate to protect the State's resources. Therefore, the solicitation of public input is appropriate and the time required for this process is well spent.

There are no provisions for hearings in subchapter 8, Letters of Interpretation. Notification is however an essential part of this process since the Department often obtains information concerning threatened and endangered species as a result of notification.

(676) COMMENT: Linear development projects should be exempt from the notification requirements because transmission projects are typically several miles in length. Instead they should be handled as they are at (N.J.A.C. 7:7A-9.5) where a newspaper advertisement is required instead of individual notices when a linear development exceeds 0.5 miles in length. In addition, the proposed notice requirements should say that notice be given to owners of all real property adjacent to any above surface structure within freshwater wetlands and related to the linear facility (Atlantic Electric).

RESPONSE: Linear development projects cannot be exempt from the notice requirements because they have impacts that may affect adjacent landowners. However, the rule at N.J.A.C. 7:7A-7.6(a) has been amended to clarify and standardize the notice requirements to be consistent with the requirements at N.J.A.C. 7:7A-9.5(c).

(677) COMMENT: The rule at N.J.A.C. 7:7A-7.6(b) should be revised to eliminate the repetition of noticing for both a transition area waiver and an LOI for applications for transition area waivers without an LOI (N.J. Builders Association).

RESPONSE: The rule has been amended at N.J.A.C. 7:7A-7.6(b) to clarify that it is unnecessary to provide redundant notices where an LOI has not been obtained prior to applying for a waiver.

(678) COMMENT: The rule at N.J.A.C. 7:7A-7.6(c)1 should be amended to change "which" to "with" (Wander Ecological Consultants).

RESPONSE: The rule has been amended on adoption to eliminate this typographical error.

(679) COMMENT: The rule at N.J.A.C. 7:7A-7.6(c)3i should be clarified to indicate that a formal survey is required for the locations of these elements. In addition, the Department should clarify if all structures on lots within 200 feet must be included. Lastly, the proposal should require the location of any proposed bulkheads or retaining walls (Wander Ecological Consultants).

RESPONSE: Based on the comments received and legal advice provided by the Attorney General's office, the Department will delete upon adoption the proposed provisions at N.J.A.C. 7:7A-7.2(e), 7.3(d) and 7.6(c)3.

(680) COMMENT: In the rule at N.J.A.C. 7:7A-7.6(c)3iii, are grasses acceptable vegetation? If not, why not (Pureland Industrial Complex)?

RESPONSE: Based on the comments received and legal advice provided by the Attorney General's office (see response to Comment 110) the Department will delete upon adoption the proposed provisions at N.J.A.C. 7:7A-7.2(e), 7.3(d) and 7.6(c)3.

N.J.A.C. 7:7A-7.7 Procedure for review of transition area waivers applications

(681) COMMENT: The addition of notice requirements for transition area waivers (N.J.A.C. 7:7A-7), LOIs (N.J.A.C. 7:7A-8.1(a)9), and GPs (N.J.A.C. 7:7A-9.5(b)) strengthens wetland protection. Public notification should be thorough and widespread, not selective (The Lacey Township Environmental Commission, and the Environmental Commission of West Milford, Stephen Barnes, Karen Siletti).

RESPONSE: The Department acknowledges this comment in support of the rule amendment. The Department makes every effort to assure that permitting pursuant to the Act is an open, public process.

(682) COMMENT: The Upper Rockaway River Watershed Association and the Borough of Mountain Lakes Environmental Commission state that the notice published in the DEPE Bulletin does not contain enough information to substitute for notification because it fails to list blocks and lots and project descriptions. The date of the Bulletin listed on the cover or the date of mailing of the Bulletin whichever is later should be the date used for counting for the purpose of limiting the public comment period (this should also apply to N.J.A.C. 7:7A-12.4).

RESPONSE: The Department is presently working with the public to incorporate additional relevant information in the DEPE Bulletin in a more understandable format. The 20-day comment period afforded to those individuals who read the DEPE Bulletin is in addition to and not a substitute for the 15-day comment period given to those who receive individual notice such as the municipal and county planning boards, environmental commission, municipal clerk and construction official, and all landowners within 200 feet of the property. Therefore, since mailing dates may vary, the publication date (that is, the date of the Bulletin on the cover) will remain the date used for determining the period for requesting a public hearing.

(683) COMMENT: The Monmouth County Friends of CLEARWATER Inc., and the Lake Musconetcong Regional Planning Board welcome the increased public notice requirements because they improve opportunities for public interest groups to provide helpful observations and comment.

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(684) COMMENT: The rule at N.J.A.C. 7:7A-7.7(a) allows the Department to return deficient applications instead of requesting additional information. Criteria should be provided so that applications are only returned under certain specified circumstances (New Jersey State Bar Association, Amy S. Greene Environmental Consultants, Inc., Pureland

Industrial Complex, N.J. Builders Association, N.J. Society of Professional Engineers).

RESPONSE: The Department, in practice, will request by telephone minor items needed to make an administratively complete application. However, to administer the freshwater wetlands program in a practical and efficient manner, the Department must retain the ability to return applications for which requested additional information is not supplied, and to return applications which are severely deficient. Note that in the case of returned applications, a checklist describing deficient items is included as provided at N.J.A.C. 7:7A-7.7.

(685) COMMENT: The rule at N.J.A.C. 7:7A-7.7(c) should require that Section Chiefs immediately notify the applicant and the Commissioner in writing the reasons for delay when the Department fails to issue or deny a transition area permit within 90 days of having received a complete application. Supervisors should be personally responsible for expediting the review of such applications (Wander Ecological Consultants).

RESPONSE: This requirement would only serve to create additional paperwork and add additional time to the review process. The Department is taking administrative steps to ensure that applications are reviewed within established time frames or in a lesser period of time. Should an applicant have questions why an application has not been acted on in a timely manner, they should contact the appropriate regional Section Chief.

(686) COMMENT: The rule at N.J.A.C. 7:7A-7.7(f) should be amended to delete the phrase, "and county" since the Department is proposing to delete notification to the counties (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The Department has retained the requirement that the applicant provide notice to the appropriate county planning board and therefore this change is unnecessary.

(687) COMMENT: In the rule at N.J.A.C. 7:7A-7.7(h) the manner of holding a public hearing and the basis for holding a public hearing are arbitrary and unreasonable (N.J. Society of Professional Engineers).

RESPONSE: It is unclear how the basis for holding a public hearing is arbitrary and unreasonable. The criterion is a "significant degree of public interest in the application." The Department does not automatically grant a hearing for every request made. The Department will make the decision to grant a hearing based on the issues raised with each request.

N.J.A.C. 7:7A-7.8 Hearings and appeal

(688) COMMENT: The term "affected party" which entitles someone to a hearing is not defined. This should be defined very narrowly so that we do not have a plethora of contested hearings especially at the initial project planning stages (New Jersey State Bar Association, N.J. Builders Association).

RESPONSE: An affected party is one who has a statutory or constitutional right to an adjudicatory hearing. However, the public should be aware that the Department has proposed new rules regarding appeals of permit decisions, N.J.A.C. 7:1-2, at 23 N.J.R. 3278(a) (November 4, 1991). These rules address procedures for appeals of the issuance and denial of permits by persons other than the permit applicant. If these rules are adopted and there is a conflict between them and any other provision of Title 7, the new rules will control, unless any applicable statute requires otherwise.

(689) COMMENT: The Department must define "other affected party" and develop a standard procedure for how such parties achieve standing, in order to avoid unnecessary confusion and waste of public and private resources (Hannoch Weisman, NAIOP).

RESPONSE: An affected party is one who has a statutory or constitutional right to an adjudicatory hearing. However, the public should be aware that the Department has proposed a "third party appeals" rule, N.J.A.C. 7:1-2, at 23 N.J.R. 3278(a) (November 4, 1991). These rules address procedures for appeals of the issuance and denial of permits by persons other than the permit applicant. If these rules are adopted and there is a conflict between them and any other provision of Title 7, the new rules will control, unless any applicable statute requires otherwise.

(690) COMMENT: The provisions for hearings and appeals at N.J.A.C. 7:7A-7.8 should be moved to a central section dealing with hearings and appeals (New Jersey State Bar Association).

RESPONSE: The rule has been amended at N.J.A.C. 7:7A-12.7 to reference other Department actions. The provision at N.J.A.C. 7:7A-7.8 cross-references this section. Therefore, no confusion or ambiguity results from the provision at N.J.A.C. 7:7A-7.8, and the provision makes it easier to locate the hearing request provisions. Other sections of the rule dealing with various Department actions reference N.J.A.C. 7:7A-12.7.

N.J.A.C. 7:7A-7.9 Duration, effect, modification and transfer of transition area permits

(691) COMMENT: If the rule at N.J.A.C. 7:7A-8.6(b), change in resource classification, is adopted the rule at N.J.A.C. 7:7A-7.9 must be amended to be consistent (Wander Ecological Consultants).

RESPONSE: The rule at N.J.A.C. 7:7A-8.6(b) has been deleted upon adoption and therefore this section has not been amended as suggested.

(692) COMMENT: It is unreasonable for the DEPE to require a new application for the extension of a transition area waiver beyond five years unless construction has not begun (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: Within the five-year time frame, site conditions may change, additional information may become available and the regulatory framework may change. It is the Department's responsibility to examine this new information and to determine if the approval of a waiver is appropriate.

(693) COMMENT: The rule at N.J.A.C. 7:7A-7.9(e) provides that permits do not run with the land but can be transferred as a minor modification. It makes no sense not to have these land use permits run with the land (New Jersey State Bar Association, N.J. Builders Association, N.J. Society of Professional Engineers).

RESPONSE: The commenter is in error. The rule at N.J.A.C. 7:7A-7.9(e) provide that the waiver does run with the land, that is, "is continued in force." All that this section requires is that the new owner be recorded through a modification of the waiver as provided at N.J.A.C. 7:7A-13.6. The modification process in this case is a simple clerical task and does not require submittal of substantial new data.

N.J.A.C. 7:7A-7.10 Cancellation, withdrawal, resubmission and amendment of applications

(694) COMMENT: In the past, DEPE has requested applicants to withdraw applications under the threat of denial. How can this be prevented (Pureland Industrial Complex)?

RESPONSE: In cases where there is insufficient information to make a positive finding as required by the statute in order to recommend approval by the Administrator, the applicant is informed of the imminent decision. The decision on withdrawing the application, resolving deficiencies and/or modifying the design is up to the applicant. The application, if withdrawn, can be resubmitted at a time when the applicant can provide complete information. In other cases, where it is clear to the review officer that a project does not meet the criteria for granting a permit or waiver, they may offer the applicant the **option** of withdrawing the application and redesigning to comply with the standards, or receiving an application denial.

(695) COMMENT: The proposed section dealing with cancellation, withdrawal, resubmission and amendment of applications should be moved to one central section (New Jersey State Bar Association).

RESPONSE: Since the criteria for cancellation, withdrawal, resubmission and amendment of applications vary with the type of application, it would serve no purpose to consolidate these sections.

(696) COMMENT: In the rule at N.J.A.C. 7:7A-7.10(b), the 60-day limit (with one 30-day extension) for responding to additional information requests is too short, especially in light of the Department's lengthy review period for most applications requiring a field inspection. Large projects may require more time for substantial revisions. The Department should provide a certified notice of proposed cancellation within 30 days unless good cause explanation is provided, in which case the application can remain active. At a minimum, subsection (b) should be revised from "the Department may send", and subsection (d) should include "cancellation" with "denial or withdrawal" to clarify that new fees will not be required if resubmitted within one year of a cancellation (which may be beyond the applicant's control) (NJ Concrete and Aggregate Association, N.J. Builders Association).

RESPONSE: All that an applicant need do to prevent cancellation of an application is to inform the review officer in writing that they are continuing to pursue their application. The rule has been amended to indicate that the Department will grant additional extensions of 30 days upon written request by the applicant.

(697) COMMENT: The rule at N.J.A.C. 7:7A-7.10(e) should be clarified to indicate whether an amendment to an application, made at the request of DEPE, would also constitute a new submission. It is unreason-

able for the DEPE to declare that any application being amended shall constitute a new submission and may, at the DEPE's discretion, require reinitiation of the entire review process (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: If the application requires major amendments in order to comply with the regulations, and the applicant is so informed by DEPE, then the DEPE reserves the right to "reinitiate the review process", that is to "restart the clock" since the review of these major amendments will in essence be a new review.

(698) COMMENT: We are in strong support of the provisions that would provide increased protection of the wetlands under N.J.A.C. 7:7A-7.10(e) (The Township of Middletown, the Lacey Environmental Commission and Greenwich Environmental Commission).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

Subchapter 8. Letters of Interpretation

N.J.A.C. 7:7A-8.1 Purpose

(699) COMMENT: The rule at N.J.A.C. 7:7A-8.1 stating that "a person proposing to engage in a regulated activity, may apply for an LOI" should be deleted. It is not a prerequisite to an application for an LOI that a person propose to engage in development (New Jersey State Bar Association).

RESPONSE: The rules already address the commenter's concern, by providing that a person "desiring the information for other purposes" may request an LOI. There is no requirement that the person propose to engage in a regulated activity and therefore the proposed language has been adopted without change.

(700) COMMENT: We are in strong support of the provisions at N.J.A.C. 7:7A-8.1(a)9 that would provide increased protection of the wetlands (The Township of Middletown and Greenwich Environmental Commission).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

N.J.A.C. 7:7A-8.2 Types of letters of interpretation

(701) COMMENT: This subchapter should contain a provision such as that at N.J.A.C. 7:7A-9.6 allowing the applicant or other party to request an administrative hearing on any letter of interpretation. In addition, letters of interpretation should state that they do not become effective for 30 days, so that the applicant does not act on information that is the subject of an appeal (Wander Ecological Consultants).

RESPONSE: The Department agrees with the commenter's concern. However, the rules at N.J.A.C. 7:7A-8 have not been amended as suggested upon adoption since the Department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department is proposing a provision to allow the applicant or other party to request an administrative hearing on a letter of interpretation. This proposal can be found in this issue of the New Jersey Register. Pending the adoption of this provision, conflicts which may arise during the letter of interpretation process will be resolved administratively by the Department.

COMMENT: Several commenters believe that the Department should create a type of letter of interpretation which allows delineations on partial properties. They had the following comments:

(702) A procedure should be established for obtaining a letter of interpretation on partial lots when only a portion of a larger lot is to be developed. Forcing a wetlands delineation for the entire parcel results in the investment of excessive time and money and this adds to the cost of housing. The Department could request a metes and bounds description of the portion of the lot for which the LOI is sought (Cumberland County Environmental Health Task Force, New Jersey Builders Association, NAIOP, Langan Engineering, Enviro-Resource, Inc.; Form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(703) The requirement that an LOI application be for an entire lot and not a portion thereof is excessive and is statutorily prohibited (Langan Engineering);

(704) While an applicant can designate an area of disturbance, if wetlands are present within the limit of disturbance the applicant must delineate the wetlands on the entire property to have them verified. This seems unnecessarily costly (Amy S. Greene Environmental Consultants, Inc.); and

(705) If an applicant chooses to construct only a small portion of a much larger parcel, he should not be required to delineate the entire lot and block. He should only be required to delineate all areas within 150 feet of his disturbed area. In the case of a utility where transmission lines traverse miles of properties, this would be an unnecessary burden to the applicant and the ratepayer (PSE&G).

RESPONSE: The Department will not amend the rule to provide LOIs for partial lot and blocks. This decision is not contrary to the Act and is based on the resource protection, enforcement and administrative problems in which this course of action would result. A partial LOI would result in an incomplete survey of the potential wetlands onsite and may result in an incorrect resource value classification that could result in significant adverse impacts to threatened and endangered species. In addition, the enforcement of the Act under a partial LOI without a formal survey of the property boundaries or of the footprint of disturbance would be extremely difficult and may result in significant adverse impacts to the surface water resources. Lastly, it will be extremely confusing administratively to track partial LOIs at all levels of government: State, county and municipal.

The Department has addressed the problem of partial LOIs by proposing the footprint of disturbance LOI for areas of up to one acre. The assumption is that the applicant, in choosing the footprint of disturbance, is attempting to locate an area that does not contain regulated features. If an area of this nature does not exist on the property it can be concluded by the applicant that permits or waivers will be needed for the proposed activity and that a full LOI for the property is appropriate. For larger scale projects that will impact an area larger than one acre it is inappropriate for only part of a lot to be delineated.

Alternatively, the applicant has the option to identify regulated areas and apply directly for permits or waivers to conduct regulated or prohibited activities in these locations. In these cases, the Department will require all necessary information regarding the location of areas to be impacted but will not require a formal LOI. These options will avoid the unnecessary problems that would result from issuing partial LOIs.

For linear development, the fee and area of investigation for an LOI is based on the right-of-way since this is the area that the applicant has the legal right to modify.

(706) COMMENT: For public parks and recreation projects, LOI application fees and content requirements should be based on the size and scope of the actual proposed activity instead of on the size of the property (New Jersey Recreation and Park Association).

RESPONSE: While the Department acknowledges that there are many categories of public interest projects, there is no statutory authority to adjust application and fee requirements for public park and recreation projects.

(707) COMMENT: We support N.J.A.C. 7:7A-8.2(a) which now includes four types of Letters of Interpretation (New Jersey State Bar Association, Van Note-Harvey Associates).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(708) COMMENT: The rule should be modified to provide for requests for only resource value classifications. These requests should be handled for a minimal fee and with minimal requirements (i.e., no photos or plans, strictly U.S.G.S. and/or NWI) (Van Note-Harvey Associates).

RESPONSE: An applicant can receive a resource value classification through the Department's simplest LOI, a presence/absence determination pursuant to N.J.A.C. 7:7A-8.2(a)1. The fee is $100.00 and does not require the submittal of a wetlands delineation but rather basic information regarding the location of the property.

(709) COMMENT: The rule should be amended at N.J.A.C. 7:7A-8.2(a)1 to delete the phrase "over one acre" since the DEPE has and should continue to offer "presence or absence determinations" even if the property is less than one acre (N.J. Builders Association).

RESPONSE: The rule has been clarified to delete the phrase "over one acre." However, applicants should be aware that for properties of one acre or less the Department will perform a complete delineation pursuant to N.J.A.C. 7:7A-8.2(a)3 for $250.00.

(710) COMMENT: At N.J.A.C. 7:7A-8.2(a)1, 3 and 4, the phrase, "limits defined by municipal tax block and lot boundaries" should be inserted after "parcel", since rights-of-way seldom have a municipal block and lot number (Wander Ecological Consultants).

RESPONSE: The phrase, "or Right-of-Way (ROW) description" has been inserted after municipal tax block and lot in the sections described as well as at N.J.A.C. 7:7A-8.3(a)1.

(711) COMMENT: We support the proposed addition of an LOI for footprint of disturbance. However, the increased fees that are intended to shift regulatory program costs do not work when the applicant is the public parks and recreation department. In this case, the financial burden still ultimately falls on the taxpayer. On most public park projects there is little opportunity to recoup application costs (New Jersey Recreation and Parks Association).

RESPONSE: While the Department acknowledges that there are many categories of public interest projects, the program is fee supported and there is no statutory authority to waive or reduce permit or waiver fees for any entities other than those that are "agencies of the State."

(712) COMMENT: For Letter of Interpretation-footprint of disturbance, can the one acre of disturbance be for two lots if it did not surpass the one acre limit (Eric S. Luscombe)?

RESPONSE: No, for each lot the applicant can obtain a footprint LOI for up to one acre of disturbance but the Department will not issue one footprint LOI for two different lots.

(713) COMMENT: In the rule at N.J.A.C. 7:7A-8.2(a)2 the language "may at its discretion require that the limits of disturbance be surveyed" is arbitrary and capricious. The DEPE should be required to submit evidence as to why a survey is necessary (N.J. Society of Professional Engineers).

RESPONSE: The rule has not been amended as suggested. A footprint of disturbance LOI is an inexpensive way for an applicant to establish a buildable area based on the absence or regulated features. Therefore, the Department will only require a survey for footprints which reveal the absence of all regulated features. A survey is necessary because a footprint of disturbance can be any shape and at any location within a much larger piece of property. Therefore, in order to provide documentation regarding the exact location of development activities within a larger parcel, a survey is necessary.

(714) COMMENT: The rules should be amended to reinstate the present requirement for the preparer's qualifications to be submitted as part of the LOI application (N.J. Recreation and Parks Association).

RESPONSE: The requirement for the preparer's qualifications has been deleted and will not be reinstated because the Department has found that it provides no useful information for the review of an LOI application.

N.J.A.C. 7:7A-8.3 Application for letters of interpretation

(715) COMMENT: What is the DEPE's rationale for increasing the number of copies of LOI information (Van Note-Harvey Associates)?

RESPONSE: The Department had not previously specified the number of copies of information to be submitted. The proposed requirement does not represent an increase in the number of copies required. Rather, the Department has standardized the number of copies required for all but applications for individual permits to three copies.

(716) COMMENT: The rule at N.J.A.C. 7:7A-8.3(a) concerning notice of property owners within 200 feet should be amended to read, "Should the applicant be requesting the letter of interpretation in connection with a specific development proposal" (New Jersey State Bar Association).

RESPONSE: The rule has not been changed as suggested. The Department requires notification of property owners within 200 feet regardless of whether or not the applicant is proposing a specific development proposal since it is at this point that the Department needs to solicit all information available on possible factors involving the resource value classification of the site.

(717) COMMENT: The rule at N.J.A.C. 7:7A-8.3(a)2 could create a hardship, by requiring a survey, on single lot owners or prospective buyers who would just like to know whether or not wetlands exist. This requirement should be waived for properties under once acre (N.J. Builders Association).

RESPONSE: The Department agrees and has amended the rule upon adoption at N.J.A.C. 7:7A-8.3(a)2 to accept a tax map in lieu of a survey or site plan for those applicants requesting a presence/absence determination.

(718) COMMENT: The rule at N.J.A.C. 7:7A-8.3(a)5 and 6 should be clarified to indicate that only a portion of the U.S.G.S. map and soil survey map showing the site must be submitted (Enviro-Resource Inc, Amy S. Greene Environmental Consultants, Inc., Van Note-Harvey Associates, NJ Concrete and Aggregate Association, N.J. Builders Association).

RESPONSE: The Department has clarified the rule in the adoption at subchapters 8 and 9 to indicate that a portion of the U.S.G.S. map is acceptable if the location of the parcel is correct and clearly defined, and in subchapter 8 that only the appropriate soil survey sheet need be submitted to satisfy these requirements.

(719) COMMENT: The rule should be amended to read, "U.S. Geological Survey" instead of U.S. Geodetic Survey (Van Note-Harvey Associates).

RESPONSE: The rule has been amended upon adoption to provide this clarification.

(720) COMMENT: Because of the scale of the Soil Survey maps, the limits of a one-acre-or-less project will not show up very clearly. It would be more meaningful to require that the surveyor or engineer transpose the soil mapping onto the survey or site plan that is submitted (Wander Ecological Consultants).

RESPONSE: The Department will accept the Soil Survey with the project site located to the best of the applicant's ability and has not amended the rule as suggested to include this further requirement. For smaller projects, the Department will use this information for basic guidance and it is unnecessary to require that the soils information be transposed to larger scale plans.

(721) COMMENT: The notification requirements should be tailored to the situation involved. It does not make sense to notify the municipal construction official for a major subdivision, nor the planning board for a single-family home needing only a building permit (Wander Ecological Consultants).

RESPONSE: While the Department acknowledges that in particular circumstances, notification to either the construction official or the planning board will not advance the purposes of the Act, the Department has not changed the provision upon adoption. The Department has adopted this provision as proposed, because to attempt to delineate all of the permutations of various types of projects would substantially complicate the rule, without significant benefit to the regulated community.

(722) COMMENT: The rule should be amended at N.J.A.C. 7:7A-8.3(a)7 to require color photographs only for the Department's applications and not for all distribution copies (Louis Berger and Associates, Inc).

RESPONSE: The rule has been amended upon adoption to reflect this clarification.

(723) COMMENT: We support the rule at N.J.A.C. 7:7A-8.3(a)9 which clarifies what proof of certified mailing will be required (New Jersey State Bar Association, N.J. Builders Association).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(724) COMMENT: The rule at N.J.A.C. 7:7A-8.3(a)9 should be clarified to state that the notice should be sent simultaneously with the submission to the Department, since there should only be a one or two day lag time at the most (New Jersey State Bar Association, N.J. Builders Association).

RESPONSE: The rule has not been amended as suggested by the commenter. This clause was added to eliminate calls to the Department on applications that have not yet been received.

(725) COMMENT: Two working days is insufficient at N.J.A.C. 7:7A-8.3(a)9. If this requirement is added it should be changed to at least seven working days (Van Note-Harvey Associates, N.J. Society of Professional Engineers).

RESPONSE: The Department does not agree and believes that two working days should provide sufficient time for the application to be received by the Department and therefore the rule not been amended as suggested.

(726) COMMENT: The rule at N.J.A.C. 7:7A-8.3(a)9iv should be clarified. To avoid misunderstanding and subjectivity it is recommended that the word "will" be substituted for "may" in the instances of the DEPE notifying the environmental commission, planning board and construction official in the municipality for which the DEPE is issuing a letter of interpretation (Morris County Planning Board, Eric S. Luscombe).

RESPONSE: The rule has been amended upon adoption to provide the suggested clarification.

(727) COMMENT: The rule at N.J.A.C. 7:7A-8.3(a)10 should be amended to be consistent with the other types of wetland approvals by requiring notice only for those landowners within 200 feet of the regulated activity (JCP&L).

RESPONSE: The Department agrees that the notice requirements for LOIs should be consistent with the notice requirements for other wetland approvals under these rules. Therefore, the rule as adopted standardizes the requirement to provide notice to all landowners within 200 feet of the property boundary as provided for other approvals under these rules, rather than within 200 feet of the regulated activity as suggested by the commenter.

(728) COMMENT: The rule at N.J.A.C. 7:7A-8.3(a)10 requires the applicant to provide unconditional consent to access. This creates an unnecessary burden, and there is no reason that the Department should not give notice of a site inspection for an LOI (at least a minimum of 48 hours in advance) (New Jersey State Bar Association, Louis Berger and Associates, Inc., Van Note-Harvey Associates, AES Cohansey, Inc., N.J. Builders Association, NAIOP).

RESPONSE: Requiring the Department to give notice at least 48 hours in advance of field inspections would result in interruptions and delays in the LOI process because several sites may be inspected in a given day and because of the variability that is often encountered during field inspections, project review officers cannot predict the precise time that they will visit subsequent sites. A site may be visited ahead of "schedule" in some circumstances, and in other cases the project review officer may not reach a site on the day they had anticipated.

(729) COMMENT: The requirement at N.J.A.C. 7:7A-8.3(b)1i and 2i(4) that flags and stakes be set in relation to known points and landmarks is generally impossible in practical field delineation because of the large number of flags and the lack of distinctive landmarks and should be eliminated (Wander Ecological Consultants).

RESPONSE: These requirements provide a means for the applicant to provide a delineation for review by the Department without having to do a survey upfront. The rule has been amended upon adoption to clarify that this requirement is not necessary if known points and landmarks are unavailable on a given site.

(730) COMMENT: For clarity, the second sentence at N.J.A.C. 7:7A-8.3(b)2i should read "The scale ... shall be one inch equals no more than 100 feet" (Wander Ecological Consultants).

RESPONSE: The rule has been amended upon adoption to provide this clarification.

(731) COMMENT: The rule at N.J.A.C. 7:7A-8.3(b)2 should be modified to allow a scale of one inch equals 400 feet since the current proposal of one inch equals 100 feet in burdensome (Louis Berger and Associates, Inc).

RESPONSE: The Department has not made the suggested change. The Department's experience has shown that without a survey or site plan on a scale at least as large as required under the rule, the Department cannot accurately make a wetland delineation or verification upon which the applicant could rely.

(732) COMMENT: The requirement that the survey include topography is unreasonable for minor subdivisions or for single building lots many of which are larger than one acre, therefore requiring regulatory line verification. Topography is not required as part of the municipal review for such projects and therefore the applicant must have it done only for the LOI, and at great expense relative to the scope of the project (Wander Ecological Consultants).

RESPONSE: The Department disagrees with the commenter's assertion that the topography is not required as part of the municipal review. This information is needed at the municipal level to identify areas of steep slopes, grading, drainage features, flood plains etc. In addition, there are companies that can provide topography from aerial photography as a less expensive alternative to conventional surveying. Therefore, this requirement has not been amended.

(733) COMMENT: The rules at N.J.A.C. 7:7A-8.3(b)2i(1) and 8.4(a) should require that the verified wetlands boundary be surveyed on properties of all sizes. It is precisely on smaller properties that the need for space may result in encroachment into wetlands and/or transition areas if their boundaries are not precisely known. It will ease the job of municipal construction officials and boards of adjustment to be able to see surveyed wetland boundaries on property maps (Wander Ecological Consultants).

RESPONSE: The Department agrees with the commenter's concern. However, the rule at N.J.A.C. 7:7A-8.3(b)2i(1) has not been amended as suggested since the Department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department will consider proposing this change at some time in the near future.

(734) COMMENT: A surveyed line should be required on all properties, except for those less than one acre at DEPE's discretion (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The Department agrees with the commenter's concern. However, the rule at N.J.A.C. 7:7A-8.3(b)2i(1) has not been amended as suggested since the Department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department will consider proposing this change at some time in the near future.

(735) COMMENT: The rule at N.J.A.C. 7:7A-8.3(b)2 states that a survey will be required for a property greater than five acres. The rule should be modified to provide the same guidance for linear facilities involving large acreages with minimal wetlands involvement (N.J. Department of Transportation).

RESPONSE: For projects which involve large acreages it is imperative that the line be surveyed since this may be the only way to reestablish the wetland line. This is particularly important for linear facilities which often cross many property boundaries.

(736) COMMENT: The phrase "of five acres or more" in the rule at N.J.A.C. 7:7A-8.3(b)2i(1) should be deleted. This is an arbitrary number and creates the unfair requirement that if the property was under five acres, a survey would be required prior to the DEPE verification (NJ Concrete and Aggregate Association, N.J. Builders Association, Johnson Engineering).

RESPONSE: The rule has been amended upon adoption to clarify that it is the Department's intent to only require surveys after the line has been verified by the Department and only for properties of five acres or more.

(737) COMMENT: The proposal at N.J.A.C. 7:7A-8.3(b)2i(2) to not require that the line be surveyed until after the DEPE verification has serious pitfalls. If the LOI states that the wetland boundary as inspected was accurate and should now be surveyed, what is to prevent some moving of flags before the survey? Also, it may not be possible to hand-sketch a complicated wetland boundary on a property map. The rule should require that the proposed wetland boundary be surveyed and shown on the map submitted with the LOI application (Wander Ecological Consultants).

RESPONSE: The intent of this provision is to not require two surveys of a property. Since wetland lines are frequently modified during field inspection, the Department is only requiring that a line be surveyed after approval by the Department so as to not put additional cost on the property owner. However, the applicant must take all steps necessary to provide the Department with a wetlands/open water boundary that is accurate enough to allow Department personnel to locate the boundary in the field. This may in some situations necessitate a surveyed boundary due to the complexity of the line. The Department is unwilling to place the burden of requiring a survey prior to line verification in order to avoid the potential for unethical behavior.

(738) COMMENT: In the rule at N.J.A.C. 7:7A-8.3(a) stating that the surveyed line shall be subject to verification and approval by the DEPE, we are concerned with the desire to remove "surveyed line" from the requirements. A survey provides good usable data seemingly important for DEPE staff when conducting onsite inspections. Admittedly, it becomes expensive for property owners when the initial surveyed line is inaccurate because of a poor wetlands delineation, and lines need to be resurveyed. It is not obvious how to provide consultants with the incentive to do the most accurate work the first time. Perhaps a certification program administered by the DEPE would help provide qualified wetlands delineators to the public (Morris County Planning Board).

RESPONSE: The Department agrees with the commenter's concern. However, the rule at N.J.A.C. 7:7A-8.3(b)2i(1) has not been amended as suggested since the Department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department will consider proposing this change at some time in the near future. The DEPE does not have the resources in either personnel or funding to establish a certification program for individuals working as consultants.

(739) COMMENT: Soil logs are often not available for properties for which regulatory line verification is requested nor are they required by the Federal Manual. In addition, the Federal Manual directs the field investigator to "check for hydric soil indicators below the A-horizon (surface layer) and within 18 inches" maximum. Therefore, the require-

ment for soil borings of "a minimum of 24 inches" is inconsistent with the Federal Manual and should be revised to require a maximum of 18 inches (Wander Ecological Consultants, Amy S. Greene Environmental Consultants, Inc., Van Note-Harvey Associates).

RESPONSE: This requirement is included because in many instances the area may contain a thick organic mat. In these cases if a soil boring is measured from the surface the 18 inches suggested would not give an overall profile or show the hydric properties of the mineral soil type. Lastly the requirement only requires an additional six inches for the boring which requires very little time and should not result in significant additional cost.

(740) COMMENT: The language at N.J.A.C. 7:7A-8.3(b)2i(2) which indicates that DEPE may require borings greater than 24 inches is arbitrary and capricious. If the DEPE wishes soil boring below 24 inches a standard depth of 36 or 48 inches should be required. Further this depth of boring should not require a permit (see GP 12) (N.J. Society of Professional Engineers).

RESPONSE: The rule at N.J.A.C. 7:7A-8.3(b)2i(2) states the minimum depth of a soil boring is 24 inches and is the standard condition. The rule further indicates that in atypical situations deeper soil boring may be required. Requests for deeper boring will be based on particular site conditions revealed during site inspection and will not be arbitrary or capricious. There is no reason to require a standard 36 or 48 inch boring for the vast majority of sites. Soil borings for wetlands investigations do not require a permit from the Department. Therefore, the rule has not been changed.

(741) COMMENT: All references to the gathering of technical data should be deleted from the rules and replaced with a statement which indicates that all technical data shall be gathered and reported in accordance with the Federal Manual for Identifying Jurisdictional Wetlands (N.J. Builders Association).

RESPONSE: The Federal Manual directs an investigator in what must be done to establish a wetland delineation. These rules also specify the administrative requirements of the Department to complete an LOI and are not contained in the Federal Manual.

(742) COMMENT: The data sheets utilized in the Federal Manual do not require both Regional and National indicator statuses for vegetation species. Therefore, the Department should only require the Regional status unless a jurisdictional determination is disputed (Wander Ecological Consultants).

RESPONSE: Department experience has shown that the Regional indicators do not always accurately indicate the growing conditions of the species in New Jersey. Therefore, it is important to know the indicator status of a species in other regions of the country to provide the Department with a more accurate prediction of indicator status for a particular species. For example, barnyard grass (*Echinochola crusgalli)* is listed as facultative wet throughout the majority of the country and is listed as facultative up in the region containing New Jersey. The Department has encountered this species numerous times in wetlands.

(743) COMMENT: The rules at N.J.A.C. 7:7A-8.3(b)2i(3), at 1.4, and 2.4(d) should be amended to consistently reference the same vegetation list (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The rule has been amended upon adoption to include this clarification.

(744) COMMENT: The proposal at N.J.A.C. 7:7A-8.3(b)2i requiring that LOI applications contain topographic information depicting contours at no greater than five foot intervals and at one foot intervals in Middlesex and Mercer Counties is unduly burdensome. In cases of linear development, such as power lines or highways, which cover several miles development, collecting detailed topographic information may be cost prohibitive. Accordingly, we suggest that the requirement for topographic information either be deleted or modified so that it is waivable on a case-by-case basis (AES Cohansey, Inc., Eric S. Luscombe, NJ Concrete and Aggregate Association).

RESPONSE: Projects of the magnitude of constructing a highway will require topography to determine the grades and the amount of cut and fill in order to offer the job for bid. This information is also required in other phases of permitting and construction and therefore does not represent an undue burden. The rule has been adopted to require five foot contours in Middlesex County, Mercer County and all counties north. However, the rule has been amended to reduce the southern New Jersey requirement to two foot contours since this information can be derived from aerial photography at a more reasonable cost.

(745) COMMENT: The proposed regulation at N.J.A.C. 7:7A-8.3(b)2i which would require an applicant for an LOI whose property is located in southern New Jersey to provide a survey including a topographical depiction of contours at no greater than one foot contours is discriminatory. The requirements should be consistent throughout the State, and should be two foot contours. One foot contours will be extremely costly for the developer, which is a cost which will ultimately be borne by the consumer (Archer and Greiner, New Jersey State Bar Association, Enviro-Resource Inc., Van Note-Harvey Associates, New Jersey Recreation and Parks Association, N.J. Builders Association, Mark H. Burlas, and Sandoz Pharmaceuticals Corporation, NAIOP).

RESPONSE: The cut-off for southern New Jersey was based on the fact that the topography of the inner and outer coastal plains are extremely flat and therefore five-foot contours would provide little or no useful information. However the rule has been amended to reduce the southern New Jersey requirement to two-foot contours since this information can be derived from aerial photography.

(746) COMMENT: The requirement at N.J.A.C. 7:7A-8.3(b)2i(2) for one foot contours would prevent aerial topography from being used since it does not achieve this degree of accuracy. In addition the cost impact will be significant (N.J. Society of Professional Engineers).

RESPONSE: The rule has been amended to reduce the southern New Jersey requirement to two foot contours since this information can be derived from aerial photography.

(747) COMMENT: The language at N.J.A.C. 7:7A-8.3(b)2i(2) and (4) imply that only surveyors can locate soil borings and flags. This is inappropriate and is counter to the licensing law (N.J. Society of Professional Engineers).

RESPONSE: The Department disagrees with the commenter's interpretation of the rules. Anyone can provide this information.

N.J.A.C. 7:7A-8.4 Onsite inspections

(748) COMMENT: The rule should be amended to substitute the word "person" for "professional" at N.J.A.C. 7:7A-8.4(a) because many qualified practitioners are not members of a licensed or certified profession (N.J. Recreation and Parks Association).

RESPONSE: The rule has been amended to delete this term.

(749) COMMENT: The Department needs to clarify what is meant by qualified professional at N.J.A.C. 7:7A-8.4(a) (Enviro-Resource Inc, Wander Ecological Consultants, N.J. Builders Association, Mark H. Burlas, Sandoz Pharmaceuticals Corporation).

RESPONSE: The rule has been amended to delete this term.

(750) COMMENT: At N.J.A.C. 7:7A-8.4, the term, "qualified professional" needs to be defined. Is the NJDEP going to certify individuals for this evaluation? If the NJDEP does require a certification, the supervision for a delineation should be performed by a licensed professional engineer with input from wetland biologists, soil scientists, hydrologists, and surveyors. The applications should be signed and sealed by the supervising professional engineer (PSE&G).

RESPONSE: The rule has been amended to delete this term.

(751) COMMENT: Does the DEPE have reviewers who are qualified and if so how are they qualified (Pureland Industrial Complex)?

RESPONSE: All DEPE regulatory staff have a minimum of a Bachelor's degree in the biological, or physical sciences, or planning. All staff members are trained in the identification of wetlands using the Federal Manual. In addition the regulatory staff either has substantial experience in the field, or is supervised by staff with such experience.

N.J.A.C. 7:7A-8.5 Local review

(752) COMMENT: In the rule at N.J.A.C. 7:7A-8.5, USEPA review, if a letter of interpretation is subject to review by EPA, then what is the purpose of permitting the DEPE to review the project (N.J. Society of Professional Engineers)?

RESPONSE: This section has been deleted upon adoption as proposed.

(753) COMMENT: The rule at N.J.A.C. 7:7A-8.5 provides that third parties may comment on the LOI request until the Department issues the LOI. This is unreasonable. There should be some cut off of the comment period (New Jersey State Bar Association, Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The letter of interpretation is a public process that solicits information from all available sources in order to follow the Act's mandate to protect the natural resources of the State. It is appropriate to accept all relevant information until a decision is made on an application. Lastly, this procedure will help avoid potential appeals of issued LOIs based on incomplete information. The rule has been amended to consistently state that comments will be accepted until the Department has reached its decision on an application.

(754) COMMENT: The notice letter at N.J.A.C. 7:7A-8.3(a)9 states that the recipient has 15 days to submit comments, whereas the rule at N.J.A.C. 7:7A-8.5 gives an unlimited comment period. The DEPE should only accept comments only until 15 days after the Municipal Clerk's Office receives a complete copy of the information submitted to the DEPE (N.J. Builders Association).

RESPONSE: Due to the importance of basing an LOI decision on all available information, the Department does not want to unduly limit the comment period and, therefore, the rule has been amended to consistently state that comments will be accepted until the Department has reached its decision on an application. The 15 day time frame has been included in the notice to encourage timely submittal of comments and to allow the Department adequate time for proper consideration of the provided information. The letter of interpretation is a public process that solicits information from all available sources in order to follow the Act's mandate to protect the natural resources of the State. It is appropriate to accept all relevant information until a decision is made on an application. Lastly, this procedure will help avoid potential appeals of issued LOIs based on incomplete information.

(756) COMMENT: The notice letter at N.J.A.C. 7:7A-8.3(a)9 states that the recipient has 15 days to submit comments, whereas the rule at N.J.A.C. 7:7A-8.5 gives an unlimited comment period. The rule should be amended to provide a 20-day review period from the post marked date that the notice was mailed. In addition the rule should state that an individual or group that notifies DEPE within the original 20 days of their intent to submit comments be allowed an additional 60 days to provide their comments (Wander Ecological Consultants).

RESPONSE: Due to the importance of basing an LOI decision on all available information, the Department does not want to unduly limit the comment period and therefore, the rule has been amended to consistently state that comments will be accepted until the Department has reached its decision on an application. The letter of interpretation is a public process that solicits information from all available sources in order to follow the Act's mandate to protect the natural resources of the State. It is appropriate to accept all relevant information until a decision is made on an application. Lastly, this procedure will help avoid potential appeals of issued LOIs based on incomplete information.

(757) COMMENT: N.J.A.C. 7:7A-8.5 has a closing bracket but no opening bracket. Was it the Department's intention to delete this provision (New Jersey State Bar Association)?

RESPONSE: The commenter is in error. The opening bracket appears to the left of "N.J.A.C. 7:7A-8.5 USEPA review." Both brackets are included in the proposal and the Department does intend to delete this subsection.

N.J.A.C. 7:7A-8.6 Effect of a letter of interpretation

(758) COMMENT: The five-year expiration date of the LOI should be stated on maps of the site (Wander Ecological Consultants).

RESPONSE: The Department agrees that the expiration date of the LOI should be on maps of the site. However, it would not be appropriate to add this requirement in the rules since this would require information available only after the completion of the LOI process. However, this requirement will instead be incorporated into the Department's approving LOI letter.

N.J.A.C. 7:7A-8.6(b)

COMMENT: Several individuals and groups, including eight groups using a form letter, submitted comments on the provision which states that a resource classification issued with a letter of interpretation is subject to change for a one year period unless the Department chooses to waive this review period based on conclusive evidence of resource value classification. They had the following comments:

(759) A change in resource classification could render a proposed project unpermittable after significant investments have been made in reliance on the LOI (AES Cohansey, Inc., New Jersey Concrete and Aggregate Association, Keller & Kirkpatrick, Amy S. Greene Environmental Consultants, Inc., Shanley & Fisher, Archer & Greiner, Hannoch Weisman);

(760) Lenders will be justifiably reluctant to advance funds, or even extend funding commitments, until all wetlands permits are fully vested (AES Cohansey Inc., New Jersey Association of Realtors, New Jersey Builders Association, JCP&L, NAIOP, Paulus, Sokolowski and Sartor, Inc., Keller & Kirkpatrick, New Jersey State Bar Association, Archer & Greiner, Hannoch Weisman, Mark H. Burlas, Sandoz Pharmaceuticals Corporation and Form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(761) Allowing the Department to change the resource value classification at any time within the first year is an unfair restriction to the landowner since LOIs are typically obtained early in the approval process (New Jersey Concrete and Aggregate Association, Environmental Evaluation Group, New Jersey State Bar Association);

(762) The Department should spend sufficient time and funds to establish the resource value classification properly before it issues the LOI rather than have a one year grace period (New Jersey Concrete and Aggregate Association, Environmental Evaluation Group);

(763) If the Department does not have sufficient time to make the determination of what the resource classification is, they should not issue the Letter of Interpretation (New Jersey Concrete and Aggregate Association, Environmental Evaluation Group);

(764) This provision violates the Act which states that, "a person who receives a letter of interpretation ... shall be entitled to rely on the determination ..." (New Jersey Association of Realtors, New Jersey Builders Association, Archer & Greiner, and Form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(765) Corporations will not take a chance in New Jersey if their building plans may be instantly rendered useless along with the tens or hundreds of thousands of dollars invested in them not including the money already invested in the land and the time involved (Eric S. Luscombe);

(766) Revisions such as this will only add to uncertainty and continue to thwart economic revival of this State (JCP&L);

(767) A one year period of time is scientifically unjustified and economically unacceptable (New Jersey Builders Association, Form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(768) Since notice is given to interested parties at the time of request for the LOI, economics and due process of law dictate that an LOI be issued promptly to be good for five years (New Jersey Builders Association, NAIOP, Brokaw DeRiso Associates, Inc., Amy S. Greene Environmental Consultants, Inc., Archer & Greiner; Form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(769) The proposed change will cause undue hardship and delay to a project because no one could proceed until the one year waiting period has expired (New Jersey Society of Professional Engineers, NAIOP, Brokaw DeRiso Associates, Inc., Enviro-Resource Inc., Shanley & Fisher);

(770) The only option presented is a comprehensive habitat evaluation by a qualified biologist or botanist and this would be particularly costly to single-family residences (New Jersey Society of Professional Engineers, Wander Ecological Consultants);

(771) Most areas have been determined with respect to resource value. The use of a biologist or botanist would only prove helpful if the applicant wished to dispute the value assigned by DEPE (New Jersey Society of Professional Engineers);

(772) At maximum, the letter of interpretation should only be held open for question for a period of 30 days (NAIOP), Joseph L. Lomax & Associates, Inc.);

(773) If the determination of the resource value classification is subject to change for one year after the issuance of the LOI, then the LOI isn't valid either, with respect to relying on the determination. This rule will have a substantial economic impact on not only planning/zoning board projects, but also any other project which plans construction to impact a wetland (William F. Voeltz, Van Note-Harvey Associates);

(774) Grandfathering provisions need to be added to exempt those projects which have substantially completed the planning and approval phase of project development before the resource value classification is upgraded because the statute is specific about protecting the de-

veloper's rights when substantive expenses have been incurred towards project planning (Langan Engineering);

(775) The effect of this may be to create a one year "twilight zone" for all projects because property owners will not want to risk a years worth of engineering and legal fees for an approval when a species sighting could make the project unapprovable (Yannoccone Associates, Inc., Pennoni Associates Inc., Amy S. Greene Environmental Consultants, Inc.);

(776) This would create significant problems on projects approved in the first year. Lots could be subdivided and sold and the new owners would have unbuildable lots (Yannoccone Associates, Inc.);

(777) Local boards may use this one year temporary LOI as a reason to put off consideration of the project for 12 months (Yannoccone Associates, Inc.);

(778) A one year period in which an applicant could build then have to remove is unreasonable (Joseph L. Lomax & Associates, Inc., Mark H. Burlas, Sandoz Pharmaceuticals Corporation);

(779) The proposal is unworkable and will add considerable expense to many projects because the additional work to evaluate a site for four fish and 24 freshwater-wetland associated terrestrial species could add several thousand dollars to the cost of the basic wetland delineation (Wander Ecological Consultants);

(780) The proposal is unworkable because there is no good time to have the evaluation addressed in the last sentence of N.J.A.C. 7:7A-8.6(b) done. If it is done before the LOI is issued, the applicant will have wasted money if the resource classification turns out to be exceptional. If done after receiving an LOI with an intermediate classification, the applicant must spend the additional time and money involved in having the study done and submitting it for evaluation (Wander Ecological Consultants);

(781) The proposal is unworkable because in order to provide conclusive evidence, the consultant must search for a species during the appropriate season and this may be only a few weeks. Specifying a search during this period would unreasonably delay many projects (Wander Ecological Consultants);

(782) The proposal is unworkable because very few consultants currently practicing in NJ are qualified to perform such evaluations, and the fact that no methodology is specified opens the door for the same people who are currently doing unprofessional wetland delineation work to do unprofessional habitat evaluations (Wander Ecological Consultants);

(783) The proposal is unworkable because the most objective methodology for doing such evaluations is probably the U.S. Fish & Wildlife Service Habitat Suitability Index and these indices are not available for many of the species in question (Wander Ecological Consultants);

(784) It is unclear what the penalty is for being in violation if the classification is changed. Will a structure have to be removed? Will a fine be imposed? Will mitigation be required and what if there is no room to perform mitigation onsite? Will the activity be eligible for a transition area permit? (Wander Ecological Consultants, Enviro-Resource, Inc., Shanley & Fisher);

(785) A reasonable compromise might be that a project, once underway, could be completed even if the transition area becomes larger but any additional disturbance would have to observe the increased transition area (Wander Ecological Consultants);

(786) The rule should be clarified to state if reversal of construction activities will be required upon change in resource classification (Johnson Engineering);

(787) The Department's database for wetland resource value classification determination is sufficient to make a proper determination at the time of the LOI issuance (Paulus, Sokolowski and Sartor, Inc.);

(788) The State has an ethical responsibility to make such an initial interpretation and stand by it (Pennoni Associates Inc., Brokaw DeRiso Associates Inc.);

(789) There currently exists a mechanism in the rules and regulations to alter the resource classification of a wetland ecosystem (Pennoni Associates Inc.);

(790) The DEPE should be able to rely upon its own qualified biologist for these determinations (Amy S. Greene Environmental Consultants, Inc.);

(791) Many projects require much time and expense at the siting and design stage and a one year period subject to change does not permit reasonable project planning (Louis Berger & Associates);

(792) The proposal will adversely impact the value of real estate and local tax revenues (Hannoch Weisman);

(793) If an applicant makes a good faith effort to obtain an LOI the findings of the LOI should be conclusive, and the applicant should be entitled to rely upon the findings (DuPont);

(794) There should not be a built-in loophole that allows the Department to waive the one year review period. The Department should always strive to protect habitats for endangered and threatened species because this is one of the purposes of the Act (Upper Rockaway Watershed Association, Borough of Mountain Lakes Environmental Commission);

(795) The one year time limit is too short for reclassification based on trout production capabilities. New trout production classifications have not been published for several years despite the fact that the Division of Fish and Game has recommended upgrading a number of streams. Therefore, the rules should not limit the time for resource reclassification based on trout production waters (Upper Rockaway Watershed Association, Borough of Mountain Lakes Environmental Commission); and

(796) The one year period is too limited. A single year is insufficient in many instances for biological purposes (Monmouth County Friends of CLEARWATER Inc.).

(797) This one year window allows the DEPE to gather information on vegetation and wildlife during all four seasons (Public Advocate of New Jersey);

(798) Any shorter period of time would prevent the DEPE from properly classifying the wetlands based on migration cycles, breeding cycles, and blooming cycles (Public Advocate of New Jersey);

(799) A waiver of the one year clock should only be considered for wetlands already classified as exceptional because a waiver on intermediate or ordinary wetlands could cause an applicant to take action on wetlands which are only later realized to be exceptional value wetlands (Public Advocate of New Jersey, N.J. Audubon Society);

(800) We have reservations regarding operating at the minimum period for biological purposes, however, we do recognize the need for predictability and proper planning by property owners based on environmental constraints (NJDEPE Endangered and Nongame Species Advisory Committee, ANJEC, Great Swamp Watershed Association, Citizens United to Protect the Maurice River and its Tributaries, Inc., Lacey Environmental Commission);

(801) One year is the bare minimum required to make a valid determination of classification. The preferable alternative would be to keep the classification open to change indefinitely until the project is complete. However, the one year "window" provides reliability to the applicant, and provides time for a thorough evaluation of the wetlands habitat for a complete growth cycle. In addition, applicants may avoid the process altogether by providing a 150-foot buffer (New Jersey Conservation Foundation);

(802) The waiting period of one year is a minimum and should be enforced (Leonard W. Hamilton);

(803) One year is necessary so that there may be sufficient time to study a freshwater wetland area for threatened and endangered species if it is determined that the area may provide the appropriate habitat (Tewksbury Township Environmental Commission);

(804) Limiting reclassification to a one year period is a bare minimum. The reclassification time period should not be so strictly limited (Lake Musconetcong Regional Planning Board, Dr. Lynn L. Siebert);

(805) We are in favor of the one year period for reclassifying wetlands (Township of West Milford Environmental Commission);

(806) This provision strengthens wetland protection and should be encouraged (Greenwich Environmental Commission, Township of Middleton);

(807) Although a one year period is minimal in biological systems, the one year limit provides some predictability to property owners and is an acceptable compromise given the questionable ability to reclassify at will as permitted under current regulations (Cumberland County Environmental Health Task Force, N.J. Audubon Society); and

(808) While a one-year period may seem reasonable, a clause should be added to allow for a change for compelling reasons on the part of the public (Passaic River Coalition).

RESPONSE: Recognizing that, as one commenter pointed out, the Act provides that a person who receives an LOI is entitled to rely on it, pursuant to N.J.S.A. 13:9B-8, it is the Department's current practice to consider significant adverse reliance before changing a resource value classification based on new information or on finding that the letter was issued on information no longer accurate. The Department does not

currently limit the time frame within which it may change a classification. In an effort to provide greater predictability, the proposed rule sought to change the current practice by limiting the time within which the Department could change a classification to one year, but foreclosed the consideration of any reliance in making that decision. Based on comments received and advice of the Attorney General regarding the statutory requirement for an LOI, the Department has decided to delete the proposed language and to continue its current procedure pending the adoption of a new proposal. The Department recognizes that this solution does not resolve the concerns of the interested parties, does not provide the needed natural resource protection mandated by the Act, and does not provide the desired administrative predictability. In recognizing these facts, the Department will be organizing a public forum to solicit further input before formulating a new proposal. In the interim, the Department will continue to issue letters of interpretation with resource classifications and will retain the standard language in these letters with modifications designed to reflect the Department's practice: "It should be noted that this determination of wetlands classification is based on the best information presently available to the Department. The classification is subject to change if this information is found no longer to be accurate, or as additional information is made available to the Department, including, but not limited to, information supplied by the applicant. The Department will consider significant adverse reliance on the issued resource value classification in deciding whether or not to change that classification."

(809) COMMENT: The NJDEP Endangered and Nongame Species Advisory Committee and Citizens United to Protect the Maurice River and its Tributaries, Inc. are concerned about the ability of impartial wildlife specialists to access properties without legal consequence since there are instances when property owners compile reports under their own cover omitting data that is not self-serving. They believe it would be beneficial for all wildlife specialists working as consultants to meet minimum professional qualifications. They would also want wildlife specialists to be required to notify the Department when threatened and endangered species are found.

RESPONSE: The DEPE does not have the resources in either personnel or funding to establish a certification program for individuals working as consultants. While these regulations are not the appropriate place to address the issues that have been raised, it should be noted that the regulations do provide some monetary incentives to applicants to provide the best information available. The rules at N.J.A.C. 7:7A-16.2(d) provide that if the DEPE must make more than one inspection to a property because of any act or omission of the applicant, the Department may assess additional fees. In addition, violators of the Act can be assessed up to $10,000 per day. Since the Act does afford added protection to wetlands which provide habitat for threatened and endangered species, the intentional suppression of this information may indeed result in a violation of the Act and the revocation of a permit.

(810) COMMENT: What are the methodologies or guidelines to be followed when a person performs a comprehensive habitat evaluation and what is the criteria for a qualified biologist or botanist? (Resource Services North, Inc., Mark H. Burlas, Enviro-Resource Inc., Sandoz Pharmaceuticals Corporation, Amy S. Greene Environmental Consultants, Inc.)?

RESPONSE: A comprehensive habitat evaluation should consist of a thorough discussion of the onsite habitat characteristics and an assessment of their potential to provide suitable habitat for the endangered or threatened species likely to inhabit the site. Information regarding endangered or threatened species likely to inhabit a site or area is available from the Office of Natural Lands Management, Natural Heritage Program. If, based on the presence of suitable habitat, a presence or absence survey is deemed necessary, the Department may be contacted for appropriate survey criteria for each specific endangered or threatened species to be searched for. The Department considers a "qualified biologist or botanist" to be an individual who possesses the education and/or work experience in the fields of wildlife, botany, biology, ecology, or related curriculum sufficient to conduct and report on the evaluations and/or surveys described above.

N.J.A.C. 7:7A-8.7 Reissuance of a letter of interpretation

(811) COMMENT: The DEPE should send out notices to all applicants who have received LOIs advising them of the provisions of this article (N.J. Society of Professional Engineers).

RESPONSE: All applicants who have received LOIs have an expiration date on their letters. Therefore, they have already been put on notice that their letters will expire. Any prudent applicant will contact the Department to determine what can be done to extend the terms of their letters at that time.

(812) COMMENT: The rule at N.J.A.C. 7:7A-8.7 provides for an extension of an LOI as long as application is made prior to the expiration of the LOI. This should be amended to allow application for an extension at any time regardless of the expiration date (New Jersey State Bar Association, N.J. Builders Association).

RESPONSE: The language regarding extension of LOIs is consistent with the provisions for the extension of all manner of approvals, from those issued pursuant to the MLUL, to permits issued by the Department, to those issued by the Federal government. Once an LOI has expired there is no longer a valid document to be extended. Therefore, this provision will not be amended.

(813) COMMENT: I support the proposed revisions in this section (Brokaw DeRiso Associates, Inc.).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(814) COMMENT: The proposed rule should delete this section (the new section on extensions of LOI) and require a new application since wetlands can improve over a five-year time period and the wetland classification could change (Public Advocate of New Jersey).

RESPONSE: The Department will not automatically extend the term of the LOI another five years. Rather the Department will make a determination to extend the letter "provided that the information upon which the original letter was based remains valid." This determination will include a review of resource classification.

(815) COMMENT: The rules should be clarified to state whether or not the resource value can be changed in the first year of an extended five-year LOI period (Mark H. Burlas, Sandoz Pharmaceuticals Corporation, NAIOP).

RESPONSE: Based upon the comments received and upon advice from the Attorney General's office, N.J.A.C. 7:7A-8.6(b) which limited the time period during which the Department could change the wetland resource classification to a one-year period, has been deleted upon adoption. Therefore, the Department will continue to issue letters of interpretation with resource classifications and will retain the standard language in these letters which states, "It should be noted that this determination of wetlands classification is based on the best information presently available to the Department. The classification is subject to change if this information is found no longer to be accurate, or as additional information is made available to the Department, including, but not limited to, information supplied by the applicant."

N.J.A.C. 7:7A-8.8 Effect of non-issuance of a letter of interpretation within time allotted

COMMENT: Several commenters stated that the rule at N.J.A.C. 7:7A-8.8(a) and (b) refers to deadlines which were previously adopted at N.J.A.C. 7:7A-8.2(d) through 8.2(g) and that were proposed for deletion. They also had the following recommendations:

(816) We recommend that the 45 day deadline be reinstated and in cases where the DEPE fails to meet the deadline the Section Chief should be required to notify the applicant and the Commissioner in writing of the reason for the delay (Wander Ecological Consultants);

(817) We recommend that the 45 day deadline be reinstated (N.J. Society of Professional Engineers);

(818) The deletion of deadlines needs to be corrected (Amy S. Greene Environmental Consultants, Inc., N.J. Builders Association);

(819) The rule should be modified to establish a reasonable time frame and if an LOI is not received within that time, a defacto permit should be issued (Pureland Industrial Complex); and

(820) The rule should be amended to reinstate these deadlines and adopt language which will impart some real meaning to these deadlines (N.J. Recreation and Parks Association).

RESPONSE: The deadlines from the Act were inadvertently eliminated and have been reinstated in the rule as they previously existed. A defacto permit will not be issued in cases where the Department fails to act within these time frames since this is contrary to the express language of the Act at N.J.S.A. 13:9B-8i and is contrary to the rules for assumption of the Federal 404 program. A requirement that the Section Chief notify the applicant and the Commissioner when these deadlines are not met would only serve to create additional paperwork and add additional time to the review process. The Department is taking administrative steps to ensure that applications are reviewed within established time frames or in a lesser period of time. Should an applicant

have questions why an application has not been acted on in a timely manner they should contact the appropriate regional Section Chief.

N.J.A.C. 7:7A-8.9 Cancellation, and resubmission of applications

(821) COMMENT: The rule at N.J.A.C. 7:7A-8.9 provides that if an application is not complete for final review within 60-days of a request for additional information the Department shall cancel it. The term "complete for final review" should be defined. In addition the 60 day time period may be too short depending on the level of information requested. There should be some flexibility provided in the regulation (New Jersey State Bar Association, N.J. Builders Association).

RESPONSE: The term "complete for final review" means that the review officer has all of the information deemed necessary to act on an application. If the 60 day time period is too short, the rule has been amended to indicate that the applicant need only contact the Department in writing and request an additional extension of time to keep the application active.

Subchapter 9. General Permits

(822) COMMENT: The Department was grossly negligent in refusing to release the environmental analysis mandated by N.J.S.A. 13:9B-23 prior to the public hearings on the proposed new rules. Not only has the Department violated state law in this respect, but by withholding environmental review analysis from public scrutiny prior to rulemaking decisions, the Department is guilty of violating the spirit of the National Environmental Policy Act which calls for optimum public participation during the environmental review process. The Department should rectify its negligence by scheduling public hearings on the enviromental analysis pertaining to general permits; publishing notice of the hearings in the New Jersey Register with a summary of the environmental analysis and information on how to obtain full copies of the documents; and providing a 45-day review period prior to public hearings. No action shall be taken on the adoption of the proposed new rules until 30 days after the public hearing (Diane Nelson).

RESPONSE: In response to the above request, the environmental assessments were hand-delivered to the commenter. However, this was done only after the comment period closed. The Act at N.J.S.A. 13:9B-23 does not specifically require that the environmental analyses be released at a particular time during the proposal process. However, the Department makes every effort to involve the public in all aspects of program development and implementation. Therefore, the Department has delayed the operative date of the amendments proposed to the previously adopted general permits and for the general permits pursuant to N.J.A.C. 7:7A-9.2(a)13, 18, 19, 20, 21, 24, 25 and has published a notice elsewhere in this volume of the New Jersey Register inviting additional public input on the general permits based upon the environmental assessments. During the comment period, the Department will conduct a public hearing and accept written comments. Based upon a full consideration of the comments received in writing and during the public hearing, the Department will either propose amendments to the adopted general permits, propose to delete them, or allow them to become operative. After the close of the comment period, a second notice will be published and will include responses to all comments other than those which raise issues already addressed in this adoption, and a statement regarding any further aciton to be taken on the general permits by the Department.

(823) COMMENT: Any limitation on the use of Statewide general permits (GPs) in EPA Priority wetlands should be deleted unless the EPA Priority wetland list is adopted in accordance with both Federal and State Administrative Procedure Acts (Hannoch Weisman, AES Cohansey Inc.).

RESPONSE: This comment goes beyond the scope of rule making. Notwithstanding this, the limitation applies only to GP nos. 6 and 7. The limitations on the use of GP nos. 6 and 7 cannot be deleted because they are required by the Act at N.J.S.A. 13:9B-23b. The Department is, however, recommending changes to USEPA concerning the scope of priority wetlands in the State based on public comment solicited by the Department at 22 N.J.R. 1387(c) (May 7, 1990) and changes, if adopted by EPA, would have impact for the applicability of these GPs.

(824) COMMENT: We commend the Department for including requirements for mitigation under the GP program (USEPA Region II, USEPA Headquarters).

RESPONSE: The Department acknowledges this comment in support of the rule proposal. However, based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement for certain GPs upon adoption. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will consider rescinding the permit.

(825) COMMENT: We commend the proposed changes which liberalize the application of general permits. However, the remaining constraints still place severe limitations upon the use of these permits for many parks projects which are intended to enhance the public appreciation of wetlands (N.J. Recreation and Parks Association).

RESPONSE: The Department recognizes that many parks projects enhance the public appreciation of wetlands. Nonetheless, the general permits must include constraints which ensure that the activities authorized (including activities cited by the commenter) have no more than de minimus impacts on wetlands and waters. Activities which cannot be performed in accordance with those constraints merit additional scrutiny through the Individual permit process.

(826) COMMENT: The rule should be amended to propose a GP for the restoration of sites on the State and National Register of Historic Places or the limitation on GP no. 1 should be relaxed to allow these activities (N.J. Recreation and Parks Association).

RESPONSE: The Department will not propose a general permit for these activities. The Department may establish a general permit for an activity only after determining that the activity will have minor impact on freshwater wetlands and State open waters. The restoration of sites mentioned by the commenter would entail a wide variety of activities, many of which could have a substantial impact. Provided the proposed activity did not involve the disturbance of additional freshwater wetlands or State open waters, and depending on the type of activities proposed in the context of a restoration, the activities may qualify for a GP no. 1 since this permit as adopted covers a wide array of activities.

(827) COMMENT: It is suggested that the size of a project and its distance from the point where waters are classified as FW-1 or FW-2 be incorporated, as well as some kind of distance cut-off. Also, unless there is "an over the counter" type of permit for the occasional need to use motorized tools to extract soil borings, the restriction seems unnecessary, as does limiting the clearing of a survey line to three feet (Brokaw De Riso Associates, Inc.).

RESPONSE: The Department cannot determine from the comment the suggested amendments to the rule. The second part of the comment suggests that the limitations for the specific set of activities at N.J.A.C. 7:7A-2.3(c), which are not considered to result in the alteration of the character of a freshwater wetland, be eliminated. These limitations are necessary in order to assure that the Department regulates all activities mandated by the Act pursuant to N.J.S.A. 13:9B-3.

N.J.A.C. 7:7A-9.1 General standards for issuing Statewide general permits

(828) COMMENT: There is no authority in the Act for DEPE to consider new activities for additional GPs beyond the nine narrowly defined categories at (N.J.S.A. 13:9B-23c. (1-9)) (Roxane C. Shinn, Sierra Club-Loantaka Group, Monmouth County Friends of CLEARWATER Inc., Dr. Lynn L. Siebert, Borough of South Plainfield Environmental Commission, Public Advocate of New Jersey).

RESPONSE: The Department does not agree. The Act at N.J.S.A. 13:9B-23c(5) specifically states that the Department shall issue additional general permits for activities, as determined by the Department, which will have no significant adverse environmental impact on freshwater wetlands provided that the issuance of the general permit for any such activities is consistent with the provisions of the Federal Act and has been approved by the USEPA.

(829) COMMENT: In the proposal at N.J.A.C. 7:7A-9.1(a), when will the State propose a draft Statewide general permit (Pureland Industrial Complex)?

RESPONSE: As stated in the rule, the Department will propose a draft Statewide general permit before issuing a new Statewide general permit and before reissuing existing Statewide general permits every five years.

(830) COMMENT: The proposal in N.J.A.C. 7:7A-9.1(b)2 is not a grammatically correct sentence. Perhaps the "and" should be moved to before the last "will" (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The rule has been amended to read, "after conducting an environmental analysis the Department determines that the regulated activities will cause only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment, and will cause only minor impacts on freshwater wetlands and State open waters."

(831) COMMENT: The proposal at N.J.A.C. 7:7A-9.1(b)4 concerning the opportunity for a public hearing defeats the purpose of a general permit. A hearing should only be an option for an individual permit (Joseph L. Lomax and Associates, Pennoni Associates, Inc.).

RESPONSE: The Department disagrees with the commenter's assertion that the hearing requirement defeats the purpose of a general permit. The Department recognizes that some confusion may have resulted from the use of the phrase "issue Statewide general permits;" this phrase refers to the establishment of the general permit in the Department's regulations and not to any determination that a particular project is authorized under a general permit. The requirement for a public hearing prior to the issuance of a new Statewide general permit is required by the Act pursuant to N.J.S.A. 13:9B-23c and is also a requirement for assumption of the 404 program.

(832) COMMENT: The statement that a GP will be issued only after the Department has conducted "environmental analysis that determines the regulated activities will cause only minimal cumulative adverse impacts on the environment and will cause only minor impacts on freshwater wetlands and State open waters" serves to make the issuance of a GP open to subjective interpretation by the review officer which increases the likelihood of arbitrary decision making (Archer and Greiner, Pennoni Associates, Inc., New Jersey Farm Bureau).

RESPONSE: This section is for the adoption of new or reissued Statewide general permits; not for the authorization of an activity under an existing Statewide general permit. The Department recognizes that some confusion may have resulted from the use of the phrase "issue Statewide general permits;" this phrase refers to the establishment of the general permit in the Department's regulations and not to any determination that a particular project is authorized under a general permit.

(833) COMMENT: The Department should not create any additional general permits until such time that permits issued to date are thoroughly evaluated for both their individual and cumulative impacts. To date, the authorization of Statewide general permits has resulted in the loss of approximately 130 acres of wetlands. This destruction represents substantial public losses that amount to at least $18,360,000 of lost public assets (New Jersey Conservation Foundation, ANJEC, Great Swamp Watershed Association).

RESPONSE: The Department will, as mandated by the Act, reevaluate each Statewide general permit every five years. At that time, a determination of individual and cumulative impacts will be made. If it is determined that a particular Statewide general permit is resulting in more than minimal adverse environmental impacts it will not be reissued. This process does not preclude the issuance of Statewide general permits for different categories of activities.

(834) COMMENT: The proposed rule at N.J.A.C. 7:7A-9.1 which states that the Department may issue Statewide general permits only after conducting an environmental analysis, is not lawful as it applies to GP nos. 6 and 7. The promulgation of the GPs was provided for in the Act (New Jersey State Bar Association).

RESPONSE: The rule has been amended upon adoption to delete GP nos. 6 and 7 from the requirements of this subsection.

N.J.A.C. 7:7A-9.2 Statewide general permit authorization

(835) COMMENT: The proposed amendments make the issuance of GPs subjective in nature by changing the current regulations at N.J.A.C. 7:7A-9.2(a) which state "are hereby allowed" to "may be authorized." This is in direct conflict with the language of the Act (Somerset County Planning Board, N.J. Society of Professional Engineers).

RESPONSE: The Department disagrees and the rule has not been amended. The amendment to N.J.A.C. 7:7A-9.2 makes clear that, after issuance of a particular GP, the Department will review the proposed activity to determine whether an Individual permit is required. This review is expressly authorized at N.J.S.A. 13:9B-23g and included in the rule at N.J.A.C. 7:7A-9.2(b). Since the Department reviews all applications to determine compliance with the Statewide general permit criteria, this language is more appropriate and is not contrary to the Act.

(836) COMMENT: It is recommended that there should be a classification for minor permits which could be routinely issued for minor activities (Brokaw DeRiso Associates, Inc.).

RESPONSE: The Statewide general permits set forth in N.J.A.C. 7:7A-9.2(a) are intended to address the commenter's concern. The number of categories of "minor activities" has now been expanded to include seven additional Statewide general permits. The general permits authorize categories of activities which will cause only minimal adverse environmental impacts when performed separately and cumulatively, and will cause only minor impacts on freshwater wetlands. Categories outside of the scope of general permits are not considered "minor activities," and the Department has not issued a general permit for this category of "minor activities."

N.J.A.C. 7:7A-9.2(a)1

(837) COMMENT: Are ongoing agricultural operations exempt from obtaining a permit for the activities authorized by this permit (New Jersey Farm Bureau)?

RESPONSE: Established, ongoing agricultural operations are exempt from obtaining a permit for maintenance activities.

N.J.A.C. 7:7A-9.2(a)2

(838) COMMENT: We support the additional language contained in this section (N.J.A.C. 7:7A-9.2(a)) (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule amendments.

COMMENT: Several commenters objected to the deletion of the condition at N.J.A.C. 7:7A-9.2(a)2iv regarding EPA Priority Wetlands because:

(839) These areas are especially important in helping to retard flooding in the Passiac River Basin (Morris County Park Commission ANJEC, Great Swamp Watershed Association);

(840) Underground pipelines disrupt the ecology of wetlands, dewater and change the hydrology of wetlands and transition areas, and interfere with natural hydrologic characteristics. These are more than minor impacts for important wetland areas (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission); and

(841) When a general permit is not applicable in EPA Priority Wetlands and an Individual permit is required there is greater opportunity for public input (CAREZ).

RESPONSE: The Department has made the finding that the placement of subsurface utility lines in compliance with the conditions at N.J.A.C. 7:7A-9.2(a)2, where the original soil is replaced, and the site returned to original grade, results in only minimal cumulative adverse impacts on the environment and is in conformance with the purposes of the Act. The Department during its review of specific authorizations under this GP will consider the specific design to assure that it meets the condition at N.J.A.C. 7:7A-9.2(a)2vi which states that an activity be designed so as not to interfere with the natural characteristics of a wetland or watershed. In addition, the authorization is limited to those projects which would involve impacts of one acre or less. Further, the rules at N.J.A.C. 7:7A-9.5(b) require that an applicant for a general permit provide notice to adjacent landowners and municipal officials and afford the opportunity for public comment on the application. Therefore, this GP is anticipated to result in only minimal cumulative adverse impacts to EPA priority wetlands.

(842) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)2 to remove the restriction on EPA Priority Wetlands from this general permit is very beneficial (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(843) COMMENT: The area of disturbance allowed under this GP should be greater than one acre because the proposed activity does not result in an elimination or permanent destruction of wetland habitat (Archer and Greiner).

RESPONSE: The Department does not agree. Impacts over one acre warrant increased scrutiny by the Department. In these cases, the alternatives and minimization assessments afforded by the Individual permit process are consistent with the protection mandated by the Act. Further, while an area is allowed to revegetate, the need to perform maintenance activities often precludes the reintroduction of woody vegetation. Therefore, in order to assure minimal impacts, this one acre limitation has not been increased.

(844) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)2 limiting the area pertaining to discharge of material backfill or bedding for utility lines should be increased. Permit requirements state that activities shall encompass no more than one acre of wetlands. We feel that this threshold should be increased to more than one acre because the proposed activity is not resulting in an elimination or permanent destruction of wetland habitat. In most cases the disturbance is temporary. Additionally, we feel that the threshold permitted under GP no. 2 should not be considered in conjunction with other general permits, most notably GP's

no. 6, 7 and 10. The removal of the Priority Wetlands criteria for issuance of this permit is supported. The revision to clarify the width of the area of disturbance is supported (Pennoni Associates, Inc.).

RESPONSE: The Department does not agree. For those projects which would involve impacts over an acre, there are often long term, unanticipated impacts which may result from the installation of subsurface utility lines. Impacts over one acre warrant increased scrutiny by the Department. In these cases, the alternatives and minimization assessments afforded by the Individual permit process are consistent with the protection mandated by the Act. Further, while an area is allowed to revegetate, the need to perform maintenance activities often precludes the reintroduction of woody vegetation. Therefore, in order to assure minimal impacts, this one acre limitation has not been increased. The Department will continue to consider the impacts under this GP when an applicant applies for multiple GPs because these impacts are not considered temporary as asserted by the commenter. In addition, the Department acknowledges the comments in support of the rule amendment.

(845) COMMENT: The rule at N.J.A.C. 7:7A-9.2(a)2 should be modified to expand the 20 foot width limitation. Modern construction activities in the central and northern portions of the State often require deep cuts on sloping ground. The needed grading around these basic pipe laying activities requires more disturbance than 20 feet for almost all pipe installation. Therefore, even the most basic storm or sanitary sewer installation violates this condition of general permit no. 2 and fosters cheating and shoddy construction practices to comply with this permit requirement. In such cases less disturbance requirements instituted by these regulations would significantly increase not only the initial construction cost but also any repair or maintenance which may be required after many years of operation (Mercer County Soil Conservation District, N.J. Department of Agriculture, Pureland Industrial Complex, William F. Voeltz).

RESPONSE: While the Department recognizes the commenters' concern, the conditions of the Statewide general permit must be based upon the nature and extent of adverse environmental impacts of the permitted activities; the Act does not allow the Department to base these conditions upon the needs of modern construction activities instead. The Department has made the finding that the placement of subsurface utility lines where the width of the area of disturbance is limited to 20 feet, results in only minimal cumulative adverse impacts on the environment and is in comformance with the purposes of the Act. At this time the commenters have not provided the Department with additional information on which to base a finding that an increase in the width limitation will still result in minimal impacts. Until the Department can make this finding, the width will not be increased. If safe construction procedures, or proper engineering require a wider area of disturbance, the applicant should apply for an Individual permit for the appropriate width.

(846) COMMENT: The word "wide" at the end of the sentence is redundant and should be deleted (N.J.A.C. 7:7A-9.2(a)2ii). In subparagraph (a)2iv, the rule would be clearer if it read, "Any excavation is backfilled (with original soil material if feasible) to the pre-existing elevation." And at subparagraph (a)2v, the commenter feels clarification is needed for species indigenous to the site and native to the site and when it is appropriate to use the two (Wander Ecological Services).

RESPONSE: The word "wide" has been deleted and N.J.A.C. 7:7A-9.2(a)2iv has been clarified. Since "native" and "indigenous" are synonymous, the word "native" was deleted on adoption at N.J.A.C. 7:7A-9.2(a)2v.

(847) COMMENT: The addition of "the width of the area of disturbance within" to N.J.A.C. 7:7A-9.2(a)2(ii) is applauded (Pennoni Associates, Inc., N.J. Builders Association, JCP&L).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(848) COMMENT: The wetlands next to a roadway should receive some kind of down rating with reference to resource value in the rule at N.J.A.C. 7:7A-9.2(a)2iii. There is also no provision to replant with existing species (Pureland Industrial Complex).

RESPONSE: The system of wetland classification pursuant to the Act can be found at N.J.S.A. 13:9B-7 and does not include a "down rating" based on proximity to a roadway. Replanting with "indigenous species" includes salvaging and replanting existing species.

(849) COMMENT: At N.J.A.C. 7:7A-9.2(a)2iv in the first sentence, "to within 18 inches" of the surface should be omitted (New Jersey Department of Transportation).

RESPONSE: The rule has been clarified to state that "the upper-most 18 inches of any excavation shall be backfilled with the original soil material if practicable and otherwise with suitable material."

N.J.A.C. 7:7A-9.2(a)6

(850) COMMENT: There is no rationale for the acreage limitations vs. area of activity for the rules at N.J.A.C. 7:7A-9.2(a)6i, iv, and vii (Pureland Industrial Complex).

RESPONSE: The acreage limitation at N.J.A.C. 7:7A-9.2(a)6i is taken directly from the Act at N.J.S.A. 13:9B-23b. The provision at N.J.A.C. 7:7A-9.2(a)6iv has been deleted upon adoption. The rule does not contain a section N.J.A.C. 9.2(a)6vii.

(851) COMMENT: The condition contained in this GP which prohibits a violation of the Flood Hazard Area should be removed from this permit and added to the section on standard conditions (New Jersey State Bar Association).

RESPONSE: The rule at N.J.A.C. 7:7A-9.3 has been changed as suggested in the rule adoption; however, it should be noted that this condition was proposed in GP no.7 not GP no. 6.

(852) COMMENT: We object to the provision at N.J.A.C. 7:7A-9.2(a)6iii which prohibits the issuance of this GP in EPA Priority Wetlands, as the entire EPA Priority Wetland program as implemented by and through DEPE is illegal (New Jersey State Bar Association).

RESPONSE: The provision at N.J.A.C. 7:7A-9.2(a)6iii is a limitation required by the Act at N.J.S.A. 13:9B-23b and therefore cannot be deleted. The Department does not implement the "EPA Priority Wetland program," the EPA does.

(853) COMMENT: In the proposal at N.J.A.C. 7:7A-9.2(a)6, if the word "isolated" is now supposed to apply to both "wetland" and "State open waters", this should be made absolutely clear by inserting another "isolated" before "State open waters." Subparagraph (a)6iii should be deleted, as was the same proposal at N.J.A.C. 7:7A-9.2(a)2iv, at least for those isolated wetlands classified as ordinary resource value (Wander Ecological Consultants).

RESPONSE: In order to more closely mirror the language in the Act, the rule at N.J.A.C. 7:7A-9.2(a)6 has been amended upon adoption to delete the reference to "isolated wetlands." The language adopted at N.J.A.C. 7:7A-9.2(a)6 states that Statewide general permit no. 6 shall be applicable for regulated activities in a freshwater wetland or State open water which is not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream. The provision regarding EPA wetlands cannot be deleted from this GP since the limitation is a requirement of the Act at N.J.S.A. 13:9B-23b. What constitutes an EPA priority wetland, however, is subject to amendment by EPA and the Department will be making recommendations to EPA on this issue.

(854) COMMENT: GP no. 6 should be closely examined for its cumulative impacts (New Jersey Conservation Foundation).

RESPONSE: The Act clearly directs the Department to issue GP nos. 6 and 7. While the Department is not prevented from assessing the cumulative impacts from the issuance of these permits, the Act does not allow the revocation of either of these GPs regardless of the findings made through such an assessment.

(855) COMMENT: This GP should not be modified to allow the filling of bogs. In addition, isolated wetlands may be connected through groundwater recharge to trout associated streams, thus maintaining base flow of cold water (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: In order to more closely mirror the language in the Act, the rule at N.J.A.C. 7:7A-9.2(a)6 has been amended upon adoption to delete the reference to "isolated wetlands." The language adopted at N.J.A.C. 7:7A-9.2(a)6 states that Statewide general permit no. 6 shall be applicable for regulated activities in a freshwater wetland or State open water which is not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream. Therefore, if a bog meets this definition, or a wetland or water does not have a discernable surface water connection, the Act dictates that the filling be authorized under a GP no. 6.

(856) COMMENT: In the proposal for N.J.A.C. 7:7A-9.2(a)6, the substitution of non-surface water tributary systems with isolated wetlands is not consistent with the Act. The Act recognizes that the two are not synonymous with isolated wetlands discussed in N.J.S.A. 13:9B-7b and the requirements for a general permit for an activity in a freshwater wetlands that is not a surface water tributary system discharging into an inland lake or pond, or a river or stream specified in N.J.S.A. 13:9B-23b (Pennoni Associates, Inc.).

RESPONSE: In order to more closely mirror the language in the Act, the rule at N.J.A.C. 7:7A-9.2(a)6 has been amended upon adoption to delete the reference to "isolated wetlands." The language adopted at N.J.A.C. 7:7A-9.2(a)6 states that Statewide general permit no. 6 shall be applicable for regulated activities in a freshwater wetland or State open water which is not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream.

N.J.A.C. 7:7A-9.2(a)6iv and (a)7vii

COMMENT: Eight groups using a form letter and several independent groups or individuals objected to the requirements for mitigation for certain general permits. Most often cited is the proposed requirement for mitigation for impacts which exceed 0.25 acres under general permits nos. 6 and 7. The following comments were submitted:

(857) The Act does not authorize the Department to require mitigation for the use of Statewide general permits (Hannoch Weisman, Brokaw DeRiso Associates, Inc., Enviro-Resource, Inc., AES Cohansey Inc., Mark H. Burlas, Sandoz Pharmaceuticals Corporation; and form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(858) The Act specifically states those conditions under which general permit numbers 6 (isolated wetlands) and 7 (headwater ditches and swales) are to be issued and they do not include mitigation (Enviro-Resource, Inc., Mark H. Burlas, Sandoz Pharmaceuticals Corporation, Archer & Greiner and form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(859) Mitigation should not be required for impacts to natural swales or isolated wetlands that are classified as ordinary resource value (Wander Ecological Consultants);

(860) Mitigation can run from $50,000 to over $200,000 per acre and was certainly never contemplated by the legislature to be used in conjunction with statewide general permits (Form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(861) Continued restriction and limitation on general permits, specifically the requirement of mitigation, is at odds with the legislative intent to adopt permits similar to the ACOE Nationwide permits which do not call for mitigation (Connell, Foley & Geiser);

(862) It is inconsistent with the salutary purposes of a statewide permit program to saddle a statewide permit applicant with mitigation costs which are often upwards of $40,000 per acre, not including land costs and major regrading (Shanley & Fisher);

(863) Small businesses will not be able to afford mitigation that has been estimated to cost up to $100,000 per acre (Eric S. Luscombe);

(864) The extra cost for mitigation will dramatically increase the cost of middle income and modest income housing (Form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp);

(865) The high cost of mitigation should have been considered by the Department in its Economic Impact discussion (Shanley & Fisher);

(866) Consideration should be given to allowing the option of preservation of high quality, wooded uplands to substitute for the creation of new wetlands because it would appear that the public would be better served by preservation of upland forests rather than in the artificial creation of a wetlands environment which would typically be a less desirable environment than a natural wetlands area (Shanley & Fisher);

(867) The Department has not provided any technical support or rationale for this mitigation requirement (Hannoch Weisman, Pureland Industrial Complex);

(868) The Department has not provided any technical support that a wetlands unit of merely 0.25 acres, particularly in palustrine forested wetland systems serves any of the resource functions which the Act seeks to protect (AES Cohansey Inc.);

(869) The cost of mitigation is extremely high, and to impose such a cost for a minor loss of wetlands is not in balance with the minor impact to the environment (Brokaw DeRiso Associates, Inc., Keller and Kirkpatrick);

(870) Statewide general permits are intended to allow disturbances which "will cause only minimal adverse environmental impacts when performed separately and will have only minimal cumulative adverse impacts on the environment . . ." Requiring mitigation indicates that the Department feels that these goals are not being met (Enviro-Resource, Inc., JCP&L);

(871) Instead of requiring mitigation, the Department should revise applicable statewide general permits to limit disturbances to 0.25 acres, and require an Individual permit, with mitigation, for any disturbance exceeding this limit (Enviro-Resource, Inc.);

(872) The inclusion of a requirement for mitigation undermines the purpose of the Statewide general permits which is to allow flexibility and ease of permitting for those activities which are less environmentally sensitive (Keller and Kirkpatrick, Archer & Greiner);

(873) The Act intended to differentiate between minor and major impacts to wetlands by setting up general versus individual permits. Requiring mitigation for general permits complicates the program and will create hardships for the small lot owner (Environmental Evaluation Group, New Jersey Concrete and Aggregate Association);

(874) The mitigation requirements should not be initiated until after the proposed mitigation bank program is established and functioning, and at reasonable cost for mitigation credits (Environmental Evaluation Group, New Jersey Concrete and Aggregate Association);

(875) The requirement to mitigate for any disturbance greater than 0.25 acres defeats the purpose of general permits, i.e., to provide an expedited review. Design, development and review of a mitigation plan does not provide "efficient, prompt relief from detailed regulatory review" as required by the Act (Van Note-Harvey Associates, Eric S. Luscombe);

(876) Statewide general permits are generally fairly easy to obtain. If a party has to follow a very complex procedure for mitigation than it seems that the whole purpose of the General permit has been defeated (Eric S. Luscombe, JCP&L);

(877) Because general permits are limited in size by definition they should not require mitigation (Joseph L. Lomax & Associations, Inc.);

(878) If a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department should attempt to revoke this permit (Pennoni Associates Inc.);

(879) The mitigation requirement falls disproportionately upon public agencies because they regularly perform activities that would fall under GP numbers 7, 9, 18, 22, and 23, and the costs would determine the funding viability of the this probject (Somerset County Planning Board);

(880) By requiring mitigation for general permits, the permits have been elevated to the status of an individual permit and this is in direct conflict with the intent of the legislation (Somerset County Planning Board);

(881) Statewide general permits are intended to allow disturbances which "will cause only minimal adverse environmental impacts when performed separately and will have only minimal cumulative adverse impacts on the environment . . ." Therefore, mitigation is not warranted and will defeat the whole purpose of the statewide general permits process (Atlantic Electric);

(882) Every large project will be effected by this change, adding another five to seven months or more to the processing time for site plan applications in the State, on top of a procedure that is already uncompetitive time-wise with our neighboring States (Eric S. Luscombe);

(883) This is an excessively restrictive requirement and should be increased to one acre as currently authorized in the Army Corps of Engineers Nationwide permitting program (PSE&G);

(884) The Department sets great store by "mitigation" but we do not know that it actually works. It would be better as a general principle to preserve the original wetlands rather than to allow exceptions and try to replace them (Adeline Arnold, Borough of South Plainfield Environmental Commission, Public Advocate of New Jersey);

(885) If the concept of mitigation and replacement is maintained, it should be at some ratio (perhaps 5:1 or 10:1) with replacement done through a bank rather than on site, and replacement accomplished before project initiation (Leonard W. Hamilton);

(886) While requiring mitigation as a condition of granting general permits seems laudable, the Department may be setting up a situation where mitigation becomes an excuse to issue more of these permits (Borough of South Plainfield Environmental Commission, Public Advocate of New Jersey);

(887) Mitigation should be allowed only cautiously because standards for success have not been generally agreed on (the term "equal ecological value" is a hope, not a standard), and achieving even relatively simple goals is as much a function of the contractor's skill as of the adequacy of the project design (Borough of South Plainfield Environmental Commission);

(888) Allowing mitigation for general permits to take the form of a monetary donation to the Mitigation Bank is an option that is clearly open to abuse (Borough of South Plainfield Environmental Commission);

(889) If mitigation onsite is not feasible, the project should not be permitted. Functional equivalence implies providing the same function as the original wetlands, one of which is flood control. Providing additional flood control capacity in a different watershed is irrelevant (Borough of South Plainfield Environmental Commission);

(890) Requiring mitigation for wetlands losses under the general permit program will not stem the loss of wetlands nor mitigate cumulative adverse impacts of these wetlands losses. Mitigation should only be viewed as a tool of last resort for those projects where no non-wetlands alternative exists. This is clearly not the case with general permits (New Jersey Conservation Foundation);

(891) Mitigation must not become an excuse to approve an application. Rather the federal nationwide condition that requires consideration of avoidance of wetlands as an alternative must be the primary test applies to Statewide general permit applications (ANJEC, Great Swamp Watershed Association, Public Advocate of New Jersey, United States Fish and Wildlife Service, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, Lake Musconetcong Regional Planning Board);

(892) Before granting a permit and accepting mitigation for a permitted activity, the DEPE should always consider whether the applicant can alter his project or change his proposed location to avoid or minimize the destruction of wetlands (Public Advocate of New Jersey);

(893) Wetland losses due to Statewide General permits should be examined and a regulation requiring applicants to prove no alternative to proposed activities should be included in the regulations (Dr. Lynn L. Siebert);

(894) Mitigation is not to be engaged in casually or as a routine "fix" encouraging the destruction of existing, natural wetlands (The Monmouth County Friends of CLEARWATER Inc.);

(895) Requiring mitigation for many of the Statewide general permits should be considered very cautiously lest is promote issuance of more of these permits (Dr. Lynn L. Siebert, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, ANJEC, Lake Musconetcong Regional Planning Board);

(896) The practicality and ecological usefulness of providing mitigation for wetland disturbances over 0.25 acres is questionable because they are such small isolated areas. It is recommended that the one acre requirement for mitigation be maintained (N.J. Department of Transportation);

(897) The proposed amendment to require mitigation for disturbances of greater than 0.25 acres of wetlands is inconsistent with Section 23(a) of the Act (The N.J. State Bar Association and Pennoni Associates Inc.);

(898) The distinction between an activity requiring an individual permit versus a General permit is obscured by the requirement for mitigation. Activities should be clearly categorized as either subject to Individual or General permit requirements so that wetlands protection is objectively administered (Louis Berger & Associates, Inc.);

(899) The mitigation requirement is an unfair financial hardship being imposed upon the public, particularly on those sites that are one acre in size (Pennoni Associates Inc.);

(900) This regulation is inconsistent with the Federal program (Pennoni Associations Inc.);

(901) Mitigation in kind appears to present some problems because areas which were permitted to be filled under GP #6 as non-surface water tributary systems have to be mitigated through the recreation of similar wetlands and this may be hard to replicate given the basis for formation (Pennoni Associates Inc.);

(902) Mitigation should be discouraged rather than encouraged as a result of poor results, dubious benefits, and the overall cost of creating even minute wetlands. Instead, wetland acquisition by developers for public use should be required because the benefits are tangible and much easier to achieve. The cost effectiveness of land acquisition as opposed to the limited success of mitigation should be considered (Mercer County Soil Conservation District);

(903) The proposed change will result in significant additional cost and economic hardship especially on small businesses, single-family residences, and small home builders (New Jersey Society of Professional Engineers);

(904) If the activity has no significant and substantial impact, both singly and cumulatively, how can the Department require mitigation? (NAIOP);

(905) The Department provides no scientific justification or evidence to support its seemingly arbitrary 0.25 acre threshold for mitigation (NAIOP);

(906) What function will the small, fractional pockets of wetlands serve? (NAIOP);

(907) It is unwise for the Department to arbitrarily act to implement the President's "no net fill policy" in advance of the federal policy to implement the President's pronouncement (NAIOP);

(908) Since mitigation is being required where none was previously required, the provisions of the recent agreement for expansion of cranberry production should probably be acknowledged (State Department of Agriculture Soil and Water Conservation Services); and

(909) The proposed revised rules at N.J.A.C. 7:7A-9.4 do not address the following and need to be clarified: If an applicant submits an application to obtain GP's 6 and 7, which have a combined total wetlands disturbance that is greater than 0.25 acres, but each specific GP 6 and 7 has a wetlands disturbance that is less than 0.25 acres, is the applicant required to have a mitigation plan as part of the GP application contents (Resource Services North, Inc.)?

RESPONSE: Based on the comments received, the legal advise from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement because the finding has not bee made that mitigation is necessary to ensure that the activities permitted by the GPs will have only minimal adverse environmental impacts, both individually and cumulatively. In particular for GPs 6 and 7 it was determined by the Department that unless required for assumption purposes, or on the basis of findings with respect to a specific application, the Act does not permit further conditioning with a mitigation requirement. However, for GPs other than 6 and 7, if at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will consider adding mitigation at that time. In addition, if the Department determines that impacts to a particular watershed are more than minimal when considered cumulatively, the Department may require that a specific activity be subjected to the standards for an Individual permit pursuant to the Act at N.J.S.A. 13:9B-23d.

(910) COMMENT: The Tewksbury Township Environmental Commission agrees with the proposal for mitigation of any disturbance greater than 0.25 acres because the loss of up to one acre of wetlands without mitigation allows too much loss of a dwindling resource.

RESPONSE: The Department acknowledges this comment in support of the rule proposal. However, based on the comments received, the legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement because the finding has not been made that mitigation is necessary to ensure that the activities permitted by the GPs will have only minimal adverse environmental impacts, both individually and cumulatively. In particular for GPs 6 and 7 it was determined by the Department that unless required for assumption purposes, or on the basis of findings with respect to a specific application, the Act does not permit further conditioning with a mitigation requirement. However, for GPs other than 6 and 7, if at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will consider adding mitigation at that time. In addition, if the Department determines that impacts to a particular watershed are more than minimal when considered cumulatively, the Department may required that a specific activity be subjected to the standards for an Individual permit pursuant to the Act at N.J.S.A. 13:9B-23d.

N.J.A.C. 7:7A-9.2(a)7

(911) COMMENT: This proposal will allow the filling of swales of up to fifty feet in width in headwater wetlands. This destruction should not be allowed because headwater wetlands are often key aquifer recharge areas. How can the Department justify the finding of no individual or cumulative significant impacts (Upper Rockaway River

Watershed Association, Borough of Mountain Lakes Environmental Commission)?

RESPONSE: The Act at N.J.S.A. 13:9B-23b mandates the Department to issue a general permit for this class of activities and does not require a finding of no individual or cumulative significant impacts.

(912) COMMENT: Are ongoing agricultural operations exempt from obtaining a permit for the activities authorized by this permit (New Jersey Farm Bureau)?

RESPONSE: Established, ongoing agricultural operations are exempt from obtaining a permit for this activity pursuant to N.J.S.A. 13:9B-4a and N.J.A.C. 7:7A-2.7.

(913) COMMENT: The word "disruption" should be changed to "elimination of a surface water connection . . ." (Brokaw DeRiso Associations, Inc.).

RESPONSE: The rule has not been amended as suggested. The word "disruption" includes temporary impacts to surface water connections which are not included in the term "elimination" which implies a permanent alteration. The term was chosen specifically to include these temporary impacts.

(914) COMMENT: The proposal at N.J..C. 7:7A-9.2(a)7v stating that the proposed activity shall not result in the isolation of adjacent wetlands or State open waters for general permit no. 7 which provides for the filling of swales, will result in an applicant filling in an entire swale rather than a portion of a swale in order to avoid creating an isolated freshwater wetlands. In effect, this will result in the Department's furthering the filling of wetlands inadvertently rather than protecting wetlands which is the intent of the Act (Environmental Evaluation Group, N.J. Builders Association).

RESPONSE: The Department does not agree that this provision will result in additional wetlands fills. To the contrary, this provision was included to preclude the use of this general permit to isolate connected wetlands so that they would qualify for filling under Statewide general permit no. 6.

(915) COMMENT: If ditches and swales are regulated at all in extreme headwaters of a watershed, the one acre limitation should govern rather than the more arbitrary 0.25 acre limitation proposed (Brokaw DeRiso Associates, Inc.).

RESPONSE: Because the disturbance limitation for this permit is one acre, the Department assumes that the commenter is referring to the proposed requirements for mitigation. Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement because the finding has not been made that mitigation is necessary to ensure that the activities permitted by the GPs will have only minimal adverse environmental impacts, both individually and cumulatively. In particular for GPs 6 and 7, it was determined by the Department that unless required for assumption purposes, or on the basis of findings with respect to a specific application, the Act does not permit further conditioning with a mitigation requirement. However, for GPs other than 6 and 7, if at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will consider adding mitigation at that time. In addition, if the Department determines that impacts to a particular watershed are more than minimal when considered cumulatively, the Department may require that a specific activity be subjected to the standards for an Individual permit pursuant to the Act at N.J.S.A. 13:9B-23d.

N.J.A.C. 7:7A-9.2(a)8

(916) COMMENT: Are ongoing agricultural operations exempt from obtaining a permit for the activities authorized by this permit (New Jersey Farm Bureau)?

RESPONSE: This permit authorizes additions to existing residential dwellings. The construction of buildings is not an activity exempted for ongoing farming operations.

(917) COMMENT: The wording of the proposal at N.J.A.C. 7:7A-9.2(a)8 is much improved and clearer. However, this section ends with a ";" implying that more should follow, but the section ends. Is there more (Amy S. Greene Environmental Consultants, Inc.)?

RESPONSE: The rule has been amended to end the paragraph with a "." since there are no additional provisions.

(918) COMMENT: The proposed rule at N.J.A.C. 7:7A-9.2(a)8 should be broadened to include the normal kinds of farm-related housing that will be required under NJ agricultural business (New Jersey Farm Bureau).

RESPONSE: This GP was proposed to allow for additions to dwellings in existence prior to July 1, 1988. The Department is unable to make a blanket finding that farm-related housing will cause only minimal adverse environmental impacts when performed separately and cumulatively.

(919) COMMENT: It should be clarified in the rule proposal at N.J.A.C. 7:7A-9.2(a)8 that the 750 square foot disturbance limitation refers only to those disturbances regulated under the Act (Langan Engineering, N.J. Builders Association).

RESPONSE: The Department agrees that the disturbance limitation refers only to regulated disturbances, but has not made the suggested changes because all limitations within this subsection refer to regulated activities.

(920) COMMENT: The rewording of the proposal at N.J.A.C. 7:7A-9.2(a)8 is applauded. This will allow the construction of detached amenities (Environmental Evaluation Group, Brokaw DeRiso Associates, Inc.).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(921) COMMENT: It was not the intent of the Act to regulate the construction of additions or improvements within 100 feet of residential dwellings lawfully existing prior to July 1, 1988. The rule should be modified to delete the 750 square foot limitation. Does the DEPE have a program or mechanism existing to inform a first time homebuyer that a construction deed/vegetable garden creation restriction is attached to any home that they purchase that was lawfully existing prior to July 1, 1988 (Mark H. Burlas, Sandoz Pharmaceuticals Corporation)?

RESPONSE: The Department disagrees since the Act at N.J.S.A. 13:9B-23c(3) specifically directs the Department to consider for adoption a general permit for the following class of activities, "Appurtenant improvements or additions to residential dwellings lawfully existing prior to the effective date of the Act, provided that the improvements or additions require less than a cumulative surface area of 750 square feet of fill and will not result in new alterations to a freshwater wetland outside of the fill area." The Department has not established a program for informing each first-time homebuyer of these restrictions. Several laws, regulations and local ordinances in addition to these regulations may affect construction activities which a homeowner wishes to perform; it is the homeowner's responsibility to become aware of these laws, regulations and ordinances. It is not practicable for the Department to indentify all first-time homebuyers who would be affected by the provision in question and advise them of the restriction. In addition, the rule at N.J.A.C. 7:7A-6.2(b)1i(7) specifically states that the continued cultivation of existing gardens and the development of new gardens no larger than one quarter acre in size does not need a waiver since it is considered a non-prohibited activity in the transition area.

N.J.A.C. 7:7A-9.2(a)9

(922) COMMENT: This GP is too broad and could result in more than minimal adverse impacts to Waters of the United States. In addition the paragraph may be misconstrued to state that mere submission of a Section 404 permit application as opposed to permit issuance satisfies the permit requirement (USEPA Region II, USEPA Headquarters).

RESPONSE: The rule has been amended to clarify that applications to the Army Corps of Engineers must have received subsequent approvals in order to qualify for this general permit. The Department has contacted the Department of Transportation (DOT) and has determined that there are no outstanding Army Corps decisions on applications submitted by the DOT prior to the effective date of the Act. Of those submitted prior to the effective date several have approvals under Nationwide permit no. 23. Those receiving Nationwide permits meet the Federal 404 rules and are anticipated to result in only minimal individual and cumulative impacts. The remaining projects that qualify for this permit have received Individual 404 permits and therefore comply with federal regulations.

(923) COMMENT: The rule has been amended to require mitigation consistent with the Act upon expiration of an ACOE Permit. The requirement for additional mitigation consistent with the Act for projects late in the planning process will result in both funding problems and delays in construction (New Jersey Department of Transportation).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement for certain GPs upon adoption. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation

where the cumulative impact of an activity is more than minimal, the Department will rescind the permit. Therefore, the Department will not impose a mitigation requirement on these activities in addition to that which may be required to meet the Federal requirements for these activities.

N.J.A.C. 7:7A-9.2(a)10

(924) COMMENT: We strongly support the amendments to N.J.A.C. 7:7A-9.2(a)10 (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(925) COMMENT: No conditions should be excluded for the widening of existing roadways (ANJEC).

RESPONSE: The rule has not been amended as suggested. The only condition that does not apply to widening of existing roadways is that regarding the acceptable crossing length. The condition which limits the length of a minor road crossing is intended to encourage an applicant to cross a wetland or water at the narrowest point. For a road which has already been constructed and is now being widened, limiting the length of the crossing will serve no purpose. Therefore, the conditions which still apply to widening an existing road are those limiting the total acreage of wetlands or waters to be disturbed and limiting the total gross fill to be placed in open waters. Together these conditions will provide that a minor road widening of existing roads will have only minimal impacts on the environment both individually and cumulatively.

(926) COMMENT: The proposed conditions for GP no. 10 have been greatly improved so that they are more workable (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The Department acknowledges this comment in support of the rule amendments.

(927) COMMENT: The permit criteria for GP no. 10 for Minor Road Crossings, states that the road crossing shall be no greater than 100 feet and that the area of disturbance shall not exceed 0.25 acres. We request the Division consider either one of the conditions (Pennoni Associates, Inc., Archer and Greiner, N.J. Department of Agriculture).

RESPONSE: The Department has not amended the rule as suggested. The Department has made the finding that, except for the widening of existing roads, in order to cause only minimal adverse environmental impacts when performed separately and cumulatively, and only minor impacts on freshwater wetlands, a minor road crossing must meet both the condition of 0.25 acres of disturbance and the condition limited crossings to no more than 100 feet. The condition which limits the length of a minor road crossing is intended to encourage an applicant to cross a wetland or water at the narrowest point while the acreage limitation is necessary to assure that impacts are minimal both separately and cumulatively.

(928) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)10ii should be changed to bring it into conformance with the Federal rule for nationwide permit no. 14 as was done with subparagraph (a)10iv of this rule (Wander Ecological Consultants).

RESPONSE: The Department disagrees and has reached its own conclusions in the environmental analysis. Therefore, the Department will not expand the crossing length to 200 feet as is allowed under Nationwide permit no. 14 since this condition is intended to encourage an applicant to cross a wetland or water at the narrowest point.

(929) COMMENT: The exception for widening of existing roadways has no limitations. This should be corrected to account for minor changes in width but to recognize potential impacts from major widening projects (USEPA Region II, USEPA Headquarters).

RESPONSE: All the provisions at N.J.A.C. 7:7A-9.2(a)10 apply to the widening of an existing roadway except N.J.A.C. 7:7A-9.2(a)10ii (100-foot length limitation). N.J.A.C. 7:7A-9.2(a)10ii has been rewritten upon adoption to clarify this provision. As a result, this GP will only authorize minor widening projects. Major widening projects which involve fill and/or disturbances over these limits will still require Individual Permits.

(930) COMMENT: The condition at N.J.A.C. 7:7A-9.2(a)10ii should be clarified to identify requirements when widening an existing roadway (New Jersey Department of Transportation).

RESPONSE: All the provisions at N.J.A.C. 7:7A-9.2(a)10 apply to the widening of an existing roadway except N.J.A.C. 7:7A-9.2(a)10ii. N.J.A.C. 7:7A-9.2(a)10ii has been rewritten upon adoption to clarify this provision.

(931) COMMENT: The limit at N.J.A.C. 7:7A-9.2(a)10iii setting a 0.25 acre limitation should not apply if an area is modified but improved in resource value (Pureland Industrial Complex).

RESPONSE: The rule has not been amended as suggested since the placement of roadway through a wetland or water will not result in an "improved resource value."

(932) COMMENT: The 0.25 acre limitation should be deleted at N.J.A.C. 7:7A-9.2(a)10iii while retaining the requirement for mitigation for impacts exceeding 0.25 acre. If this change is made, this GP should be excluded from the combined acreage total limit at N.J.A.C. 7:7A-9.4(c) (DuPont).

RESPONSE: The rule has not been amended as suggested. Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement for certain GPs upon adoption. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will rescind the permit.

(933) COMMENT: We support the amendment to allow the placement of up to 200 cubic yards of fill (Archer and Greiner, New Jersey State Bar Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(934) COMMENT: The increase to 200 cubic yards is an improvement; however, this limitation still seems arbitrary and unnecessary in light of the maximum allowable disturbance of 0.25 acres. This limitation should be deleted (Hunterdon County Engineer).

RESPONSE: The rule has not been amended as suggested. The Department has made the finding that in order to cause only minimal adverse environmental impacts when performed separately and cumulatively, a minor road crossing must meet both conditions of 0.25 acres of disturbance and involve no more than 200 cubic yards of fill in open waters. The 200 cubic yard limitation encourages that a road crossing be designed to employ the least amount of fill which will therefore result in a minimization of impacts to wetlands and open waters. For example this limitation will encourage the use of open bottomed box culverts and arch bridges that will result in minimal disturbance.

(935) COMMENT: The proposed language at N.J.A.C. 7:7A-9.2(a)10iv should be modified to refer to total net fill below the high water mark, not gross fill (Langan Engineering).

RESPONSE: The rule has not been amended as suggested. The use of the term "gross" is necessary to limit environmental impacts. If the suggested term "net" were used instead, there would be no limit on the amount of excavation and replacement fill so long as the 200 cubic yard "net" fill limit was met. The applicant could in fact be removing and replacing far in excess of 200 cubic yards potentially resulting in significant impacts.

(936) COMMENT: In the proposal at N.J.A.C. 7:7A-9.2(a)10, a definition of "high water mark" is needed. The Department should also consider expanding the area of allowable disturbance on either side of the high water mark from 50 to 100 feet (Enviro-Resource Inc., N.J. Builders Association).

RESPONSE: The rule has been amended on adoption to include the definition of "ordinary high water mark" as defined pursuant to the ACOE regulations at 33 CFR 328.3(d). The Department has made the finding that in order to cause only minimal adverse environmental impacts when performed separately and cumulatively, a minor road crossing shall not exceed 100 feet. Therefore, the Department will not expand the crossing length to 100 feet since this condition is intended to encourage an applicant to cross a wetland or water at the narrowest point. Therefore, this provision has not been amended.

(937) COMMENT: Establishment of a minimum disturbance area of 0.25 acres at N.J.A.C. 7:7A-9.2(a)10 in most instances requires that costly arch bridge and box culvert structures must be built to span wetlands. These structures are not only costly to construct now but are costly to maintain in the future. Further, the road crossings should be designed in a manner acceptable to both the Bureau of Flood Plain Management as well as accepted engineering practice. Ordinary high water mark language should be replaced with standard accepted storm frequency stormwater flows such as a two-year or 25-year storm event. Finally, it is important to understand that, due to road surface elevation with respect to the flood water surface, all designs for such structures should be such that construction can be accomplished to safely pass the travelling public at a cost that can easily be maintained by the municipality (William F. Voeltz).

RESPONSE: The Department has made the finding that in order to cause only minimal adverse environmental impacts when performed separately and cumulatively, a minor road crossing must be limited to 0.25 acres of disturbance. This general permit is designed to allow minor access roads to upland properties and is not necessarily intended to facilitate any but the smallest road projects. Therefore, arch bridges and box culvert structures, which in some cases may be necessary in order to meet the general permit standards, help to fulfill the Act's mandate to minimize separate and cumulative impacts to the environment and to allow only minor impacts in wetlands as a result of these activities. These requirements can be designed into a project which is consistent with both the Act and the Flood Hazard Area Control Act (N.J.S.A. 58:16A-50 et seq.). The Department has defined "ordinary high water" to be consistent with the definition used by the ACOE regulations at 33 CFR 328.3(d) which does not include a reference to a particular storm event. Finally, while a municipality must assure that a roadway should always be constructed to safely pass traffic, the Department must assure that such roadways be designed to minimize impacts to wetlands and waters regardless of whether such construction can be accomplished in the context of a general permit or will necessitate an Individual permit approval.

(938) COMMENT: It is suggested that the Department adopt at least a 400 cubic yard limit on wetlands crossings for general permit no. 10. A 0.25 acre fill would be one quarter of one foot and a 200 cubic yard limit, as proposed, would be one half of one foot. This regulation is thus, effective only on paper. That is, it seems reasonable to allow up to 0.25 acres of fill, but this limit could never be practically reached. Three to six inches of fill could not even fill a puddle and could never support a roadway (B. Laing Associates).

RESPONSE: The rule as adopted has increased the fill limit from 100 cubic yards to 200 cubic yards and has also changed the provision to apply only to open waters and not to wetlands. The construction of road crossings to these design limits has been successfully accomplished through the use of box and arch culverts and therefore the rule has not been amended as suggested.

(939) COMMENT: The proposal should be modified to define "high water mark" to be consistent with ACOE definition for "high water line" which is based on the 2.3 year flood elevation. In addition the area of allowable disturbance on either side of the high water mark should be expanded from 50 to 100 feet with a maximum of 200 feet where the water body is not evident (Archer and Greiner).

RESPONSE: The phrase used in the rule is "ordinary high water mark" and this is specifically defined by the ACOE at 33 CFR 328.3(d). Therefore the rule will not be amended as suggested but instead a definition of "ordinary high water mark" consistent with the ACOE definition has been added to the rule upon adoption at N.J.A.C. 7:7A-1.4. The Department has made the finding that in order to cause only minimal adverse environmental impacts when performed separately and cumulatively, a minor road crossing shall not exceed 100 feet. Therefore, the Department will not expand the crossing length to 200 feet since this condition is intended to encourage an applicant to cross a wetland or water at the narrowest point.

(940) COMMENT: In intermediate resource value wetlands the permit should only allow one "new" minor road crossing. Allowing the 0.25 acre of fill to be spread out among several new road crossings results in the fragmentation and alteration of many valuable wetlands and transition areas (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: Since the majority of minor road crossings involve fill in both freshwater wetlands and open waters, both limitations of 0.25 acres of disturbance and a maximum fill limit of 200 cubic yards will apply to a single project contamplating several new road crossings. Practically speaking, however, these limits would not support several crossings.

(941) COMMENT: The proposed fill volume of 200 cubic yards together with the existing length limitation of 100 feet will serve to prevent the issuance of GPs for many municipal and county road extension projects. It is suggested that road crossings having the length of at least 500 feet and fill volumes of at least 1000 to 2000 cubic yards should be allowed under this GP. The limitation of 0.25 acres would prevent abuse of this permit (Shanley and Fisher).

RESPONSE: The commenter's suggested changes to the rule have not been made since the quantities suggested far exceed those deemed by the Department to cause only minimal adverse environmental impacts when performed separately and cumulatively. The Department has made the finding that in order to cause only minimal adverse environmental impacts when performed separately and cumulatively, a minor road crossing shall not exceed 100 feet. Therefore, the Department will not expand the crossing length to 500 feet since this condition is intended to encourage an applicant to cross a wetland or water at the narrowest point. The 200 cubic yard limitation encourages that a road crossing be designed to employ the least amount of fill which will therefore result in a minimization of impacts to wetlands and open waters. For example this limitation will encourage the use of open bottomed box culverts and arch bridges that will result in minimal disturbance.

(942) COMMENT: The proposal should be amended to include the following hierarchy of limitations for road widths; state roads—500 feet, county and local collector roads—300 feet, minor roads—200 feet and drives—100 feet. Such a distinction will allow acknowledgement of different roadway classifications and relative public need. Additionally the limitation on fill should be deleted as it is not adequately supported (Brokaw DeRiso Associates, Inc.).

RESPONSE: The Department must assess the separate and cumulative impacts of an activity on the environment and must seek to minimize impacts to wetlands when deciding whether or not to issue a Statewide general permit for a certain class of activities. Neither the relative public need for a proposed road, more its identity as a State road, county or local road, is relevant to these impacts. The Department notes that it does consider the relative need for the roadway in determining whether to issue an Individual permit for a specific project. The Department has made the finding that in order to cause only minimal adverse environmental impacts when performed separately and cumulatively, a minor road crossing shall not exceed the placement of 200 cubic yards of fill. The 200 cubic yard limitation encourages that a road crossing be designed to employ the least amount of fill which will therefore result in a minimization of impacts to wetlands and open waters. For example this limitation will encourage the use of open bottomed box culverts and arch bridges that will result in minimal disturbance.

(943) COMMENT: There is no basis to assume that positive economic impact will be realized by New Jersey taxpayers with the proposal of new Statewide general permits. Many new Statewide General Permits are often applied for by municipalities in response to maintenance, safety or public welfare concerns. All fees, professional costs, construction and mitigation are paid for by either grants or the taxpayer through property taxes. Notwithstanding municipal projects, all costs normally associated with permit acquisition are paid for by developers and passed along to the public in the form of increased prices, often making affordable housing not so affordable. Few private individuals who wish to build in wetlands areas will realize that their construction is the result of the direct derivation of benefit. However, no economic value can be placed on the loss of human life lost due to establishment of unattainable design standards by unlicensed government individuals not subject to the same professional standards as are placed on the New Jersey professional engineering community (William F. Voeltz).

RESPONSE: The Department does not agrees. Since the cost of a Statewide general permit is $250.00 as compared to the cost of $1000 plus $100.00 per tenth of acre of wetlands disturbed under an Individual permit, it is immediately obvious that there are net savings to the applicant. The Department does not understand the commenter's contention that the issuance of new Statewide general permits, which streamline the permitting process at a significantly reduced cost will result in escalating the cost of affordable housing. GP No. 10 general permit is designed to allow minor access roads to upland properties and is not necessarily intended to facilitate any but the smallest road projects. Keeping this goal in mind, the Department does not impose any engineering or design standards under this general permit. Rather the Department only establishes the standards to be met for minor impacts to wetlands. If the licensed professional engineering community cannot design projects subject to the conditions of this GP then it is encumbent upon them to design projects to the necessary design standards to ensure public safety. If these projects do not qualify for GPs then an Individual permit must be obtained.

N.J.A.C. 7:7A-9.2(a)11

(944) COMMENT: The 10 cubic yards limitation on rip-rap is not a realistic standard and is inconsistent with accepted U.S.D.A.-S.C.S. Standards for Conduit Outlet Protection. By replacing this limitation with an area of disturbance (that is, 0.25 acres) DEPE could put an appropriate limitation on the amount of wetland loss while providing for

appropriate erosion controls (Shanley and Fisher, N.J. Builders Association).

RESPONSE: While the Department does not agree with the commenter's assertion that the 10 cubic yard limitation is not realistic, the Department recognizes the commenter's concern. The rule at N.J.A.C. 7:7A-9.2(a)11vi has not been amended as suggested since the Department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department will consider proposing a change to this provision at some time in the near future. In the interim it should be recognized that the Department does not impose any engineering or design standards under this general permit. Rather the Department establishes the standards to be met for minor impacts to wetlands. This limit was set to encourage the use of multiple outfalls discharging smaller volumes and thereby minimizing environmental impacts. If additional rip-rap is necessary in a particular situation, and the standards for a general permit cannot be achieved due to engineering constraints in a particular situation, then the applicant may still be able to undertake the proposed activity by pursuing an Individual permit.

(945) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)11vii should be reworded to clarify whether "indigenous" refers to NJ or to the site being disturbed (Wander Ecological Consultants).

RESPONSE: The term "indigenous" includes species found on a particular site as well as those found in a particular physiographic region of the State.

(946) COMMENT: Why does the rule at N.J.A.C. 7:7A-9.2(a)11vii not allow revegetation with existing plant material (Pureland Industrial Complex)?

RESPONSE: The rule as adopted requires revegetation with "indigenous species" which can include salvaging and replanting existing species.

(947) COMMENT: Limiting stormwater outfall riprap to 10 cubic yards at N.J.A.C. 7:7A-9.2(a)11 is not in the interest of public safety in view that the area limitation is not the proper standard to which design should be addressed. It is improper for non-licensed individuals to set criteria to which licensed professionals must adhere to, especially when the reason for the limitation is acreage, or footprint disturbance (William F. Voeltz).

RESPONSE: The Department does not impose any engineering or design standards under this general permit. Rather the Department establishes the standards to be met for minor impacts to wetlands. This limit was set to encourage the use of multiple outfalls discharging smaller volumes and thereby minimizing environmental impacts. If additional rip-rap is necessary in a particular situation, and the standards for a general permit cannot be achieved due to engineering constraints in a particular situation, then the applicant may still be able to undertake the proposed activity by pursuing an Individual permit.

(948) COMMENT: We support the clarification at N.J.A.C. 7:7A-9.2(a)11vi that states that the 10 cubic yard limitation applies only to rip-rap; however, this may not make a practical difference (New Jersey State Bar Association).

RESPONSE: The Department does not agree with the commenter's assertion that the rule amendment does not make a difference. The amendment excludes that fill necessary for construction of a headwall from the 10 cubic-yard limit on materials used for energy dissipation at the end of the headwall.

(949) COMMENT: We support the clarification at N.J.A.C. 7:7A-9.2(a)11vi that states that the 10 cubic yard limitation applies only to rip-rap (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule amendment. However, the commenter should note that the 10 cubic yard limitation applies to any material used for energy dissipation and not only rip-rap.

(950) COMMENT: The 10 cubic yard limitation is totally arbitrary and has absolutely no basis in engineering science. This 10 yard figure is exceeded by even the smallest 15 inch storm sewer outfall under multiple everyday scenarios. The designer is then faced with undersizing the rip-rap protection which is required under N.J.S.A. 4:24-42 (Soil Erosion and Sediment Control Act). The proposal should be revised to state the maximum volume of rip-rap below an outfall structure should be based on the "Standards for Soil Erosion and Sediment Control in New Jersey" (Mercer County Soil Conservation District, N.J. Department of Agriculture, Brokaw DeRiso Associates, Inc., Johnson Engineering).

RESPONSE: While the Department does not agree with the commenter's assertion that the 10 cubic yard limitation is arbitrary, the Department recognizes the commenter's concern. The rule at N.J.A.C. 7:7A-9.2(a)11vi has not been amended as suggested since the Department believes that it is necessary to solicit additional comments before making the desired amendment. Therefore, the Department will consider proposing a change to this provision at some time in the near future. In the interim it should be recognized that the department does not impose any engineering or design standards under this general permit. Rather the Department establishes the standards to be met for minor impacts to wetlands through an environmental analysis. This limit was set to encourage the use of multiple outfalls discharging smaller volumes and thereby minimizing environmental impacts. If additional rip-rap is necessary in a particular situation, and the standards for a general permit cannot be achieved due to engineering constraints in a particular situation, then the applicant may still be able to undertake the proposed activity by pursuing an Individual permit.

(951) COMMENT: The use of swales to convey stormwater into a receiving body of water at N.J.A.C. 7:7A-9.2(a)11x is the best practicable means for routing of floodwaters without creating excessively costly and large structures. The DEPE should not dictate how design should be conducted by licensed professionals regulated by the NJ Board of Professional Engineers and Land Surveyors. Further there is no technical basis to substantiate that a one year storm event provides water quality according to BMP's (William F. Voeltz).

RESPONSE: The Department does not impose any engineering or design standards under this general permit. Rather the Department establishes the standards to be met for minor impacts to wetlands through an environmental analysis. The Department has made the finding that in order for a stormwater outfall structure to result in minimal impacts to wetlands, the water to be discharged must be pre-treated to provide water quality protection. The currently accepted technical standard to achieve this pre-treatment is to design a basin for the one-year storm event. In addition, while a swale may be a desired method for the conveyance of water from an outfall to the receiving waterbody, such conveyance is unacceptable if it results in draining the surrounding wetlands. If the standards for a general permit cannot be achieved due to engineering constraints in a particular situation, then the applicant may still be able to undertake the proposed activity by pursuing an Individual permit.

(952) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)11vii that a stormwater pipe which transects a wetland, must be backfilled with the upper 18 inches of topsoil is unreasonable. It may be impossible to place the pipe at least 18 inches below the existing grade because then the outfall of the pipe would discharge below the elevation of the adjacent waterbody. This requirement cannot be met in many circumstances and should be eliminated entirely (Environmental Evaluation Group, N.J. Concrete and Aggregate Association, N.J. Builders Association).

RESPONSE: The rule has been amended upon adoption to clarify that the depth from 18 inches to the surface shall be backfilled with the original topsoil to the pre-existing elevation. Therefore, if the pipe is only six inches below the pre-existing elevation it should be covered with only six inches of the original topsoil.

(953) COMMENT: A stormwater conveyance pipe, once it has been backfilled, graded, and revegetated is only a temporary impact. Therefore, this should not be counted as a permanent loss of wetlands when considering the 0.25 acre limitation (Brokaw DeRiso Associates, Inc.).

RESPONSE: The conveyance pipe is one part of the stormwater outfall activity for which this general permit was designed. In the majority of situations, the construction of new outfalls will be through forested areas adjacent to the receiving water and therefore despite the revegetation of the area, the destruction of this vegetation will be long term if not permanent. Therefore, the area for the conveyance pipe construction will continue to be considered as part of the area to be disturbed under the 0.25 acre limitation of this general permit.

(954) COMMENT: The requirement at N.J.A.C. 7:7A-9.2(a)11vii requiring revegatation with indigenous species should be deleted since they typically require more than one growing season to become established promoting erosion (N.J. Department of Agriculture).

RESPONSE: This requirement will not be deleted since there are indigenous species that are recommended by the Soil Conservation districts which will quickly become established in one season to prevent erosion.

(955) COMMENT: The reference to "anti-seep" collars at N.J.A.C. 7:7A-9.2(a)11viii is incorrect. The requirement should be that proper

"gasketing" of pipes be employed in construction to prohibit seepage into or from stormwater pipes, thus preventing drainage of wetlands and assuring the disturbed area will revert to original condition (Brokaw DeRiso Associates, Inc.).

RESPONSE: The Department does not agree. Anti-seep collars are being required to prevent the drainage of surrounding wetlands caused by the "channel" of new bedding material surrounding the pipe. Requiring proper "gasketing" will not prevent the drainage of the surrounding wetlands through the resulting channel formed by the new bedding material. Therefore, the rule will not be amended as suggested.

(956) COMMENT: GP-11, condition viii, states that anti-seep collars must be installed on stormwater outlet pipes. These collars typically are made of reinforced concrete and extend two feet around the pipe. No spacing or design requirements are mentioned. Given the fact that many outlet pipes in wetlands/transiton areas are flat and have minimum cover, these collars may extend into the topsoil or even above grade. A more reasonable condition is to construct the pipes with watertight joints (Yannaccone Associates, Inc.).

RESPONSE: The rule has been amended upon adoption to clarify that the collars are to be spaced to prevent drainage of the surrounding wetlands and that they should be designed not to exceed the pre-existing elevation. Requiring watertight joints will not prevent the drainage of the surrounding wetlands through the resulting channel formed by the new bedding material.

(957) COMMENT: The rule at N.J.A.C. 7:7A-9.2(a)11ix requiring review of calculations and profiles for stormwater management will not allow for an expedited review (Van Note-Harvey Associates).

RESPONSE: The review of routing calculations is necessary to ensure that the construction of the outfall will result in only minor environmental impacts. Since these permits are for specific activities and not an entire project the review time frames will still remain significantly expedited as compared to an Individual permit review.

(958) COMMENT: The proposed rule at N.J.A.C. 7:7A-9.2(a)11ix should be amended to replace the phrase, "the one-year storm event" with "the 25-year storm event" (Passaic River Coalition).

RESPONSE: The Department disagrees and the rule has not been amended as suggested since the one-year storm event is the current design standard used by the Department as described in "A Guide to Stormwater Management Practices in New Jersey" to provide water quality.

(959) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)11x concerning the placement of swales in wetlands should be revised to clarify that swales will only be permitted in wetlands where no other alternatives exist on-site for stormwater management (Langan Engineering, N.J. Builders Association, NAIOP).

RESPONSE: The rule has been amended upon adoption to include the suggested clarification.

(960) COMMENT: It is not necessary at N.J.A.C. 7:7A-9.2(a)11x to require profiles and cross sections all the way to a receiving waterbody to prove the swale will not result in drainage of the wetland. Data for determining whether drainage of the wetlands will occur can be limited to that necessary for SCS approval of the swale (Environmental Evaluation Group, Concrete and Aggregate Association, N.J. Builders Association).

RESPONSE: SCS standards are designed to minimize soil erosion, and to ensure sediment control and the construction of stable channels. They are not specifically designed to minimize impacts to wetlands. For this reason, the information required for the SCS approval will not be sufficient to enable the Department to determine that the construction of the swale will result in only minimal adverse environmental impacts.

(961) COMMENT: The condition at N.J.A.C. 7:7A-9.2(a)11x encourages piping in most cases. This condition should only be imposed for channels with a depth from natural water grade greater than four feet on average through a delineated wetland, and does not cut below the localized water table (Brokaw DeRiso Associaties, Inc.).

RESPONSE: The Department agrees that the condition at N.J.A.C. 7:7A-9.2(a)11x encourages piping and the rule has not been amended as suggested. The condition that the commenter suggests would not be appropriate since wetlands have a seasonal high water table within 18 inches of the surface.

(962) COMMENT: We support the provision at N.J.A.C. 7:7A-9.2(a)11x. However, the rule should be clarified to define the phrase, "no other alternative" (Associated Executives of Mosquito Control Work in N.J.).

RESPONSE: The Department acknowledges this comment in support of the rule amendment. The phrase "no other alternative" has been deleted and the rule has been clarified to state that swales will be approved where onsite conditions prohibit the construction of a buried pipe to convey/stormwater to the outfall.

N.J.A.C. 7:7A-9.2(a)12

(963) COMMENT: Since N.J.A.C. 7:7A-2.3(c)1 specifically states that the activities described in this general permit are no longer regulated, the "permit" should be deleted, or revised to describe what types of surveying activities and soil borings **do** require a permit (Wander Ecological Consultants, Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The proposal and this adoption, both at N.J.A.C. 7:7A-2.3(c)1 and 9.2(a)12, clearly state that only those soil borings dug by hand using non-mechanized means no greater than three feet in diameter or in depth shall not require Department authorization.

(964) COMMENT: The rule at N.J.A.C. 7:7A-9.2(a)12 now requires authorization from DEPE for soil borings deeper than three feet in a wetland (N.J. Society of Professional Engineers).

RESPONSE: This is correct.

N.J.A.C. 7:7A-9.2(a)13

(965) COMMENT: We support this permit because normal lake succession through eutrophication downstream can be easily handled and help maintain open water lakes (Division of Fish, Game and Wildlife, Johnson Engineering).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(966) COMMENT: The proposal for GP no. 13 gives an acreage limitation for wetlands disturbed for access. There should be a limit for wetlands disturbed due to the dredging activity itself (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: In conducting the environmental analysis for this GP, the Department anticipated the loss of wetlands that have formed as a result of siltation and eutrophication. This permit only authorizes the restoration of a lake to its original contours and does not allow dredging of new acres. While the GP does not include a specific limitation on the amount of wetlands that may by disturbed in returning a lake to its original configuration, the conditions for authorization of this GP will ensure that the loss of these wetlands will result in only minimal adverse environmental impacts.

(967) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)13i should specify whether the lake lowering permit must be obtained before applying for the general permit. Subparagraph (a)13iii should state what kind of documentation is acceptable. Under subparagraph (a)13v it should be specified what type of laboratory should perform the testing and what contaminants are to be tested for and should be waived for residential and farm ponds. Subparagraph (a)vi should specify that "no detrimental effect" can be demonstrated by observing the restrictions at N.J.A.C. 7:7A-9.3(c)3. And under subparagraph (a)13viii it should be specified what is meant by "other environmentally sensitive areas" (Wander Ecological Consultants, Somerset County Park Commission, Somerset County Planning Board).

RESPONSE: The lake lowering permit can be obtained either before or after the general permit is obtained. The documentation sufficient in any particular case to show that the area to be dredged will be confined to the original configuration and bottom contours of the lake will vary. Accordingly, the Department has not established a list of documentation which must be submitted in every case. However, the rule has been amended on adoption to include examples of acceptable documentation such as aerial photography and original construction plans. While the Department will not waive the requirement for sediment testing for residential and farm ponds, the rule has also been amended on adoption to state that the Department will require sediment testing only in those situations where there is known or suspected contamination. The applicant should contact the Department to determine whether testing will be required, the number of samples to be collected, and the type of analysis to be performed. The rule will not be amended to reference N.J.A.C. 7:7A-9.3(c)3 in lieu of N.J.A.C. 7:7A-9.2(a)13vi since this provision is intended to protect resident fish populations which may be dependent upon existing conditions in the lake to be dredged, in addition to those downstream which are protected through the timing restrictions. Finally, "other environmentally sensitive areas" will vary on a site by site basis but may include such areas as floodplains, breeding areas for non-water dependent threatened and endangered species, etc.

(968) COMMENT: This permit is too lenient because it allows almost any amount of wetlands destruction near any lake. Because this permit will result in more than minimal impacts an Individual permit should be required (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The Department does not agree. This permit allows a maximum of 0.25 acres of wetland disturbance for access to the lake to be dredged. The remainder of the wetland disturbance will be limited to those areas which have developed within the original confines and contours of the lake. In addition, such dredging activities are strictly conditioned to disallow those which may negatively impact spawning of fish populations and documented threatened or endangered species or their habitats.

(969) COMMENT: N.J.A.C. 7:7A-9.2(a)13iii should be modified to include specific provisions to permit deepening beyond the original bottom contours subject to reasonable conditions (Somerset County Park Commission, Somerset County Planning Board).

RESPONSE: The Department does not agree. This general permit is specifically designed to facilitate the maintenance of existing lakes. The Department cannot expand the scope of this general permit as suggested without making the finding of minimal environmental impact resulting from the expanded activity. The Department knows of no basis for such a finding, and the commenter has not provided information which could support such a finding.

(970) COMMENT: We suggest amending the language at N.J.A.C. 7:7A-9.2(a)13iii to state that where lake bottom probes clearly define the transition from sediment to the original lake bottom, the area to be dredged will be confined to the sediment above the original bottom contours of the lake (NAIOP).

RESPONSE: The Department believes that the rule already addresses the commenter's concern. The Department has not amended the rule as suggested since the proposed language would not result in rule clarification. The rule clearly states that the area to be dredged will be confined to the original configuration and bottom contours.

(971) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)13 would prohibit significant deepening with a V-shape versus a U-shape; the V-shape is preferred to forestall eutrophication. We feel the rules should be modified (Consulting Engineers Council of New Jersey).

RESPONSE: The Department does not agree. This general permit is specifically designed to facilitate the maintenance of existing lakes. The Department cannot expand the scope of this general permit as suggested without making the finding of minimal environmental impact resulting from the expanded activity. The Department knows of no basis for such a finding, and the commenter has not provided information which could support such a finding. In addition, the Department has empirical data to document contamination of groundwater resources due to dredging activities below the original lake bottom contours.

(972) COMMENT: N.J.A.C. 7:7A-9.2(a)13v requires core sample borings which restricts sampling methods. Other methods may be acceptable which are less costly and disruptive. In addition, we suggest that if the spoils are found to be contaminated, provisions should be included for the proper disposal of the spoils rather than not permitting dredging. Finally, standards for testing and contaminant levels should be referenced (Somerset County Park Commission, Somerset County Planning Board).

RESPONSE: The rule has been amended upon adoption to clarify that other sampling methods are acceptable. The rule has not been amended as suggested to allow "proper disposal" of contaminated spoils, in all cases, since the disturbance and possible resuspension of these materials may also be undesirable. Finally, the applicant should contact the Department for a site specific determination of which analyses may be required.

(973) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)13v for core sample borings that are taken in spoil materials to be removed should also be tested for acid producing deposits. This should be tested prior to the issuance of a permit and a spoil site should be designated or a means of handling spoils should be stated and evaluated (Environmental Evaluation Group, Concrete and Aggregate Association).

RESPONSE: If the Department determines that acid producing deposits may be encountered, the applicant will be required to perform the appropriate tests. If these tests indicate the presence of acid producing deposits, the potential adverse environmental impacts will preclude authorization of the project under this general permit and the activity will require an Individual permit.

(974) COMMENT: N.J.A.C. 7:7A-9.2(a)13vi might be improved by modifying "detrimental effect" to "substantial and permanent detrimental effect," or by otherwise clarifying the intent and implementation standards of this provision (Somerset County Park Commission, Somerset County Planning Board).

RESPONSE: The Department disagrees. The language has been adopted as proposed because it includes both temporary and permanent detrimental effects. The Department has adopted the provision as proposed, requiring that there be no detrimental effects (temporary or permanent) upon spawning resident or downstream fish populations, because a temporary detrimental effect may have long-term after-effects.

(975) COMMENT: The condition at N.J.A.C. 7:7A-9.2(a)13vi of this general permit proposal should be eliminated. This element of review would be covered by the Division of Fish, Game and Wildlife in their issuance of a Lake Lowering Permit (Langan Engineering, N.J. Builders Association).

RESPONSE: The Department disagrees with the commenter's suggestion. N.J.A.C. 7:7A-9.2(a)13vi requires that there be no detrimental effect to spawning resident or downstream fish populations. The Department has made this criterion an express condition of the general permit for purposes of clarity. If the Department obtains information in the course of evaluating the lake lowering permit application sufficient to establish that the proposed activity satisfies this condition, there is no additional burden upon the applicant.

N.J.A.C. 7:7A-9.2(a)14

(976) COMMENT: We support the proposed language at N.J.A.C. 7:7A-9.2(a)14 (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule proposal. However, the rule at N.J.A.C. 7:7A-2.3(c) and at N.J.A.C. 7:7A-9.2(a)14 has been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters. See response to Comment 251.

(977) COMMENT: There is a discrepancy between the square footage of disturbance authorized under this GP and the square footage limitation included in N.J.A.C. 7:7A-2.3(c) as nonregulated activities (New Jersey State Bar Association, Cumberland County Environmental Health Task Force, Amy S. Greene Environmental Consultants, Inc., Van Note-Harvey Associates).

RESPONSE: The rule at N.J.A.C. 7:7A-2.3(c) and 9.2(a)14 has been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters.

(978) COMMENT: The proposed one square yard limitation at N.J.A.C. 7:7A-9.2(a)14 should be increased to 10 square feet to be consistent with N.J.A.C. 7:7A-2.3(c). Also, the DEPE should clarify that the limitation applies per monitoring well (N.J. Builders Association, JCP&L).

RESPONSE: The rule at N.J.A.C. 7:7A-2.3(c) and 9.2(a)14 has been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters.

(979) COMMENT: There is no justification for the surface area limitation of the one square yard threshold as stated in N.J.A.C. 7:7A-9.2(a)14 (William F. Voeltz).

RESPONSE: The rule at N.J.A.C. 7:7A-2.3(c) and 9.2(a)14 has been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters.

(980) COMMENT: The last sentence addition is strongly supported. GP no. 14 should be changed to say "ten square feet" instead of "one square yard" (Environmental Evaluation Group).

RESPONSE: The Department acknowledges this comment in support of the rule proposal. The rule at N.J.A.C. 7:7A-2.3(c) and 9.2(a)14 has been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters.

(981) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)14 concerning the disturbance limitation of this general permit, as proposed contradicts N.J.A.C. 7:7A-2.3(c)3 (one square yard vs. 10 square feet respectively). This contradiction should be corrected. However, both of these disturbance limits are unrealistic unless the specified limit is intended to reflect only permanent disturbances. If the disturbance referred to is temporary, 100 square feet would be more realistic (Langan Engineering).

RESPONSE: The rule at N.J.A.C. 7:7A-2.3(c) and 9.2(a)14 has been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters.

(982) COMMENT: The language proposed at N.J.A.C. 7:7A-9.2(a)14 should be deleted (Brokaw DeRiso Associates, Inc.).

RESPONSE: The rule has been amended as suggested.

N.J.A.C. 7:7A-9.2(a)16

(983) COMMENT: We support the applicability of this permit to "publically controlled" lands (NJ Recreation and Parks Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

N.J.A.C. 7:7A-9.2(a)17

(984) COMMENT: We support the applicability of this permit to "publically controlled" lands (NJ Recreation and Parks Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(985) COMMENT: We recommend that DEPE, through amendments to the rule, formalize and clarify recent policy changes to allow greater flexibility in the design of trails and structures and establish a "Best Design and Management Practices" committee (NJ Recreation and Parks Association).

RESPONSE: The Department is unaware of the specific policy changes that the commenter is referring to. The rule has been adopted as proposed only with minor changes. The Department is willing to work with the commenter to establish a committee to establish "Best Design and Management Practices" for trails and boardwalks.

(986) COMMENT: The rule at N.J.A.C. 7:7A-9.2(a)17 should be amended to delete the term "publically owned or controlled" and replace it with "conservation areas" in order to allow this GP to be used on privately owned land (NAIOP).

RESPONSE: The rule will not be amended as suggested since the environmental analysis for this general permit specifically addressed the impacts of this category of activities on publically owned and controlled property and did not address the unlimited use of this GP on private lands. In addition, the GP is structured to facilitate the opportunities for educating the general public about the values and functions of wetlands. While privately owned land may be partially designated for "conservation," these areas are not accessible to the general public.

N.J.A.C. 7:7A-9.2(a)18

(987) COMMENT: The proposal should be modified to ensure that the proposed activity does not cause substantial secondary adverse impacts of additional flooding (USEPA Region II, USEPA Headquarters).

RESPONSE: While the Department believes that the rule as proposed precluded an increase in the height of the dam and the area of inundation, the rule has been amended upon adoption to specifically exclude these activities.

(988) COMMENT: The proposed rule should be clarified to ensure that it does not allow the enlargement of dam structures for the purpose of creating greater surface water areas which would flood wetlands. This type of activity should require an Individual permit (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The Department believes that the rule as proposed precluded an increase in the height of the dam and the area of inundation, however, the rule has been amended upon adoption to specifically exclude these activities. In addition to making the finding that the activities will cause only minimal adverse environmental impacts when performed separately and cumulatively, the Department also feels that it is important to streamline the permitting process for dam repairs by adopting this general permit.

(989) COMMENT: The proposed rule should state whether a Dam permit must be obtained before applying for the permit (Wander Ecological Consultants).

RESPONSE: Both permits are required prior to construction and it is the applicants' discretion to determine application synchrony.

(990) COMMENT: The limitation on five-feet of increased water elevation is arbitrary and should be deleted (Brokaw DeRiso Associates, Inc.).

RESPONSE: There is no such reference in this general permit. In fact, the permit contemplates that there will be no increase in water surface elevations.

(991) COMMENT: The prohibition of a facility in a trout associated water is too broad a restriction and appears arbitrary (Brokaw DeRiso Associates, Inc.).

RESPONSE: There is no such prohibition proposed in this general permit.

(992) COMMENT: Several commenters supported the proposal of a General permit for the repair, rehabilitation, or maintenance of currently servicable dam structures. In particular several resolutions were passed supporting the proposal but included the following conditions: the proposed language should be modified to delete the proposed one acre disturbance limit and the 0.25 mitigation threshold. These limits should be removed because they will afford only short-term protection to man-made wetlands and open waters while resulting in delays which will slow the pace of repairs. These limits also place the well-being of both man-made and natural wetlands and waters above the health and safety of residents living and working downstream of unsafe dams (Somerset County Board of Chosen Freeholders, Somerset County Planning Board, Warren County Board of Chosen Freeholders, Township of Berkeley Heights, Somerset Department of Public Works, Township of Montgomery, Township of Evesham, 10 members of the Alaimo Group, Brokaw DeRiso Associates Inc., New Jersey Society of Professional Engineers, Township of Scotch Plains, New Jersey State Association of County Engineers Inc., Ocean County Engineering Department, New Jersey Society of Professional Engineers, Union County Department of Engineering and Planning, NAIOP, William F. Voeltz, Langan Engineering, Consulting Engineers Council of New Jersey).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement because the finding has not been made that is necessary to ensure that the activity permitted by the GP will have only minimal adverse environmental impacts, both individually and cumulatively. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will rescind the permit. The rule has not been amended to delete the one acre limitation of this GP since Department engineers responsible for the enforcement of Dam Safety Standards were consulted during the development of this GP and agreed the majority of dams throughout the State could be repaired without disturbing greater than one acre of wetlands and State open waters. If a specific dam requires the disturbance of more than one acre of wetlands due to engineering constraints, then the applicant may still be able to undertake the proposed activity by pursuing an Individual permit. If a particular dam represents an immediate threat to public health and safety the Department has the authority to mandate the lowering of the water level to neutralize the immediate threat, therefore this limit does not "place the well-being of both man-made and natural wetlands and waters above the health and safety of residents living and working downstream of unsafe dams."

(993) COMMENT: The original construction of these dams in all likelihood created wetlands. Therefore, the continuation of the dam structure should be maintained. Requiring an individual permit would not benefit the public (Township of Wayne).

RESPONSE: The Department has adopted this GP to allow the majority of dam repairs to occur without an Individual permit. However, the issuance of a GP is dependent upon the finding of no significant impacts either separately or cumulatively. The value of wetlands does not necessarily relate to their origin, and in fact, many viable functioning wetland areas in New Jersey have resulted from human impacts to the environment. It is, therefore, necessary to impose these limitations.

(994) COMMENT: The fill limit allowed under this permit should be 0.5 acres since it allows only repair, rehabilitation, replacement or reconstruction of dam structures (ANJEC, Great Swamp Watershed Association).

RESPONSE: The Department's engineers responsible for the enforcement of Dam Safety Standards were consulted during the development of this GP and agreed that the majority of dams throughout the State could be repaired without disturbing greater than one acre of wetlands and State open waters. Since the purpose of this GP is to facilitate the repair of dams throughout the State, and because the finding can be made that these activities will result in minimal environmental impacts only if they disturb one acre or less of wetlands, the rule has not been amended as suggested.

N.J.A.C. 7:7A-9.2(a)19

(995) COMMENT: The proposed language at N.J.A.C. 7:7A-9.2(a)19i(1) should be revised so as not to prohibit the sharing of a proposed docking facility by two adjacent residential property owners, thus conserving both economic and natural resources (Langan Engineering).

RESPONSE: The rule has been amended upon adoption to clarify that this GP will authorize only one dock per lot and will not preclude the sharing of a dock by adjacent land owners.

(996) COMMENT: At N.J.A.C. 7:7A-9.2(a)19i(2), it is impossible for a recreation or fishing dock or public boat ramp to not have an adverse impact on an exceptional resource value wetland (Manchester Township Environmental Commission).

RESPONSE: The Department does not agree. Due to the variety of threatened and endangered species and their habitats, and their relative susceptibilities to disturbance, this activity will not always result in adverse impacts.

(997) COMMENT: Does the 0.10 acre limitation include overshadowing (New Jersey State Bar Association)?

RESPONSE: The rule has been amended to clarify that the 0.10 acre limitation does include the area shaded by the dock.

(998) COMMENT: The condition at N.J.A.C. 7:7A-9.2(a)19i(3) should indicate "... more than 0.10 acres **of regulated areas**" (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The rule has been amended to clarify that the 0.10 acre limit refers to "wetlands and State open waters."

(999) COMMENT: The condition limiting structures to a minimum of 50 feet outside of any authorized navigation channel should be deleted unless it is a Federal standard (New Jersey State Bar Association).

RESPONSE: The rule has not been amended since this condition is taken directly from the Federal 404 State Program General Permit no. 19 for docks and piers in navigable waters and, thus, is a Federal standard.

(1000) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)19i(4) should be reworded to read "... will be constructed perpendicular to the shoreline **where feasible**," (Wander Ecological Consultants).

RESPONSE: The rule has been amended on adoption as suggested since there may be circumstances when placing a dock or pier perpendicular to the shoreline may extend it into a navigation channel.

(1001) COMMENT: The condition at N.J.A.C. 7:7A-9.2(a)19i(4) does not provide any avenue for the structure to meet the shoreline. Also this height requirement is unsuitable for piers which are intended for educational purposes and does not allow for the use of floating structures (N.J. Recreation and Parks Association).

RESPONSE: The Department does not understand why the commenter believes that this provision does not provide for the structure to meet the shoreline; however, the rule has been amended to clarify this provision. This GP is designed specifically for docks and piers for recreational and fishing purposes and was not intended for educational purposes. General permit no. 17 (trails and boardwalks) should be requested by applicants wishing to construct "piers" for educational purposes on public lands. The rule as adopted clearly allows the use of floating docks and piers.

(1002) COMMENT: The limitations of spacing and plank width for construction of recreation and fishing docks at N.J.A.C. 7:7A-9.2(a)19i(5) is unnecessarily limiting. Under this rule a homeowner who proposes to build a dock with 2 x 6's and spaces them 3/8 inches apart would be required to file for an individual permit. What objective does this limitation achieve (Mercer County Soil Conservation District)?

RESPONSE: This limitation assures that sufficient sunlight is able to reach the vegetation beneath the dock and is therefore necessary to minimize the impacts of this general permit to wetlands.

(1003) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)19i(6) requires piers to be 50 feet outside navigation channels. This would prohibit any piers on manmade lagoons. This standard should be ten feet which is consistent with the ACOE regulations in tidal waterways including lagoons (Environmental Evaulation Group, N.J. Builders Association).

RESPONSE: The rule has been amended upon adoption to clarify that this provision does not apply to human made lagoons. However, the rule has been adopted as proposed to require the 50 foot limitation as this condition is taken directly from the Federal 404 State Program General Permit no. 19 for docks and piers in navigable waters.

(1004) COMMENT: In the proposal at N.J.A.C. 7:7A-9.2(a)19i(6), the word "horizontal" should be added before "ground surface" (Wander Ecological Consultants).

RESPONSE: The rule has not been amended as suggested since the commenter's suggestion would not clarify this provision.

(1005) COMMENT: The proposal should be modified to include dock facilities which are owned by a public agency and constructed to be used by the general public (Somerset County Planning Board, N.J. Recreation and Parks Association).

RESPONSE: The rule at N.J.A.C. 7:7A-9.2(a)19 has been amended upon adoption to clarify that the construction of docks and piers is not limited to private individuals.

(1006) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)19ii(2) should be reworded to read "... placed at a location requiring **the minimum feasible** cut or fill" (Wander Ecological Consultants).

RESPONSE: The rule has been amended as suggested to clarify this provision.

(1007) COMMENT: The proposed criteria at N.J.A.C. 7:7A-9.2(a)19ii(3) should be revised to indicate that the 0.10 acres of fill or disturbance pertains to regulated areas only (Langan Engineering).

RESPONSE: The rule has been amended as suggested to clarify this provision.

N.J.A.C. 7:7A-9.2(a)20

(1008) COMMENT: The rule at N.J.A.C. 7:7A-9.2(a)20 should be modified to replace 150 feet with 500 feet to make it consistent with Nationwide permit no. 13 (NAIOP).

RESPONSE: The Department cannot expand the scope of this general permit as suggested without making the finding of minimal environmental impact resulting from the expanded activity. The Department knows of no basis for such a finding, and the commenter has not provided information which could support such a finding.

(1009) COMMENT: The proposed rule which prohibits the use of GP no. 20 in conjunction with other GPs is unnecesarily restrictive (Hannoch Weisman).

RESPONSE: The Department does not agree and finds that this limitation is necessary in order to make the necessary finding that the activities will cause only minimal adverse environmental impacts when performed separately and cumulatively. This general permit is designed to correct existing stability problems and is not intended to be combined to extend the scope of allowable disturbance under other GPs.

(1010) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)20 that allows for the placement of protection along stream channels is not a function of area limitations, but on engineering principles required to properly and safely protect public and private lands from the forces of the environment (William F. Voeltz).

RESPONSE: The Department does not impose any engineering or design standards under this general permit. Rather the Department establishes the standards to be met for minor impacts to the environment. If the standards for a general permit cannot be achieved due to engineering constraints in a particular situation, then the applicant may still be able to undertake the proposed activity by pursuing an Individual permit.

(1011) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)20ii allows the activity if it is required by and designed in accordance with the Soil Conservation Service Standards for soil erosion and sediment control in New Jersey. This citation is inaccurate. These standards were promulgated by the New Jersey Department of Agriculture, State Soil Conservation Committee (Mercer County Soil Conservation District, New Jersey Department of Transportation).

RESPONSE: The rule was amended on adoption to delete the reference to the Soil Conservation Service.

(1012) COMMENT: The condition at N.J.A.C. 7:7A-9.2(a)20ii should provide for NJDOT's certification of its own erosion control plans, as provided by the Soil Erosion and Sediment Control Act (New Jersey Department of Transportation).

RESPONSE: The rule as adopted does not require certification of plans. Rather it requires that the activity be designed in accordance with the Standards for Soil Erosion and Sediment Control in New Jersey. The rule does not preclude New Jersey Department of Transportation from certifying its own plans.

(1013) COMMENT: The proposed rule at N.J.A.C. 7:7A-9.2(a)20ii may conflict with N.J.A.C. 7:7A-9.2(a)20iii because there is no provision in the standards for limiting volumes of rip-rap per running foot. N.J.A.C. 7:7A-9.2(a)20iii may also conflict with N.J.A.C. 7:7A-9.2(a)20iv which states the rip-rap shall be the minimum amount required according to the standards. In instances where the standards require more than one cubic yard per running foot a definite conflict arises. The proposal should be amended to correct this (Mercer County Soil Conservation District, N.J. Department of Agriculture).

RESPONSE: The rule has not been amended as suggested. In order to issue this general permit the Department must make a finding that the activities will cause only minimal adverse environmental impacts when performed separately and cumulatively. The limits within this GP have been included to achieve this goal. The reference to the Soil Erosion and Sediment Control standards were included to ensure that these

activities are properly designed to provide the necessary sediment and erosion control. In those situations where the Soil Erosion and Sediment Control standards require quantities in excess of those allowed under the GP, for example the criteria at N.J.A.C. 7:7A-9.2(a)20iii, the activity will not qualify for the GP and an Individual permit will be required.

(1014) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)20vii for the requirements of bank stabilization are somewhat onerous. The way the permit is currently written, you will not be able to armor or stabilize the opposite bank that may become an erosion problem because of the location of the headwall. The way that this permit is written would prohibit the stabilization of these banks and result in the requirement for an Individual Wetlands Permit for a stormwater outfall, which is entirely unreasonable (Environmental Evaluation Group, Concrete and Aggregate Association, N.J. Builders Association).

RESPONSE: The Department does not agree and finds that the limitation that this GP activity represent a single and complete project is necessary in order to make the finding that the activities will cause only minimal adverse environmental impacts when performed separately and cumulatively. Where proposed activities exceed GP limits or necessitate more than one general permit it is appropriate that the activities be reviewed in the context of an Individual permit. This general permit is designed to correct existing stability problems and is not intended to be combined to extend the scope of allowable disturbance under other GPs.

N.J.A.C. 7:7A-9.2(a)21

(1015) COMMENT: The proposed criteria at N.J.A.C. 7:7A-9.2(a)21 concerning 20-foot permanent ROW and a 0.25 acre limitation should be deleted (Brokaw DeRiso Associates, Inc.).

RESPONSE: The Department does not agree and the rule has not been amended as suggested. The Act at N.J.S.A. 13:9B-27 mandates that the Department pursue assumption of the 404 program. The Federal regulations at 40 CFR Part 233—404 State Program Regulations, governing State assumption of the 404 program requires that "Any approved State program shall, at all times, be conducted in accordance with the requirements of the Act (Federal Act) and of this part." The Federal regulations at 40 CFR Part 233.21(c)(1) state that general permits must include a specific description of the types of activities which are authorized, including limitations of any single operation. Therefore, the Department must include limitations in order to comply with these regulations. The limitations of a 20-foot wide limit of disturbance and 0.25 acre total limit of disturbance are necessary to define the category of activities covered by this Statewide general permit and are part of the basis for a finding of no significant adverse environmental impact made in the environmental analysis.

(1016) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)21 should be amended to include sanitary sewers and also realize that this disturbance is temporary in nature and should not be included in the one-acre disturbance limitation. Additionally, the 0.25 acre mitigation criteria should be eliminated (Brokaw DeRiso Associates, Inc.).

RESPONSE: Statewide general permit no. 2 already addresses the construction of sanitary sewer lines and therefore the rule has not been amended as suggested. In addition, based on the comments received, the legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement for certain GPs upon adoption. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will rescind the permit.

(1017) COMMENT: The rule proposal should include a limiting condition regarding EPA Priority Wetlands because these areas are especially important in helping to retard flooding in the Passaic River Basin (Morris County Park Commission, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rule has not been amended on adoption since the placement of the specified structures in the flood fringe will involve only negligible fill and therefore will not increase flooding problems. The placement of these structures in the floodway, however, will require review and approval pursuant to the Flood Hazard Area Regulations (N.J.A.C. 7:13-1).

(1018) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(a)21 should read "... or **disturbance** to provide access. Under subparagraph (a)21vi, if the "area used to gain access" is in a wetlands, then this condition should specify that the area be replanted with "native, indigenous **wetland** species" (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The rule at N.J.A.C. 7:7A-9.2(a)21i has been amended upon adoption to clarify the specific activities which are included in the one acre limit. Since the words "native" and "indigenous" are synonymous, the rule has been amended on adoption to require replanting with "indigenous wetland species."

(1019) COMMENT: There is potential for negative impact to wetland habitat by adopting this GP. This permit will authorize up to one acre of disturbance without an alternatives test (Citizens United to Protect the Maurice River and its Tributaries, Inc., Franklyn Isaacson, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The Department does not agree and has made a finding that the activities will cause only minimal adverse environmental impacts when performed separately and cumulatively.

(1020) COMMENT: There is potential for negative impacts to threatened and endangered species habitat by adopting this GP (Endangered and Nongame Species Advisory Committee).

RESPONSE: The Department does not agree since the rule at N.J.A.C. 7:7A-9.2(a)21iv requires that the activity will not negatively impact documented threatened or endangered species or their habitats.

(1021) COMMENT: It is unclear if this permit applies to both above ground and underground utility lines and may be combined with GP 2 to fill two acres (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rule has been amended to state that this general permit only applies to the construction or installation of above ground utility lines. This general permit cannot be combined with any other general prmit if the combined acreage exceeds one acre. See N.J.A.C. 7:7A-9.4(d).

(1022) COMMENT: It is a bad idea to permit utility lines in wetlands or any areas susceptible to flooding because it will be difficult for the owner/operator of a utility to do work in an emergency if the permanent ROW is 20 feet wide (Franklyn Isaacson).

RESPONSE: The Department has made the finding that this category of activities will cause only minimal adverse environmental impacts when performed separately and cumulatively. In addition to making this finding, the Department recognizes the public need for various utilities. Working in a flooded right-of-way, regardless of width in an emergency situation will be difficult.

(1023) COMMENT: The rule at N.J.A.C. 7:7A-9.2(a)21 allows large overhead utility lines through all resource classification wetlands. The rules should be amended to also allow for small utility lines (Eric S. Luscombe).

RESPONSE: The rule as adopted does not distinguish between large and small utility lines, but rather, the extent of disturbance and its effect upon freshwater wetlands and State open waters.

(1024) COMMENT: It is unclear at N.J.A.C. 7:7A-9.2(a)21i whether the one acre of wetlands or open water refers only to discharge and fill or also to the area of vegetation maintenance. In addition, the limits at subparagraphs (a)21ii and iii are not sufficient to meet the National Electric Safety Code requirements for clearance needed to mainain the reliability of most electric lines. The maintained ROW should be 70 feet (Atlantic Electric).

RESPONSE: The rule has been amended to clarify that the one-acre limit at N.J.A.C. 7:7A-9.2(a)21i includes the limit of discharge of dredge and fill combined with the total area where the maintenance of vegetation would alter the character of the freshwater wetland, including the cutting of trees. If the standards for a general permit cannot be achieved due to other requirements in a particular situation, then the applicant may still be able to undertake the proposed activity by pursuing an Individual permit.

(1025) COMMENT: The rule at N.J.A.C. 7:7A-9.2(a)21ii should be amended to limit clearing to less than 60 feet when threatened or endangered species habitat is crossed. Further, the rules should be amended to add a limiting condition denying authorization for the use of this permit in wildlife refuges and specific wetlands being managed because of their exceptional resource values (Passaic River Coalition).

RESPONSE: Prior to authorizing an applicant to conduct an activity under this general permit, the Department will make a determination regarding whether or not the proposed clearing activity will negatively impact threatened or endangered species or its habitat and it is therefore unnecessary to amend the rule as suggested. In addition, pursuant to N.J.A.C. 7:7A-9.2(b), the Department may require an application for an Individual permit if the Department finds that additional permit conditions would not be sufficient, or that special circumstances make this

action necessary to ensure compliance with the Act, this chapter, or the Federal Act. Therefore, it is unneccesary to amend the rule as suggested.

(1026) COMMENT: The width restriction of 20 feet at N.J.A.C. 7:7A-9.2(a)21iii is unreasonable (Wander Ecological Consultants).

RESPONSE: The Department does not agree. In order to issue this general permit the Department must make a finding that the activities will cause only minimal adverse environmental impacts when performed separately and cumulatively. The Department is unable to make this finding for right-of-way widths exceeding 20 feet. The Department cannot expand the scope of this general permit without making the finding of minimal environmental impact resulting from the expanded activity. The Department knows of no basis for such a finding, and the commenter has not provided information which could support such a finding.

(1027) COMMENT: The proposal should be clarified to say that the total areal extent of disturbance should be limited to one acre for a given length of utility line not for the placement of each individual pole (USEPA Region II, USEPA Headquarters).

RESPONSE: The rule has been clarified as suggested to limit disturbance to one acre for the construction of the line which constitutes a single and complete project of independent utility.

(1028) COMMENT: The proposal should be clarified to say that the one acre limit pertains to clearing, access, and construction of each individual structure given that some new cross-country lines can be 30 miles or longer. In addition, the word "disturbance" must also be defined since use of BMPs in sensitive areas cause disturbance that is temporary and negligible (JCP&L).

RESPONSE: The rule has not been amended as suggested since the one acre wetland disturbance is for the construction of the line which constitutes a single and complete project of independent utility, not per individual structure. While a cross-country line may extend for several miles, this general permit will only apply to those lines which traverse a total of one acre or less of wetlands or waters since the Department cannot make the finding that the activities will cause only minimal adverse environmental impacts when performed separately and cumulatively for lines exceeding these limits. The Department cannot expand the scope of this general permit as suggested without making the finding of minimal environmental impact resulting from the expanded activity. The Department knows of no basis for such a finding, and the commenter has not provided information which could support such a finding. The term "disturbance" includes all regulated activities whether temporary or permanent. The provision at N.J.A.C. 7:7A-9.2(a)21viii which uses the term "disturbance" has been deleted.

(1029) COMMENT: The Department is to be commended for proposing a general permit no. 21 for construction of utility lines that generally have minor impacts on the environment. However, limiting the clearance for construction is too restrictive, as is the area to be maintained as a permanent right-of-way. It is also felt that since ROWS need to be maintained to gain access, these areas should not be replanted as proposed in subparagraph (a)21vi. It is also stated that mitigation would be required where a disturbance of 0.25 acres or more occurs. This is unreasonable. In subparagraph (a)21i, is the one acre limit per installation site or the entire ROW? Is it temporary or permanent disturbance? Conditions at (a)21ii and 21iii should be omitted (Environmental Evaluation Group, N.J. Builders Association).

RESPONSE: While the Department recognizes that the right-of-way will be maintained for access it should still be revegetated with wetland herbaceous species in order to minimize environmental impacts. Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement for certain GPs upon adoption. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will rescind the permit. The one acre limit is per line, not per individual structure, and includes both temporary and permanent regulated activities. The limits at N.J.A.C. 7:7A-9.2(a)21ii and iii are necessary in order for the Department to make a finding that the activities will cause only minimal adverse environmental impacts when performed separately and cumulatively.

(1030) COMMENT: The rule should be modified to indicate that the limits of clearing should be 60 feet on either side of the pole (JCP&L).

RESPONSE: The Department is unable to make a finding that the activities will cause only minimal adverse environmental impacts when performed separately and cumulatively based on a total width of clearing of 120 feet and therefore the rule has not been amended as suggested. The Department cannot expand the scope of this general permit as suggested without making the finding of minimal environmental impact resulting from the expanded activity. The Department knows of no basis for such a finding, and the commenter has not provided information which could support such a finding.

(1031) COMMENT: The word "permanent" needs to be defined. Does permanent mean vegetatively cleared or fixed fill? This restriction of 20 feet must also include access to the right of way (JCP&L).

RESPONSE: The term "permanent" at N.J.A.C. 7:7A-9.2(a)21iii includes both vegetative clearing and maintenance of fill. The rule has been amended to clarify this provison. The 20 foot limitation applies to all permanently maintained right-of-ways, regardless if they are located under the utility line or are used as access to the utility line.

(1032) COMMENT: The rule at subparagraph (a)21v should be modified to include the following phrase, "to the maximum extent practical" as unscheduled conditions may require matting for longer periods of time (JCP&L).

RESPONSE: The rule has been amended upon adoption to include the suggested clarification.

(1033) COMMENT: The rule at subparagraph (a)21vi should include the phrase "as required" as utilization of BMPs should preclude any disturbance and thus any replanting (JCP&L).

RESPONSE: The rule has been amended upon adoption to include the suggested clarification.

(1034) COMMENT: The rule at subparagraph (a)21viii should be modified to not require mitigation unless there is permanent disturbance of greater than 0.25 acres (JCP&L).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement because the finding has not been made that is necessary to ensure that the activity permitted by the GP will have only minimal adverse environmental impacts, both individually and cumulatively. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will rescind the availability of a permit.

(1035) COMMENT: We support the rule at N.J.A.C. 7:7A-9.2(a)21 with the exception of the condition at subparagraph (a)21viii (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule amendment. Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement for certain GPs upon adoption. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will rescind the permit.

N.J.A.C. 7:7A-9.2(a)22

COMMENT: Several individuals and groups submitted comments and questions on the proposd Statewide general permit for regional detention facilities. These comments are as follows:

(1036) This GP is too broad and could result in more than minimal adverse impacts to waters of the United States, specifically with respect to impacts to wetlands caused by impoundment of water. This GP should be deleted or modified to ensure only minimal adverse environmental impacts. It is unclear whether the footprint of the project or the total wetland area impacted by the project, including that area inundated by storm water retention, is limited to one acre. Is there some justification for selecting a five foot limit on surface elevation increase? This seems excessive for a minimal impacts project (USEPA Region II, USEPA Headquarters);

(1037) The existing regulations specifically prohibit using wetlands as stormwater detention facilities. To change this would destroy the natural integrity of the wetlands (Patrick J. Roma, Assemblyman—District 38, Leonard W. Hamilton);

(1038) The proposed GP does not comply with the Federal regulations for Nationwide Permits (ANJEC, Great Swamp Watershed Association);

(1039) The proposed rule will alter the stream's lotic characteristics, destory or alter established ecosystems in the inundated area, increase erosion, increase mosquito production (wet/dry cycle), and block anadromous/other spawning movements of fishes (New Jersey Division of Fish, Game and Wildlife, U.S. Fish and Wildlife Service);

(1040) Changes in water levels in wetlands utilized for stormwater detention basins will result in unacceptable impacts on vegetation and

habitats. Inevitably, sediment will accumulate in the flooded areas causing additional problems. Predischarge treatment techniques are not always implemented correctly and maintenance is often lacking. Existing large stormwater basins in Morris County have caused unacceptable pollutant loadings on high quality streams (Morris County Park Commission, Great Swamp Watershed Association, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, Citizens United to Protect the Maurice River and its Tributaries, Inc., Public Advocate of New Jersey, New Jersey Division of Fish, Game and Wildlife, NJDEP Endangered and Nongame Species Advisory Committee, Cumberland County Environmental Health Task Force, N.J. Audubon Society);

(1041) Required and necessary maintenance of these basins would alter their wetland character and in a short time frame, wetland values will be eliminated by maintenance activities (New Jersey Division of Fish, Game and Wildlife);

(1042) The proposed rule should be modified to replace detention facilities with retention (permanent ponds with extra storage capacity). These new areas would provide a permanent water source and would expand/create wetland diversity (New Jersey Division of Fish, Game and Wildlife, Associated Executives of Mosquito Control Work in N.J.);

(1043) The proposal could have significant detrimental effects on our fragile wetland areas (Richard Van Wagner, Senator, District 13; Middletown Township Environmental Commission, Township of Old Bridge Environmental Commission);

(1044) This proposal would seem to be contrary to the legal intent of the legislators who passed the Act (Township of Old Bridge Environmental Commission, Walter B. Stochel, Jr.);

(1045) The proposal may result in the introduction of additional pollutants into the aquifers serving the wetland system (Philip and Lisa Tracy-Savoie);

(1046) This proposal will increase pollutant loadings in wetlands to a level which will be inconsistent with the ecological capacity to manage these pollutants, and will cause damage to the plant and animal communities of these wetlands, and the general water quality of these wetlands and their downstream waters (Tewksbury Township Environmental Commission);

(1047) Review of this activity for wetlands impacts should occur through an Individual Permit (New Jersey Conservation Foundation, New Jersey Division of Fish, Game and Wildlife, Cumberland County Environmental Health Task Force, N.J. Audubon Society);

(1048) DEPE has not made a finding that the GP will have only "minor impacts on freshwater wetlands both individually and cumulatively" (Roxane C. Shinn);

(1049) It will be difficult to predict the duration of inundation to meet the 36-hour limit (Cumberland County Environmental Health Task Force);

(1050) The Act only authorizes DEPE to consider a permit for "Maintenance and repair of storm water management facilities lawfully constructed prior to the effective date of this act . . ." (Roxane C. Shinn);

(1051) This activity should not be allowed under a general permit until more is known about the effectiveness of regional detention basins and the possible negative effects of construction and operation of such facilities on wetlands (Holmdel Township Environmental Commission, Township of Montgomery, Township of West Milford Environmental Commission, Greenwich Environmental Commission, Lacey Township Environmental Commission, Adeline Arnold, ANJEC, Passaic River Coalition);

(1052) New evidence from Middlesex County shows that regional detention basins do not accomplish their main purpose—attenuation of flood surges. In addition, water quality basins would still need to be built throughout the watershed (ANJEC, Great Swamp Watershed Association); and

(1053) To allow the destruction of a one-acre site in a densely developed area where no other wetlands exist, is to deprive the whole area of wetlands (Brick Township Environmental Commission);

(1054) The pretreatment requirement for all stormwater (subparagraph (a)22iii) should be revised to apply only to runoff from proposed land developments in the regional detention basin's drainage area. This is due to the inability of a county to require stormwater pretreatment from existing developments and the demonstrated compatibility of any existing wetlands in the proposed impoundment area (by virtue of its very existence) with existing runoff (Somerset County Board of Chosen Freeholders, Warren County Board of Chosen Freeholders, Township of Berkeley Heights, Somerset Department of Public Works, Somerset County Planning Board, Township of Montgomery, Township of Evesham, 10 members of the Alaimo Group, Brokaw DeRiso Associates Inc., New Jersey Society of Professional Engineers, Morris County Planning Board, Township of Scotch Plains, New Jersey State Association of County Engineers Inc., Ocean County Engineering Department, New Jersey Society of Professional Engineers, Union County Department of Engineering and Planning, D&R Canal Commission, Consulting Engineers Council of New Jersey);

(1055) The proposed regulation should be modified to clearly define DEPE's pretreatment requirements in order to facilitate rather than inhibit the regional planning process (Somerset County Board of Chosen Freeholders, Warren County Board of Chosen Freeholders, Township of Berkeley Heights, Somerset Department of Public Works, Somerset County Planning Board, Township of Montgomery, Township of Evesham, Brokaw DeRiso Associates Inc., New Jersey Society of Professional Engineers, Morris County Planning Board, Township of Scotch Plains, New Jersey State Association of County Engineers Inc., Ocean County Engineering Department, D&R Canal Commission);

(1056) The proposal should be modified to obligate the Department to accept potentially outdated pretreatment methods that were acceptable of the time of their construction or implementation (Somerset County Board of Chosen Freeholders, Somerset County Planning Board, Warren County Board of Chosen Freeholders, Township of Berkeley Heights, Somerset Department of Public Works, Township of Montgomery, Township of Evesham, Brokaw DeRiso Associates Inc., New Jersey Society of Professional Engineers, Township of Scotch Plains, New Jersey State Association of County Engineers Inc., Ocean County Engineering Department, D&R Canal Commission);

(1057) The proposal should be modified to delete the five-foot restriction on the water surface increase (subparagraph (a)22v) because due to its restrictive nature, it makes this general permit unobtainable and may result in the excavation of upland areas in order to provide required storage volumes. This would result in destruction of upland vegetation and habitat in the impoundment area (Somerset County Board of Chosen Freeholders, Somerset County Planning Board, Warren County Board of Chosen Freeholders, Township of Berkeley Heights, Somerset Department of Public Works, Township of Montgomery, Township of Evesham, 10 members of the Alaimo Group, Brokaw DeRiso Associates Inc., New Jersey Society of Professional Engineers, Morris County Planning Board, Township of Scotch Plains, New Jersey State Association of County Engineers Inc., Ocean County Engineering Department, New Jersey Society of Professional Engineers, Union County Department of Engineering and Planning, D&R Canal Commission, Shanley & Fisher, Consulting Engineers Council of New Jersey);

(1058) Regional basins should be a viable option in considering stormwater management plans. Without this GP regional basins may not be analyzed based on their hydraulic benefits but will be burdened by unnecessary constraints (Township of Wayne);

(1059) The inclusion of this GP is crucial to addressing water quality and water quantity concerns on a regional basis. Furthermore, wetlands will be enhanced and expanded through regional stormwater management (Township of Eastampton);

(1060) The Department's approach to stormwater management (i.e. the water quality provisions of GP 11 and 22) is contrary to the Act. The Act recognizes the important role freshwater wetlands can play in stormwater management, therefore, the Department's efforts to avoid any discharge of stormwater into wetlands are unnecessarily restrictive. As an alternative to complete prohibition, the Department should establish design criteria for use of freshwater wetlands as part of a stormwater management plan (Hannoch Weisman);

(1061) Detention basins which are proposed for use as the method of pretreatment for water quality should be designed for more precipitation than a one-year storm event (Manchester Township Environmental Commission);

(1062) This permit realizes that stormwater into wetlands is necessary to maintain the wetlands systems and remove runoff from developed upland areas (Paulus, Sokolowski and Sartor, Inc.); and

(1063) The term substantial modification should be defined. Does the one acre limit refer only to areas that will be filled or permanently submerged (Langan Engineering)?

RESPONSE: The Department has considered all comments and questions regarding the proposed GP for regional detention facilities. In addition, the Department has consulted with the EPA and the Attorney General's Office, and has come to the conclusion that this GP cannot be adopted because the finding cannot be made definitively that all

activities which may qualify for the proposed GP will have only minimal adverse environmental impacts, both individually and cumulatively. Therefore, these activities will continue to require Individual permits. The Department realizes that there are specific instances where regional detention is preferable both environmentally and for stormwater management purposes. In these instances, the Department will work with the applicant through the Individual permit process to design a project to meet the standards and conditions for approval.

N.J.A.C. 7:7A-9.2(a)23

COMMENT: Several individuals and groups submitted comments and questions on the proposed Statewide general permit for affordable housing. These comments are as follows:

(1064) This permit should be deleted. As defined and written, this permit is in conflict with the Section 404(b)(1) Guidelines. The Section 404(b)(1) Guidelines do not recognize affordability of housing as a factor in determining adverse environmental impacts. Further, dependence upon a factor of affordability may render this permit unmanageable due solely to the difficulty in defining the term "affordable". It is unclear whether "housing" refers to an entire project or each individual house. Activities authorized by the proposed GP seem to have the potential to cause more than minimal adverse impacts on the aquatic environment and, therefore, should be subject to the individual permit process. If NJDEP plans on incorporating this GP into the final rule, the state program would be very unlikely to fulfill the requirements for assumption of the Section 404 program (USEPA Region II, USEPA Headquarters, CAREZ, N.J. Audubon Society);

(1065) Where in the Freshwater Wetlands Statute is there authority for the DEPE to propose this regulation? The answer is that it does not exist. However, there is language that permits a less severe test of "practicable alternative" for public purpose activities of which low and moderate income housing would certainly be one. This general permit will set a precedent for the invasion of wetlands for any public purpose. In addition, the assumption of the 404 program as mandated by the Act will be jeopardized (Assemblywoman Maureen Ogden);

(1066) To permit the destruction of one acre of freshwater wetlands for affordable housing in otherwise fully developed areas, is contrary to all of the reasons the Act was adopted (Assemblyman Patrick J. Roma, District 38);

(1067) The Division of Coastal Resource's primary interest should lie with protecting our constantly threatened and ever diminishing natural environments. Specific policy aimed at facilitating affordable housing should be the responsibility of other State offices (Louis Berger & Associates, Inc.);

(1068) This general permit provides opportunities for abuse by developers who would attempt to reclassify their project in order to receive construction approval in the name of Mt. Laurel (Louis Berger & Associates, Inc.);

(1069) DEPE has over stepped its legislative authority in proposing this GP. It is not specifically authorized in the Act (13:9B-23) and DEPE has not made a finding that the GP will have only "minor impacts on freshwater wetlands both individually and cumulatively" (Roxane C. Shinn, Lake Musconetcong Regional Planning Board, Monmouth County Friends of CLEARWATER Inc., Gerry Pizzi, Borough of South Plainfield Environmental Commission, New Jersey Conservation Foundation, Environmental Evaluation Group);

(1070) The proposed GP is flawed because it does not consider how cash contributions to other towns, in lieu of building the affordable units, would be reviewed. This cash contribution in combination with this proposed GP will be tantamount to "buying" wetlands permits from the DEPE (Gerry Pizzi);

(1071) A reasonable estimate of the impact of this proposal would be two-affordable projects per each of 567 municipalities for a total of 1134 acres of wetlands lost through this GP (Gerry Pizzi);

(1072) DEPE's proposal to "balance" the obligation to protect state wetlands with the state's affordable housing objectives is misguided, unwise and unsupportable because there are no references to such a general permit in either the State or federal (Clean Water Act) statutes protecting wetlands (Roxane C. Shinn, Plumsted Township Environmental Commission, Michele R. Donato, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, CAREZ, Environmental Evaluation Group);

(1073) To carve an exception based upon a perceived social policy will certainly jeopardize New Jersey's ability to assume jurisdiction under the Clean Water Act (Michele R. Donato);

(1074) The DEPE has given affordable housing a priority for encroachment into wetlands. Certainly other laudable public purposes will come forth with similar arguments for exception. This is not within the purview of the DEPE but rather should be a matter decided by the Legislature which adopted both the Fair Housing Act and the Freshwater Wetlands Protection Act (Michele R. Donato, Morris County Park Commission, Adeline Arnold, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, Wander Ecological Consultants);

(1075) There is no evidence that the promotion of affordable housing was ever a driving force in the enactment of the Act nor was the tradeoff of environmentally sensitive areas an explicit or implicit part of the Fair Housing Act which established the Council on Affordable Housing. Therefore, DEPE does not have the authority to "balance" these two competing state goals in the manner proposed (Roxane C. Shinn);

(1076) Fully developed communities are the very communities that have the greatest need for natural habitat preservation. It's absolutely imperative to preserve whatever vestiges of open space and natural terrain survive in our heavily urbanized and suburbanized municipalities and this need is at least equal to the regional need for affordable housing (William P. Schuber, Bergen County Executive; Eric C. Martindale, Jr.);

(1077) This proposal will be disastrous to the wetlands of Bergen County, in particular Borg's Woods of Hackensack (William P. Schuber, Bergen County Executive);

(1078) It appears that this GP is based on public need for this type of land use. I believe this "public need" factor would be better considered under the provision of the Individual Permit process. Greater weight could be given to this type of land use and the required mitigation would ensure that the regulated activity would result in minimal adverse environmental impacts as required by the rules (Wilma Bakelaar, New Jersey Conservation Foundation, Public Advocate of New Jersey, Cumberland County Environmental Health Task Force);

(1079) My fear with this proposal is that over time the courts may decide that the State is not allowed to set a limit of one acre of fill under GP 23 and we will return to allowing significant fills as was the case with the ACOE program and Nationwide Permit no. 26 (Wilma Bakelaar);

(1080) Environmental impacts must have priority over social and economic impacts. We have compromised too much already on environmental issues. These changes will nibble away acre by acre our precious, irreplaceable wetlands (Mary H. Owen, Brick Township Environmental Commission, Dr. Lynn L. Siebert, Leonard W. Hamilton);

(1081) Existing General permits nos. 6 and 7 already allow up to one acre of wetland disturbance for such projects. This sets a dangerous precedent for promoting non-water dependent activities in wetlands (Township of Montgomery, Township of West Milford Environmental Commission, Greenwich Environmental Commission, Lacey Township Environmental Commission, Morris County Park Commission, Manchester Township Environmental Commission, ANJEC, Great Swamp Watershed Association, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, Citizens United to Protect the Maurice River and its Tributaries, Inc., NJDEPE Endangered and Nongame Species Advisory Committee, U.S. Fish and Wildlife Service, Cumberland County Environmental Health Task Force);

(1082) The affordable housing regulations should be amended instead of the wetlands regulations to allow midrises in fully developed communities within walking distance of mass transit, schools, stores and businesses (Eric C. Martindale, Jr.);

(1083) The state's affordable housing regulations prohibit the development of wetlands (Eric C. Martindale, Jr., New Jersey Conservation Foundation, Franklyn Isaacson, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, CAREZ, Public Advocate of New Jersey);

(1084) State officials should find a reasonable social consensus that will not pit environmentalists and housing advocates in intense battles all across the state (Eric C. Martindale, Jr., Michele R. Donato, Parsippany-Troy Hills Citizens for Responsible Government, Inc., Citizens United to Protect the Maurice River and its Tributaries, Inc.);

(1085) For 30 years I have lived in a house built on wetlands. I would not wish this on anybody—but least of all on those of low or moderate income who are least able to meet the medical and maintenance costs associated with moldy dwellings. New Jersey's wetland regulations are one of the best things that has happened to the environment of the state. They also serve as protection against the hazards to people of living

in damp houses. I am opposed to any weakening of our state's wetlands regulations. My personal experience makes me especially leery of providing a general permit for affordable housing (Esther Yanai, Moorestown Township Environmental Advisory Committee);

(1086) As noble a cause as affordable housing may be, it cannot be allowed to destroy the essential environmental infrastructure. During the April 1, 1991 Morris Township Planning Board hearing, Mr. Peter Abeles testified that it is not the intent of the Mt. Laurel decision to overdevelop a parcel of land by building a development too dense for the land to support. In addition, Judge Serpentelli of Superior Court has stated: "The Supreme Court did not envision that a project would not otherwise be allowed will be built merely because of its Mt. Laurel nature". (Barbara C. Klingsporn, Roxane C. Shinn);

(1087) The Mt. Laurel decision made the following findings which are contrary to the proposed general permit: (1) Mt. Laurel does not require growth in environmentally sensitive areas. (2) Lower income housing should not result in environmental damage. (3) Court's concern for protecting the environment is strong. (4) No trial court should order low income housing that causes environmental degradation. (5) Conservation areas are not land banks for housing speculators. (6) Obligation for low income housing does not extend to conservation areas. (7) Builder's projects for low income housing must be located in accordance with sound planning, including environmental impact. (8) Municipalities can reject projects because of environmental concerns. (9) Certain areas should not yield to growth trends. (10) The State Plan promotes conservation of valuable natural resources (Roxane C. Shinn, Michele R. Donato, Township of Bedminster Environmental Commission, Franklyn Isaacson, Morris County Planning Board, N.J. Audubon Society);

(1088) We emphatically object to the proposal. We wish to express our extreme dismay at what seems to be a systematic process of chipping away at well-conceived and necessary legislation to protect the State's valuable, endangered wetlands (Ocean County Environmental Agency, Thomas B. and Linda A. Palsa, Louisa Perimenis, Middletown Township Environmental Commission, Sierra Club-Loantaka Group);

(1089) We regard this proposal as a cynical perversion of the worthy aim of meeting the need for low-income housing. Not only are wetlands of immense value as wildlife habitat and in mitigating the effects of overland run-off, but they are by nature extremely sensitive to- and prone to- flooding. Therefore, such proposal would encourage people who can least afford flood insurance or flood repairs to locate in these hazardous areas (Ocean County Environmental Agency, Philip and Lisa Tracy-Savoie, Holmdel Township Environmental Commission, Gerry Pizzi, Great Swamp Watershed Association, Franklyn Isaacson, Passaic River Coalition, Save Our Swamp);

(1090) Projects constructed through this proposal may be the source of potential health problems, for example, mosquitos, potentially contaminated water supplies, and potentially failing septic systems (Philip and Lisa Tracy-Savoie, Tewksbury Township Environmental Commission, Walter R. Stochel Jr., Somerset County Mosquito Extermination Commission);

(1091) The need for affordable housing does not supersede that of the need for freshwater wetlands. Affordable housing can be placed anywhere, however wetlands are confined to those areas in which they have naturally evolved. Once lost these wetlands cannot be replaced, except imperfectly through mitigation (Tewksbury Township Environmental Commission, Public Advocate of New Jersey);

(1092) Wetlands are important aquifer areas. Therefore a town which is expanding should ensure that wetlands are maintained in order to accommodate additional potable water demands (Tewksbury Township Environmental Commission, ANJEC);

(1093) I cannot believe other suitable land is unavailable on which to construct affordable housing since wetlands are of extreme importance to the ecological balance. Why are wetlands even being considered as housing sites? Who is really benefitting from this proposal, certainly not low income families. What barbarians we are when profit is our only motivation (Amy E. Page);

(1094) New Jersey's Freshwater Wetlands Protection Act was the result of political compromise and was watered down to the point where it accomplished far less than what had been hoped for. To now permit what is left of the remaining wetland resources to be used to any degree for development purposes for any type of housing is unthinkable (Feinberg, Dee & Feinberg);

(1096) It would make much more sense to redevelop existing buildings in urban areas than to construct new buildings in wetland areas thus avoiding the environmental conflict of trading wetlands for housing (Feinberg, Dee & Feinberg, Cumberland County Environmental Health Task Force);

(1097) Construction costs in wetland areas would undoubtedly be higher than the cost of constructing similar dwellings on upland areas (Feinberg, Dee & Feinberg, Environmental Evaluation Group);

(1098) The use of mitigation as an excuse for wetlands encroachments is unsatisfactory. Mature wetlands cannot reasonably be compensated for by the uncertain creation of new wetlands areas (Michele R. Donato);

(1099) Minor modifications of certain wetlands, particularly in fully-developed municipalities, would facilitate the development of the constitutionally-mandated affordable housing that is undeniably needed by tens of thousands of New Jersey households. The Council On Affordable Housing (COAH) estimates that 65,000 low and moderate income dwelling units are needed by 1993 and at most 5% exists to date (Kinsey & Hand, NAIOP);

(1100) The general permit should be limited to developments that actually build low and moderate income housing on-site, i.e. "inclusionary developments." Private developers should not be allowed to "buy" wetlands filling rights through density bonus or developer fee programs which provide a cash contribution to a municipal affordable housing trust program (Kinsey & Hand);

(1101) The proposed rule properly limits the general permit to those sites that have been scrutinized and approved by either COAH or the courts (Kinsey & Hand);

(1102) The proposal will add suitable land for affordable housing construction on small and, but for some wetlands, often otherwise developable sites in built up communities (Kinsey & Hand);

(1103) The proposed rule will strike a reasonable balance between environmental protection and affordable housing—two of New Jersey's pressing needs. (Non-Profit Affordable Housing Network of New Jersey);

(1104) The proposed rule will help strike a better relationship between the protection of freshwater wetlands and the local provision of the constitutional right of New Jersey residents for access to low and moderate income housing. One hundred and twelve municipal housing elements to date have eliminated 89% of the prospective need of new low and moderate income units with local and State environmental regulations (New Jersey Council on Affordable Housing);

(1105) The proposed rule will help implement development policies in the emerging State Development and Redevelopment Plan by encouraging future growth into the existing development patterns, growth corridors or centers rather than encourage sprawl into more sensitive outlying environmental areas (New Jersey Council on Affordable Housing);

(1106) Continuation of rules that treat all wetlands as sacrosanct may actually cause more net environmental damage than a flexible refinement in the rules by putting pressure on areas of ground water recharge (New Jersey Council on Affordable Housing);

(1107) The proposed rule will make available otherwise inaccessible sites. By facilitating limited road construction for access, there are more options in site selection and site design without the difficult, time-consuming, and costly task of applying for an individual permit and having to go through an alternatives analysis and the rebuttable presumption test (Kinsey & Hand, New Jersey Council on Affordable Housing, New Jersey Department of Community Affairs, Alliance for Affordable Housing);

(1108) A general permit for affordable housing clearly signals the DEPE's recognition that such development is unambiguously in the public interest (Kinsey & Hand);

(1109) The condition regarding an alternatives analysis for exceptional resource value wetlands should be limited to a demonstration that there is no alternative in the municipality since it is the municipality fair share obligation (Kinsey & Hand, Langan Engineering);

(1110) The general permit should be limited to projects that are in COAH-certified or court-approved housing elements and fair share plans to provide adequate assurances that a project meets the appropriate criteria (Kinsey & Hand);

(1111) The general permit should not be limited to court-approved projects since some municipalities initiated and achieved voluntary compliance with *Mount Laurel* prior to enactment of the Fair Housing Act (Kinsey & Hand);

(1112) I support the proposed regulation since it will help to avoid delays, additional cost and possible cancellation of public housing projects (Feist & Feist Realty Corp., New Jersey Department of Community Affairs, Alliance for Affordable Housing);

(1113) By adopting the proposal, DEPE would act in harmony with both a sister agency (COAH) and New Jersey municipalities (Alliance for Affordable Housing);

(1114) The municipality selects the site for the low and moderate income housing. If the GP is not authorized, the municipal choice of site may be frustrated and COAH may have to force the municipality to approve a site which is not consistent with the municipality's master plan (Alliance for Affordable Housing);

(1115) Will the designated affordable housing units be eligible for this permit while the balance of the project is not? (Lagan Engineering);

(1116) Kinsey & Hand state that the language of GP 23 for affordable housing should be clarified in the following manner:

"... reconstruction of affordable housing on-site, either in an inclusionary development, as defined at N.J.A.C. 5:92-1.3, or in a publicly-funded or financed development with 100% housing affordable to low and moderate income households, provided that:

i. The project is part of a housing element and fair share plan that has received substantive certification from the New Jersey Council on Affordable Housing, pursuant to N.J.S.A. 52:27D-301 et seq. or the project is part of a compliance plan approved by the New Jersey Superior Court, resulting from Mr. Laurel litigation;

ii. ... the applicant shall demonstrate to the Department's satisfaction that there is no practical alternative in the municipality to the proposed activity ...;"

(1117) The requirement for mitigation may be counter productive in view of the high cost of mitigation. Review of an individual mitigation plan could cause the type of substantial delay that DEPE is seeking to reduce. The DEPE should permit the applicant to make a payment for offsite mitigation (Alliance for Affordable Housing, Maser Sosinski & Associates, New Jersey Builders Association, New Jersey State Bar Association);

(1118) We endorse this GP but believe the requirement for mitigation for disturbances exceeding 0.25 acres is arbitrary and contrary to the Act (Hannoch Weisman);

(1119) We support the proposed amendment (Brokaw DeRiso Associates, Inc., Mark H. Burlas, Sandoz Pharmaceuticals Corporation);

(1120) It should be made clear in the regulations that the authorization of this GP will not allow the construction of housing in the 100 year flood plain (Alliance for Affordable Housing);

(1121) The one acre permit should be available to developments that provide at least 20 percent low and moderate income housing on or off site (Alliance for Affordable Housing);

(1122) The legal basis for this permit is Section 23(a) which allows the Department to adopt all applicable Nationwide permits which were approved under the Federal regulations. Since Nationwide 26 authorized one acre of fill by definition then a one acre permit is authorized by Section 23(a) (Alliance for Affordable Housing);

(1123) Subparagraph (a)23i should be amended to include municipalities receiving urban aid to be consistent with our criteria for providing funding for affordable housing (New Jersey Department of Community Affairs);

(1124) The General permit has not been adequately defined to identify what types of wetlands may be filled (i.e. isolated, headwaters, etc.). This is ambiguous and leaves an unacceptable amount of interpretation for such a sensitive issue. The fill requirements should be similar to the existing GP no. 6 (Maser Sosinski & Associates);

(1125) The filling of exceptional resource value wetlands should be prohibited under this GP because there is a practicable alternative for any project, including the consideration of building on any other property throughout the State (Maser Sosinski & Associates, Franklyn Isaacson);

(1126) While we welcome a proposed SGP for Affordable Housing it may be more internally consistent to amend the standards for individual permits to reflect the fact that Mt. Laurel projects which meet the fourfold test contained in the proposed general permit actually meet the standards for individual permits (New Jersey State Bar Association, Public Advocate of New Jersey, Amy S. Greene Environmental Consultants, Inc.);

(1127) The acreage limitation should be reduced from one acre to 0.25 acres (Franklyn Isaacson); and

(1128) The proposed rule should be amended to incorporate the restrictions found at N.J.S.A. 13:9B-23(b) which includes limiting the permit to wetlands which are not part of a surface water tributary system, not designated as exceptional resource value, not designated as EPA Priority Wetlands, and that the activity will not destroy more than an acre of wetlands (Public Advocate of New Jersey).

RESPONSE: The Department has considered all comments and questions regarding the proposed GP for affordable housing. In addition, the Department has consulted with the EPA and with the Attorney General's Office and has concluded that this GP cannot be adopted because the finding cannot be made definitively that all activities which may qualify for the proposed GP will have only minimal adverse environmental impacts, both individually and cumulatively. Therefore, these activities will continue to require Individual permits. The standards at N.J.A.C. 7:7A-3.1(a)1 for granting Individual permits in the amended rules state that the applicant should consider only those alternatives which still fulfill the overall project purpose. Therefore, for projects that are part of a housing plan approved by a court or the Council on Affordable Housing, the scope of Department review of alternative sites for affordable housing projects may be limited to the particular municipality within which the project was proposed. In addition, projects which include a substantial percentage of affordable housing onsite will likely meet the standards at N.J.A.C. 7:7A-3.5(a)11, for determining whether proposed activities are in the public interest, which are considered during the Individual permit process.

N.J.A.C. 7:7A-9.2(a)24

(1129) COMMENT: We support the condition which would limit the use of this GP in Exceptional resource value wetlands (Citizens United to Protect the Maurice River and its Tributaries, Inc., Endangered and Nongame Species Advisory Committee).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(1130) COMMENT: I object to the proposed Statewide General Permit no. 24 regarding the placement of bulkheads adjacent to human-made lagoons. This will create a severe hardship to the property owners. The State must realize that these lagoon developments are eroding at an alarming rate and need to be stabilized (Patrick J. Connell).

RESPONSE: The Department assumes that the commenter is suggesting that the construction of bulkheads not be regulated. The Department is mandated by the Act to regulate the discharge of fill and the driving of pilings in wetlands and waters. The Department has issued this GP in an effort to streamline the permit process and reduce the cost associated with these activities. The Department cannot reduce its regulation of this activity further, however, without contravening the Act, which mandates that the Department regulate the discharge of fill and the driving of pilings in wetlands and waters.

(1131) COMMENT: The proposal of General Permit no. 24 for bulkheads on manmade lagoons is applauded as it does not contain "infill" requirements where bulkheads exist on both sides of the property (Environmental Evaluation Group).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

N.J.A.C. 7:7A-9.2(a)25 Subsurface sewage disposal systems

(1132) COMMENT: The rule should be modified to not require mitigation for impacts exceeding 0.25 acres under this general permit (paragraph (a)25) (Johnson Engineering).

RESPONSE: The rule as proposed and adopted does not include a requirement for mitigation.

(1133) COMMENT: If the Board of Health is responsible for the authority of subsurface sewage disposal systems as stated at N.J.A.C. 7:7A-3.3(c), does having to apply to the Department constitute regulatory authority by the Department or joint jurisdiction by both agencies (Van Note-Harvey Associates)?

RESPONSE: This arrangement represents joint jurisdiction by both agencies. The rule has been amended at N.J.A.C. 7:7A-9.5(a) and (f) to clarify the modified authorization procedures to be followed by an applicant for this GP.

(1134) COMMENT: We support this GP because it should result in improved water quality which will benefit wildlife habitat (Citizens United to Protect the Maurice River and its Tributaries, Inc., Cumberland County Environmental Health Task Force, Endangered and Nongame Species Advisory Committee).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(1135) COMMENT: We recommend that subparagraph (a)25i be modified to read "Except where a Statewide General Permit No. 8 is utilized, there is no expansion or change in the use of the building or facility which will result in an increase in the volume of sanitary sewage (Consulting Engineers Council of New Jersey)."

RESPONSE: The Department disagrees and the rule has not been amended as suggested since this GP is only for the repair of malfunctioning systems. The rules that govern septic systems, at N.J.A.C. 7:9A-1.1, prohibit the expansion of malfunctioning existing systems.

(1136) COMMENT: The provision at subparagraph (a)25i should be amended to read, "there is no increase in the volume of sanitary useage" (NAIOP).

RESPONSE: The Department disagrees. The rule requires that there be no expansion or change in the use of the building or facility which will result in an increase in the volume of sanitary sewage. The Department believes that the provision clearly expresses the intended limitation.

(1137) COMMENT: The proposal at subparagraph (a)25ii should be altered to include that the **repair** of a malfunctioning system may be made in a manner as in the original system provided all are approved by the administrative authority (Pennoni Associates, Inc.).

RESPONSE: The rule has not been amended as suggested since the applicant is directed to the standards at N.J.A.C. 7:9A-3.3(c) which govern the manner in which a malfunctioning system shall be corrected.

(1138) COMMENT: The rule at subparagraph (a)25ii which require that corrections to the malfunctioning system meet the requirements at N.J.A.C. 7:9A-3.3(c) are unreasonable as they require examination of alternative sites (N.J. Builders Association).

RESPONSE: The provision cited by the commentator does not require examination of alternative sites. N.J.A.C. 7:9A-3.3(c) is a reference to the section governing repair of malfunction subsurface sewage disposal systems under Chapter 9 and not subchapter 3 of these rules (N.J.A.C. 7:7A). Therefore, there is no requirement for an examination of alternative sites.

(1139) COMMENT: This permit should be limited to systems in existence prior to July 1, 1988, the effective date of the Act (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The Department does not agree since this GP has been adopted to facilitate the repair of any malfunctioning system, regardless of the date of construction and therefore the rule has not been amended as suggested.

(1140) COMMENT: The proposal at subparagraph (a)25iii provides for the repair or replacement of a failing septic system if the seasonal high water table is at least 1.5 feet from the existing ground surface. This is in direct contradiction with the regulations outlines in Chapter 199. It is recommended that the 1.5 feet be changed to 2.0 feet to be in compliance with the revised Chapter 199 regulations (Environmental Evaluation Group).

RESPONSE: The commenter is incorrect. This condition does not contradict the rules at N.J.A.C. 7:9A-3.3 for the repair of existing systems. The rule as adopted specifies a depth of 1.5 feet since this depth would avoid most wetland areas.

(1141) COMMENT: We support the proposal at subparagraph (a)25 (Brokaw DeRiso Associates, Inc.).

RESPONSE: The Department acknowledges this comment in support of the rules.

(1142) COMMENT: The rule at subparagraph (a)25iii should be modified to include the phrase, "onsite" after the words "no alternative location" (N.J. Builders Association, NAIOP).

RESPONSE: The rule has been amended as suggested to clarify this provision.

N.J.A.C. 7:7A-9.2(b)

(1143) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(b) should be clarified to provide specific criteria when DEPE can require an applicant to obtain an Individual permit (New Jersey State Bar Association, N.J. Builders Association).

RESPONSE: The Department has not made the suggested change. N.J.A.C. 7:7A-9.2(b) provides that the Department may require an application for an Individual permit if the Department finds that additional permit conditions would not be sufficient, or that special circumstances make the action necessary, to ensure compliance with the Act, the Federal Act, N.J.A.C. 7:7A, and permits and orders issued thereunder. The special circumstances making the Individual permit application necessary are, by definition, specific to each case. Therefore, the Department cannot provide a complete list of circumstances which would trigger the requirement for an Individual permit application.

(1144) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(b) should not apply to GP 25 because the potential degradation of ground water and surface water resources is of greater consequence than the possible destruction of wetlands from remediation procedures (Morris County Planning Board, Bedminster Environmental Commission).

RESPONSE: This determination as to potential degradation of ground water and surface water resources must be made on a case by case basis. Therefore, the Department cannot categorically exclude the authorization of GP no. 25 from this provision.

N.J.A.C. 7:7A-9.2(c)

(1145) COMMENT: The proposal at N.J.A.C. 7:7A-9.2(c) which prohibits the issuance of both GPs and Individual permits for a single project should be eliminated. There is no reason why as a matter of policy this should not be done (New Jersey State Bar Association).

RESPONSE: If a proposed project exceeds Statewide general permit standards, the Department will no longer be able to make a finding that the activities will cause only minimal adverse environmental impacts when performed separately and cumulatively. Therefore, the project no longer qualifies for GPs and the entire project shall be evaluated under the Individual permit review standards.

(1146) COMMENT: Project impacts regulated under the proposed Freshwater Wetlands Protection Act Rules should be permitted to be segmented according to geographic location and proposed activity (Louis Berger and Associates, Inc).

RESPONSE: The Department disagrees with the commenter's suggestion. In order to assess the cumulative impacts of a large project to wetlands and waters, and for the Department to review the applicant's assertion of no practicable alternatives, the Department must be able to review the entire project and all of its anticipated impacts. If the applicant could submit segments of the project separately, the Department will be unable to assess the impacts of the project as a whole.

(1147) COMMENT: The rule at N.J.A.C. 7:7A-9.2(c) should be modified to read, "Where a project's impacts involve greater than one acre of wetlands disturbance and State open water fill, . . ., except that the Department shall process and approve Statewide general permits for complete activities, such as minor road crossings which will perform their intended function whether or not an Individual permit or other proposed regulated activity is approved" (NAIOP).

RESPONSE: The Department has not modified the rule as suggested. Statewide general permits are issued with the finding that the activitiy will cause only minimal adverse environmental impacts when performed separately and will have only minimal cumulative adverse impacts on the environment. If a proposed project exceeds Statewide general permit standards, the Department will no longer be able to make a finding that the activities will cause only minimal adverse environmental impacts when performed separately and cumulatively. Therefore, the project no longer qualifies for GPs and the entire project shall be evaluated under the Individual permit review standards. Further, in order to assess the cumulative impacts of a large project to wetlands and waters, and for the Department to review the applicant's assertion of no practicable alternatives, the Department must be able to review the entire project and all its anticipated impacts.

N.J.A.C. 7:7A-9.3 Standards and conditions for all Statewide General Permit Authorizations

(1148) COMMENT: This section should include a standard condition that states that impacts to wetlands should be minimized or avoided through the use of other practical alternatives as is currently stated in the federal regulations at 33 CFR 330.6(a)(1) (ANJEC, Great Swamp Watershed Association, Franklyn Isaacson).

RESPONSE: The Department has not amended the rule on adoption as suggested. The Federal requirements for assumption at 40 CFR Part 233, 404 State Program Regulations, require that the State follow set procedures for the adoption of general permits and associated conditions. They do not require that the State adopt specific Nationwide permits from the ACOE program of their associated conditions. Since the State is not assuming the existing Nationwide permits, there is no requirement that the State adopt the standard conditions for Nationwide permits. Therefore, EPA will evaluate the Statewide general permits and their associated conditions to determine if they were adopted according to the procedures found at 40 C.F.R. 233.21, General Permits.

(1149) COMMENT: The proposal at N.J.A.C. 7:7A-9.3(a) requiring mitigation is inconsistent with the establishment of the General Permit Program. If it is determined that the mitigation requirement of the General Permit Program is valid, the mitigation plan should be a condition of the approval (Pennoni Associates, Inc.).

RESPONSE: Based on the comments received, the legal advice from the Attorney General's office, the Department has decided to delete the

proposed provisions for a mitigation requirement for certain GPs upon adoption. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will rescind the permit.

(1150) COMMENT: We support the clarification at N.J.A.C. 7:7A-9.3(a)1 (ANJEC, Great Swamp Watershed Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(1151) COMMENT: We support the inclusion of the paragraph at N.J.A.C. 7:7A-9.3(b)1; however, the term "project" should be defined (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, Public Advocate of New Jersey).

RESPONSE: The Department acknowledges this comment in support of the rule amendment. For the purposes of this specific subsection, project shall mean the use and configuration of all buildings, pavements, roadways, storage areas and structures, and the extent of all activities associated with the proposal. The rule at N.J.A.C. 7:7A-9.3(b) has been amended upon adoption to include this definition. The Department notes that the term is used in this manner in section 9.3, and throughout most of N.J.A.C. 7:7A. However, this common meaning of the term in N.J.A.C. 7:7A-2.7(d), concerning exemptions based upon previously granted municipal approvals. For the purpose of N.J.A.C. 7:7A-2.7(d), the Department has proposed a definition of "project" which applies specifically to that provision. This proposal is published in this issue of the New Jersey Register.

(1152) COMMENT: The proposal at N.J.A.C. 7:7A-9.3(b)1 should be eliminated. If the proposed activity meets the standards for a GP, that is, its individual and cumulative impacts are minimal and acceptable to the Department, then a GP should be issued regardless of the applicant's intent (New Jersey State Bar Association, Hannoch Weisman, AES Cohansey Inc.).

RESPONSE: As stated previously by one of the commenters, N.J.A.C. 7:7A-9.1, which requires an environmental analysis prior to issuance of a Statewide general permit, does not apply to GP nos. 6 and 7 because their issuance is mandated by the Act. Therefore, the environmental impacts of these permits have never been assessed either individually or cumulatively. The Act at N.J.S.A. 13:9B-23d empowers the Department, on the basis of findings with respect to a specific application, to modify a general permit issued pursuant to this section by adding special conditions. Therefore, by implication the Department has the right to review specific plans for a specific project prior to the authorization of a Statewide general permit.

(1153) COMMENT: In the proposal at N.J.A.C. 7:7A-9.3(b)1, the Act does not allow the Department to require plans for issuance of General Permits. Please provide seer hats to all who are anticipating future regulations. This effectively precludes the "Grandfathering" of any permit (Pennoni Associates, Inc.).

RESPONSE: The Act at N.J.S.A. 13:9B-23d empowers the Department, on the basis of findings with respect to a specific application to modify a general permit issued pursuant to this section by adding special conditions. Therefore, by implication the Department has the right to review specific plans for a specific project to determine whether special conditions should be added to a Statewide general permit. The Department interprets the commenter's last two statements to imply that he or she is concerned that applications submitted prior to this rule adoption would be subject to this requirement. Applications will be reviewed under the rules that are currently effective as of the date of review.

(1154) COMMENT: The rule at N.J.A.C. 7:7A-9.3(b)2 should include a definition of "proximity" (USEPA Region II, USEPA Headquarters).

RESPONSE: The rule has not been amended to include a definition of "proximity." This determination will be made on a case by case basis and will depend on such variables as the type of project or discharge, whether the intake is upstream or downstream, etc.

(1155) COMMENT: The rule at N.J.A.C. 7:7A-9.3(b)4 limits the use of GPs on rivers which have been designated or are under study for designation as Federal or State Wild and Scenic River Systems. This restriction prohibits placement of structures in wetlands associated with these areas. Ironically, this may preclude visual access by the public to areas which have been recognized by the public for their outstanding scenic component. This condition should not apply to GP nos. 16 and 17 (NJ Recreation and Parks Association).

RESPONSE: This standard condition will continue to apply to all Statewide general permits and is consistent with the standard requirement on all Nationwide permits. This requirement is a mechanism to ensure that all activities with the potential to affect a wild or scenic river receive the additional review attendant with applications for Individual permits.

(1156) COMMENT: Why was the deletion of N.J.A.C. 7:7A-9.3(b)7, compliance with Best Management Practices made (Associated Executives of Mosquito Control Work in N.J.)?

RESPONSE: This requirement was not deleted but was moved to N.J.A.C. 7:7A-9.3(c)5.

(1157) COMMENT: The rule at N.J.A.C. 7:7A-9.3(c)1 should reference a promulgated standard of what constitutes a toxic amount for each toxic pollutant (PSE&G).

RESPONSE: It is unnecessary to incorporate a list of all potential toxics within the context of these rules since this list is promulgated pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., and the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. The Department is in the process of promulgating a list of toxic levels for various pollutants. If an applicant is considering the placement of fill which may potentially contain a toxic substance, he or she should consult the Department for additional information.

(1158) COMMENT: The rule at N.J.A.C. 7:7A-9.3(c)1 should be amended to include the following language, "when there is reason, or evidence to suggest that, because of watershed land useage or fill material sources, toxic levels of pollutants may exist in wetland fill or dredge spoils, it shall be demonstrated that any toxic pollutant levels meets State and Federal standards" (Associated Executives of Mosquito Control Work in N.J.).

RESPONSE: The Department has not amended the language as suggested. For consistency with the Federal program, the Department is adopting language identical to that of the Federal 404 program.

(1159) COMMENT: The time periods identified at N.J.A.C. 7:7A-9.3(c)3 are too restrictive for long term, ongoing land uses such as mining. In this situation, careful stormwater management and soil erosion and sediment control should be sufficient to eliminate the possible impacts on waterways containing fisheries resources. This duplicates regulation under other programs and should be deleted (Concrete and Aggregate Association).

RESPONSE: This condition is included for construction projects that will be completed within a finite period of time and is only applicable to activities undertaken pursuant to authorization under a GP. For approved projects which are ongoing, the Department will require stormwater management, soil erosion and sediment control and perhaps other site-specific provisions as a condition of approval that will be suitable for longer periods of time as suggested by the commenter.

(1160) COMMENT: We support the inclusion of the detailed information concerning conditions for permits on trout associated streams at N.J.A.C. 7:7A-9.3(c)3 (ANJEC, Great Swamp Watershed Association, Public Advocate of New Jersey, Division of Fish, Game and Wildlife).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(1161) COMMENT: Although identified to be regulated on a case by case basis, General permit activity (N.J.A.C. 7:7A-9.3(c)3) timing restrictions related to warm water fishery spawning areas could be construed to prevent construction for two months each year adjacent to most waterbodies in the state. This condition should be clarified (Louis Berger and Associates, Inc.).

RESPONSE: With the authorization of a GP, the need for and the specific timing restriction will be determined through consultation with the New Jersey Division of Fish, Game and Wildlife after an evaluation of potential project impacts and a determination of whether the water body is a spawning area for warm water fish.

(1162) COMMENT: The condition at N.J.A.C. 7:7A-9.3(c)3 should be amended to combine the categories of "general, brook, and brown trout" into one as "brook/brown trout ... September 15-March 15" (Division of Fish, Game and Wildlife).

RESPONSE: The rule has been amended as suggested upon adoption.

(1163) COMMENT: The applicant should be allowed to demonstrate that their project will not adversely affect downstream fish populations through the use of various sediment and turbidity control practices, and therefore not be subject to the timing restrictions at N.J.A.C. 7:7A-9.3(c)3 (Atlantic Electric).

RESPONSE: If a project could cause adverse impacts to the fisheries resource, these timing restrictions will apply since Department experience has shown that even properly installed and maintained sediment control practices can fail. Such failure during the spawning season could result in the loss of an entire age class of a particular species.

(1164) COMMENT: At N.J.A.C. 7:7A-9.3(c)3, should not the timing restriction for regulated activities affecting American shad run from September 1-November 1, instead of September 1-November 30? What is the basis for this date since the ACOE is less restrictive (PSE&G)?

RESPONSE: These timing restrictions have been established based on waterway-specific information collected by the Division of Fish, Game and Wildlife specifically for the State of New Jersey while those established by the ACOE are done on a regional basis.

(1165) COMMENT: In the rules at N.J.A.C. 7:7A-9.3(c)3, the phrase "or adjacent" should be deleted (NAIOP).

RESPONSE: This phrase has not been deleted since it is likely that the wetland area being affected by the regulated activity will be adjacent to the stream channel.

(1166) COMMENT: A standard condition should be added requiring that discharges will not restrict the movement of aquatic species indigenous to the waters as required in 33 CFR 330.6(a)(3), and that the accelerated passage of water and the restriction of its flow be minimized, as required in 33 CFR 330.6(a)(4). In addition the DEPE should prohibit the discharge of material into breeding areas for migratory waterfowl as required by 33 CFR 330.6(a)(7) (Public Advocate of New Jersey).

RESPONSE: The Department has not amended the rule on adoption as suggested. The Federal requirements for assumption at 40 CFR Part 233, 404 State Program Regulations, require that the State follow set procedures for the adoption of general permits and associated conditions. It does not require that the State adopt specific Nationwide permits from the ACOE program or their associated conditions. Since the State is not assuming the existing Nationwide permits, there is no requirement that the state adopt the standard conditions for Nationwide permits. Therefore, EPA will evaluate the Statewide general permits and their associated conditions to determine if they were adopted according to the procedures found at 40 C.F.R. 233.21, General Permits.

(1167) COMMENT: We support the addition of N.J.A.C. 7:7A-9.3(c)4 regarding acid soils and (c)5, best management practices (Division of Fish, Game and Wildlife).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(1168) COMMENT: The proposed condition at N.J.A.C. 7:7A-9.3(c)4 should be reworded to clarify that monitoring for the presence of acid producing soils must be conducted, but only for those excavations which meet the applicability requirement at N.J.A.C. 7:13-5.10. It would be appropriate to include the wording at N.J.A.C. 7:13-5.10 verbatim and add clarification that this monitoring pertains only to activities regulated by the Freshwater Wetlands Protection Act. It should also be clarified that the post-planting monitoring program refers only to those projects with temporary disturbances. It should not be implied that activities which receive DEPE approval for permanent disturbances will automatically require planting and monitoring because acid producing deposits were found (Langan Engineering, N.J. Builders Association).

RESPONSE: This provision expressly incorporates N.J.A.C. 7:13-5.10 by reference and therefore it is unnecessary to repeat the wording within this rule. Since this is a permit condition for conducting regulated activities in wetlands or waters, it is unnecessary to repeat that these activities are being conducted "pursuant to the Act." However, the word "temporarily" has been added as clarification on the requirement for post-planting monitoring.

(1169) COMMENT: The proposal at N.J.A.C. 7:7A-9.3(c)4 should be modified to include the following language, "during construction activities in those Geologic formations identified in Section 3.6 of the Stream Encroachment Technical Manual as sometimes containing acid producing deposits, excavations must be visually or chemically checked as appropriate" (NAIOP).

RESPONSE: N.J.A.C. 7:13-5.10 which is incorporated into this provision by reference lists the same Geologic formations identified in the technical manual. Therefore, there is no need to add further clarification.

(1170) COMMENT: The proposal at N.J.A.C. 7:7A-9.3(c)4 requiring a minimum of 85 percent plant survival is unrealistic and should be revised to solely read "coverage rate" (Louis Berger and Associates, Inc.).

RESPONSE: Based upon Department experience, an 85 percent plant survival rate is not unrealistic if a site has been properly remediated. Situations where plantings are not surviving at this rate indicate that the acid condition continues to affect the site. Therefore, this requirement has not been deleted.

N.J.A.C. 7:7A-9.4 Use of multiple Statewide general permits

(1171) COMMENT: In the rules at N.J.A.C. 7:7A-9.4(a), the last sentence is no longer valid since DEPE authorization is no longer required for Statewide general permits nos. 14 and 25 (NAIOP).

RESPONSE: The Department has amended the rule upon adoption to clarify the notification and authorization procedures for GP no. 25 at N.J.A.C. 7:7A-9.5(a) and 9.5(f). In addition, the rules at N.J.A.C. 7:7A-2.3(c) and 9.2(a)14 have been amended to delete the proposed allowance for the placement of devices disturbing less than "one square yard" of wetlands or waters. Therefore, the last sentence at N.J.A.C. 7:7A-9.4(a) remains valid.

(1172) COMMENT: The requirement at N.J.A.C. 7:7A-9.4(c) creates the anomalous situation where one acre of wetlands may be filled on three separate five-acre tracts, yet only one acre can be filled on one 15-acre tract. The regulation should be modified to consider the percentage of wetlands to be filled and the specific condition of the wetlands in fashioning a discretionary standard for allowing the use of multiple GPs affecting more than one acre (Archer and Greiner, Pureland Industrial Complex).

RESPONSE: The Department disagrees and the rule has not been modified as suggested. The Act mandates that Statewide general permits be issued when an activity "will cause only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment, [and] will cause only minor impacts on freshwater wetlands ..." Therefore, the Department must consider the nature of the impact, and in some cases the resource value of the wetland to be affected, and not the size of the property in making this determination. In addition, the piece-meal destruction of wetlands by a single landowner with extensive property holdings does not meet this objective. Similarly situated persons are treated equally, that is, all single landowners are treated equally. The perceived anomaly exists because at this point in time the Department has not yet assessed cumulative impacts on a watershed basis. At the end of the five-year effective period of the Statewide general permits, the Department will evaluate the cumulative impacts of all GP authorizations within a given watershed.

(1173) COMMENT: The inclusion of transition areas in the one acre limitation proposed at N.J.A.C. 7:7A-9.4(c) is overly restrictive and should be removed (Amy S. Greene Environmental Consultants, Inc., Van Note-Harvey Associates).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has amended the rule upon adoption to delete the term "transition areas" given that it could not be shown at this time to be necessary to meet the standard required to issue general permits (activities permitted will cause only minimal environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment, and will cause only minor impacts on freshwater wetlands). If it is shown in the future that without these stacking provisions, the permitted activities exceed the statutory standard, the Department will reconsider the inclusion of transition areas in the stacking provision with regard to appropriate general permits or, alternatively, consider limiting the special activity waivers based on general permits. In addition, pursuant to N.J.S.A. 13:9B-23d, the Department may, with respect to a specific application, condition a general permit or require an Individual permit.

(1174) COMMENT: The combined acreage limitation at N.J.A.C. 7:7A-9.4(c) unnecessarily duplicates the regulation of activities at N.J.A.C. 7:7A-7.4 (Louis Berger and Associates, Inc.).

RESPONSE: The combined acreage limitation found at N.J.A.C. 7:7A-9.4(c) is necessary for these activities to comply with the findings of the environmental assessments prepared for activities authorized under Statewide general permits. The rule at N.J.A.C. 7:7A-7.4(e) addresses a separate issue of combining GPs with Special Activities Waivers for GP activities.

(1175) COMMENT: The rule at N.J.A.C. 7:7A-9.4(c) should be clarified to state that the one acre limitation on the combined use of GPs does not apply to GP no. 17 (NJ Recreation and Parks Association).

RESPONSE: The rule at N.J.A.C. 7:7A-9.4(c) has been amended to clarify that the acreage limitation does not apply to general permit no. 17 since this permit authorizes only walkways on publicly owned or controlled land. The Department has determined in the Environmental Analysis for this Statewide general permit that walkways on publicly owned or controlled land will cause only minimal adverse impacts on the environment and will result in only minimal impacts to freshwater wetlands.

(1176) COMMENT: Is the term "single property" being used synonymously for the term "onsite"? This term should be clarified (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: Yes. The term "single property" was proposed for deletion and deleted on adoption. The term "onsite" is now used consistently throughout this subsection.

(1177) COMMENT: The proposal at N.J.A.C. 7:7A-9.4(c) states that the total area of wetlands/transition areas disturbed or modified cannot exceed one acre. Does this mean an averaging plan cannot propose the modification of more than one acre on a site (Yannaccone Associates, Inc.)?

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has amended the rule upon adoption to delete the term "transition areas." See response to Comment 1173. Neither the proposed provision nor the adopted provision limit the acreage that may be modified under a transition area averaging plan.

(1178) COMMENT: The proposal at N.J.A.C. 7:7A-9.4(c) concerning the one acre disturbance limit from wetlands, State open waters and transition areas should not include temporary disturbances where restoration is required or transition area disturbances that are compensated for by buffer averaging (Langan Engineering).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has amended the rule upon adoption to delete the term "transition areas." See response to Comment 1173.

(1179) COMMENT: In the proposal at N.J.A.C. 7:7A-9.4(c), the limitation of one acre total disturbance for wetlands, State open waters and transition areas is contrary to the statute which allows stacking of SGP's up to the one acre limit without restriction as to transition areas and State open waters. The applicant should, further, be permitted to use any combination of SGP's provided their total impact doesn't exceed the regulated one acre threshold (William F. Voeltz, Brokaw DeRiso Associates, Inc.).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to amend the rule upon adoption to delete the term "transition areas." See response to Comment 1173.

(1180) COMMENT: The rule at N.J.A.C. 7:7A-9.4(c) should be amended to exclude GP nos. 6, 7, and 21 from the cumulative one acre limitation and allow one acre of disturbance for each of these permits (DuPont).

RESPONSE: The Department disagrees. Following the mandate of the Act at N.J.S.A. 13:9B-23c the Department has created a Statewide general permit program that will assure that activities will cause only minimal adverse environmental impacts when performed separately and cumulatively and will cause only minor impacts to freshwater wetlands. The "stacking" provision at N.J.A.C. 7:7A-9.4(c) is an integral part of this program. To allow a cumulative impact of potentially four acres would be contrary to the intent of the Act. There are often long term, unanticipated impacts, which may result from the installation of above ground utility lines if the total area to be disturbed is allowed to exceed one acre. Further, while an area is allowed to revegetate, the need to perform maintenance activities often precludes the reintroduction of woody vegetation. Therefore, in order to assure minimal cumulative impacts, the Department will continue to consider the impacts under this GP when an applicant applies for multiple GPs.

(1181) COMMENT: We strongly support the proposal which will require an Individual permit if the cumulative impact of one acre will be exceeded by any combination of Statewide general permits at N.J.A.C. 7:7A-9.4(d) (ANJEC, Great Swamp Watershed Association).

RESPONSE: The Department acknowledges this comment in support of the rule amendment.

(1182) COMMENT: N.J.A.C. 7:7A-9.4(f) does not make sense and should be clarified or eliminated (N.J. Builders Association).

RESPONSE: The provision at N.J.A.C. 7:7A-9.4(f) has been amended upon adoption to clarify that Statewide general permit nos. 13, 15, 18, and 20 will only be authorized onsite once every five years.

(1183) COMMENT: It is very beneficial that the Department has eliminated GP nos. 2, 6, 7, and 10 from being issued to the same property more than once. But it is necessary to clearly state that these GPs will not be issued more than once for the same properties and that no subdivision of properties subsequent to the issuance of these GPs will be the subject of additional approvals under these GPs (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The Department acknowledges this comment in support of the rule amendment. This provision as adopted includes the term "onsite." The definition of "onsite," incorporates area boundaries as they existed on July 1, 1988. Therefore, the subsequent subdivision of a parcel will not qualify for additional GP authorizations.

(1184) COMMENT: The proposal should be modified to include a statement that no property which has received an exemption under Nationwide permits for up to one acre of fill shall be eligible for GPs 2, 6, 7, 10 and 11. In these cases, an Individual permit should be required for additional wetlands fill (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The Act does not provide the authority to impose the suggested restriction on the authorization of these GPs. However, the Act at N.J.S.A. 13:9B-23d does provide that the Department may require an application for an Individual permit if additional permit conditions would not be sufficient and that special circumstances make this action necessary to insure compliance with the Act or the Federal Act. For example if a property has been the subject of a Nationwide permit no. 26 for the filling of one acre of wetlands and the owner applies to the Department for authorization under Statewide general permit no. 2 and the Department makes the finding that additional permit conditions are not sufficient to minimize the additional environmental damage that result from the cumulative impacts of the Nationwide permit and the Statewide general permit the Department could require that the proposed activity be the subject of an Individual permit review.

(1185) COMMENT: The disturbance under GP 2 should not be considered in determining the one acre cumulative impact threshold at N.J.A.C. 7:7A-9.4(d) because they do not result in permanent loss of habitat (Archer and Greiner).

RESPONSE: The Department does not agree. There are often long term, unanticipated impacts, which may result from the installation of subsurface utility lines if the total area to be disturbed is allowed to exceed one acre. Further, while an area is allowed to revegetate, the need to perform maintenance activities often precludes the reintroduction of woody vegetation. Therefore, in order to assure minimal cumulative impacts, the Department will continue to consider the impacts under this GP when an applicant applies for multiple GPs.

(1186) COMMENT: Reference to general permits 2, 6, 7 and 10 has been removed from this subsection (N.J.A.C. 7:7A-9.4(f)). Is it therefore the Department's intent (by this omission) to issue approvals for any number of these activities on a given property (Langan Engineering)?

RESPONSE: No. Statewide general permits nos. 2, 6, 7, and 10 have been included at N.J.A.C. 7:7A-9.4(d) that clearly states that the Department may approve activities covered by these GPs onsite, provided that the individual limits of each GP are complied with and that the total area of wetlands, and State open disturbed or modified does not exceed one acre.

N.J.A.C. 7:7A-9.5 Application for activities under Statewide general permits

(1187) COMMENT: In the rule at N.J.A.C. 7:7A-9.5(a), Statewide general permit no. 14 should be added to no. 25 in the first sentence (NAIOP).

RESPONSE: The rule has not been amended as suggested because it remains necessary for an applicant to submit an application to the Department for authorization or activities pursuant to N.J.A.C. 7:7A-9.2(a)14.

(1188) COMMENT: The proposed rule at N.J.A.C. 7:7A-9.5(a) which deletes "at least 30 working days prior to commencement of work" is illegal. The deleted language should be replaced (New Jersey State Bar Association).

RESPONSE: The Department agrees and, therefore, the rule has been amended upon adoption to more closely track the language of the Act.

(1189) COMMENT: The Department continues to violate the Act by not responding to notices requesting authorization of GPs within 30 days (New Jersey State Bar Association).

RESPONSE: In order to fulfill the mandate of the Act, the Department must confirm that the proposed activities meet the criteria for authorization under issued GPs. Unless the applicant has previously obtained a letter of interpretation for the site, a field inspection is necessary. Applicants can significantly reduce review time frames by first obtaining an LOI for the subject property to eliminate the necessity for a field inspection upon application for a GP.

(1190) COMMENT: The Department is not specific enough in the proposal at N.J.A.C. 7:7A-9.5(a)2, in requesting what information will be required to determine if General Permit conditions will be satisfied. The phrase "including, but not limited to the following information" should be eliminated. If the Department desires additional information, it should be outlined in this point rather than subjecting applicants to the vagaries of a project review officer who can review a project and decide that additional information is needed (Environmental Evaluation Group, Concrete and Aggregate Association, N.J. Builders Association).

RESPONSE: The Department has provided a specific and detailed list of information which, in most cases, is sufficient to enable the Department to determine whether the conditions of a GP will be satisfied. However, since each application is unique and has the potential to raise questions which will not be resolved by the materials listed at N.J.A.C. 7:7A-9.5(a)2, the Department must retain the flexibility to require additional information. Without this flexibility, the Department would not be able to reliably fulfill its statutory responsibility to determine whether the conditions of a general permit will be satisfied. If the applicant believes that the material required at N.J.A.C. 7:7A-9.5(a)2 do not contain all of the information necessary to determine if the conditions of the GP will be satisfied, the applicant can contact the Department for additional guidance before submitting the application.

(1191) COMMENT: The Department should require a formal report at N.J.A.C. 7:7A-9.5(a)2 for species habitat as well as wetlands field data for GPs authorizing fill and wetlands alterations in order to know whether the standards and conditions outlined in N.J.A.C. 7:7A-9.3, specifically that an activity will not jeoparidze a threatened or endangered species or its habitat, will be met (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rule has not been amended to require formal reports for all GP applications because this would place an unnecessary burden on the regulated public. Information on the presence of documented habitat for threatened and endangered Species is derived from two sources: the Department's database, and information from the public responding to the required public notices. Based on its review of this information the Department will require reports only for those sites where this habitat may be present.

(1192) COMMENT: The information at N.J.A.C. 7:7A-9.5(a)2i should be waived for Statewide general permits since the information is required for LOI requests (Amy S. Greene Environmental Consultants, Inc., N.J. Builders Association).

RESPONSE: The submittal of this information will not be waived since not all applicants applying for GPs have received LOIs. Therefore, the Department is requiring delineation information only for the area to be disturbed under the Statewide general permit.

(1193) COMMENT: The requirements at N.J.A.C. 7:7A-9.5(a)2i specifically for a complete wetlands delineation and providing wetlands field data sheets destroys the general permit concept and makes mosquito control work non-feasible. Since mosquito control activity is not undertaken for economic gain it should not be subject to the same requirements (Associated Executives of Mosquito Control Work in N.J.).

RESPONSE: N.J.A.C. 7:7A-9.5(a)2i requires a complete wetlands delineation only for the area to be disturbed. The requirement is to provide "wetlands field data sheets including soils and vegetation information (no formal report is required) for this more limited area under the Statewide general permit application." Therefore, in order to undertake mosquito control activities pursuant to N.J.A.C. 7:7A-9.2(a)15, the Department requires information only for the wetlands in the area to be disturbed in order to authorize the activity. The commenter should note that this requirement has not represented a serious problem for the Middlesex County Mosquito Commission which has made extensive use of GP 15 to conduct water management activities.

COMMENT: Several commenters were confused by and objected to the provisions regarding Swamp Pink at N.J.A.C. 7:7A-9.5(a)2iii. They made the following comments:

(1194) Protection of Swamp Pink is already provided under N.J.A.C. 7:7A-9.3(b)3. This requirement creates added costs and time delays for projects in the affected regions. Additionally, the State has singled out a specific species for extraordinary protection (Pennoni Associates, Inc.);

(1195) The provision should be deleted because the general public does not have access to documented habitat maps. This requirement should be inserted in N.J.A.C. 7:7A-9.3 and the DEPE should be responsible for this determination (N.J. Builders Association);

(1196) There is no logical reason why Swamp Pink has been singled out for this type of certification. Why would this not be required for other State or Federally listed species? This type of certification should not even be required (Amy S. Greene Environmental Consultants, Inc.);

(1197) There is no logical reason why Swamp Pink has been singled out for this type of certification. In addition, what constitutes "indirect adverse impacts to swamp pink" (JCP&L);

(1198) The rule should be modified to limit documented habitat for Swamp pink to the actual location of the plant itself rather than areas where the plant could grow (NAIOP);

(1199) The proposal at N.J.A.C. 7:7A-9.5(a)2iii should read "... listed below at (a)2iii(1) ..." The statement to be submitted should be prepared and signed by a qualified botanist or ecologist to certify swamp pink will not be impacted (Wander Ecological Consultants, NAIOP);

(1200) Why is Swamp Pink endangered if it is found in all of the locations at N.J.A.C. 7:7A-9.5(a)2iii. (Joseph L. Lomax and Associates);

(1201) What makes someone qualified to prepare a statement that the project will not impact swamps pinks? And why single out swamp pinks from all of the other endangered species listed for the State in N.J.A.C. 7:5C-5.1 (Environmental Evaluation Group, Concrete and Aggregate Association);

(1202) It is unreasonable and unrealistic to have an applicant sign a statement certifying that Swamp Pink will not be affected by the proposed activities (N.J.A.C. 7:7A-9.5(a)2iii).

While it is important to protect Swamp Pink, the regulated public does not have access to documented habitat maps. Swamp Pink may not be readily observable, especially if the site investigation is conducted during a non-flowering season. The requirement should be removed from N.J.A.C. 7:7A-9.5 and inserted in N.J.A.C 7:7A-9.3 as a condition for all statewide general permits. Documented habitat maps could then be investigated during the application process, without putting unrealistic requirements on the applicant beforehand (Langan Engineering);

(1203) While we support the required certification regarding Swamp Pink we question why this additional certification is needed when N.J.A.C. 7:7A-9.3(b) already addresses the issue of impacts on threatened and endangered species (Cumberland County Environmental Health Task Force);

(1204) It is unreasonable and unrealistic to have an applicant sign a statement certifying that Swamp Pink will not be directly or indirectly affected by the proposed activities (N.J.A.C. 7:7A-9.5(a)2iii). The provisions of subchapter 17, "Administrative Penalties ..." create an unacceptable risk factor associated with indirect adverse impacts on Swamp pink or its habitat (Associated Executives of Mosquito Control Work in N.J.); and

(1205) The rule at N.J.A.C. 7:7A-9.5 should be clarified to indicate that any such certification is to the best of the applicant's knowledge and is based solely on the information which is available to and in possession of the applicant (New Jersey State Bar Association).

RESPONSE: The rule has been amended to include the most current listing of townships and the Department will publish notice in the New Jersey Register of any amendments to the list at N.J.A.C. 7:7A-9.5(a)2iii(1) based upon updated information and make such information available at its offices and through the Office of Administrative Law.

While the rule at N.J.A.C. 7:7A-9.3 does specify that activities authorized under Statewide general permits shall not impact threatened or endangered species, Swamp pink (*Helonias bullata*) has been singled out for special consideration because the species is globally endangered and New Jersey contains the majority of the remaining populations world-wide. This special status for New Jersey has been recognized by the federal government through a regulatory guidance letter issued by the ACOE on January 25, 1990. In addition, several previously unknown populations of swamp pink have been impacted by activities that could have been avoided if survey efforts had been undertaken. The Department has determined that this additional requirement is necessary to protect this species and to carry out the intent of the Act pursuant to N.J.S.A. 13:9B-2, Legislative findings and declarations.

The maps produced from the Department's data base are only a library for known locations of threatened and endangered species and do not include all locations. Therefore, the maps will not provide the information necessary for the Department or the applicant to make a conclusive determination of the presence or absence of Swamp pink on a particular property. In order to reduce the processing time involved with the Department's review of an application it is essential that the survey for Swamp pink be conducted before the application is submitted.

In establishing documented habitat for Swamp pink, the Department incorporates th actual habitat supporting the plants and additional habitat

surrounding the population necessary to preserve the associated vegetation community and wetland hydrological regime. An "indirect adverse impact" would be any action which alters the wetland hydrology or physical composition of the wetland community which contains the Swamp pink. This may include, but is not limited to, alterations of hydrology, modifications of the flood regime, deposition of silt or modification of the vegetation. In addition to the published notices in the New Jersey Register, the applicant can request a list of municipalities from the Office of Natural Lands Management, Natural Heritage Program.

The rule has been amended to include the proper citation, N.J.A.C. 7:7A-9.5(a)2iii(1). While the Department will not require that the individual making this certification (the applicant) is a certified botanist or ecologist, the individual who makes the determination regarding the presence or absence of Swamp pink must have the education and/or background that would allow him or her to be able to identify the species, recognize the published habitat requirements, and know the proper methods to be used as well as the appropriate time of the year to survey for the species. Swamp pink is evergreen and its basal rosette is identifiable at any time of the year. The applicant must certify that the proposed activity will not result in any direct or indirect adverse impacts to Swamp pink or its documented habitat.

The penalty provisions of subchapter 17 will be of no value if a population is destroyed. The rule as amended requires that the applicant sign a statement certifying that the proposed activities will not result in any direct or indirect impacts to the species or its habitat. This requirement will ensure that the applicant will determine if the species or its habitat are present, and that they will accept the responsibility for taking all necessary steps to avoid impacts to the species. Limiting this requirement to the applicant's best knowledge, based solely on information in his possession, would defeat the purpose of this provision to ensure the protection of the species.

(1206) COMMENT: The proposal should require submittal of information to document negative impacts. Each acre of wetlands lost represents loss and/or transfer of water storage to other areas. Measurement of the hydrological impact appears to be a practical and feasible requirement to provide the Department with at least some measure of the cumulative impacts wetland losses are causing. This information is critical for the required Department reevaluation of all Statewide general permits every five years (ANJEC, Great Swamp Watershed Association).

RESPONSE: The rule will not be amended to include the suggested requirement. The Department agrees that there is at present no definitive basis to document cumulative impacts to the hydrology of a watershed from the filling of wetlands under GPs. The Department also concurs that site specific data on storage capacity lost is more accurate for determining impacts to the watershed than a general estimate based on the total acreage filled. However, while the commenter's concept has merit, it is overly simplistic. There are no scientific methodologies available which account for the water storage capabilities of wetlands under various conditions. In addition, while methodologies exist that will predict surface water runoff for large sites, these methodologies ignore the greater storage capability of wetlands and therefore, do not produce the desired data. In addition, there are no methods available for smaller sites. As a result, the Department would be unable to effectively assess the cumulative impacts of smaller sites which represent the majority of construction activities. The commenter should note that impacts to hydrology is just one factor that will be assessed during the review of cumulative environmental impacts since wetlands provide many other values and functions.

(1207) COMMENT: We support the addition of the provision requiring a certification that *Helonias bullata* will not be negatively impacted by the proposed activity. However, there are omissions in the list. There are at least four known sites in Maurice River Township and Cape May County's list is also incomplete (Citizens United to Protect the Maurice River and Its Tributaries, Inc., Endangered and Nongame Species Advisory Committee).

RESPONSE: The rule has been amended to include the most current listing of municipalities as it exists in the Office of Natural Lands Management, Natural Heritage Program database.

(1208) COMMENT: The signed statement certifying that no direct or indirect impacts will befall Swamp Pink should not be confined to only the municipalities listed. Watersheds, in which Swamp Pink have been found, extend into adjacent municipalities, and the possibility exists for new populations to be found. Due to the fact that New Jersey represents the stronghold for this species, the Department in administering the Freshwater Wetlands Protection Act should in addition, request that projects within the possible distribution of *Helonias bullata* have a professional botanist investigate the wetlands of the site to determine the presence or absence of Swamp Pink (Najarian Associates).

RESPONSE: The Department has determined that the rule as adopted will provide sufficient protection for the species based on information and guidance received from the U.S. Fish and Wildlife Service. While the Department will not require that the individual making this certification is a certified botanist or ecologist, an individual who makes this certification must have the education and/or background that would allow him or her to be able to identify the species, recognize the published habitat requirements, and know the proper methods to be used as well as the appropriate time of the year to survey for the species. Swamp pink is ever-green and its basal rosette is identifiable at any time of the year.

(1209) COMMENT: The proposal at N.J.A.C. 7:7A-9.5(a)3 should specify that photographs are necessary only of the area proposed to be impacted under the Statewide General Permit for which application is being made (Wander Ecological Consultants).

RESPONSE: The rule has been amended to provide this clarification at N.J.A.C. 7:7A-9.5(a)3.

(1210) COMMENT: Hammonton is not by definition a township as listed in the proposal at N.J.A.C. 7:7A-9.5(a)5iii(1). The correct municipal designation is "Town of Hammontown" (Environmental Evaluation Group).

RESPONSE: The rule at N.J.A.C. 7:7A-9.5(a)2iii(1) has been clarified upon adoption to reflect this information.

(1211) COMMENT: The list of state threatened and endangered plants should be incorporated into the regulations to extend protection in the same manner that CAFRA uses the list (Citizens United to Protect the Maurice River and Its Tributaries, Inc.).

RESPONSE: The Department has been advised by the Attorney General's office that because of the absence of this list or any provisions for adding new lists in the Act at N.J.S.A. 13:9B-7(d), the State endangered plant list can not be included in the definition.

(1212) COMMENT: N.J.A.C. 7:7A-9.5(a) requires that an applicant provide LOI field data sheets and photographs of the property. Why is this information required if it was already submitted in conjunction with the LOI? (New Jersey State Bar Association).

RESPONSE: Since an LOI is not required prior to submittal for a GP, wetland field data sheets are required to provide the necessary data for review of the GP request. "LOI field data sheets" are not being requested. If an LOI was done prior to the GP application, then this information is not necessary.

(1213) COMMENT: We strongly support N.J.A.C. 7:7A-9.5(b), new notice requirements because they will provide increased protection of the wetlands (Middletown Township Environmental Commission, West Milford Environmental Commission, Greenwich Environmental Commission, Lacey Environmental Commission, ANJEC, Great Swamp Watershed Association, Public Advocate of New Jersey).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(1214) COMMENT: N.J.A.C. 7:7A-9.5(b) that requires notice for GPs is an added burden that is probably not necessary (New Jersey State Bar Association).

RESPONSE: The Department does not agree that this is a burdensome and unnecessary requirement. The Department's objective with the proposed language is to assure public participation in the permitting process. This objective is best accomplished through the notification process and by soliciting information from concerned citizens on specific applications. Therefore, the language will not deleted.

(1215) COMMENT: The rule at N.J.A.C. 7:7A-9.5(b) should be amended to eliminate the requirement for sending complete application packages to all municipal offices, since such application packages are considered junk mail. In addition the requirement to notify property owners within 200 feet of the wetlands boundary is unreasonable and expensive (Associated Executives of Mosquito Control Work in N.J.).

RESPONSE: By requiring that the applicant provide a complete copy of an application to the municipal clerk, the Department is providing a nearby location for interested parties to review an application. Based on the comments that the Department has received, not all clerks consider these applications "junk mail." The Department does not agree that this is an unreasonable and expensive requirement. The Department's objective with the proposed language is to assure public participation in the permitting process. This objective is best accomplished

through the notification process and by soliciting information from concerned citizens on specific applications. The cost involved with such notice is that for obtaining a list of surrounding property owners from the tax assessor and the cost associated with postage, both of which are nominal. The notification requirements for the wetlands permitting program is a legal notification consistent with the MLUL. Therefore, notice is required 200 feet from the property boundary.

(1216) COMMENT: We recommend that the Department extend the 15-day comment period to 30 days in the rule at N.J.A.C. 7:7A-9.5(b)3 (Public Advocate of New Jersey).

RESPONSE: The rule has been amended upon adoption at N.J.A.C. 7:7A-9.5(b)3 to state that comments will be accepted until the Department has reached its decision on an application.

(1217) COMMENT: Because the proposed paragraph of the notification letter regarding site inspection is inappropriate for any of the recipients except adjacent landowners, the rule should specify that the paragraph is required only in those notices. The notice should include a DEPE phone number for landowners to call for information. The paragraph beginning "The Department will notify your municipal . . ." is clearly directed specifically at the landowners to be notified, and is not appropriate for those notices sent to the environmental commission, planning board, and construction official (Wander Ecological Consultants).

RESPONSE: This letter will also serve to notify municipal and county officials that the Department may perform a site inspection within their jurisdiction and therefore the rule has not been amended. Since the application may not have been received by the Department at the time the notices are received by the concerned landowners, the applicant or the applicant's agent would be the best contacts for information.

(1218) COMMENT: Notice should be provided to environmental commissions and "any other public body with similar responsibilities" as stated under N.J.A.C. 7:7A-11.1(b)9 (Cumberland County Environmental Health Task Force).

RESPONSE: This rule at N.J.A.C. 7:7A-9.5(b) has been amended upon adoption to provide this clarification.

(1219) COMMENT: We support the flexible notice provisions for linear facilities at N.J.A.C. 7:7A-9.5(c). However, the requirement of display advertising creates unnecessary expense and may present legal issues (that is publishers may decline to run display materials but cannot reject legal advertising). Further, we suggest that the term "surface structure" be defined to exclude poles, overhead wires and similar structures (AES Cohansey Inc.).

RESPONSE: The Department's Coastal Permit Program rules require display advertisements, and to date have not experienced a problem, legal or otherwise, with this requirement; therefore, the rule will not be amended. The rule has been amended to clarify that structures includes pumping stations, treatment plants, power substations, grade separated interchanges and similar structures and does not include utility support structures or conveyance lines.

(1220) COMMENT: We support N.J.A.C. 7:7A-9.5(c) to change notice requirements for linear facilities (New Jersey State Bar Association, N.J. Builders Association).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(1221) COMMENT: The rule at N.J.A.C. 7:7A-9.5(c) should be clarified to define what a "surface structure related to a linear facility" is (New Jersey Department of Transportation, NAIOP).

RESPONSE: The rule has been clarified upon adoption to state that "surface structure" includes pumping stations, treatment plants, power substations, grade separated interchanges and similar structures and does not include utility support structures or conveyance lines.

(1222) COMMENT: The rule at N.J.A.C. 7:7A-9.5(c) should be modified to exempt recurring structures such as manholes or utility poles from the requirement of notice (NAIOP).

RESPONSE: The rule has been clarified to state that "surface structure" does not include utility support structures or conveyance lines but does include pumping stations, treatment plants, power substations, grade separated interchanges and similar structures. Therefore, manholes and utility lines does not include within the definition of "surface structure," and do not trigger the notice requirements.

(1223) COMMENT: It is unclear whether this noticing requirement (N.J.A.C. 7:7A-9.5(c)) affects all regulated activities which are part of linear facilities more than 0.5 miles in length or whether this refers only to the length of the regulated portion of the linear activity (Langan Engineering).

RESPONSE: This requirement refers to the entire length of a linear facility and not to the length of the regulated portion of the facility. The rule at N.J.A.C. 7:7A-9.5(c) has been amended to delete the reference to "regulated activity" and to state that, "if the proposed project involves a linear facility such as a pipeline or road of more than 0.5 mile . . ." for clarification.

(1224) COMMENT: The rule at N.J.A.C. 7:7A-9.5(c) should be modified to allow either newspaper notification or letter notification to adjacent land owners within 200 feet of the regulated activity, as a linear development may only be sited next to one or two property owners (JCP&L).

RESPONSE: The rule has not been amended as requested. This amendment was proposed to ensure that the appropriate adjacent landowners are notified of proposed regulated activities. It would seem to be a rare occurrence when a linear project of 0.5 miles in length or greater would only involve one or two adjacent landowners.

(1225) COMMENT: N.J.A.C. 7:7A-9.5(d) only provides two alternatives for reviewing an application: declare an application complete, or return it. There is no provision for requesting additional information. We request that the rule be modified to provide for requests for additional information and criteria for when an application will be returned vs. when it will be subject to a request for additional information (New Jersey State Bar Association, Langan Engineering, Wander Ecological Consultants, N.J. Builders Association).

RESPONSE: The Department, in practice, will request by telephone minor items needed to make an administratively complete application. However, to administer the freshwater wetlands program in a practical and efficient manner, the Department must retain the ability to return applications for which requested additional information is not supplied, and to return applications which are severely deficient. Note that a checklist describing deficient items is included with returned applications.

(1226) COMMENT: At N.J.A.C. 7:7A-9.5(e)4, the ability for public comment to dictate whether an individual permit application is required is unjustified (NAIOP, Mark H. Burlas, Sandoz Pharmaceuticals Corporation, Archer and Greiner, New Jersey State Bar Association, Hannoch Weisman, AES Cohansey Inc., N.J. Builders Association and form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp, Resources Services North, Inc.).

RESPONSE: The Department disagrees with the commenters' interpretation of the provision in question. Under N.J.A.C. 7:7A-9.5(e)4, public comment cannot dictate whether an Individual permit application is required; however, public comment can bring matters to the Department's attention which indicate that the application does not meet general permit criteria. The provision gives the Department the opportunity to review and confirm the information provided through public comment, and conclude that an Individual permit is required.

(1227) COMMENT: The Department should establish a procedure of acknowledging comments from the public at N.J.A.C. 7:7A-9.5(e)4 because these comments are invaluable (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The Department may in the future establish an administrative procedure which may include mailing a postcard to acknowledge the receipt of comments.

(1228) COMMENT: The provision at N.J.A.C. 7:7A-9.5(e)4 should be stricken. N.J.A.C. 7:7A-9.5(e)3 should be sufficient to cover the point. The DEPE should make this finding, not the public commentors (Langan Engineering, Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The rule will not be amended as suggested. While the Department agrees that N.J.A.C. 7:7A-9.5(e)3 is sufficient in practice, N.J.A.C. 7:7A-9.5(e)4 has been retained to make it clear to the regulated community and the public at large that the Department will consider public comment in determining whether an Individual permit is necessary.

(1229) COMMENT: Under the proposal at N.J.A.C. 7:7A-9.5(e)4, what kind of public comment could indicate that the application does not meet general permit criteria (Pennoni Associates, Inc.)?

RESPONSE: Members of the public can bring to the Department's attention information which was not contained in the application, or information which the applicant and the public may have viewed and presented differently. For example, the public commenter could be aware

of documented evidence of threatened or endangered species for the Department to review and evaluate before issuing its determination.

(1230) COMMENT: At N.J.A.C. 7:7A-9.5(e)4, this sentence should be either eliminated or rewritten to indicate that the public is invited to comment on applications but is required to substantiate any objections or reasons for a denial with proper documentation, data and background information (Consulting Engineers Council of New Jersey).

RESPONSE: This section has not been rewritten since the Department will substantiate any objections or reasons for denial and will make the final determination on whether a project qualifies for a GP authorization or requires an Individual permit.

N.J.A.C. 7:7A-9.6 Hearings and appeal

(1231) COMMENT: We support the inclusion of third party appeal rights at N.J.A.C. 7:7A-9.6. We recommend that DEPE broadly define "affected party" to include those persons or organizations that have strictly an environmental or aesthetic interest in a proposed project. We also recommend that DEPE clarify when it will grant a third party's request for an administrative hearing (Public Advocate of New Jersey, ANJEC, Upper Rockaway River Watershed Association, Borough Mountain Lakes Environmental Commission, Great Swamp Watershed Association).

RESPONSE: An affected party is one who has a statutory or constitutional right to an adjudicatory hearing. However, the public should be aware that the Department recently proposed a rule at N.J.A.C. 7:1-2 addressing appeals of permit decisions, in order to codify its procedures for appeals of the issuance and denial of permits by persons other than the permit applicant. This proposal was published in the November 4, 1991 New Jersey Rgister at 23 N.J.R. 3278(a).

(1232) COMMENT: The proposal at N.J.A.C. 7:7A-9.59.6 providing the opportunity to request administrative hearings on general permit decisions is an excellent proposal. Note that since N.J.A.C. 7:7A-12.7 allows 30 days for such a request to be filed, general permits should state that they do not become effective for 30 days, so that the applicant does not quickly undertake activities on the basis of a decision that may be reversed (Wander Ecological Consultants).

RESPONSE: The Department does not agree and the rule has not been amended as suggested. The opportunity for comment and challenge of a particular general permit is given during the proposal and adoption of the rule issuing a general permit. At that time the finding is made that the category of activities will cause only minimal adverse environmental impacts when performed separately and cumulatively. In addition, notice is given of an application for authorization under a general permit for a particular site. At this time concerned parties are given the opportunity for comment to provide input into the Department's decision. Finally, the rule at N.J.A.C. 7:7A-12.7, provides for a "stay" at the discretion of the Commissioner immediately upon request for a hearing, if warranted, based on the facts presented. In cases where a third party believes that their concerns were not addressed during the Department's review process, it is encumbant upon them to request a hearing and a stay immediately upon notification of the Department's decision.

N.J.A.C. 7:7A-9.7 Duration of permit authorizations

(1233) COMMENT: We object to the proposal to allow a Statewide general permit to be valid for five years. This contradicts the Federal regulatory guidance which requires Nationide permit renewal every two to three years (ANJEC).

RESPONSE: The Federal requirements for assumption at 40 CFR Part 233, 404 State Program Regulations, require that the State follow set procedures for the adoption of general permits and their implementing regulations. It does not require that the State adopt specific Nationwide permits from the ACOE program or their associated implementing regulations. The two-year expiration of Nationwide permit verifications is part of the implementing regulations for the Nationwide permit program and only applies to written Nationwide authorizations. The remainder of Nationwide authorizations are valid for up to five years. Since the State is not assuming the existing Nationwide permits, there is no requirement for Nationwide permits. Therefore, the Department believes that since Statewide general permits must be reviewed, modified or reissued every five years, the authorizations based on these permits should remain valid for a coinciding period of time. However, if the GP authorizing a particular activity is reissued without amendments, or with amendments expanding the authorized scope of activities, the authorization will remain effective for the authorized five-year term. Therefore, the rule at N.J.A.C. 7:7A-9.7(c) has been amended upon adoption to provide this clarification.

(1234) COMMENT: There is no logical reason why permit extensions (not re-application) should not be allowed (Amy S. Greene Environmental Consultants, Inc., N.J. Builders Association).

RESPONSE: The Act mandates at N.J.S.A. 13:9B-23e that Statewide general permits be reviewed and then either modified, reissued or revoked. Further, the Federal requirements for assumption at 40 CFR Part 233, 404 State Program Regulations, require at Part 233.1(d) that "any approved State Program shall, at all times, be conducted in accordance with the requirements of the [Federal] Act.... While States may impose more stringent requirements, they may not impose any less stringent requirements...." Therefore, at the end of this five-year time period, applicants must reapply in order to comply with the newly adopted general permits. However, if the GP authorizing a particular activity is reissued without amendments, or with amendments expanding the authorized scope of activities, the authorization will remain effective for the duration of the authorized five-year term. The Department will follow the same procedures used by the Federal government and will allow applicants with projects either under contract or under construction on the date of the expiration of the general permits to complete construction within one year from that date. Therefore, the rule at N.J.A.C. 7:7A-9.7(c) has been amended upon adoption to provide this clarification.

N.J.A.C. 7:7A-9.8 Cancellations, withdrawal, resubmission and amendment of applications

(1235) COMMENT: The provision at N.J.A.C. 7:7A-9.8(e) should be clarified to state that the Municipal Clerk shall receive copies of all amendments and notification of such filing shall be submitted to the same list as originally notified. As now phrased the applicant is not required to notify the surrounding landowners of the submission of an amended application (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rule has not been so amended. The rule at N.J.A.C. 7:7A-9.8(e) already addresses the commenter's concern, by requiring the applicant to distribute copies of amendments and amended information to the same persons to whom copies of the initial application were distributed. If adjacent landowners are concerned with proposed regulated activities on a project site, they can monitor the process by periodically contacting the Department or the municipal clerk's office since all updates to the application will be on file in both locations.

(1236) COMMENT: In the proposed rules at N.J.A.C. 7:7A-9.8(b), it is implied that a request for additional information may be made by DEPE, but this option is not allowed in N.J.A.C. 7:7A-9.5(d). Also, how can references be made to the "previously submitted application" if this application has been purged from the DEPE files (Amy S. Greene Environmental Consultants, Inc.)?

RESPONSE: The rule at N.J.A.C. 7:7A-9.5(d) refers to the items required to make an application "administratively" complete. Without these items, the application will not be entered into the Department's data base and the timeframe for review will not begin. The rule at N.J.A.C. 7:7A-9.8(b), however, refers to technical deficiencies discovered once an application has been accepted as administratively complete and is undergoing an in-depth review by the assigned review officer. In these cases, the review officer will request the required additional technical information in order to render a final decision on the issuance of the permit authorization.

(1237) COMMENT: The cancellation of a project at N.J.A.C. 7:7A-9.8(b)1 may be beyond an applicant's control and new application fees should not be required within one year as with denied or withdrawn applications (Environmental Evaluation Group, N.J. Builders Association).

RESPONSE: An applicant is always given the opportunity to document good cause for not submitting the required information, thereby avoiding cancellation of the application. If an applicant chooses not to respond to the Department's repeated request for information and the application is subsequently cancelled, the Department will retain the application fee to cover initial review and administrative costs. A new fee will be required upon reapplication.

(1238) COMMENT: We support this amendment providing for cancellation of permit applications (ANJEC, Great Swamp Watershed Association).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

Subchapter 10. Pre-Application Conferences

(1239) COMMENT: The Department should provide for fact-finding meetings in this section. Such a provision already exists for Stream Encroachment permits and is beneficial to the Department, the applicant, and the public because concerns can be addressed at the beginning of the review process (ANJEC, Great Swamp Watershed Association).

RESPONSE: The Department will not add fact-finding meetings in this section because they would be an unnecessary expenditure of limited resources. The rules as adopted herein have significantly expanded the opportunity for public comment and input into the decision making process by increasing notice requirements and the opportunity for public hearings. These are sufficient to facilitate access to decision makers and to make the process open.

N.J.A.C. 7:7A-10.1 Purpose

(1240) COMMENT: We support the change which encourages a joint pre-application conference under the jurisdiction of the DEPE (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

N.J.A.C. 7:7A-10.2 Request for a pre-application conference

(1241) COMMENT: We support the deletion of the requirement for an applicant to obtain an LOI prior to requesting a pre-application conference (NJ Recreation and Parks Association).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

N.J.A.C. 7:7A-10.3 Discussion of information requirements

(1242) COMMENT: Have N.J.A.C. 7:7A-10.3 and 10.4 been deleted (Enviro Resource, Inc., Amy S. Greene Environmental Consultants, Inc., N.J. Builders Association)?

RESPONSE: N.J.A.C. 7:7A-10.3 and 10.4 have not been deleted. The Department has not proposed any changes to these sections.

Subchapter 11. Application Procedure

(1243) COMMENT: The Department should clarify which local agencies should receive notice and whether the limitation for notice is 150 feet or 200 feet from the property line (Hannoch Weisman, AES Cohansey Inc.).

RESPONSE: The rule at N.J.A.C. 7:7A-9.1(b)9 clearly states that an applicant for an Individual permit shall notify the "clerk, environmental commission or any other public body with similar responsibilities, and planning board of the municipality in which the proposed regulated activity will occur; the planning board, environmental commission and county mosquito control agency of the county in which the proposed regulated activity will occur; landowners within 200 feet of the property or properties on which the proposed regulated activity will occur (applicant shall also provide a list of all landowners within 200 feet), and all persons as identified by the Department who requested to be notified. . . ."

N.J.A.C. 7:7A-11.1 Application contents for Individual Freshwater Wetlands and Open Water Fill Permits, and Individual Water Quality Certificates

(1244) COMMENT: The rules in this subchapter should be amended to allow a case by case adjustment of permit application requirements for public park and recreation projects to more closely reflect the scope of the proposed activities, and to relieve the taxpayer of unnecessary financial burdens (NJ Recreation and Parks Association).

RESPONSE: While the Department acknowledges that there are many categories of public interest projects, all of the materials required under the rule are necessary to enable the Department to review the application in the manner required by the statute and therefore the rule has not been amended as suggested.

(1245) COMMENT: If the Department intends that these application procedures also apply to applications for Stream Encroachment permits the title of N.J.A.C. 7:7A-11.1 should be amplified to include "Stream Encroachment". In addition the procedures must be at least as stringent as those found at N.J.A.C. 7:13-1.1 (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: This rule in no way applies to the review of Stream Encroachment applications. The Department merely suggests that an applicant may wish to apply for all permits from the Element simultaneously with freshwater wetlands permits to reduce review time.

(1246) COMMENT: At N.J.A.C. 7:7A-11.1(a), the proposed issuance of joint permits for projects requiring more than one Division permit is an excellent step towards permit coordination and project review. This joint issuance will help applicants and the Department decide on project compliance with all Division programs at one time instead of separate permit applications being reviewed and approved at different times (Paulus, Sokolowski and Sartor, Inc.).

RESPONSE: The Department acknowledges this comment in support of the adoption.

(1247) COMMENT: The rule at N.J.A.C. 7:7A-11.1(a) should be amended to include the following language, "The DEPE shall be responsible to advise the applicant of the permits required." (N.J. Society of Professional Engineers).

RESPONSE: The Department disagrees and the suggested language will not be included in the rule. While the Department endeavors to inform the applicant at every opportunity of the need for various permits, it remains the applicant's responsibility to comply with all laws, whether State, Federal, municipal, or county.

(1248) COMMENT: The proposal at N.J.A.C. 7:7A-11.1(b)8 conflicts with N.J.A.C. 7:7A-8.3(a)5 which requires a full quad sheet. We agree with the wording found here and the same should be used for N.J.A.C. 7:7A-8.3(a)5 (Environmental Evaluation Group).

RESPONSE: The language at N.J.A.C. 7:7A-8.3(a)5 has been amended upon rule adoption to be consistent with the language found at N.J.A.C. 7:7A-11.1(b)8.

(1249) COMMENT: The proposal at N.J.A.C. 7:7A-11.1(b)9iv should specify that the drawing may be 8.5 x 11 inches, so that full size drawings do not have to be supplied to all parties. Although the required notice informs the recipient that a complete copy of the application can be viewed at the municipal clerk's office, there is no specific requirement that the list of application contents include verification of delivery of such a package to the municipal clerk (Wander Ecological Consultants).

RESPONSE: Since this requirement is simply to supply the person to be notified with a plan showing the location of the site, the rule at N.J.A.C. 7:7A-11.1(b)9iv has been amended to specify that a drawing may be 8.5 x 11 inches. In addition, the language at N.J.A.C. 7:7A-11.1(b)9 has been clarified to state that a complete application package must be filed with the municipal clerk's office.

(1250) COMMENT: The language at N.J.A.C. 7:7A-11.1(b)1 implies that the Department intends not to charge an additional fee for Stream Encroachment applications that are submitted simultaneously with wetlands permits. Additional fees should be required to allow adequate review (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: As stated previously, this rule does not apply to the review of Stream Encroachment applications. Review fees for Stream Encroachment permits remain unchanged.

(1251) COMMENT: The language at N.J.A.C. 7:7A-11.1(b)1 should be modified to read "all regulated activities which the applicant. . ." (NAIOP).

RESPONSE: The language will not be amended as suggested. Since the review of an Individual permit includes an alternatives analysis, it is necessary for the Department to review all activities that are part of the project in order to comprehensively evaluate the alternatives available to the applicant.

(1252) COMMENT: N.J.A.C. 7:7A-11.1(b)9 should be clarified to say that the Department will provide a list of additional people to be notified, prior to application (New Jersey State Bar Association, Hannoch Weisman, AES Cohansey Inc.).

RESPONSE: The Department agrees with the commenter's concern, and has revised the rule to provide that the Department will furnish the necessary list upon the applicant's request.

(1253) COMMENT: At N.J.A.C. 7:7A-11.1(b)9 we support the addition of "any other public body with similar responsibilities" (Cumberland County Environmental Health Task Force).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(1254) COMMENT: At N.J.A.C. 7:7A-11.1(b)9, we recommend the deletion of the phrase, "any other public body with similar responsibilities" because it opens applications to procedural challenges when a municipality uses a substitute body in place of an environmental commission. Instead the rule should simply delete the phrase, "if any" (NAIOP).

RESPONSE: The Department does not agree and the phrase has been adopted. This language was added specifically to recognize that some municipalities designate agencies other than those created pursuant to the Environmental Commission enabling legislation, N.J.S.A. 40:56A,

to review issues potentially affecting the environment of a municipality. The Department does not want to exclude these agencies from the opportunity to review and comment on an Individual permit application.

(1255) COMMENT: It is unreasonable to supply the plan to all persons notified as proposed in N.J.A.C. 7:7A-11.1(b)9iv. In subparagraph (b)9v, it is not up to third parties to determine the impacts of the activity (Amy S. Greene Environmental Consultants, Inc., N.J. Builders Association)

RESPONSE: The Department does not agree that this requirement is "unreasonable" since the requirement is simply to supply the person to be notified with a plan showing the location of the site. In addition, the rule at N.J.A.C. 7:7A-11.1(b)9iv has been amended to specify that a drawing may be 8.5 x 11 inches. This information is necessary to inform the recipient of a notice where the property requiring a permit is in relation to his or her own property. Further, "third parties" may be in a good position to predict and evaluate potential impacts from a specific activity on their own properties and on the area as a whole since they live there and have experienced changes from other development activities over time.

(1256) COMMENT: We recommend the deletion of the requirement of building elevations to be supplied to adjacent property owners at N.J.A.C. 7:7A-11.1(b)9iv (NAIOP).

RESPONSE: There is no requirement at N.J.A.C. 7:7A-11.1(b)9iv to supply "building elevations" to adjacent property owners. The requirement is simply to prvide both a plan and elevational drawing showing site location.

(1257) COMMENT: We recommend the deletion of the requirements at N.J.A.C. 7:7A-11.1(b)9v which leave an applicant open to a procedural challenge. Any information that must be in the notice should be specified (NAIOP).

RESPONSE: The provision has been amended so that it is clear that it is not intended to invite procedural challenges. Unlike applications for authorizations under subchapter 9, General permits, each Individual permit application is unique. The applcant, rather than the Department, is in a better position to determine what additional information would be necessary to evaluate the likely impact of the proposed activity. Therefore, the provision has not been further amended as suggested.

(1258) COMMENT: At N.J.A.C. 7:7A-11.1(b)9vi, the notice should require a statement of a listing of other permits that are expected to be issued in a joint permit (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The notice will not be amended to require a list of other permits since this notice is specifically for an Individual permit application. In those cases where this notice is intended by the applicant to meet the notice requirements for more than one type of permit, the applicant shall include all the permits to be requested in the same notice.

(1259) COMMENT: N.J.A.C. 7:7A-11.1(b)10 should be modified to include the requirement that notice be made in an official newspaper utilized by the municipality for legal notice and circulated in both the municipality and county where the activity is proposed (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rule has been amended as suggested to require that a display advertisement be placed in the official newspaper for legal notice of the municipality in which the project is proposed.

(1260) COMMENT: We object to the requirement at N.J.A.C. 7:7A-11.1(b)10 for a display advertisement. What justification does the DEPE make for this departure from previous legal notice advertising requirements (NAIOP)?

RESPONSE: The Department, in consolidating its application requirements, is adopting the standards for notice from the Coastal Permit Program rules for applications for CAFRA permits. In addition, the Department believes that display advertisements provide more effective notice than legal notices.

(1261) COMMENT: The requirement for the 100-year flood hazard delineation at N.J.A.C. 7:7A-11.1(c)2 clearly goes beyond the legislative scope of the Act (NAIOP).

RESPONSE: The Department does not agree. The review of an Individual permit includes an alternatives analysis. It is necessary for the Department to review all activities and all potential environmental impacts of a project in order to comprehensively evaluate the alternatives provided by the applicant and to be assured that a proposed alternative would "not have other significant adverse environmental consequences, that is, it shall not merely substitute other significant environmental consequences for those attendant on the original proposal" (N.J.A.C. 7:7A-3.2(a)3 and 3.3(a)3).

(1262) COMMENT: The proposed rule at N.J.A.C. 7:7A-11.1(c)3 which would eliminate an ACOE jurisdictional letter (JD) as a source of information should not be adopted. A field verified ACOE JD should still be accepted as a valid wetland delineation (New Jersey State Bar Association).

RESPONSE: The Department disagrees and the deletion of this subsection has been adopted. The Department in reviewing an application for an Individual permit must be assured that all impacts to wetlands, open waters, and transition areas are being accurately presented. Based on the uncertainties of which delineation methodologies are to be used by the ACOE at this time, the Department shall make its own onsite determination of wetland boundaries.

(1263) COMMENT: Does the deletion of the ACOE at N.J.A.C. 7:7A-11.1(c)3 mean that current applications are subject to the ACOE's letter of interpretation or to the DEPE's (Pureland Industrial Complex)?

RESPONSE: If an applicant is claiming that a project is exempt from the Act pursuant to N.J.A.C. 7:7A-2.7(d) or 2.7(g) (exemptions pursuant to municipal approvals or ACOE Nationwide permits respectively), the project is subject to the Federal regulations as implemented by the ACOE. All other projects are subject to the requirements of the Act and would therefore require an LOI from the Department.

Subchapter 12. Review of Applications

N.J.A.C. 7:7A-12.1 Initial Department action for Individual Freshwater Wetlands and Open Water Fill Permits, and Individual Water Quality Certificates

(1264) COMMENT: When does the State assume the 404 program (Pureland Industrial Complex)?

RESPONSE: The State will assume the 404 program after an application is submitted, public hearings are held and the EPA approves the application for assumption.

(1265) COMMENT: Returning an application for technical deficiencies or minor technicalities is an inefficient and bureaucratic method of processing (Pureland Industrial Complex).

RESPONSE: The Department, in practice, will request by telephone minor items needed to make an administratively complete application. However, to administer the program in a practical and efficient manner, the Department must retain the ability to return applications for which requested additional information is not supplied, and to return applications so severely deficient that no effective processing of the application is possible.

(1266) COMMENT: We object to the requirement for new notices if an application is not refiled within 60 days in cases where the required information will take longer than 60 days to prepare. An exception to the notice provision should be made in this case (NAIOP).

RESPONSE: The Department has not made the suggested exception. Applicants for Individual permits should request pre-application meetings prior to application submittal and should be aware of all application requirements and the time required to gather the necessary information prior to submittal. It will frustrate the intent of the notice provisions if an interested party receives notice but is unable to review the application at the time of notification or within a reasonable period of time (within 60 days) of being notified. Such a long delay would, in practice, result in many interested parties not knowing when or how to exercise their rights to participate in the permitting process.

N.J.A.C. 7:7A-12.2 Draft permits

(1267) COMMENT: We support the deletion of the section pertaining to draft permits (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

N.J.A.C. 7:7A-12.2 USEPA review

(1268) COMMENT: The statement at deleted N.J.A.C. 7:7A-12.2(b) which states that the Department shall consider and give great weight to comments provided by the EPA should not have been eliminated (CAREZ).

RESPONSE: The Department deleted this statement due to its vague nature. The rules now clearly define the coordinated review process with EPA and DEPE. In particular, at N.J.A.C. 7:7A-12.2(i), EPA retains its veto power.

(1269) COMMENT: The term major discharge is defined in the definition section but the only time that it is used is in N.J.A.C. 7:7A-12.2.

Accordingly, the term should be removed and placed here (New Jersey State Bar Association).

RESPONSE: Because of the length of this definition, it is more appropriate that it remain in the definition section N.J.A.C. 7:7A-1.4.

(1270) COMMENT: If all of the regulated activities listed at N.J.A.C. 7:7A-12.2(b) require EPA review, why not just follow EPA review for all regulated activities (N.J. Society of Professional Engineers)?

RESPONSE: EPA will be concentrating its review on "major discharges" in New Jersey, which is a small subset of all regulated activities statewide.

(1271) COMMENT: In the rule at N.J.A.C. 7:7A-12.2(b), the term "proximity" should be clarified. Does it refer to 10 feet, 100 feet, or 1 mile (NAIOP)?

RESPONSE: The rule has not been amended to include a definition of "proximity." This determination will be made on a case by case basis because it is dependent on such variables as the type of project or discharge, whether the intake is upstream or downstream, etc.

N.J.A.C. 7:7A-12.3 Soliciting public comment

(1272) COMMENT: This section should be modified to include General Permits (Franklyn Isaacson).

RESPONSE: The provision at N.J.A.C. 7:7A-9.5(b) already provides opportunity for public comment on GPs, therefore this change is unnecessary.

(1273) COMMENT: The proposed language concerning a 30-day waiting period for public comments following publication in the DEPE Bulletin at N.J.A.C. 7:7A-12.3(a) should be deleted. Following all other potential notices required throughout the rules as well as satisfying the notice requirements of the MLUL, this additional wait is unwarranted. By including this language the Department is failing to recognize the time value of the investments made in these projects (NAIOP).

RESPONSE: There is nothing proposed in the rule about a "30-day waiting period." Rather, the rule states that upon receipt of an application, the Department shall provide notice in the DEPE Bulletin and afford the public 30 days to submit comments. The Department believes that this is an important public notification because a regulated activity which requires an Individual permit, by definition, has more than de-minimus impacts. Further this notice will not result in the delay of a permit decision, since there is the need in some situations for the EPA to be involved in the review of such permits, and because the Department must conduct an extensive review in order to determine whether or not to approve an Individual permit. Therefore, this 30-day period will occur concurrently with the review necessary under this subsection.

N.J.A.C. 7:7A-12.4 Hearings on applications

(1274) COMMENT: The rule at N.J.A.C. 7:7A-12.4(a) should be modified to include the following language "... at the hearing, the relevance of the issues to the matter at hand and whether these issues have been raised at the other local, regional or State hearings on this application". (NAIOP)

RESPONSE: The Department has not amended the rule to include the suggested language since it is of no relevance to the Department whether or not the issues to be raised at a hearing have already been raised at other hearings which did not include the Department. Further, the Department will make a decision, based on the information submitted, whether the issues raised are relevant and whether or not to grant a hearing on a particular application.

N.J.A.C. 7:7A-12.5 Final decisions

(1275) COMMENT: The proposal at N.J.A.C. 7:7A-12.5(c) should be amended to include the following language at the end of the section, "Unless the permittee has appealed particular conditions of that permit" (New Jersey State Bar Association).

RESPONSE: The language has not been amended as suggested since a permit will not be valid unless the applicant has accepted the permit including all conditions. If the applicant appeals any aspect of the permit, then the permit is not valid until the appeal is resolved. The appeal is resolved and regulated activities undertaken thereunder, would be permitted and in violation of the Act.

(1276) COMMENT: The additional language at N.J.A.C. 7:7A-12.5(c) should be deleted because it would require that a permittee accept even ultra vires or other illegal permit conditions in order to move forward with any aspect of a permitted project (NAIOP).

RESPONSE: The Department disagrees and this provision has been adopted as proposed. Permit conditions are a part of the issued permit and therefore, if an applicant believes that conditions are ultra vires or illegal they have the option to appeal pursuant to N.J.A.C. 7:7A-12.7.

N.J.A.C. 7:7A-12.6 Cancellation, withdrawal, resubmission and amendment of applications

(1277) COMMENT: We support the provision that allows the Department to cancel applications (ANJEC).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(1278) COMMENT: In the rule at N.J.A.C. 7:7A-12.6(b) the DEPE should reserve the ability to grant additional time for the receipt of additional information if the applicant demonstrates a reasonable need for the additional time (NAIOP).

RESPONSE: The rule as adopted provides for the Department to grant additional time under the circumstances described by the commenter.

(1279) COMMENT: The rule at N.J.A.C. 7:7A-12.6(c) should define the term significant in reference to fee refunds (New Jersey State Bar Association).

RESPONSE: The determination of when a "significant portion of the review has been completed" must be made on case-by-case basis as it is a function of the requirements and submittals received for the specific Individual permit application being reviewed. The term "significant" connotes "of consequence."

N.J.A.C. 7:7A-12.7 Hearings and appeal of permit decisions

(1280) COMMENT: The language at N.J.A.C. 7:7A-12.7(c)1 should not be changed. In all cases the Commissioner should be referring requests for hearing to the Office of Administrative Law (OAL). What happens in cases where the Commissioner does not refer the request to the OAL (Franklyn Isaacson)?

RESPONSE: The rule at N.J.A.C. 7:7A-12.7(c)1 has not been amended to delete the proposed change upon adoption. N.J.A.C. 1:1-3.2 provides in relevant parts that "[t]he Office of Administrative Law shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head ..." Where, for example there are no contested issues of fact, there may be no need for a hearing before the Office of Administrative Law. Where a request for a hearing is not referred to the Office of Administrative Law, the decision to issue or deny is a final decision which may be heard by the Appellate Division of the Superior Court of New Jersey. See also response to Comment 1281.

(1281) COMMENT: The proposal at N.J.A.C. 7:7A-12.7 should be a separate subchapter, and should be reworded so that it can apply to exemptions, letters of interpretation and transition area permits as well as to general and individual permits. Subsection (a) should be reworded "An applicant for an exemption, letter of interpretation, transition area permit, general permit, individual permit or open water fill permit or other affected or interested party, may request of the Commissioner an administrative hearing on any decision made by the Department on these matters pursuant to the Act and the chapter." The rule should require the Commissioner to grant a hearing for any nontrivial request (Wander Ecological Services).

RESPONSE: The Department disagrees that this subsection should be a separate subchapter. The rule at N.J.A.C. 7:7A-12.7(a) has been amended upon adoption to make reference to an applicant "who receives a final agency action." N.J.A.C. 1:1-3.3 provides in relevant parts that "[t]he Office of Administrative Law shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head ..." Where the record is fully developed there may be no need for a hearing before the Office of Administrative Law. Where a request for a hearing is not referred to the Office of Administrative Law, the decision to issue or deny is a final decision which may be heard by the Appellate Division of the Superior Court of New Jersey. The public should be aware that the Department has proposed a "third party appeals" rule (N.J.A.C. 7:1-2) which will address expanded provisions for hearing requests. This proposal was published in the New Jersey Register at 23 N.J.R. 3278(a) (November 4, 1991). These rules address procedures for appeals of the issuance and denial of permits by persons other than the permit applicant. If these rules are adopted and there is a conflict between them and any other provision of Title 7, the new rules will control, unless any applicable statute requires otherwise.

(1282) COMMENT: The Department should provide a definition of affected parties which should include the general public (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: An affected party is one who has a statutory or constitutional right to an adjudicatory hearing. However, the public should be aware that the Department has recently proposed a rule at N.J.A.C. 7:1-2 addressing appeals of permit decisions, in order to codify its procedures for appeals of the issuance and denial of permits by persons other than the permit applicant. This proposal was published in the New Jersey Register at 23 N.J.R. 3278(a) (November 4, 1991). These rules address procedures for appeals of the issuance and denial of permits by persons other than the permit applicant. If these rules are adopted and there is a conflict between them and any other provision of Title 7, the new rules will control, unless any applicable statute requires otherwise.

(1283) COMMENT: Under no circumstances should the decision making agency be authorized to make decisions on whether adjudicatory hearings should be granted or not. The appropriate office in DEPE for reviewing hearing requests is the Commissioner's office (New Jersey State Bar Association).

RESPONSE: It is unclear what change the commenter is suggesting since the rule at N.J.A.C. 7:7A-12.7 clearly states that "an applicant ... or other affected party may request of the Commissioner an administrative hearing ..." The rule at N.J.A.C. 7:7A-12.7 has been amended upon adoption to state that requests for administrative hearing should be submitted to:

Office of Legal Affairs
ATTENTION: Adjudicatory Hearing Requests
Department of Environmental Protecton and Energy
401 East State Street
CN 402
Trenton, New Jersey 08625-0402

(1284) COMMENT: The rule at N.J.A.C. 7:7A-12.7 should be amended to include time frames for the administrative hearing procedure (Pureland Industrial Complex).

RESPONSE: These procedures are governed by the Administrative Practice Act, N.J.S.A. 52:14B-1 et seq. and the Uniform Administrative Procedure Rules, N.J.A.C. 1.1.

(1285) COMMENT: The proposed language at N.J.A.C. 7:7A-12.7(a), staying a permit based on an affected party appeal, should be deleted. The party that can demonstrate both the requisite standing and that there will be irreparable harm without a stay already has the legal right to seek a stay (NAIOP).

RESPONSE: While the Department does not dispute the commenter's statement, the additional language has been adopted to clearly provide notice of the potential for such action by the Commissioner.

Subchapter 13. Permit contents

N.J.A.C. 7:7A-13.1 Conditions applicable to all permits

(1286) COMMENT: The rule should be amended to include a standard condition requiring all permittees to post a copy of the permit at the project site (US Fish and Wildlife Service).

RESPONSE: This requirement is already a part of the rule at N.J.A.C. 7:7A-13.1(a)17.

(1287) COMMENT: In the rule proposal at N.J.A.C. 7:7A-13.1(a)4, was it the intent of the New Jersey Freshwater Wetlands Protection Act to require mitigation for authorized GP activities (Resource Services North, Inc.)?

RESPONSE: It was the intent of the Freshwater Wetlands Protection Act to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance. The Department may find that to achieve this goal it is necessary to condition GPs with the requirement for mitigation or to rescind these permits entirely.

N.J.A.C. 7:7A-13.3 Duration of permits

(1288) COMMENT: All permits should be valid for only two years with no opportunity for extension. At this time a person might obtain a permit good for five years solely to use the "cumulative effects" rule to block others from obtaining General permits (Franklyn Isaacson).

RESPONSE: The Department disagrees and the rule has not been amended as suggested. Experience with several permit programs has shown that two years is often an insufficient amount of time for an applicant to complete permitted activities. This section applies only to Individual permits. The Department does not understand the connection concerning cumulative impacts that the commenter is making between this provision and those concerning Statewide general permits.

N.J.A.C. 7:7A-13.9 Minor modification of permits

(1289) COMMENT: We object to the deletion of the language at N.J.A.C. 7:7A-13.9(b)4 which would allow the extension of a permit as a minor modification. What is the basis for this amendment (NAIOP)?

RESPONSE: The deleted language was meaningless since it merely extended the term of a permit through the original five year effective period and did not extend it beyond this limit.

Subhchapter 14. Mitigation

(1290) COMMENT: I strongly question the value and wisdom of mitigation. Creating wetlands from prime farmland at a ratio of 2:1 will eliminate the remaining food and fiber producing areas of the state. America did not become a great nation because of its valuable swamps, bogs and marshes. It is great because of its enormous food producing capacity. During wet seasons or years of excessive rainfall, as we had in 1989 and 1990, there were severe outbreaks of mosquitos through the State. Severe outbreaks of encephalitis, malaria or other diseases that threaten the public health and safety are possible. How can communities protect its residents against these kinds of epidemics brought about by State and Federal regulations concerned with protecting and enhancing wetlands (Wendell Kirkham)?

RESPONSE: The Act at N.J.S.A. 13:9B-13b includes creation as a viable means of mitigation. America could never reach its present food producing capability without its existing surface and ground water resources, including the vast complex of headwaters, swamps, bogs and marshes. Without these natural amenities, we lose the ability to maintain and replenish the water resources of the nation including both surface and groundwaters. Communities can protect their residents by discouraging development in or immediately adjacent to wetland areas and by asking developers to site their detention basins in an area that will have minimal impact to those future home buyers who will reside nearby.

(1291) COMMENT: The proposal communicates a false message to the public that mitigation is a viable solution for remedying the negative impacts caused by wetlands destruction (Bedminster Environmental Commission, Morris County Planning Borad).

RESPONSE: The Act at N.J.S.A. 13:9B-13b includes creation as a viable means of mitigation. The Department disagrees with the commenter's assertions regarding mitigation. Mitigation is only required in those cases where the Department has already decided to issue a permit. In these cases there are two options: require mitigation for impacts that will occur as a result of a permit; or allow the impacts to occur without mitigation. Therefore, in those situations where a permit will be issued, mitigation is the last opportunity to attempt to recoup the lost values and functions of the wetlands to be destroyed or altered.

(1292) COMMENT: Mitigation attempts are likely to effect double damage to the environment: destruction of wetlands with a permit and destruction of the uplands targeted for mitigation purposes (Bedminster Environmental Commission, Morris County Planning Board).

RESPONSE: The Department disagrees. The Act at N.J.S.A. 13:9B-13b includes creation as a viable means of mitigation. If mitigation sites are properly chosen to avoid destruction of other valuable upland habitats, and with adequate follow-up to assure that a mitigation plan has been carried out as designed, mitigation does afford the opportunity to replace some of the values and functions lost in the filling of a wetland or water.

(1293) COMMENT: The success rate for inland wetlands creation is dubious at best. Because this concept is relatively new, there is not much data available. Thus the Department is providing the development community with a mitigation option that is of questionable value (Bedminster Environmental Commission, Morris County Planning Board, Somerset County Mosquito Extermination Commission).

RESPONSE: Mitigation is required only in those cases where the Department has already decided to issue a permit. In these cases there are two options: require mitigation for impacts that will occur as a result of a permit; or allow the impacts to occur without mitigation. If mitigation sites are properly chosen, and with adequate follow-up to assure that a mitigation plan has been carried out as designed, mitigation does afford the opportunity to replace some of the values and functions lost in the filling of a wetland or water. As more of these sites are created, the Department will have the opportunity to review the problems and successes associated with these projects which will then provide better information on which to base future mitigation projects.

(1294) COMMENT: Why is mitigation required for a WQC (Pureland Industrial Complex)?

RESPONSE: Based on the review of the comments received and on legal advice received from the Attorney General's office, subchapter 4 has not been adopted and will be reproposed with substantive changes in the future.

(1295) COMMENT: The commenter is in favor of requiring mitigation for the disturbance of wetlands. However, it is clear from the lack of success of many of the projects approved by the Department, that mitigation is only marginally successful at replacing lost wetlands values and functions. The Department needs to develop better guidelines for use in designing, implementing and monitoring mitigation projects. In addition, the Department should consider a program to certify individuals to design, implement and monitor mitigation projects. The Department should consider the use of Mitigation Banking as a practicable alternative to onsite mitigation. The creation/enhancement and management of wetlands on approved mitigation banking sites should result in a better replacement of lost wetlands values and functions. Perhaps the Department should require two years monitoring and a donation of money for long term monitoring of these systems (Enviro Resources, Inc.).

RESPONSE: The Department is in the process of visiting all previously approved mitigation sites to collect data on the success of these projects. This data will facilitate the development of better guidelines for developing future projects. The Department does not foresee creating a program to certify individuals to design, implement and monitor mitigation projects since these activities can be undertaken by individuals already in the wetlands consulting business, so long as they are provided with the necessary guidelines. In addition, the Department is involved in developing a mitigation banking program to be able to make better use of this provision of the Act.

(1296) COMMENT: As proposed, the rules on mitigation deal only with mitigating wetland damage caused by a permitted activity. We recommend that the DEPE broaden its mitigation requirement to require applicants to alter their project at the outset to minimize the alteration or loss of wetlands resources (Public Advocate of New Jersey).

RESPONSE: The Department has addressed this concern for minimization of impacts and alternatives analyses in subchapter 3, General Standards for Granting Individual Freshwater Wetlands and Open Water Fill Permits.

(1297) COMMENT: Grandfathering provisions need to be added to specify which projects authorized under GPs will be subject to mitigation requirements (Langan Engineering).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement for certain GPs upon adoption. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will rescind the permit.

N.J.A.C. 7:7A-14.1 Mitigation goals

(1298) COMMENT: Permit conditons need to clearly define what wetland values may be lost; acknowledge the variabilty among different wetland systems; or identify the function sor habitats most in need of replacement or restoration. The failure of permit conditions to state specific restoration objectives or provide sufficient technical detail about restoration design makes it difficult to develop successful evaluation criteria (Morris County Planning Board).

RESPONSE: When requiring mitigation as a condition of an Individual permit, the applicant is required to submit plans and a written description of the mitigation work to be completed regardless of whether mitigation entails restoration of a site, or creation of a new wetland. The extensive requirements at N.J.A.C. 7:7A-14.4 detailing the information that must be supplied by the applicant to the Department when proposing to do wetlands creation are designed to assess the functions and values of the wetlands being lost and those being proposed for creation. The information that the Department requires facilitates the Department determinations as to the habitats which must be replaced as a result of a permit approval.

(1299) COMMENT: We oppose the amendments which now allow mitigation which was formally restricted to degraded wetlands (Save Our Swamp).

RESPONSE: It is unclear to what amendments the commenter is referring. There are no adopted amendments which allow mitigation where it was formally restricted to cases involving degraded wetlands.

(1300) COMMENT: The proposed regulations seek to treat open waters in much the same way as wetlands by imposing stringent mitigation requirements on projects that affect state open waters. There is no distinction in the type or amount of mitigation required to compensate for activities in wetlands versus activities in open waters. Hence normally dry, intermittent streams in uplands may have to be replaced at 2:1 by new vegetated wetlands with an associated transition area. This appears to be excessive. The DEPE should clarify these requirements and provide a rationale (DuPont).

RESPONSE: In order to assume the 404 program, the Freshwater Wetlands Protection Act rules must be at least as stringent as the Federal program. The 404(b)1 guidelines at 40 CFR 230.75, Actions affecting plant and animal populations, (d) states that, "habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat." Since these guidelines apply to all waters of the U.S., which include state open waters, these regulations must reflect this requirement. However, the definition of State open water encompasses a wide variety of feaures. Therefore, the Department will have to evaluate each specific case in order to determine the appropriate form of mitigation. For example, the filling of a pond or lake may necessitate the creation of a pond or lake, while the recreation of an intermittent stream bed as mitigation for the filling of an intermittent stream may not be desirable. The extensive requirements at N.J.A.C. 7:7A-14.4 detailing the information that must be supplied by the applicant to the Department when proposing to do wetlands or waters creation are designed to assess the functions and values of the wetlands or waters being lost and those being proposed for creation. The information that the Department requires serves to allow the Department to determine the habitats which must be replaced as a result of a permit approval.

(1301) COMMENT: The government agencies involved in managing and regulating natural resources need to identify restoration goals which state the habitats and functions deemed to be important within each eco-region. This will result in improved project coordination within an eco-region, and also allow for identification of the cumulative effects of piecemeal alterations in the region. To this end, we recommend greater coordiantion with the U.S. Fish and Wildlife Service (Morris County Planning Board).

RESPONSE: The Department agrees with the concept of establishing goals for wetland protection. The Department's rules to implement the Act are just one mechanism to effect protection of the State's natural resources. The Department is the current recipient of a Federal Wetland Conservation Planning grant which will allow the Department to formulate many non-regulatory tools for wetland protection as well as to more effectively guide resource management efforts of state, local and private entities. In the course of constructing a plan for the State, the Department will use every available resource and will seek information and coordintion with the U.S. Fish and Wildlife Service.

(1302) COMMENT: The proposal at N.J.A.C. 7:7A-14.1(a) requiring mitigation for certain general permits is in direct disagreement with the function of this mechanism. If the activity does not meet the criteria, it should be an Individual Permit Application (Pennoni Associates, Inc.).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement for certain GPs upon adoption. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation where the cumulative impact of an activity is more than minimal, the Department will rescind the permit.

(1303) COMMENT: In the proposal at N.J.A.C. 7:7A-14.1(a), the rule should be clarified to require only the creation of open water to mitigate the loss of open waters (NAIOP).

RESPONSE: The rule has not been amended as suggested. The definition of State open water encompasses a wide variety of features. Therefore, the Department will have to evaluate each specific case in order to determine the appropriate form of mitigation. For example, the filling of a pond or lake may necessitate the creation of a pond or lake, while the recreation of an intermittent stream bed as mitigation for the filling of an intermittent stream may not be desirable. The extensive requirements at N.J.A.C. 7:7A-14.4 detailing the information that must be supplied by the applicant to the Department when proposing to do wetlands or waters creation are designed to assess the functions and values of the wetlands or waters being lost and those being proposed for creation. The information that the Department requires serves to allow the Department to determine the habitats which must be replaced as a result of a permit approval.

(1304) COMMENT: The added language at the bottom of N.J.A.C. 7:7A-14.1(a) is vague. This type of mitigation has less likelihood of

adequately compensating for values and functions lost as a result of the project than the other types of mitigation. This addition should either be clarified or deleted (USEPA Region II, USEPA Headquarters).

RESPONSE: The rule has been amended upon adoption to clarify that the option of donating land or money to the Mitigation Bank or other public or private non-profit organizations must first be approved by the Mitigation Council and the Department in consultation with the USEPA. The reference to public or private non-profit conservation organizations includes organizations such as the New Jersey Natural Lands Trust, the New Jersey Conservation Foundation, etc. These organizations would provide the Department and the Mitigation Council with an established mechanism to acquire lands which "has potential to be a valuable component of the freshwater wetlands ecosystem" pursuant to the Act at N.J.S.A. 13:9B-13c.

(1305) COMMENT: We support the proposal at N.J.A.C. 7:7A-14.1(b) which requires that applicants document how proposed mitigation will provide the ecological values of wetlands to be lost or disturbed (U.S. Fish and Wildlife Service).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(1306) COMMENT: In the proposal at N.J.A.C. 7:7A-14.1(b) the rule should specify one or more standard wetlands functional assessment methodologies that are acceptable for demonstrating equal ecological value (Wander Ecological Consultants, Louis Berger and Associates, Inc.).

RESPONSE: In order to allow flexibility, the Department has intentionally not included a suggested model in this section but instead has specified some of the factors that must be addressed by the applicant regardless of whether he or she chooses a published method or pursues this assessment on his or her own. The Department will review each assessment to ensure that all pertinent factors are properly evaluated.

(1307) COMMENT: At N.J.A.C. 7:7A-14.1(b), cannot a disturbance occur without the need to create additional wetlands if in disturbing them to carry drainage one expects they will act as they are intended to—to act as treatment centers prior to discharge into open water (Pureland Industrial Complex)?

RESPONSE: It is unclear from the comment exactly what type of disturbance is being questioned. However, the way in which wetlands act to filter stormwater prior to development is affected and often impaired by the addition of impervious pavement introduced by development as well as by the addition of runoff that may include artificially introduced pollutants which were not present in the natural system. Therefore, projects requiring the issuance of an Individual permit will require mitigation.

(1308) COMMENT: The language at N.J.A.C. 7:7A-14.1(c) is unclear as to what figure the 115 percent is applied (DuPont).

RESPONSE: The rule has been amended on adoption to clarify that the 115 percent is applied to the construction cost of the proposed mitigation activity.

(1309) COMMENT: N.J.A.C. 7:7A-14.1(c) as proposed will require performance and maintenance guarantees in connection with Freshwater Wetlands or State Open Water mitigation plans. Certain organizations, such as municipalities, charitable organizations, etc. should be specifically exempted from these requirements (Consulting Engineers Council of New Jersey).

RESPONSE: The Department cannot waive the performance and maintenance guarantees for these agenices without risking the completion of mitigation activities. The requirement for performance and maintenance guarantees is to assure that the responsibility for completing mitigation for activities performed pursuant to an Individual permit remains with the owner/applicant. If the mitigation is not carried out, the Department will then have a source of funding with which to ensure that the project is completed.

(1310) COMMENT: As proposed at N.J.A.C. 7:7A-14.1(c), bonding for mitigation is an unreasonable burden for developers that are required to do mitigation as a result of a general permit. Also, what is meant in subparagraph (f)2iii by environmental value versus ecological value? How will environmental value be determined (Amy S. Greene Environmental Consultants, Inc., N.J. Builders Association)?

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement for certain GPs upon adoption. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situtation where the cumulative impact of an activity is more than minimal, the Department will rescind the permit.

(1311) The rules at N.J.A.C. 7:7A-14.1(c) should state that the bond should expire after two complete years. That is sufficient time to install the work and establish that it has taken hold and is stabilized (Pureland Industrial Complex).

RESPONSE: The Department cannot set a two-year time limit on the posting of bonds since Individual permits are valid for five years and there is no guarantee that the mitigation work will be performed in the first two years. Further, the Department requires monitoring and maintenance of the mitigation site for at least three years after planting pursuant to N.J.A.C. 7:7A-14.4(a)4. However, the rule at N.J.A.C. 7:7A-14.1(c)1 has been amended upon adoption to indicate that the performance bond will be released when the Department confirms completion of construction of the mitigation site. The maintenance bond will be released when the Department confirms that no additional maintenance is required in order to meet the specifications of the approved mitigation plan.

(1312) COMMENT: The rules at N.J.A.C. 7:7A-14.1(c) should state when the developer would be free of this bonding obligation (N.J. Builders Association).

RESPONSE: The rule at N.J.A.C. 7:7A-4.1(c)1 has been amended upon adoption to indicate that the performance bond will be released when the Department confirms completion of construction of the mitigation site. The maintenance bond will be released when the Department confirms that no additional maintenance is required in order to meet the specifications of the approved mitigation plan.

(1313) COMMENT: The proposal at N.J.A.C. 7:7A-14.1(c) for the bonding for construction of mitigation should be at the municipal level. The Division does not have the expertise nor mechanism to implement this proposal (Pennoni Associates, Inc.).

RESPONSE: Bonding for mitigation shall remain with the Department because the municipality does not have jurisdiction over wetland mitigation and, therefore, there is no authority for the municipality to require a bond for mitigation. Further, the Department has bonding experience in its hazardous waste and Green Acres programs and is therefore well equipped to implement this proposal.

(1314) COMMENT: Property owners and municipalities also may require bonds. Multiple bonds are not cost effective. There should be a process to eliminate bonding if a bond is posted at the municipal level. This requirement is best met on a local level (Pureland Industrial Complex).

RESPONSE: The bonds required at the municipal level are required for various development activities and do not include monies to cover the costs of mitigation. Since the municipality does not have jurisdiction over wetland mitigation, there is no authority for the municipality to require additional bond money for mitigation. Therefore, the implementation of this requirement will remain with the Department.

(1315) COMMENT: The rules should require that transition areas be provided for adjacent to all mitigation projects, not just those creating wetlands (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: In the other specific types of wetland mitigation, that is, restoration, and enhancement, there is no need to specify that transition areas be provided since these areas are already wetlands by definition. Therefore, by operative of law, these areas already have a transition area associated with them. If the Department receives information that a restored or enhanced wetland mitigation area provides documented habitat for a threatened or endangered species, the transition area will be increased to 150 feet to reflect this information.

(1316) COMMENT: The Department policy providing for exemption of mitigation requirements for the expansion of cranberry farms should be formalized in the rules (N.J. Department of Agriculture).

RESPONSE: The Department's current policy regarding the expansion of existing cranberry farms only pertains to stream Encroachment permits in the area under the jurisdiction of the Pinelands Commission which are exempt from the Act.

(1317) COMMENT: The rules at N.J.A.C. 7:7A-14.1(c) requiring bonding is overly burdensome, especially for homeowners using general permits (Van Note-Harvey Associates).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to delete the proposed provisions for a mitigation requirement for certain GPs upon adoption. If at a future point in time the Department gathers additional data which indicates that a general permit activity creates a situation

where the cumulative impact of an activity is more than minimal, the Department will rescind the permit.

(1318) COMMENT: The proposal at N.J.A.C. 7:7A-14.1(c) requires the posting of financial assurances to ensure that mitigation shall be undertaken, but still requires that mitigation be performed prior to or concurrent with construction. This section should be amended to allow permittees to carry out mitigation after the authorized activity has occurred (New Jersey State Bar Association).

RESPONSE: This section has not been amended as suggested. The Department has consistently specified that mitigation be undertaken "prior to or concurrent with construction" and this has not resulted in a satisfactory rate of compliance. Therefore, the Department has determined that it is necessary to couple this requirement with the specified financial assurances.

(1319) COMMENT: The requirement at N.J.A.C. 7:7A-14.1(c) for performance and maintenance bonds should not be required of another State agency (New Jersey Department of Transportation).

RESPONSE: The Department cannot waive the performance and maintenance guarantees for State agencies. The requirement for performance and maintenance guarantees is to assure that the responsibility for completing mitigation for activities performed pursuant to an Individual permit remains with the owner/applicant. If the mitigation is not carried out, the Department of Environmental Protection and Energy will then have a source of funding with which to ensure project completeness. Transportation projects are often funded with Federal monies that are not accessible to the DEPE if the mitigation project fails.

(1320) COMMENT: We support the proposal requiring applicants to obtain a secured bond or other surety to insure monitoring and a maintenance of mitigation efforts at N.J.A.C. 7:7A-14.1(c) (ANJEC, Great Swamp Watershed Association).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(1321) COMMENT: The requirements at N.J.A.C. 7:7A-14.1(c) for bonding of mitigation projects could inhibit the implementation of private mitigation banks (NJ Recreation and Parks Association).

RESPONSE: The surety requirements at N.J.A.C. 7:7A-14.1(c) only apply when mitigation is a condition of an approved permit. If a mitigation bank is being created outside of an application, then there is no requirement for bonding that could inhibit the implementation of a private bank.

(1322) COMMENT: Are performance and maintenance bonds required in all cases (N.J. Department of Agriculture)?

RESPONSE: Performance and maintenance bonds are always required when mitigation is a condition of an approved permit.

(1323) COMMENT: The provision for bonding at N.J.A.C. 7:7A-14.1(c) should be deleted as it is unnecessary in view of the penalty provisions of the statute and regulations. If bonding is nevertheless required, the rules should specify release of the surety at the end of construction and the return of any maintenance bond not later than three years following the completion of the mitigation project (NAIOP).

RESPONSE: The ability to assess penalties does not eliminate the need for a performance bond. Without a bond, the Department runs the risk that the person responsible for the cost of mitigation will not have the assets necessary to pay those costs; the costs would then be effectively uncollectable. For the same reason, the Department may find that it is unable to collect on a penalty assessment. The Department does agree, however, with the commenter's suggested language for the release of the bonds, and language has been added upon adoption at N.J.A.C. 7:7A-14.1(c)1 to clarify this provision.

(1324) COMMENT: The rule at N.J.A.C. 7:7A-14.1(e) should be amended to only require receipt of the filing of a deed restriction instead of the actual recording which could take from six to 12 months (PSE&G).

RESPONSE: The Department has amended the rule to accept proof of filing in lieu of a copy of the deed including restrictive language.

(1325) COMMENT: The provision at N.J.A.C. 7:7A-14.1(e) requiring a conservation easement on mitigation sites seems to be contradicted by N.J.A.C. 7:7A-14.1(f) which establishes criteria for allowing regulated activities on mitigation sites (Borough of South Plainfield Environmental Commission, JCP&L).

RESPONSE: The provision at N.J.A.C. 7:7A-14.1(e) pertains to deed restricting a mitigation site. The rule, amended on adoption, N.J.A.C. 7:7A-14.1(e)1 describes the limited category of projects for which the Department would consider allowing regulated activities in a mitigation area covered by a deed restriction. This provision includes a requirement for the applicant to demosntate no practicable alternatives and compelling public need.

(1326) COMMENT: Public lands dedicated as open space and used for enhancement or creation, by their very existence, satisfy the necessity of a deed restriction (Somerset County Planning Board).

RESPONSE: The Department does not agree. A deed restriction specifically prohibits regulated activities such as the removal, excavation or disturbance of soil, dumping or filling, driving of pilings, placing of obstructions, or the destruction of plant life as described pursuant to N.J.A.C. 7:7A-2.3. The uses of public lands dedicated for open space may include a wide variety of activities some of which may be regulated activities. It is, therefore, necessary to include specific deed restriction language for creation or enhancement sites in these areas.

(1327) COMMENT: At N.J.A.C. 7:7A-14.1(e), the rule should be modified to allow public agencies to satisfy surety requirements by virtue of approved items in the budget (Somerset County Planning Board).

RESPONSE: The Department would accept an approved item in the budget, to the extent that it can be demonstrated that this would provide the Department with the same assurance as that resulting from the posting of a bond or other assurety.

(1328) COMMENT: We question why mitigated parcels are deed restricted (N.J. Department of Agriculture).

RESPONSE: The Act at N.J.S.A. 13:9B-13c states that the Department may consider the option of permitting the creation of freshwater wetlands with the restriction on these wetlands of any future development. When the Department issues an Individual permit, it makes a finding that there is no practicable alternative to the activity as approved. However, since an Individual permit is required for activities having more than minor impacts, the Act at N.J.S.A. 13:9B-13 allows the Department to require mitigation in order to compensate for the wetlands loss. The requirement for deed restrictions on newly created wetlands is appropriate to inform current and future landowners that the lot they have purchased was involved in an application for and approval of regulated activities pursuant to the Act, and to inform of the purpose and nature of the restrictions on the use and enjoyment of the lot.

(1329) COMMENT: There must be no provision to allow future development of mitigation sites (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The provisions for allowing future development of mitigation sites pursuant to N.J.A.C. 7:7A-14.1(e)1 will not be deleted. While ideally, a mitigation site once established will remain undeveloped in perpetuity, the Department recognizes that there may be some instances when it may be the least environmentally damaging alternative to allow the disturbance of a mitigation site.

(1330) COMMENT: The rules at N.J.A.C. 7:7A-14.1(e) should be amended to provide an exemption in the deed restriction which would expedite wetland modification for the purposes of mosquito control where public health is concerned (Associated Executives of Mosquito Control Work in N.J.).

RESPONSE: The Department believes that the rules already address the commenter's concern, to the extent that this is possible without substantially compromising the goals of the mitigation requirement. While the rule does not provide for an exemption in the deed restriction, the restriction includes provisions allowing regulated activities on the restricted land if there is no practicable alternative and that there is a compelling public need. The Department recognizes that depending upon the specific circumstances, the mosquito control activities cited by the commenter may meet these criteria.

(1331) COMMENT: The provision at N.J.A.C. 7:7A-14.1(e) will result in title problems in perpetuity (NAIOP).

RESPONSE: The Department does not understand how the provision will result in title problems in perpetuity since the commenter failed to identify the problems. However, the Department notes that deed restrictions are required at all levels of government, as well as by public utilities and do not result in perpetual title problems.

COMMENT: Several commenters objected to the proposal at N.J.A.C. 7:7A-14.1(f) to allow publicly funded projects to carry out mitigation on public lands. They had the following comments:

(1332) The proposed change will weaken the protection provided by the Act and cause further environmental damage (Middletown Township Environmental Commission, NAIOP);

(1333) Despite the requirement in the Rules that approval must be obtained from Green Acres and the State House Commission, the rule

proposal has the potential for seriously compromising the public trust (Morris County Park Commission);

(1334) This proposal would damage the public good twice. The public loses open space, green corridors, the amenities of natural waterways and then has to pay for the mitigation of the loss. Developers must bare the cost of mitigation solely, as they are the only ones who will benefit for the destruction of the wetland areas (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, Stephen Barnes, Karen Siletti); and

(1335) The benefits of mitigation by construction of new wetlands is questionable. Such mitigation should not be considered a quick fix, encouraging the destruction of natural wetlands. Any mitigation on public land should be strictly regulated and limited to the restoration of degraded wetlands (Plumsted Township Environmental Commission, Montgomery Township Environmental Commission, Lake Musconetcong Regional Planning Board, Environmental Commission of West Milford Township, Monmouth County Friends of CLEARWATER Inc., Greenwich Environmental Commission. Dr. Lynn L. Siebert, Walter R. Stochel Jr., Lacey Township Environmental Commission, Public Advocate of New Jersey, Adeline Arnold, New Jersey Conservation Foundation, Morris County Planning Board).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to amend this provision upon adoption. The rule at N.J.A.C. 7:7A-14(f)1 now states that mitigation on public land will only be permitted when that land was purchased expressly for the purpose of fulfilling a mitigation requirement of a permit. The rule, therefore, implements the plain language of the Act that specifically states that offsite mitigation shall be on private property, N.J.S.A. 13:9B-13c, while at the same time avoids the absurd result that a public body may never mitigate offsite because private land purchased by a public body automatically becomes public.

(1336) COMMENT: We approve of the change that allows for the donation of land or money or both to other public or non-profit agencies but recommend that the phrase should read "... or through other public or non-profit conservation mechanisms..." (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The Department has amended the rule upon adoption to provide this clarification.

(1337) COMMENT: We commend the proposed rule change which permits mitigation for publicly funded projects to be carried out on public lands (New Jersey Recreation and Park Association).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to amend this provision upon adoption. The rule at N.J.A.C. 7:7A-14(f)1 now states that mitigation on public land will only be permitted when that land was purchased expressly for the purpose of fulfilling a mitigation requirement of a permit. This language will eliminate an unnecessary contradiction that would occur once the title of a parcel was transferred to public ownership.

(1338) COMMENT: If a private developer secures a right from a public agency to carry out mitigation on public lands, such rights should not be restricted (Connell, Foley & Gesier).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to amend this provision upon adoption. The rule at N.J.A.C. 7:7A-14(f)1 now states that mitigation on public land will only be permitted when that land was purchased expressly for the purpose of fulfilling a mitigation requirement of a permit. This language will eliminate the unnecessary contradiction that would occur once the title of a parcel was transferred to public ownership.

(1339) COMMENT: We support the provision at N.J.A.C. 7:7A-14.1(f) to allow mitigation projects on public lands. However, this requires a statutory amendment (NAIOP).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to amend this provision upon adoption. The rule at N.J.A.C. 7:7A-14(f)1 now states that mitigation on public land will only be permitted when that land was purchased expressly for the purpose of fulfilling a mitigation requirement of a permit. This language will eliminate the unnecessary contradiction that would occur once the title of a parcel was transferred to public ownership.

(1340) COMMENT: The restriction of mitigation to private property should be maintained. Mitigation should result in increased acres protected, but mitigation on public lands will not have that result since the land is already preserved (N.J. Audubon Society).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to amend this provision upon adoption. The rule at N.J.A.C. 7:7A-14(f)1 now states that mitigation on public land will only be permitted when that land was purchased expressly for the purpose of fulfilling a mitigation requirement of a permit. This language will eliminate the unnecessary contradiction that would occur once the title of a parcel was transferred to public ownership.

(1341) COMMENT: The proposal at N.J.A.C. 7:7A-14.1(f)2 needs to be expanded to more fully explain the equation of environmental value and ecological value (Morris County Planning Board).

RESPONSE: Based on the comments received, and legal advice from the Attorney General's office, the Department has decided to amend this provision upon adoption. The rule at N.J.A.C. 7:7A-14(f)1 now states that mitigation on public land will only be permitted when that land was purchased expressly for the purpose of fulfilling a mitigation requirement of a permit. The provision which included a reference to environmental value and equal ecological value has been deleted.

N.J.A.C. 7:7A-14.2 Wetland or State open water mitigation options

(1342) COMMENT: Instead of offering creation of wetlands as a mitigation option, the Department should conduct an investigation of mitigation projects already completed in the State of New Jersey. If there is truly a significant percentage of projects meeting their pre-determined goals by which to measure success, then creation can be included as a viable conscionable alternative, otherwise it should not be allowed (Morris County Planning Board).

RESPONSE: The Act at N.J.S.A. 13:9B-13b states that creation is a viable mitigation option. Mitigation is required only in those cases where the Department has already decided to issue a permit. In these cases there are two options: require mitigation for impacts that will occur as a result of a permit; or allow the impacts to occur without mitigation. Therefore, in those situations where a permit will be issued, mitigation is the last opportunity to attempt to recoup the lost values and functions of these wetlands. As more of these sites are created, the Department will have the opportunity to review the problems and successes associated with these projects which will then provide better information on which to base future mitigation projects.

(1343) COMMENT: In N.J.A.C. 7:7A-14.2(a), the deletion of the language "in decreasing order of their desirability", which will allow applicants and the Department to determine which type of mitigation is acceptable on a case by case basis, is supported. In some situations, creation of wetlands may not be feasible or desirable and other types of mitigation may be more appropriate (Paulus, Sokolowski and Sartor, Inc.).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(1344) COMMENT: It is appropriate that restoration activities be allowed to exceed six months in length; however, this discretion should not be limited only to situations where a violation has occurred (N.J.A.C. 7:7A-14.2(a)1i). Special provisions should be added to this rule to address regulated activities in hazardous waste situations (Langan Engineering, N.J. Builders Association).

RESPONSE: This provision has not been amended as suggested because the Department believes that restoration should be limited to six months except at the Department's discretion where a violation has occurred. The Department has made this provision in recognition of the time frames involved in resolving violation cases. Alterations to the hydrology of wetlands, if allowed to remain for more than six months, will have permanent impacts on the wetlands and the longer such a condition exists, the more difficult it is to successfully restore the site. Therefore, beyond this six month period, since the Department can no longer be assured that restoration will be successful, this provision no longer applies and an applicant shall follow the provisions for the creation of wetlands at N.J.A.C. 7:7A-14.2(a)2. Subchapter 5 deals with permitting regulated activities in emergency situations, such as those implicit in the comment about hazardous waste situations. Mitigation in these situations is resolved once the emergency has been addressed.

(1345) COMMENT: We support the provision at N.J.A.C. 7:7A-14.2(a)1i to extend a restoration period beyond six months to remedy a violation. Similar extensions should be available for major restoration projects not involving a violation. The rule should be clarified to measure the restoration period from the completion of the wetlands disturbance and commencement of restoration (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule adoption but has not amended the rule as suggested. Alterations to the hydrology of wetlands, if allowed to remain for more than six months, will have permanent impacts on the wetlands and the longer such a condition exists, the more difficult it is to successfully restore the site. Therefore, beyond this six month period, since the Department can no longer be assured that restoration will be successful, this provision no longer applies and an applicant shall follow the provisions for the creation of wetlands N.J.A.C. 7:7A-14.2(a)2. The Department will consider the six month period to begin at the time the regulated activity begins and not upon completion of the regulated activity.

(1346) COMMENT: Mitigation should only be required on a 1:1 basis for linear development projects requiring an Individual permit and which alter the form of wetlands from forested to scrub/shrub or emergent. In addition, no mitigation should be required where the existing wetlands are already classified as scrub/shrub or emergent (Atlantic Electric).

RESPONSE: The Department has not amended the rules as suggested. The Act at N.J.S.A. 13:9B-13 identifies mitigation options to mitigate adverse environmental impacts to provide areas of equal ecological value. These options include restoration which is normally accepted at a ratio of 1:1 and creation at a ratio of 2:1. The Department does not consider the alteration of forested wetlands to scrub/shrub or emergent a restoration since it does not provide habitat of equal ecological value and therefore, creation at a ratio of 2:1 is required. The clearing of all wetland vegetation is a regulated activity and projects necessitating the issuance of an Individual permit require mitigation. Therefore, the Department will continue to require mitigation for all linear development projects requiring an Individual permit.

(1347) COMMENT: N.J.A.C. 7:7A-14.2(a)2 should be deleted until the Department conducts adequate research to determine that creation of inland wetlands is viable (Bedminster Environmental Commission).

RESPONSE: Mitigation is required only in those cases where the Department has already decided to issue a permit. The Act at N.J.S.A. 13:9B-13 mandates that the Department require as a condition of a permit that all appropriate measures have been carried out to mitigate adverse environmental impacts and provide areas of equal ecological value. Therefore, in those situations where a permit will be issued, mitigation is the last opportunity to attempt to recoup the lost values and functions of these wetlands. As more of these sites are created, the Department will have the opportunity to review the problems and successes associated with these projects which will then provide better information on which to base future mitigation projects.

(1348) COMMENT: In the proposal at N.J.A.C. 7:7A-14.2(a)2i the phrase "over time" should be replaced with a reasonable specific time period (Wander Ecological Consultants, NAIOP).

RESPONSE: The rule has been amended on adoption to replace the phrase "over time" with a reference to the standard three-year monitoring period referenced at N.J.A.C. 7:7A-14.4(a)4.

(1349) COMMENT: What is the rationale for the requirement of transition areas at N.J.A.C. 7:7A-14.2(a)2iii (N.J. Department of Agriculture)?

RESPONSE: Every exceptional and intermediate resource value wetland requires a transition area pursuant to the Act at N.J.S.A. 13:9B-16. If an applicant is creating a functional wetlands, it is important ecologically to provide a transition area because of the functions and values that a transition area provides to the wetland. Therefore, when the applicant creates a wetlands, he or she is also creating a transition area which could potentially affect a neighboring property if not completely encompassed within the mitigation site owned or otherwise controlled by the applicant.

(1350) COMMENT: The proposal at N.J.A.C. 7:7A-14.2(a)2iii requires mitigation wetlands to have a minimum transition area of 50 feet. Does a roadway count as part of the transition area? Will any structures or other construction activities be allowed within the new transition area? What if the size of the site does not allow for an undisturbed transition area? May the transition area extend offsite onto another property? Mitigation banking should be made more viable as an option, especially for projects where mitigation is required only due to the use of a general permit (Amy S. Greene Environmental Consultants, Inc., N.J. Builders Association).

RESPONSE: A paved cartway, or transition areas with new structures or construction activities, do not serve the functions and values of a transition area and, therefore, will not be approved as the transition area to a mitigation site. The transition area cannot extend offsite onto another property. Therefore, if the mitigation site is not large enough to contain an entire, undisturbed transition area, the Department will not approve the use of that site for mitigation. The Department is working with the Mitigation Council to develop guidelines to make mitigation banking a more viable option.

(1351) COMMENT: In the rules at N.J.A.C. 7:7A-14.2(a)2iii, any transition area should be determined by the value of the disturbed wetlands, not that of a proximate wetland since mitigation must recreate equivalent ecological value (NAIOP).

RESPONSE: When determinig the resource classification of a wetland to be created, the resource classification of proximate wetlands is the best indicator of the potential resource classification of the created wetland. For example, a newly created wetland which discharges into trout production waters, or created in the vicinity of habitats for threatened or endangered species, has the potential to take on these characteristics and therefore, merits a 150 foot transition area.

(1352) COMMENT: We object to elimination of the mitigation hierarchy in the existing regulations which are based on the provisions of the Act. The existing regulatory hierarchy gives appropriate and necessary guidance for consistent implementation (ANJEC, Great Swamp Watershed Association).

RESPONSE: The Act at N.J.S.A. 13:9B-13c provides for a two-tiered hierarchy: opportunities for mitigation onsite must first be investigated, and if onsite mitigation is not feasible the Department may permit mitigation offsite or allow the applicant to make a contribution to the mitigation bank. The Act does not prioritize offsite mitigation or a contribution. The Department has simply provided a definition of when mitigation onsite is considered "feasible" and then has established an additional hierarchy to be followed when considering offsite mitigation options.

(1353) COMMENT: We support the elimination of the mitigation hierarchy in the existing regulations which are based on the provisions of the Act. However, we believe that a statutory amendment is required to affect this change (NAIOP).

RESPONSE: The Department has not eliminated the mitigation hierarchy. Since the Act does not prioritize offsite mitigation or a contribution to the bank, the Department has simply provided a definition of when mitigation onsite is considered "feasible" and then has established an additional hierarchy to be followed when considering offsite mitigation options.

(1354) COMMENT: Creation of new wetlands should not be permitted on environmentally valuable uplands because it will result in the alteration and destruction of habitats for declining species. As an alternative, the applicant should be permitted to permanently preserve large areas of uplands (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The Department must review and approve every mitigation plan including site location and potential loss of significant upland habitats. Therefore, the Department will limit, to the extent possible, the destruction of declining species' habitats for the creation of wetlands mitigation. The Act does not provide the authority to substitute the preservation of uplands for wetlands mitigation.

(1355) COMMENT: The method for determining ecological value of disturbed wetlands vs. enhanced wetlands at N.J.A.C. 7:7A-14.2(a)3 needs to be defined. Should USFWS Habitat Evaluation Procedures be used or are other methods acceptable (Cumberland County Environmental Health Task Force)?

RESPONSE: The USFWS Habitat Evaluation Procedures, in conjunction with the assessment of soil, vegetation, flood storage capacity, water quality functions, and soil erosion and sediment control functions is an acceptable method for the determination of equal ecological value. The Department has intentionally not included a suggested model since it does not believe that there is only one model which considers all of the functions and values that a wetland provides. The Department will review each assessment to ensure that all pertinent factors are properly evaluated.

(1356) COMMENT: We support enhancement based upon assessment of the ecological value of the wetlands disturbed or modified (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(1357) COMMENT: The rule at N.J.A.C. 7:7A-14.2(a)4i should be amended to delete "equal ecological value" and creation at the ratio of 2:1 should be the minimum acceptable ratio (Passaic River Coalition).

RESPONSE: The rule has not been amended as suggested since there are situations where the loss of a particular wetland will not merit

replacement at a 2:1 ratio, for example, the filling of a previously constructed roadside ditch vegetated by Phragmites.

(1358) COMMENT: The paragraph at N.J.A.C. 7:7A-14.2(a)4 should be modified by adding the phrase "... The Department will consider the contribution of money to the mitigation bank or public or non-profit conservation agencies ..." (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rule at N.J.A.C. 7:7A-14.1(a) and 14.2(a)4 has been amended upon adoption to clarify that the Mitigation Council, and the Department in consultation with the EPA may approve donations of land or money to public or private non-profit agencies.

(1359) COMMENT: The section at N.J.A.C. 7:7A-14.2(a)4 should be expanded to include donations of open waters, surface water ecosystems, and rare, threatened and declining species habitats such as old fields and secondary growth forests (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rule has not been amended as suggested since the existing language at N.J.A.C. 7:7A-14.2(a)4ii simply states that the contribution of land will be considered to be acceptable if the area has the potential to be a valuable component of the freshwater wetland ecosystem and does not require a specific type of land.

(1360) COMMENT: The donation of land does not replace lost wetlands of ecological values. This section should be amended to ensure that land donations must achieve equal ecological value, not just additions to the freshwater wetlands system. The Department should develop a system to document ecological value. Additionally, the rules should be amended to specify criteria for determining when other forms of mitigation are not practicable or feasible or would not be as ecologically beneficial as land donation (U.S. Fish and Wildlife Service).

RESPONSE: The Act at N.J.S.A. 13:9B-13 does not require that donations of land replace wetlands or ecological values but rather that the Department and EPA determine that other forms of mitigation onsite are not feasible before a donation or land is considered. In addition, before a contribution of land is accepted, the Mitigation Council and the Department in consultation with the EPA shall have to make the finding that the donated land has the potential to be a valuable component of the freshwater wetland ecosystem. The rule at N.J.A.C. 7:7A-14.2(a)4 has been amended to clarify when the donation of money of land is acceptable in lieu of other forms of mitigation. The rule has been further amended upon adoption to delete the term "practicable," and for the purposes of this subsection only the term "feasible" has been defined to include a determination of whether other types of mitigation would be as ecologically beneficial as the donation.

(1361) COMMENT: There is some ambiguity in the regulations (N.J.A.C. 7:7A-14.2(a)4 as to when a land donation is acceptable versus when money is acceptable. Do the same criteria apply for both forms of these donations when determining if a donation to the Mitigation Bank is acceptable? It appears that a money donation may be acceptable in certain situations where land donation is not. A monetary donation is acceptable only if mitigation cannot be conducted onsite, but a land contribution is only allowed if mitigation cannot be performed in the watershed. One possible modification is as follows: "The Department will permit a donation to the Mitigation Bank only after determining: (a) that creation or restoration of wetlands on site is not feasible; and (b) that creation, restoration, or enhancement cannot be carried out in the same watershed; or (c) that other forms of mitigation are not practical or feasible or would not be as ecologically beneficial as the donation (Langan Engineering, N.J. Builders Association).

RESPONSE: As described more specifically in the response to the previous comment, the rule at N.J.A.C. 7:7A-14.2(a)4 has been amended upon adoption to clarify that the donation of money or land is acceptable in lieu of other forms of mitigation.

N.J.A.C. 7:7A-14.3 Location of mitigation sites

(1362) COMMENT: The Department should clearly define the terms "practicable" and "less ecologically beneficial" to provide consistency in the administration of this regulation as well as predictability to applicants. The clarity provided should reflect the intent of the Act that mitigation shall not substitute for preservation of wetlands (ANJEC, Great Swamp Watershed Association).

RESPONSE: The rule at N.J.A.C. 7:7A-14.3(a) has been clarified upon adoption to define the term "practicable" as meaning that all efforts have been exhausted after taking into consideration cost, existing technology, and logistics in light of the overall project purposes. However, the Department cannot succinctly define all of the factors, their inter-relationship, and how they will be considered when determining whether mitigation onsite will be less ecologically beneficial, so that mitigation in a different watershed will be acceptable.

(1363) COMMENT: How does the definition of "onsite" in N.J.A.C. 7:7A-14.3(a) compare to the definition of "onsite" at N.J.A.C. 7:7A-1.4 (USEPA Region II, USEPA Headquarters).

RESPONSE: The definition of "onsite" at N.J.A.C. 7:7A-14.3(a) is the same as that in the definition section at N.J.A.C. 7:7A-1.4.

(1364) COMMENT: The rule at N.J.A.C. 7:7A-14.3(a)3i must be amended to reflect the provisions of the Act at N.J.S.A. 13:9B-13 which allows contribution based upon the lesser cost of purchasing and restoring degraded wetlands or the cost of purchasing uplands and creating wetlands (NAIOP).

RESPONSE: The Department believes that the commenter is referring to the rule at N.J.A.C. 7:7A-14.2(a)4. The rule at N.J.A.C. 7:7A-14.2(a)4 has been amended upon adoption to provide the options mandated by the Act.

(1365) COMMENT: The rule at N.J.A.C. 7:7A-14.3(a)3ii must be amended to reflect the provisions of the Act at N.J.S.A. 13:9B-13 which allows only the Mitigation Council to determine whether a proposed land donation is potentially a valuable component of a wetlands ecosystem (NAIOP).

RESPONSE: The Department believes that the commenter is referring to the rule at N.J.A.C. 7:7A-14.2(a)4. The Act at N.J.S.A. 13:9B-13c states that the Department shall "permit the donation of land ... only after determining that all alternatives to the donation are not practicable or feasible." Therefore, the reference to the Department has not been deleted. In addition, in recognition of the EPA's future oversight role upon assumption, the rule has been amended upon adoption to include the EPA in the determination of whether to permit donations of land.

(1366) COMMENT: N.J.A.C. 7:7A-14.3(b) should be clarified to specify that the same watershed means the subwatershed tributary to the affected wetland being mitigated (Upper Rockaway Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rule has not been amended as suggested. The Department has found to date that the possibility of locating a potential mitigation site within the same watershed is extremely limiting. To further limit the area of acceptable mitigation sites to the subwatershed would be unreasonable.

(1367) COMMENT: An amendment to the statute is necessary in order to amend the rule as proposed at N.J.A.C. 7:7A-14.3(c), approval of offiste mitigation because the Act does not include a determination of whether mitigation onsite is less ecologically beneficial (NAIOP).

RESPONSE: The rule has been amended to more closely track the language in the Act at N.J.S.A. 13:9B-13c and to clarify that the term "feasibility" shall include a determination of whether other types of mitigation would be as ecologically beneficial.

N.J.A.C. 7:7A-14.5 Acceptability of wetlands mitigation proposals

(1368) COMMENT: Under what circumstances will the mitigation plan be required as a part of the permit application and when is it permissible to submit it subsequent to a permit decision (N.J.A.C. 7:7A-14.5(b)) (Langan Engineering)?

RESPONSE: A mitigation plan is required as part of an application for a GP no. 4 for hazardous waste cleanups, as adopted September 4, 1990. Applicants for Individual permits have the option of submitting mitigation plans with their applications pursuant to N.J.A.C. 7:7A-11.1(f), but it is not a requirement until after the Individual permit has been issued.

(1369) COMMENT: N.J.A.C. 7:7A-14.5(a) includes State open waters; however, a different set of criteria needs to be developed for mitigation of open waters (Amy S. Greene Environmental Consultants, Inc.).

RESPONSE: The definition of State open water encompasses a wide variety of features. Therefore, the Department will have to evaluate each specific case in order to determine the appropriate form of mitigation. For example, the filling of a pond or lake will necessitate the creation of a pond or lake, while the recreation of an intermittent stream bed as mitigation for the filling of an intermittent stream may not be desirable. The extensive requirements at N.J.A.C. 7:7A-14.4 detailing the information that must be supplied by the applicant to the Department when proposing to do wetlands or waters creation are designed to assess the functions and values of the wetlands or waters being lost and those being proposed for creation. The information that the Department requires serves to allow the Department to determine the habitats which must be replaced as a result of a permit approval.

(1370) COMMENT: We support the proposed timetable for review of mitigation proposals at N.J.A.C. 7:7A-14.5(b) (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

N.J.A.C. 7:7A-14.6 Wetlands Mitigation Council

(1371) COMMENT: The names and addresses of all members of the Mitigation Council should be published. Further it should be published as to how membership in the Council is determined.

RESPONSE: Membership to the Council will change every three years and may change more often based on personal commitments. Therefore, to obtain current names and addresses, an interested party should contact the Department. Membership in the Council is specified in the Act at N.J.S.A. 13:9B-14b and, therefore, it is unnecessary to restate this information in the rules.

(1372) COMMENT: We support the provision at N.J.A.C. 7:7A-14.6(a) to allow the Mitigation Council to cover all programs within the Division of Coastal Resources. However, a statutory amendment is required (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule amendment. The Wetlands Mitigation Council is empowered at N.J.S.A. 13:9B-15 to finance projects mitigating for freshwater wetlands losses and freshwater wetlands conservation purposes without limitation to those arising from activities permitted under the Act. Therefore, while it may serve all programs contained in the Department for which wetlands and open water mitigation is required as a condition of a permit, it may not be accurate to state that it will "cover all programs within the Land Use Regulation Element."

(1373) COMMENT: The rules at N.J.A.C. 7:7A-14.6(a)4 allow for the purchase of land to mitigate for wetland losses. It should be noted that as a general policy the purchase of wetlands specifically to preserve those areas does not generally compensate for the loss of wetlands (USEPA Region II, USEPA Headquarters).

RESPONSE: The rules at N.J.A.C. 7:7A-14.2(a)4 specifically state that the Department will consult with EPA in determining if a specific contribution of land is appropriate for wetlands mitigation. Therefore, EPA will be given the opportunity to help make this determination based on site specific information.

(1374) COMMENT: In the rule at N.J.A.C. 7:7A-14.6(a)5 approval of a private mitigation bank would presumably include the location of the mitigation. Final approval of where to mitigate should rest with the Department not with the Mitigation Council (N.J. Audubon Society).

RESPONSE: The rule has not been amended as suggested. The Act has provided the authority for approving mitigation banks to the Mitigation Council. The Department will review the proposed location of a mitigation bank if it requires permits under any of the Department's land use statutes.

(1375) COMMENT: We support the rule at N.J.A.C. 7:7A-14.6(a)5 which allows consideration of private mitigation banks (NJ Recreation and Parks Association).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(1376) COMMENT: The rule at N.J.A.C. 7:7A-14.6(a)5 should be amended to insert "and public" after the word "private" (Passaic River Coalition).

RESPONSE: The Department agrees with the commenter that the rule should be amended to add a provision for oversight by the Mitigation Council of public mitigation banks. However, this would be a substantive change upon adoption and therefore will be considered for proposal in the future.

(1377) COMMENT: Current DEPE regulations have limited if not totally eliminated the role of the mitigation council. We support a Mitigation Council with an increased decision making role because donation to the Mitigation Bank will greatly enhance the objective of the Legislature (Mark H. Burlas, Sandoz Pharmaceuticals Corporation).

RESPONSE: The Department disagrees that the role of the mitigation council has been limited or eliminated and the commenters have not provided enough information as to which rule provision they believe has this perceived effect. In particular the rules include provisions at N.J.A.C. 7:7A-14.6 which authorizes that the Council accept donations or money of land, determine if land to be donated has the potential to be a valuable component of the wetlands or surface water ecosystem, disburse funds, purchase lands and approve the establishment of private mitigation banks.

(1378) COMMENT: The rule at N.J.A.C. 7:7A-14.6(b)4 addresses the use of wetland mitigation bank monies for research. While we recognize the need for advancement in the science of wetland mitigation, expenditures of mitigation bank funds in this area should acknowledge that the primary intent of the bank is to mitigate for wetland losses rather than to support research (USEPA Region II, USEPA Headquarters).

RESPONSE: The Act at N.J.S.A. 13:9B-15c(4) specifically allows the transfer of funds or lands for research to enhance the practice of mitigation. Most research on mitigation practices will be carried out by Department staff to evaluate existing and proposed mitigation projects and will not involve Mitigation Bank funds. The lowest priority use of Mitigation Bank funds will be for research.

Subchapter 15. Enforcement

N.J.A.C. 7:7A-15.1 General

(1379) COMMENT: Nothing in the Enforcement subchapter anticipates a situation in which a Notice of Violation is issued to a party who subsequently is demonstrated not to be in violation of the Act. Either it should be the Department's responsibility to gather all the evidence required to demonstrate that a party is indeed in violation before issuing the NOV, or it should compensate for the expenses of the defense of those whom it has mistakenly cited (Wander Ecological Consultants).

RESPONSE: The Department will issue a Notice of Violation only when it has determined that a regulated or prohibited activity has occurred without a permit, or waiver issued by the Department. A Notice of Violation offers a potential violator three options: submit to the Department a plan for the removal of the fill and/or structures and restoration of the site; submit to the Department documentation that demonstrates that the regulated activities are exempt from the Act; or submit to the Department an application and fee for the existing regulated activities. These options provide the individual served with the Notice of Violation with a method to quickly and without legal counsel cure the violation.

N.J.A.C. 7:7A-15.5 Civil administrative penalty

(1380) COMMENT: The rules at N.J.A.C. 7:7A-15.5, 15.6 and 15.7 should clarify that once given notice, a violation ceases when the person in violation stops work in an alleged wetland (Pureland Industrial Complex).

RESPONSE: The rules have not been amended as suggested. The Act at N.J.S.A. 13:9B-21d provides that each day during which each violation continues shall constitute an additional, separate, and distinct offense.

(1381) COMMENT: The penalty of $10,000 per day per violation is excessive, punitive and has no relationship to the severity of the act (N.J. Society of Professional Engineers).

RESPONSE: The provision for a penalty of not more than $10,000 per day for each violation is mandated by the Act at N.J.S.A. 13:9B-21d. The rule at N.J.A.C. 7:7A-17.2(c) as adopted allows flexibility in establishing penalties based on such factors as conduct of the violator, acreage of impact, and resource value classification of wetland impacted.

N.J.A.C. 7:7A-15.9 "After the fact" permit

(1382) COMMENT: The language in this section must be clarified to ensure that a violator is penalized despite the fact that the regulated activity meets the standards for permit approval. If there is no penalty, there will be no incentive to comply with the regulations (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rule at N.J.A.C. 7:7A-15.9(a) clearly states that the Department may issue an "after the fact" permit for a regulated activity **only** when all of the factors at N.J.A.C. 7:7A-15.9(a) have been met, including the collection of penalties for costs or damages pursuant to N.J.A.C. 7:7A-15.9(a)2.

(1383) COMMENT: This section must include a statement that all "after the fact permits" must comply with the Act and the Federal act (USEPA Region II, USEPA Headquarters).

RESPONSE: The rule at N.J.A.C. 7:7A-15.9(a) has been amended upon adoption to clarify that an "after the fact" permit will be issued only if it complies with the Act and the Federal Act. Since the Freshwater Wetlands Protection Act was drafted to mirror the Federal Act, and is at least as stringent and, in most cases, more restrictive, the addition of the Federal Act to this provision does not represent a substantial change.

(1384) COMMENT: We endorse the clarifications to this section. However, N.J.A.C. 7:7A-15.9(c) should be relettered as N.J.A.C. 7:7A-15.9(b) (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rules. The rule has been amended upon adoption to provide this recodification.

N.J.A.C. 7:7A-15.10 Termination of permits

(1385) COMMENT: This section should include an explanation of "unanticipated negative environmental impacts" such as destruction of vegetation in the transition area by stockpiling soil, soil erosion and siltation into surface waters and wetlands etc. (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rule at N.J.A.C. 7:7A-15.10(a)3 has been amended upon adoption to clarify this subsection by providing examples.

(1386) COMMENT: We vigorously object to the addition of the termination clause at N.J.A.C. 7:7A-15.10(a)3, 15.10(b) and 15.10(c). How can an applicant and a lending institution be assured of the certainty of a permit once issued? What is to prevent an arbitrary action to invoke this vague clause for any reason (NAIOP)?

RESPONSE: The rules at N.J.A.C. 7:7A-13.1 provide for standard conditions on permits that place the responsibility for correction of unanticipated environmental damage on the permittee. In the majority of cases, the Department will pursue the correction of these impacts with the permittee and the permittee will comply. The objective of the rules at N.J.A.C. 7:7A-15.10 is to provide a mechanism in the unlikely event that a permittee refuses to take corrective action for unanticipated negative impacts. This section will only be used as a last resort and it is not the intent of the Department to arbitarily revoke permits. N.J.A.C. 7:7A-15.10(b) provides for a hearing on the permit termination in order to further ensure against arbitrary action.

(1387) COMMENT: We support the language in N.J.A.C. 7:7A-15.10(c) which allows the DEPE to reinstate a permit rather than requiring a new application in all cases (NAIOP).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(1388) COMMENT: We support the proposed amendments to allow public participation in the enforcement process at N.J.A.C. 7:7A-15.10(e) because it will result in a more efficient enforcement of the Act (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The Department acknowledges this comment in support of the rule adoption.

(1389) COMMENT: This section should be amended to state that a permit will not be terminated without first granting the permittee a hearing (New Jersey State Bar Association).

RESPONSE: The rule at N.J.A.C. 7:7A-15.10(b) already provides the permittee the option of requesting a hearing. Pre-hearing suspension will ensue only as necessary to protect the public health safety and welfare. In such cases any post-suspension hearing will be conducted on an expedited basis.

(1390) COMMENT: The proposal at N.J.A.C. 7:7A-15.10(e) which states that the Department shall provide for public participation by not opposing intervention by any citizen when permissive intervention is authorized by statute, rule, or regulation is illegal and invalid because there are principles of law governing standing and the Department cannot by regulation simply grant intervention (New Jersey State Bar Association).

RESPONSE: The provision at N.J.A.C. 7:7A-15.10(e) which has been recodified upon adoption as N.J.A.C. 7:7A-15.11 was adopted in response to the Federal requirements for assumption of the 404 program pursuant to 40 CFR 233.41(e). New Jersey Court rules at **R.** 4:33-2 allow for permissive intervention when a party's claim or defense in the main action have a question of law or fact in common. This provision will not create or afford any "new" rights. The proposal does not read "the Department will grant intervention." Rather it simply states that the Department will not oppose intervention pursuant to N.J.A.C. 7:7A-15.11(a)2.

(1391) COMMENT: Why should citizens be permitted to intervene in the termination of a permit as stated at N.J.A.C. 7:7A-15.10(e)2? Such provision could only lead to other problems (William F. Voeltz, N.J. Builders Association).

RESPONSE: The adoption of this language is required by the Federal regulations (40 CFR Parts 232 and 233) for the assumption of the 404 program. This language also furthers the Department's goal to provide more meaningful public input into the Department's decision making process. The proposal has been amended upon adoption to recodify this section as N.J.A.C. 7:7A-15.11, since it applies to all enforcement actions under this Act.

(1392) COMMENT: N.J.A.C. 7:7A-15.10(e) refers to the New Jersey Bulletin, no such publication exists (New Jersey State Bar Association).

RESPONSE: There is no reference to the "New Jersey Bulletin" in this section. Rather the reference is to the DEPE Bulletin.

(1393) COMMENT: The proposal at N.J.A.C. 7:7A-15.10(e)3 requires publication of notice concerning proposed settlements. The provision will unnecessarily hold up settlements (New Jersey State Bar Association, N.J. Builders Association).

RESPONSE: The adoption of this language is required by the Federal regulations (40 CFR Parts 232 and 233) for the assumption of the 404 program.

(1394) COMMENT: The rule at N.J.A.C. 7:7A-15.10(e)3 should be amended to change 30 days to 20 days (NAIOP).

RESPONSE: The rule has not been amended as suggested. The Federal regulations (40 CFR Parts 232 and 233) for the assumption of the 404 program specify "at least 30 days for public comment on any proposed settlement."

N.J.A.C. 7:7A-15.11 Remedies not exclusive

(1395) COMMENT: Why was N.J.A.C. 7:7A-15.11 deleted from the rules (Pureland Industrial Complex)?

RESPONSE: This section was deleted because it did not provide any additional authority to the Department or to the permittee.

Subchapter 16. Fees

N.J.A.C. 7:7A-16.1 Payment of fees

(1396) COMMENT: The Department should provide justification of all fee increases. The DEPE should justify the fees charged for LOIs, specifically the increase to $35.00 per acre, with an accounting of hour typically spent in processing and site inspection, on an acre average basis. The maximum fee should be amended from $50,000 to $20,000 (NAIOP, New Jersey State Bar Association, N.J. Department of Agriculture, Pennoni Associates, Inc., New Jersey Association of Realtors, N.J. Builders Association, N.J. Society of Professional Engineers).

RESPONSE: The fees are based upon the number of person-hours required to perform the activities for which fees are charged, and upon the hourly cost associated with the work of a Department employee. A discussion of those two factors follows.

On July 1, 1988, the Division of Coastal Resources began administering the Freshwater Wetlands Protection Act (Act) (N.J.S.A. 13:9B-1). The Act authorized the Department to assess fees to cover the cost of processing and reviewing applications. At that time, the Department estimated the costs associated with the processing of applications for Letters of Interpretation, Letters of Exemption, Statewide general permits and Individual Freshwater Wetlands and Open Water Fill Permits. A year later, in July 1989, the Department estimated and promulgated fees for the review of the various types of transition area waivers as established by the Act. The fee estimates were based on an estimated number of person-hours required to perform various tasks, and the hourly rate associated with the salaries funded by the Department for the people performing these tasks.

Since the fee rules were promulgated, the hourly cost associated with the work of a Department employee has increased. In addition, the Element has collected information on the actual number of hours spent, on average, by the staff in the review of various applications. The Department has increased its fees to reflect increases in the hourly cost of an employee, and to accurately reflect the number of person-hours required to perform the activities for which fees are charged.

Letters of Interpretation (LOIs)

In the original rules adopted in 1988, there were three classes of LOIs: presence/absence, delineation for under one acre, and delineation for over one acre of property. The Division informally added a fourth type of LOI to allow a presence or absence determination on a one acre portion, or footprint, of any size property. The proposed fee increases are a result of information indicating that additional time is spent in the field to perform line verifications, and for delineations on properties under one acre. In addition, while a field inspection is not necessary for all presence/absence determinations, a footprint of disturbance will almost always require an onsite inspection. Therefore, a higher fee is required.

Statewide General Permits

In general, Statewide general permit authorizations require the lowest level of review among the permits under the Act because the activities are of a limited extent and impact. However, a site inspection by the project reviewer is required to assess compliance with the conditions of the Statewide general permits. The proposal to increase the fees for Statewide general permits reflects the time necessary to make onsite inspections.

Transition Area Waivers

The fees for transition area waivers have been increased to reflect the fee increases in Letters of Interpretation. This increase is required since the review of a transition area waiver without an LOI requires that the Department also review the same information that is required for an LOI application. In fact, the Department also provides the applicant with a LOI in conjunction with the transition area waiver decision.

In addition to the increased fees proposed for LOIs and Statewide General Permits, the Element has also added fees for the reissuance of LOIs, and permit modifications.

Reissuance of LOIs and permit modifications

While LOIs are issued for a five year period, it may become necessary at the end of that time for an applicant to request an extension for projects not yet built. The complexity of the reissuance, and the time required to process it, depends essentially upon the complexity of the original application, though a certain minimum amount of time is required to process even the simplest reissuance. The fee for reissuance for an LOI, which is a percentage of the fee for the original application, reflects this complexity.

Permit modifications will also vary. A minor modification under N.J.A.C. 7:7A-13.9 requires no significant time to process. Therefore, there is no fee for such minor modifications. For other modifications, the complexity of the modification, and the time required to process it, depends essentially upon the complexity of the original application. The modification fee, which is a percentage of the fee for the original application, reflects this complexity.

COST ESTIMATE

ACTIVITY: PROCESSING OF A LETTER OF INTERPRETATION THAT CONFIRMS THE WETLAND BOUNDARY

BASIS: THIS ESTIMATE IS FOR AN AVERAGE SITE OF 15-20 ACRES

PHASE OF WORK	TITLE	PERSON HOURS	HOURLY RATE	TOTAL
Log in, assign update, and report on Application	MIS Tech.	2	$ 13.22	$ 26.44
	Sr. Clerk Typ.	1	$ 8.52	$ 8.52
Review of Classification	Planner	8	$14.63	$117.04
Review and process LOI App; Confirmation of wetland boundary	Sup. Env. Spec.	3	$21.24	$ 63.72
	Prin. Env. Spec.	16	$18.92	$302.72
	Sr. Clerk Typ.	1	$ 8.52	$ 8.52
	DIRECT LABOR COST			$526.96
	OVERHEAD (24.21% OF LABOR COST)			$127.58
	SUBTOTAL LABOR			$654.54
DIRECT NON-LABOR	(30.3% OF DIRECT LABOR COST) (office rental, communications, office supplies, travel, etc.)			$159.67
FINAL TOTAL (ALL COSTS)				$814.21

COST ESTIMATE

ACTIVITY: PROCESSING OF A STATEWIDE GENERAL PERMIT APPLICATION

BASIS: THIS ESTIMATE IS FOR AN AVERAGE SITE OF 10-15 ACRES THAT WILL REQUIRE A FIELD INSPECTION

PHASE OF WORK	TITLE	PERSON HOURS	HOURLY RATE	TOTAL
Log in, assign update, and report on Application	MIS Tech.	2	$ 13.22	$ 26.44
	Sr. Clerk Typ.	1	$ 8.52	$ 8.52
Review and process waiver App.	Sup. Env. Spec.	1	$21.24	$ 21.24
	Prin. Env. Spec.	8	$18.92	$151.36
	Sr. Clerk Typ.	1	$ 8.52	$ 8.52
	DIRECT LABOR COST			$184.18
	OVERHEAD (24.21% OF LABOR COST)			$ 44.57
	SUBTOTAL LABOR			$228.75
DIRECT NON-LABOR	(30.3% OF DIRECT LABOR COST) (office rental, communications, office supplies, travel, etc.)			$ 55.80
FINAL TOTAL (ALL COSTS)				$284.55

COST ESTIMATE

ACTIVITY: PROCESSING OF A TRANSITION AREA WAIVER APPLICATION WHICH DOES NOT HAVE A LETTER OF INTERPRETATION THAT EITHER DELINEATES OR CONFIRMS THE WETLAND BOUNDARY

BASIS: THIS ESTIMATE IS FOR AN AVERAGE SITE OF 15-20 ACRES

PHASE OF WORK	TITLE	PERSON HOURS	HOURLY RATE	TOTAL
Log in, assign update, and report on Application	MIS Tech.	2	$ 13.22	$ 26.44
	Sr. Clerk Typ.	1	$ 8.52	$ 8.52
Review and process waiver App.	Sup. Env. Spec.	2	$21.24	$ 42.48
	Prin. Env. Spec.	10	$18.92	$180.92
	Sr. Clerk Typ.	1	$ 8.52	$ 8.52
	DIRECT LABOR COST			$266.88
	OVERHEAD (24.21% OF LABOR COST)			$ 64.61
	SUBTOTAL LABOR			$331.49
DIRECT NON-LABOR	(30.3% OF DIRECT LABOR COST) (office rental, communications, office supplies, travel, etc.)			$ 80.86
FINAL TOTAL (ALL COSTS)				$412.35

(1397) COMMENT: The proposed fee increases are not justified. Fees should realistically reflect the amount of time spent on each individual project review. The fees collected by the ACOE program are substantially lower (Atlantic Electric).

RESPONSE: These fees are justified since they do in fact represent the amount of time spent in review of actual projects. The wetlands program is entirely fee supported and the fee increases are necessary to cover employee salaries and overhead. The ACOE program receives a federal appropriation and, therefore, does not have to rely entirely on permit application fees to fund the program.

(1398) COMMENT: The increase in review fees is burdensome especially for the individual homeowner (Van Note-Harvey Associates).

RESPONSE: The wetlands permit program is entirely supported by application fees and fee increases are necessary to cover employee salaries and overhead. The Department has proposed several lower cost regulatory options specifically for the minor impact projects that are usually conducted for or by the individual homeowner. For example, the "footprint of disturbance" LOI and several of the modified or proposed Statewide general permits provide inexpensive mechanisms to comply with the Act.

(1399) COMMENT: Fees are increased for no apparent reason. Fees should not be raised to cover the state wetlands mapping program nor

to pay for the review of applications from other State agencies. These costs should be borne by all taxpayers and not the individual applicant (Langan Engineering).

RESPONSE: These fees are justified since they do in fact represent the amount of time spent in review of actual, non-State-agency projects. The wetlands program is entirely fee supported and the fee increases are necessary to cover employee salaries and overhead. The mapping program is, and the review and processing of State-agency applications will be, supported by a separate legislative appropriation and does not receive money from the collection of permit fees.

(1400) COMMENT: The rules should be amended to accommodate payment by voucher, so that public parks and recreation projects may be processed without undue administrative delay (NJ Recreation and Parks Association).

RESPONSE: The Department already accepts payment by voucher from public entities.

(1401) COMMENT: The charging of fees is a form of taxation without representation and a way of avoiding asking the legislature for funding (Pureland Industrial Complex).

RESPONSE: A State-run program may either derive its funding from legislative appropriations, or by directly charging those seeking a service, through user fees. Fee collection affects only those who develop under permits and/or those purchasing from the developer, while funding from legislative appropriations is borne by all taxpayers. For the purposes of freshwater wetland regulation under the Act, the legislature determined that fee collection is the preferred method of funding. The proposed fee schedule reflects actual costs to administer the program.

(1402) COMMENT: The fees at N.J.A.C. 7:7A-16.1(b)2 for LOI applications should be related to the area of wetlands or the boundary length of the wetlands rather than the gross acreage of a tract of land upon which the wetlands is located (Archer and Greiner, Concrete and Aggregate Association, Environmental Evaluation Group, N.J. Builders Association and form letters from: Pouliot Incorporated [and Affiliates], Four Builders Inc., Builders Association of Northwest Jersey, Glendon Development, Inc., Glendale Builders, Inc., Atmostemp Inc. Heating & Cooling, Centex Real Estate Corporation New Jersey Division, D.W. Smith Associates, P.A., NIAM Corp).

RESPONSE: The rule has not been amended as suggested. In order to give a comprehensive assessment of all wetlands, waters and transition areas on a subject property, the Department must conduct a field investigation of the entire tract.

N.J.A.C. 7:7A-16.2 Fees for review of requests for letters of interpretation

(1403) COMMENT: The rules at N.J.A.C. 7:7A-16.2(a)i and ii should define "parcel of land" and "footprint of land" (Pureland Industrial Complex).

RESPONSE: The terms referenced in N.J.A.C. 7:7A-16.1(a)1 and (a)2 are already defined at N.J.A.C. 7:7A-8.2(a)1 and (a)2.

(1404) COMMENT: There is no justification for charging $100.00 for a presence/absence determination on a parcel which may be over one acre in size, and requiring $200.00 for a footprint LOI, which can only apply to an area of one acre or less. Both should be $100.00 (NAIOP).

RESPONSE: The rule has not been amended as suggested. While a field inspection is not always necessary for presence/absence determinations, a request for a footprint of disturbance LOI almost always requires an onsite inspection because it is usually requested when the applicant is trying to locate a project site on a parcel which contains regulated features. Therefore, a higher fee is justified.

(1405) COMMENT: The proposal at N.J.A.C. 7:7A-16.2(c) does not provide any basis for charging 25 percent of the original application fee in order to reissue an LOI. In the case of large sites where the original LOI fee was many thousands of dollars the proposed reissuance fee would be burdensome and not reflective of the actual time involved. We object to the 25 percent reissuance fee, and urge that the maximum fee be capped at $100.00 (Archer & Greiner, NAIOP).

RESPONSE: Since site conditions are subject to change in five years, LOIs are only valid for that period of time. A site investigation and a reexamination of many of the factors used in making an LOI determination will have to be made in order to approve reissuance of an LOI and therefore, 25 percent of the original fee is justified.

N.J.A.C. 7:7A-16.3 Fees for review of individual freshwater wetlands, and open water fill permits or individual water quality certificate applications

(1406) COMMENT: The Department should cite the legal basis for charging fees for the review of Water Quality Certificates (New Jersey State Bar Association).

RESPONSE: Based on the review of the submitted comments and on legal advice received from the Attorney General's office, subchapter 4 has not been adopted and will be reproposed with substantive changes in the future.

(1407) COMMENT: The language at N.J.A.C. 7:7A-16.3 should be clarified to state that an individual fee is to be imposed for a WQC only when it is the only approval required (DuPont).

RESPONSE: Based on the review of the submitted comments and on legal advice received from the Attorney General's office, subchapter 4 has not been adopted and will be reproposed with substantive changes in the future.

N.J.A.C. 7:7A-16.4 Fees for review of Statewide general permit authorization applications

(1408) COMMENT: The fee for the review of a GP authorization bears no relationship to the complexity of the review needed for certain permits. The fees for GPS for properties that have not obtained a Letter of Interpretation (LOI) should be charged a fee at least equal to the fee for an LOI. The proposed fee of $250.00 is insufficient for an adequate review to determine compliance with the standards (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The Department has prepared a fee justification for these fees prior to proposing any fee increases. Please refer to the first response under the heading N.J.A.C. 7:7A-16.1, Payment of fees, above.

(1409) COMMENT: All GPs that involve the loss of wetlands or transition areas should have special fees that cover the costs for environmental impacts analysis and site inspection (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The fees for GPs have been increased to reflect Department personnel time expended in the review of submitted documentation and field investigation of the site. An environmental impact analysis is not required in an application for an authoization under an issued GP and therefore the rule has not been amended as suggested.

N.J.A.C. 7:7A-16.5 Fees for review and processing of transition area waiver applications

(1410) COMMENT: The proposed fee at N.J.A.C. 7:7A-16.5(a)2 for a transition area waiver on a large property without an LOI is substantially greater than the fee for an LOI and TAW individually. The fee should be equal (Environmental Evaluation Group, Concrete and Aggregate Association, N.J. Builders Association).

RESPONSE: The Department does not agree. The additional cost for a transition area waiver request without an LOI is necessary because the evaluation of the proposed modification of the transition area will involve an unknown wetland line, unknown resource classification and unknown acreage of transition area. Therefore, it may be necessary for the Department to review the waiver more than once since the originally submitted material may need to be completely revised upon the Department's determination of the wetlands line location and resource classification.

(1411) COMMENT: The rule should be amended at N.J.A.C. 7:7A-16.5(a)3 to reduce the fee to $250.00 plus $20.00 an acre when an absence determintion has been secured (NAIOP).

RESPONSE: The Department has not changed the rule as suggested. If an applicant has received an absence determination, which states that there are no regulated features on the property or in a designated footprint of disturbance, there would be no need for a transition area waiver.

N.J.A.C. 7:7A-16.7 Fees for the review and processing of requests for permit modifications

(1412) COMMENT: The causes for modification are not based on acreage and therefore do not require an evaluation of the entire permit. "When a permit is modified, only the conditions subject to modification are reopened . . .," as stated in N.J.A.C. 7:7A-13.6(e). Therefore, the rule should be modified at N.J.A.C. 7:7A-16.7 to charge a flat fee of $250.00, comparable to the administrative fee for reviewing a general permit (NAIOP).

RESPONSE: The rule has not been amended as suggested. The rule at N.J.A.C. 7:7A-13.7 discusses the causes for modification which can involve changes in materials, and substantial alterations or additions proposed to the permitted project or activity after permit issuance. Therefore, there is no way for the Department to predict what conditions the applicant may request to modify, the impacts that these modifications may have on the environment or the amount of review that will be required by the Department. Based upon Department experience, modifications often result in significant work efforts.

N.J.A.C. 7:7A-16.8 Fee refunds

(1413) COMMENT: The rule at N.J.A.C. 7:7A-16.8 should be modified to reflect that refunds should be based on the amount of work involved. If not they become an unauthorized tax (Pureland Industrial Complex).

RESPONSE: The rule has not been amended as suggested because the fees are based on an average amount of effort involved to process an application. Therefore, it would be more administratively costly and therefore less efficient to make case by case determinations. In addition, if such a structure was adopted, the Department would need to assess additional fees for applications that require more work than the average.

Subchapter 17. Civil Administrative Penalties and Requests for Adjudciation Hearings

(1414) COMMENT: It is unclear what the relationship is between this subchapter and subchapter 15. They appear to be redundant (New Jersey State Bar Association).

RESPONSE: Subchapter N.J.A.C. 7:7A-15 describes the Department's enforcement authority and possible remedies to violations. Subchapter N.J.A.C. 7:7A-17 describes how civil administrative penalties, one of several remedies statutorily available to the Department, are assessed for various violations of the Act. Redundancy in these subchapters is a result of trying to provide the clearest guidance possible.

N.J.A.C. 7:7A-17.1 General penalty provisions

(1415) COMMENT: The Department should establish a "safe harbor" provision for unintentional violations so that property owners are not faced with accumulating penalties for third party violations. Furthermore N.J.A.C. 7:7A-17.1(c)1 appears to require at least a one day penalty no matter what action is taken (Hannoch Weisman, AES Cohansey Inc., NAIOP).

RESPONSE: The rule at N.J.A.C. 7:7A-17.2(a) have been amended to give the Department flexibility in determining the penalty based on conduct of the violator, acreage of impact, and the resource value classification of the impacted wetland. This will allow the Department to consider if a violation was "unintentional" when assessing a penalty. However, the Act mandates that penalties be assessed for each day of the violation.

(1416) COMMENT: The penalties assessed per day at N.J.A.C. 7:7A-17.1(c)1 and 17.2(b)1 and 2 are arbitrary and capricious. There is no evidence as to severity of the act and proposed penalty. Further, the DEPE has inserted a provision to retroactively impose a penalty (N.J. Society of Professional Engineers).

RESPONSE: The Act at N.J.S.A. 13:9B-21d mandates that a penalty be assessed for each day during which each violation continues and that regulations be established based on the type of violation, seriousness, and duration. The rules at N.J.A.C. 7:7A-17.2(a) have been amended to give the Department flexibility in determining the penalty based on conduct of the violator, acreage of impact, and the resource value classification of the impacted wetland. The last two factors determine severity in a predictable and consistent manner. The Department disagrees that a provision has been inserted to impose penalties retroactively since the Act mandates that a penalty be assessed for each day during which each violation continues regardless of when it comes to the attention of the Department that a violation has occurred.

N.J.A.C. 7:7A-17.2 Civil administrative penalty determination

(1417) COMMENT: The rule at N.J.A.C. 7:7A-17.2(b)2iii assign one point for impacts less than one acre. What points are assigned to parcels less than one half acre or one quarter acre (N.J. Society of Professional Engineers).

RESPONSE: As clearly stated, all impacts of less than one acre are assigned one point. The Department notes that parcels less than one half acre or less than one quarter acre would, by definition, be included in the term "less than one acre."

(1418) COMMENT: In the rule at N.J.A.C. 7:7A-17.2(c), the point system seems unfair if the wetlands violation was not intentional and if the wetlands were restored (Pureland Industrial Complex).

RESPONSE: Intent of the violation is considered as part of the conduct factor. Further, a violation results in environmental impacts regardless of whether the wetlands are restored and thus this will not be a factor in assessing a penalty.

(1419) COMMENT: N.J.A.C. 7:7A-17.2(c) should be modified to allow flexibility to lower the penalty amount below $1500 (USEPA Region II, USEPA Headquarters).

RESPONSE: The rule has not been amended as suggested because the Department believes that reducing the bottom point of the range established by regulation would severely reduce the legislative intent of deterring random, unnecessary or undesirable alteration or disturbance of wetlands.

N.J.A.C. 7:7A-17.4 Civil administrative penalty for submitting inaccurate or false information

(1420) COMMENT: There should be a paragraph and penalty listed at N.J.A.C. 7:7A-17.4 for an applicant who submits false, inaccurate information and the penalty should be greater than $1000 to be an effective deterrent (CAREZ, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

RESPONSE: The rule at N.J.A.C. 7:7A-17.4 as adopted reflects the mandate of the Act pursuant to N.J.S.A. 13:9B-21d. The assessed penalties will range from a minimum of $8,000 to a maximum of $10,000 for each violation.

(1421) COMMENT: The proposal at N.J.A.C. 7:7A-17.4(b) is inconsistent with section 21(f) of the Act, which states that a person who knowingly makes a false statement, representation or certification is subject to a one time fine of not more than $10,000.00 (New Jersey State Bar Association, Hannoch Weisman, AES Cohansey Inc., NAIOP).

RESPONSE: As clearly stated at N.J.S.A. 13:9B-21a(5), 21f applies to criminal sanctions. Civil administrative penalties are discussed at 21d and are available to the Department for any violation of the "Act, or any rule or regulation adopted, or permit or order issued, pursuant to the Act." Clearly, a person making a false statement, representation or certification is in violation and may be assessed civil administrative penalties under 21d as well as subject to criminal sanctions under 21f (to the extent it would not constitute double jeopardy) as expressly provided in the last sentence in 21a.

Summary of Agency-Initiated Changes:

The following changes have been made upon adoption for clarification:

1. The rule has been amended upon adoption to universally replace the reference to "DEP" with "DEPE," "Department of Environmental Protection" with "Department of Environmental Protection and Energy," "Director" with "Administrator," "Division" with "Element," and "Division of Coastal Resources" with "Land Use Regulation Element," to reflect recent organizational changes.
2. The definition of "major discharge" at N.J.A.C. 7:7A-1.4 has been amended to make it grammatically correct.
3. The rule at N.J.A.C. 7:7A-7.1(g) has been reordered to clarify the intention of this provision.
4. The rule at N.J.A.C. 7:7A-7.6(a) and 7.6(c)4 has been amended upon adoption to clarify the notification and approval procedures for Special Activity Waivers based on Statewide general permit no. 25.
5. The rule at N.J.A.C. 7:7A-8.3(a)2 has been amended upon adoption to allow the submittal of a tax map for presence or absence determinations pursuant to N.J.A.C. 7:7A-8.2(a)1 since this is all that is necessary for the Department's determination.
6. The language at N.J.A.C. 7:7A-14.1(f)1 has been moved in its entirety to N.J.A.C. 7:7A-14.1(e)1 since this subsection relates directly to N.J.A.C. 7:7A-14.1(e).
7. The langauge at N.J.A.C. 7:7A-15.10(e) has been recodified as N.J.A.C. 7:7A-15.11 for clarification.
8. The rule at N.J.A.C. 7:7A-16.2(a)i and ii has been recodified correctly as N.J.A.C. 7:7A-16.2(a)1 and 2.
9. The rule at N.J.A.C. 7:7A-17.1(c) has been recodified correctly.
10. The rule at N.J.A.C. 7:7A-17.2(d) has been deleted since these provisions referred to provisions at 17.2(a) which were proposed for and subsequently deleted. In addition, these provisions are included at N.J.A.C. 7:7A-17.2(b).

Comments Beyond the Scope of the Proposal

The following is a list of comments that were beyond the scope of the February 19, 1991 proposal. As with any comments received by the Department on existing rules, these comments will be evaluated and considered during future rule amendment proposals.

COMMENT: The definition of "aquatic ecosystems" should be modified to delete all language after the word "wetlands" (USEPA Region II).

COMMENT: The definition of "BMP" should be amended to substitute "Standards for Soil Erosion and Sediment Control, N.J.A.C. 2:90-1.3," promulgated by the State Soil Conservation Committee for "1982 Standards for Soil Erosion and Sediment Control in New Jersey" (N.J. Department of Agriculture).

COMMENT: It is submitted that mosquito control in New Jersey has been established by N.J.S.A. 26:9-6 through 30 as a "compelling public need." The defintion of "compelling public need" should reflect this fact (Associated Executives of Mosquito Control Work in New Jersey).

The definition of critical habitat needs to identify those specific species of wildlife that are considered commercially and recreationally important (Resource Services North, Inc., NAIOP);

The definition of critical habitat needs to identify those specific species of wildlife that are considered commercially and recreationally important. The Division of Fish, Game & Wildlife should be made part of the definition so that Bureau of Regulation personnel do not have to make ad hoc judgements on this point (Wander Ecological Consultants, Mark Burlas);

We recommend that the DEPE eliminate the phrase, "commercially and recreationally." In addition, we recommend the DEPE replace the phrase, "uncommon vegetational communities" with the phrase, "representative flora" to ensure that critical habitats for flora are not defined in too restrictive a manner (Public Advocate of New Jersey, N.J. Audubon Sociey);

The definition of critical habitat should be amended to read "for fauna, areas which serve an essential ecological role in maintaining wildlife" (ANJEC, Great Swamp Watershed Association, N.J. Audubon Society);

The phrase "essential role" in the definition of "critical habitat or fauna or flora" should be explained (Resource Servies North Inc., Mark Burlas);

The phrase "essential role in maintaining" in the definition of "critical habitat for fauna or flora" should be explained carefully to describe what is being maintained: the survival of the species in NJ, concurrent population levels overall or in NJ, the presence of the species at that particular location, or something else (Wander Ecological Consultants);

The methodologies used to determine whether or not an area contains rare, unique, or uncommon vegetation communities need to be identified to clarify the definition of "critical habitat for fauna or flora" (Resource Services North Inc., Mark Burlas);

The definition of critical habitat should specify that for flora rare or unique plant species means those rank S1-S3 on the New Jersey Natural Heritage Program list "Special Plants of New Jersey". A list of uncommon vegetational communities promulgated by the same program should also be referenced. Note that every plant species is by definition "unique" therefore the word "unique" should be removed from this definition (Wander Ecological Consultants);

The definition of critical habitat should specify that for flora "rare or unique plant species" and "uncommon vegetational communities" must be defined. It would be logical to reference the appropriate classifications such as the new State Endangered Plant List for "rare or unique" species and the listing of natural communities put out by the Natural Heritage Program for determining "uncommon vegetational communities". Without these references, determining what is "critical habitat for fauna or flora" is too subjective and unpredictable (Amy S. Greene Environmental Consultants, N.J. Builders Association);

Use of the words rare, unique, and uncommon are relative in comparison with others. It should be further described as to what makes a plant species rare, unique, or uncommon. For example, the species should be listed on the State list found at N.J.A.C. 7:7C-5.1 (Environmental Evaluation Group, N.J. Concrete and Aggregate Association);

Within the definition of "critical habitat for fauna or flora" the terms "rare," "unique" and "uncommon" need to be further defined. Applicable habitat terminology should be limited to those referenced under Endangered Species Act of 1973 (JCP&L);

The definition of critical habitat should not be restricted to commercially and recreationally important wildlife. For example, habitat for some forest interior birds is rapidly dwindling and they are not considered "commercially and recreationally important" (Amy S. Greene Environmental Consultants, New Jersey Conservation Foundation); and

Where does the burden of proof rest for determining if an area is "critical habitat" for fauna (Amy S. Greene Environmental Consultants); and

COMMENT: The burden of proof for determining critical habitat should at be the responsibility of the DEPE (N.J. Builders Association).

COMMENT: In the definition of "degraded wetland" the terms "undisturbed" and "region" could be widely interpreted and should be clarified (U.S. Fish and Wildlife Service).

COMMENT: The DEPE should provide a definition for documented habitat and indicate the criteria that must be satisfied before an area is so designated (N.J. Builders Association).

COMMENT: The term "drainage" is redefined to be very narrow and specific. the proposed definition will create confusion. It is unclear whether this definition includes roof drainage, regrading of softball fields, or whether it refers to drainage in the general sense (Pureland).

COMMENT: The term "equal ecological value" should indicate that the term means "functional equivalency" (U.S. Fish and Wildlife Service).

COMMENT: The definition of "established, ongoing farming, ranching or silvicultural operations" impermissably narrows the statutory exemption for these activities. This definition should reflect the statutory language and reflect the guidance on prior converted croplands as defined in Regulatory Guidance letter No. 90-70 (NAIOP).

COMMENT: It is clear elsewhere in the rule that an "Intermittent stream" is not subject to wetland regulation. This definition should be clarified to reflect this (Pureland).

COMMENT: In the definition of "major discharge" the impacts on State listed endangered or threatened species should be considered as well as those on Federally listed species (Amy S. Greene Environmental Consultants).

COMMENT: The definition of "maximum extent practicable" should be clarified (Borough of South Plainfield Environmental Commission).

COMMENT: The definition of "plowing" impermissably narrows the scope of the statutory exemption for farming activities (NAIOP).

COMMENT: "Practicable alternative" as defined does not recognize those developments that were established as ongoing (land purchase, approvals obtained, buildings constructed, etc.) at the time of the Act and for which there is no possible way of recovering to date investments through an alternative. It is suggested that developments whose total investment per acre at this time exceeds the cost per acre of similar land in the area should be exempted from satisfying the practicable altenative definition (Pureland).

COMMENT: In the definition of "practicable alternative", there is a need for some limit such as a mile radius from the site or township or county of the proposed project for identifying what the other practicable choice is. Although another site for a proposed housing development may be available at the other end of the State, it may not be a suitable alternative, and therefore not "practicable," if the proposed project is to be located where housing is really needed. More guidance is needed for the purposes of doing an alternative analysis (Amy S. Greene Environmental Consultants).

COMMENT: The term "special aquatic site" should be defined and not reference the federal 404(b)1 guidelines and it should include bogs (ANJEC, Great Swamp Watershed Association).

COMMENT: "Significant adverse impact" as defined can include any alteration, any increase, any change, any loss, etc., and therefore is too broad. This definition should be modified by placing limits on the modification (Pureland).

COMMENT: The definition of "significant adverse impact" should reference impacts on "a wetland or State open water" since the two are referenced together in most of the regulations (Amy S. Greene Environmental Consultants).

COMMENT: The Department has failed to incorporate in N.J.A.C. 7:7A-1.6(e) the court decision in *New Jersey Chapter of the National Association of Industrial and Office Parks v. New Jersey Department of Environmental Protection,* 241 *N.J. Super.* 145 (App. Div. 1990) *certif. denied* 122 *N.J.* 374 (1990) which found that this provision is valid only if construed to mean that the wetlands aspects of exempt projects are not regulated pursuant to these pre-existing programs.

COMMENT: Repair of erosion control measures such as riprap at discharge pipes which entail less than 500 square feet of disturbance should not be considered a regulated activity pursuant to N.J.A.C. 7:7A-2.3(a)3. Allowing such disturbance without the need for a permit

encourages maintance of soil erosion controls and will protect downstream watercourses and wetlands (Brokaw DeRiso Associates).

COMMENT: In N.J.A.C. 7:7A-2.3(b) which defines the term "Regulated Activity" it would be useful to specify what constitutes "dredged or fill material" in State open waters as is done under N.J.A.C. 7:7A-2.3(a) for wetlands. This section does not specify whether fill includes the driving of pilings or the placing of obstructions (Amy S. Greene Environmental Consultants).

COMMENT: N.J.A.C. 7:7A-2.4(b) concerning "Presence or absence of hydrologic indicators", should be "presence or absence of *wetland* hydrology indicators" (Enviro-Resource Inc.).

COMMENT: The rule at N.J.A.C. 7:7A-2.5(b)2i should be amended to deny a downgrading of classification based on water quality, vegetation density or vegetation diversity (Manchester Township Environmental Commission).

COMMENT: The rule at N.J.A.C. 7:7A-2.9(b) should be amended to require public notification when requesting a letter of exemption. The notice requirements should be consistent with those for requesting an LOI (U.S. Fish and Wildlife Service, Public Advocate of New Jersey, Morris County Park Commission, Parsippany-Troy Hills Citizens for Responsible Government, Inc, New Jersey Conservation Foundation, ANJEC, Great Swamp Watershed Association, Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission, Passaic River Coalition).

COMMENT: At N.J.A.C. 7:7A-3.5(a)11v how does one determine the quality of a wetland? The Act only designates three resource value classifications and does not differentiate qualities to those types (Environmental Evaluation Group, N.J. Builders Association, N.J. Concrete and Aggregate Association)?

COMMENT: The use of herbicides to control unwanted trees should become a part of accepted Best Management Practices. (JCP&L).

COMMENT: The rule at N.J.A.C. 7:7A-7.1(c)1i8 should be amended to specify that the artificial features that may be maintained include fill (Wander Ecological Consultants).

COMMENT: The rules at N.J.A.C. 7:7A-7.2(c)6i list SIC industry categories including lumber and wood products, furniture and fixtures, leather and leather products. These are industries which can use raw materials which can be produced in agriculture and rural areas. Encouraging natural resource related industries is one of the goals of new federal rural development programs and a similar goal is expressed in the draft New Jersey interim State Development and Redevelopment Plan. The wetland rules should incorporate the same (N.J. Farm Bureau).

COMMENT: The standards set forth in N.J.A.C. 7:7A-7.2 which categorically eliminate most types of activities from eligibility for a transition area width reduction permit are inconsistent with the statute that provides for reduction down to 75 feet upon a showing of no substantial impact or hardship. The Department must more reasonably define substantial impact and remove the categorical exclusions (ie., documented habitats, commercial facilities, etc.) and issue waivers/permits upon a showing of no substantial impact to wetlands (NJ Builders Association).

COMMENT: In the rules at N.J.A.C. 7:7A-7.3(b)6 and 7:7A-7.3(c)5, this industry would like to voice its objection to mineral extraction of processing operations being necessarily identified as having a substantial impact, and therefore not able to be granted reductions in transition area width. With careful site planning, stormwater management, implementation of appropriate soil erosion and all required approvals, these types of operations need not have a significant impact on the environment and have not been identified as such relative to the other industries identified under these subsections (NJ Concrete an Aggregate Association).

COMMENT: The rule at N.J.A.C. 7:7A-7.3(c)1 is ambiguous (Amy S. Greene Environmental Consultants, Inc.).

COMMENT: It is unclear if N.J.A.C. 7:7A-7.3(c)3 applies to Pureland (Pureland Industrial Complex).

COMMENT: Do the rules at N.J.A.C. 7:7A-7.3(c)4 allow for the distribution of acid soils to prevent degradation (Pureland Industrial Complex)?

COMMENT: The use of SIC codes at N.J.A.C. 7:7A-7.3 may be inappropriate if they are based solely on warehousing or assembly or if the disturbance has no effect (Pureland Industrial Complex).

COMMENT: The rule at N.J.A.C. 7:7A-7.3 should clarify that deed restrictions, municipal approvals, installed infrastructure which relate to the subject property are "not the result of any action or inaction by the applicant" and run with the land (Pureland Industrial Complex).

COMMENT: At N.J.A.C. 7:7A-7.3(c)2 what constitutes a component of the Wild and Scenic River System (Pureland Industrial Complex)?

COMMENT: At N.J.A.C. 7:7A-7.3 the Department should clarify the reasoning behind "dominant vegetational community" and "development intensity" (Pureland Industrial Complex).

COMMENT: At N.J.A.C. 7:7A-7.5(c) what is the definition of an individual freshwater wetland (Pureland Industrial Complex)?

COMMENT: In the rule at N.J.A.C. 7:7A-7.6(c)4i, the rule should be amended to request a "schematic" site plan instead of a "site plan" (Pureland Industrial Complex).

COMMENT: Providing notice of application for transition area permits in the DEPE Bulletin as stated at N.J.A.C. 7:7A-7.7(g) is too cumbersome and not workable (N.J. Society of Professional Engineers).

COMMENT: The language at N.J.A.C. 7:7A-7.7(i) which allows the DEPE to establish conditions on transition area permits as needed on a case by case basis is not specific enough (N.J. Society of Professional Engineers).

COMMENT: The rules at N.J.A.C. 7:7A-7.9(d) provide that the issuance of a transition area permit does not convey property rights or any sort of exclusive privilege. This is inconsistent with general principles of Property and Administrative Law. Moreover, since the proposed amendments to the transition area regulations require that such areas be recorded in deeds, they do convey property rights under New Jersey Law.

COMMENT: An extension of 45 days is referenced at N.J.A.C. 7:7A-8.4(b) but no where in the subchapter does it indicate what the normal review time should be (Amy S. Greene Environmental Consultants, Inc.).

COMMENT: An extension of 45 days is referenced at N.J.A.C. 7:7A-8.4(b). This is much too long (Pureland Industrial Complex).

COMMENT: The proposed amendment to N.J.A.C. 7:7A-9.1(e) must provide for notice, an administrative hearing and an opportunity for appellate review (Hannoch Weisman, AES Cohansey Inc.).

COMMENT: The proposed rule at N.J.A.C. 7:7A-9.1(e) should be modified to provide that the Department may rescind a GP only if it does so pursuant to the Administrative Procedure Act (New Jersey State Bar Association).

COMMENT: The rule at N.J.A.C. 7:7A-9.2(a)5 should be modified to allow the cleaning and clearing of swales and intermittent streams (Pureland Industrial Complex).

COMMENT: This permit should be modified to limit its use in exceptional resource value wetlands (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

COMMENT: The rules at N.J.A.C. 7:7A-9.2(a)10v(1) requires the minimization of cartway widths and shoulder widths to reduce environmental impacts. The rule should be amended to that they should not be reduced below acceptable engineering standards as this is an important public safety issue (Brokaw DeRiso Associates, Inc.).

COMMENT: At N.J.A.C. 7:7A-9.2(a)15, what are low sills and dams (Pureland Industrial Complex)?

COMMENT: We note that this section (timing restrictions) applies to general permits when in fact these standard conditions should also apply to Individual Permits (Division of Fish, Game and Wildlife).

COMMENT: The proposal at N.J.A.C. 7:7A-10.4(b) should be modified to specify that copies of the memorandum of record shall be mailed to municipal clerks, municipal planning boards and county planning boards (Upper Rockaway River Watershed Association, Borough of Mountain Lakes Environmental Commission).

COMMENT: The rule at N.J.A.C. 7:7A-10.4 should be modified to include internal guidelines for applicant's use for preparing applications (Pureland Industrial Complex).

COMMENT: As currently worded at N.J.A.C. 7:7A-11.1(c)3, double noticing is required for both the Individual Permit application and again separately under N.J.A.C. 7:7A-8.3(a) for the Letter of Interpretation portion of the application. This section should be reworded to require those items at N.J.A.C. 7:7A-8.3(a)1-7 and (b)2 while omitting those listed at (a)8-12 which deal with duplicate noticing requirements (Langan Engineering, N.J. Builders Association).

COMMENT: The rule at N.J.A.C. 7:7A-17.1(c) states that "the violation continues irrespective of weather, approval of other agencies to remove them, safety, due process under the law ..." This is blatantly unfair (Pureland Industrial Complex).

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions to proposal indicated in brackets with asterisks *[thus]*).

SUBCHAPTER 1. GENERAL INFORMATION

7:7A-1.1 Scope and authority

This chapter constitutes the rules governing the implementation of the Freshwater Wetlands Protection Act, P.L. 1987, c.156 *[and the rules governing the issuance of Water Quality Certifications pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq]*. The provision of any State law, rule or regulation to the contrary notwithstanding, the alteration or disturbance in and around freshwater wetland areas in the State, and the discharge of dredged or fill material into State open waters are subject to this chapter and the Act.

7:7A-1.2 Construction

This chapter shall be liberally construed to allow the Department to implement fully its statutory functions pursuant to the Act and to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

7:7A-1.3 Forms and information

Any forms, fees or other information required to be submitted by this chapter shall be obtained from and returned to the *[Division of Coastal Resources]* ***Land Use Regulation Element***, New Jersey Department of Environmental Protection ***and Energy***, CN 401, Trenton, New Jersey 08625. Courier and hand deliveries may be delivered to 5 Station Plaza, 501 East State Street, Trenton, New Jersey. Other sources of information referred to in this chapter are available from the Office of Maps and Publications located at 428 State Street, Trenton, New Jersey 08625.

7:7A-1.4 Definitions

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

"Acid producing deposits" means those geologic deposits containing iron sulfide minerals (pyrite or marcasite) which oxidize upon exposure to oxygen from the air or from surface waters to produce sulfuric acid.

"Act" means the Freshwater Wetlands Protection Act, P.L. 1987, c.156.

["Adjacent" means bordering, contiguous, or neighboring.]

"Administrator" means the Administrator of the Land Use Regulation Element.

"Applicant" means a person who submits an application for a permit, waiver, or any other Department decision pursuant to N.J.A.C. 7:7A.

"Application for development" means the application form and all accompanying documents required by ordinance for approval of a subdivision plat, site plan, planned development, conditional use, zoning variance or direction of the issuance of a permit pursuant to N.J.S.A. 40:55D-34 or N.J.S.A. 40:55D-36.

"Agency of the State" means each of the principal departments in the executive branch of the State Government, and all boards, divisions, commissions, agencies, departments, councils, authorities, offices or officers within any such departments.

. . .

"Best Management Practices" (BMP's) means methods, measures, designs, performance standards, maintenance procedures, and other management practices which prevent or reduce adverse impacts upon or pollution of freshwater wetlands, State open waters, and adjacent aquatic habitats, which facilitate compliance with the Federal Section 404(b)(1) guidelines (40 C.F.R. Part 230), New Jersey Department of Environmental Protection ***and Energy*** Flood Hazard Area Regulations (N.J.A.C. 7:13), 1982 Standards for Soil Erosion and Sediment Control in New Jersey, Storm Water Management Regulations (N.J.A.C. 7:8), and effluent limitations or prohibitions under Section 307(a) of the Federal Act and New Jersey Department of Environmental Protection ***and Energy*** Surface Water Quality Standards (N.J.A.C. 7:9-4). Examples include practices found at 33 C.F.R. 330.6, 40 C.F.R. 233.35(a)6, the Department's Technical Manual for Stream Encroachment, and "A Manual of Freshwater Wetland Management Practices for Mosquito Control in New Jersey". ***The manuals included in this definition is only a partial listing, interested parties should contact the Department the most up to date list.***

"Clean Water Act", "Federal Act", or "CWA" means the Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 (33 U.S.C. §§1251 et seq.) and any amendments and supplements thereto, and the regulations adopted pursuant thereto.

"Climax habitat" means a mature, well developed natural ecological community. See N.J.A.C. 7:7A-14.

"Commissioner" means the Commissioner of the Department of Environmental Protection ***and Energy***.

"Compelling public need" means that based on specific facts, the proposed regulated activity will serve an essential health or safety need of the municipality in which the proposed regulated activity is located, that the public health and safety benefit from the proposed use and that the proposed use is required to serve existing needs of the residents of the State, and that there is no other means available to meet the established public need. See N.J.A.C. 7:7A-3.4(a)1.

"Contiguous" means adjacent properties, even if they are separated by human-made barriers or structures or legal boundaries.

"Council" means the Wetlands Mitigation Council established pursuant to Section 14 of the Act.

"Critical habitat for fauna or flora" means:

1. For fauna, areas which serve an essential role in maintaining commercially and recreationally important wildlife, particularly for wintering, breeding, spawning and migrating activities;

2. For flora, areas supporting rare or unique plant species or uncommon vegetational communities in New Jersey.

. . .

"Delegable waters" means all waters of the United States, as defined at N.J.A.C. 7:7A-1.4, within the legal boundaries of the State that will be regulated by the Department as part of the Federal 404 program with the exception of:

1. Those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark including adjacent wetlands. In those waters over which the Department does not assume jurisdiction under the 404 program, the Department will retain jurisdiction under State law, and both State and Federal requirements will apply.

2. Specific bodies of water over which the Department will not assume 404 program jurisdiction include, but are not limited to:

i. The entire length of the Delaware River within the State of New Jersey;

ii. Waters of the United States under the jurisdiction of the Hackensack Meadowlands Development Commission; and

iii. Greenwood Lake.

"Department" means the Department of Environmental Protection ***and Energy***.

. . .

["Director" means the Director of the Division of Coastal Resources.]

"Discharge of dredged material" means any addition of dredged material into State open waters or freshwater wetlands. The term includes the addition of dredged material into State open waters or freshwater wetlands and the runoff or overflow from a contained land or water dredge material disposal area. Discharges of pollutants into State open waters resulting from the subsequent onshore processing of dredged material are not included within this term and are subject to the New Jersey Pollutant Discharge Elimination System, N.J.S.A. 58:10A-1 et seq., program even though the extraction and deposit of such material may also require an open water fill permit or a 404 permit from the U.S. Army Corps of Engineers or a Water Quality Certification.

"Discharge of fill material" means the addition of "fill material" into State open waters or freshwater wetlands. The term includes, but is not limited to, the following activities:

1. Placement of fill that is necessary for the construction of any structure;
2. The building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction;
3. Site-development fill for recreational, industrial, commercial, residential, and other uses;
4. Causeways or road fills;
5. Dams and dikes;
6. Artificial islands;
7. Property protection or reclamation devices, or both, such as riprap, groins, seawalls, breakwaters, and revetments;
8. Beach nourishment;
9. Levees;
10. Fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and
11. Artificial reefs.

"Disturbance of the water level or water table" a term used to define regulated activity in N.J.A.C. 7:7A-2.3(a)2, means the alteration of the existing elevation of groundwater or surface water, regardless of duration of such alteration, by:

1. Adding or impounding a sufficient quantity of stormwater or water from other sources to modify the existing vegetation, values or functions of the wetland; ***and***

2. Draining, ditching or otherwise causing the depletion of the existing groundwater or surface water levels such that the activity would modify the existing vegetation, values or functions of the wetland*[; or]**.*

[3. The draw down of greater than 12 inches of the water table in a wetland.]

"Ditch" means a linear topographic depression ***with bed and banks*** of human construction which conveys water to or from a site. This does not include channelized or redirected natural water courses.

["Division" means the Division of Coastal Resources, or its successor in name, in the Department.]

...

"Element" means the Land Use Regulation Element.

...

"EPA priority wetlands" means wetlands which are designated as priority wetlands by EPA. The "Priority Wetlands List for the State of New Jersey" is available from the Office of Maps and Publications listed at N.J.A.C. 7:7A-1.3.

...

"Fill" means the deposition of material (for example, soil, sand, earth, rock, concrete, pavement, solid material of any kind, etc.) into an area which changes the resultant elevation in relation to surface water or groundwater level. "Fill" also means the material deposited.

"FW" means the general surface water classification applied to fresh waters in the Department's Surface Water Quality Standards, N.J.A.C. 7:9-4, and subsequent amendments thereto.

"FW1" means those fresh waters that originate in and are wholly within Federal or State parks, forests, fish and wildlife lands, and other special holdings, that are to be maintained in their natural state of quality (set aside for posterity, and not subjected to any wastewater discharges of human origin), as designated in the Department's Surface Water Quality Standards, N.J.A.C. 7:9-4, and subsequent amendments thereto.

"FW2" means the general surface water classification applied in the Department's Surface Water Quality Standards, N.J.A.C. 7:9-4, and subsequent amendments thereto, to those fresh waters that are not designated as FW1 or Pinelands Waters.

"Freshwater wetland" or wetland means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation; provided, however, that the Department, in designating a wetland, shall use the three-parameter approach (that is, hydrology, soils and vegetation) enumerated in the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands," and any subsequent amendments thereto, incorporated herein by reference. These include tidally influenced wetlands which have not been included on a promulgated map pursuant to the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq.

...

"Hydric soils" means a soil that in its undrained condition is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions that favor the growth and regeneration of hydrophytic vegetation. These soils may be on New Jersey's Official List of Hydric Soils developed by the United States Department of Agriculture Soil Conservation Service and the United States Fish and Wildlife Service National Wetlands Inventory, in "The Wetlands of New Jersey" 1985, published by the United States Fish and Wildlife Service or in the Federal Manual for Identifying and Delineating Jurisdictional Wetlands and amendments thereto. Alluvial land, as mapped by soil surveys, or other soils exhibiting hydric characteristics identified through field investigation ***as described in Part III, field indicators and other available information of the "Federal Manual"*** may also be considered a hydric soil for the purposes of wetland classification. Also, wet phase of somewhat poorly drained soils not on New Jersey's Official List of Hydric Soils may also, on occasion, be associated with a wetland and therefore for the purposes of this Act shall be considered a hydric soil.

...

"Individual permit" means a permit issued pursuant to N.J.A.C. 7:7A-3.

...

"Isolated wetlands or ***isolated*** State open waters" means a freshwater wetland or State open water which is not connected to a surface water tributary system discharging into a lake, pond, river, stream or other surface water feature. ***The term "connected to" includes all surface water connections whether regulated or not, as well as connections by way of stormwater or drainage pipes. "Connected to" does not include a groundwater connection nor does it include overland flow unless there is evidence of scouring or erosion.***

"Lake, pond, or reservoir" means any impoundment, whether naturally occurring or created in whole or in part by the building of structures for the retention of surface water.

"Letters of interpretation" are letters issued by the Department for the purpose of indicating the presence or absence of wetlands, State open waters, or transition areas (see N.J.A.C. 7:7A-8); for the purpose of verifying or delineating the boundaries of freshwater wetlands, State open waters, transition areas; or to obtain a wetland resource value classification.

"Linear development" means land uses such as roads, ***drives,*** railroads, sewerage and stormwater management pipes, gas and water pipelines, electric, telephone and other transmission lines and the rights-of-way therefor, the basic function of which is to connect two points. Linear development shall not mean residential, commercial, office, or industrial buildings, improvements within a development such as utility lines or pipes, or internal circulation roads.

"Major discharge" means:

1. Discharges of dredged or fill material into areas identified by the Department, in consultation with USEPA, the Corps and the USFWS, which could have the following impacts:

i. Significant adverse effects on freshwater wetlands or State open waters which are unique for a particular geographic region;

ii. *[Significantly reduce]* ***Significant reductions in*** the ecological, commercial, or recreational values of more than five acres of a freshwater wetland or State open water; or

iii. Affect***s to*** a Federally listed or proposed endangered or threatened species;

2. Wetland fills involving more than 10,000 cubic yards of material.

"Maximum extent practicable" means to the maximum extent after weighing, evaluating and interpreting alternatives to protect the ecological integrity of a wetland or State open water.

"Mitigation" means activities carried out pursuant to N.J.A.C. 7:7A-14 in order to compensate for freshwater wetlands or State open waters loss or disturbance caused by regulated activities.

"Offsite" means the area not onsite.

"Onsite" means the area located within the legal boundary of the property or properties on which the regulated activity or activities are proposed, are occurring, or have occurred, as set forth in the deed for that area, plus any contiguous land owned by the same person as set forth in the deed or deeds for that contiguous land, as these boundaries existed on July 1, 1988 or on the date of submission of the application if lots and blocks were merged subsequent to July 1, 1988.

"Open water fill permit" means the type of New Jersey Pollution Discharge Elimination System permit issued pursuant to this chapter and N.J.S.A. 58:10A-1 et seq., which governs the discharge of dredged or fill material into State open waters.

"Ordinary high water mark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

"Permit" means *[a permit]* ***an approval*** to engage in a regulated activity in a freshwater wetland, State open water, or transition area issued pursuant to the Act and this chapter.

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

"Pilings" means timber, metal, concrete or other similar structures driven, dropped, poured, or placed to support a vertical load.

"Preliminary approval" means the conferral of certain rights pursuant to N.J.S.A. 40:55D-46, 48 and 49 prior to final approval after specific elements of a development plan have been agreed upon by the planning board and the applicant.

"Property" means the area contained within the legal boundary as defined by municipal block and lot***, or right-of-way description*** as set forth in the deed for that area.

"Public hearing" means an administrative non-adversarial type hearing before a representative or representatives of the Department providing the opportunity for public comment, but does not include cross-examination.

"Redevelopment" means the construction of structures or improvements on ***or below*** impervious surfaces ***such as buildings, asphalt, concrete, and other materials which will not allow infiltration of liquids,*** legally existing in the transition area prior to July 1, 1989.

"Regulated activity" means any of the activities defined at N.J.A.C. 7:7A-2.3 *[and N.J.A.C. 7:7A-6.2(a)]*.

...

"Silviculture" means the planting, cultivating and harvesting by cutting or digging, of Christmas trees or nursery stock. After harvesting, new seedings are replanted for a future crop. For the purposes of this chapter, "silviculture" does not include forestry activities such as the production of lumber products or firewood.

"Special aquatic site" means any site described in subpart E of the 404(b)1 guidelines (40 C.F.R. 230 et seq., or any amendments thereto), with the exception of freshwater wetlands which, for the purposes of this chapter shall not be considered special aquatic sites.

"State Forester" means the chief forester employed by the Department.

"State open waters" means those waters *[of the State]* ***of the United States within the boundary of the State or subject to its jurisdiction*** that are not wetlands as defined in this section.

"Swale" means a linear topographic depression, either naturally occurring or of human construction, which drains less than 50 acres. Swales ***are wetland features meeting the three parameter approach,*** do not have distinguishable bed and banks and are not intermittent streams. A swale can not be within a larger wetland complex, nor is it an undulation in the boundary of a wetland complex. A swale is a natural or human-made feature, which has formed or was constructed in uplands to convey surface water runoff from the surrounding upland areas. The definition of swales generally does not include wetland features over 50 feet in width at the widest point which are considered by the Department to be independent wetland features.

"Threatened or endangered species" shall be those species identified pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq., or those identified pursuant to the Endangered Species Act of 1973, 16 U.S.C. 1531 et al. and subsequent amendments thereto.

...

"Transition area *[permit]* ***waiver***" means a *[permit]* ***waiver*** issued by the Department to engage in any of the *[regulated]* ***prohibited*** activities enumerated at N.J.A.C. 7:7A-6.2(a) in a transition area issued by the Department pursuant to the Act and this chapter. A transition area *[permit]* ***waiver*** may be issued by the Department in the transition area adjacent to either a freshwater wetlands of exceptional or intermediate resource value and may take one of the following forms:

1. Transition area *[permit]* ***waiver***, Reduction. This *[permit]* ***waiver*** may be approved on the basis of a finding of no substantial impact or if the *[permit]* ***waiver*** is necessary to avoid an extraordinary or substantial hardship as defined at N.J.A.C. 7:7A-7.2(g) or 7.3(f), respectively. The *[permit]* ***waiver*** would result in a reduction in the standard width of a transition area without requiring an expansion of the remaining transition area for compensation;

2. Transition area *[permit]* ***waiver***, Special Activities. This *[permit]* ***waiver*** may be issued to approve the partial elimination of the standard transition area, without requiring an expansion of the remaining transition area for compensation for the special activities set forth below:

i. Stormwater management facilities as defined at N.J.A.C. 7:7A-7.4(b)1;

ii. Linear development as defined at N.J.A.C. 7:7A-1.4;

iii. Activities permitted under the specific Statewide general permits listed at N.J.A.C. 7:7A-7.4(e). The Statewide general permits themselves are set forth at N.J.A.C. 7:7A-9.2(a); or

iv. Activities defined as redevelopment pursuant to N.J.A.C. 7:7A-7.4(f); or

3. Transition area *[permit]* ***waiver***, Averaging Plan. This *[permit]* ***waiver*** may be issued to approve a plan to modify the overall shape of the standard transition area without reducing the total square footage of the standard transition area.

...

"USFWS" means the United States Department of the Interior, Fish and Wildlife Service.

...

"Waters of the United States" means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

2. All interstate waters including interstate wetlands;

3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), wetlands, mudflats, sandflats, sloughs, wet meadows, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

i. Which are or could be used by interstate or foreign travelers for recreational or other purposes;

ii. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

iii. Which are used or could be used for industrial purposes by industries in interstate commerce;

iv. Which are or would be used as habitat by birds protected by Migratory Bird Treaties;

v. Which are or would be used as habitat by other migratory birds which cross state lines;

vi. Which are or would be used as habitat for endangered and threatened species; or

vii. Which are used to irrigate crops sold in interstate commerce;

4. All impoundments of waters otherwise defined as waters of the United States under the definition;

5. Tributaries of waters identified in paragraphs 1 through 4 of this definition;

6. The territorial seas; and

7. Wetlands adjacent to waters identified in paragraphs 1 through 6 of this definition other than those that are themselves wetlands.

The following waters are generally not considered "waters of the United States". However, the right is reserved to determine on a case by case basis, if particular watercourses or waterbodies are "waters of the United States":

1. Non-tidal drainage and irrigation ditches excavated on dry land;

2. Artificially irrigated areas which would revert to upland if the irrigation ceased;

3. Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

4. Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons;

5. Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the above definition of "waters of the United States";

6. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds); and

7. Erosional channels less than two feet wide and six inches deep in upland areas resulting from poor soil management practices.

"Water Quality Certification (WQC)" is the determination that the Department shall make pursuant to Section 401 of the Federal Act and N.J.S.A. 58:10A-1 et seq. in the evaluation of a proposed activity which requires a Federal license or permit.

7:7A-1.6 Other statutes and regulations

(a)-(b) (No change.)

(c) This section shall not, however, preclude municipal advice to the Department concerning letters of interpretation pursuant to N.J.A.C. 7:7A-8.5.

(d)-(e) (No change.)

7:7A-1.7 Effective and operative dates

This chapter, with the exception of N.J.A.C. 7:7A-6 and 7, became effective June 6, 1988, and became operative on July 1, 1988. N.J.A.C. 7:7A-6 and 7 became operative on July 1, 1989.

SUBCHAPTER 2. APPLICABILITY

7:7A-2.1 Jurisdiction

(a) (No change.)

(b) *[Except when an activity is authorized by the board of health having jurisdiction or its authorized agent acting on its behalf pursuant to N.J.A.C. 7:7A-9.2(a)25, *[a]* ***A*** person proposing to engage in a regulated activity ***in a wetland*** shall apply to the Department for a Statewide general permit authorization or *[a]* ***an Individual*** freshwater wetlands permit, and a person proposing to discharge dredged or fill material into State open waters shall apply to the Department for ***a Statewide general permit authorization or*** an ***Individual*** open water fill permit. The discharge of dredged or fill material in a State open water or wetland may also need a stream encroachment permit pursuant to the Flood Hazard Area Control Act N.J.S.A. 58:16A-50 et seq. or a Water Quality Certification *[pursuant to N.J.A.C. 7:7A-4]*.

(c) (No change.)

(d) Where a proposed project requires more than one permit from the *[Division, the Division]* ***Element, the Element*** will require the submittal of only one application, but that application shall comply with the requirements of each applicable permit program including all fee requirements. This provision does not preclude an applicant from submitting separate applications if the timing or magnitude of a project requires it.

(e) Where a proposed project requires more than one permit from the *[Division]* ***Element***, applicants are strongly encouraged to apply for all required permits at one time. In most cases this will allow the Department to issue joint permits.

7:7A-2.2 Subchapters which apply to freshwater wetlands permits ***or**[,]* open water fill permits*[, and Water Quality Certificates]*

[(a)] Any person proposing to engage in a regulated activity in a freshwater wetlands or State open water shall comply with the provisions of subchapters 1 (General information), 2 (Applicability), 3 (General standards for granting individual freshwater wetlands and open water fill permits), 5 (Emergency permits), 6 (Transition areas), 7 (Transition area waivers), 8 (Letters of Interpretation), 9 (General permits), 10 (Pre-application conferences), 11 (Application procedure), 12 (Review of applications), 13 (Permit contents), 14 (Mitigation), 15 (Enforcement), and 16 (Fees) of this chapter.

[(b) Any person proposing to engage in an activity requiring a Water Quality Certificate shall comply with the provisions of subchapter 4 (General standards for granting water quality certificates).]

7:7A-2.3 Regulated activities

(a) The following activities in a freshwater wetland are regulated pursuant to the Act and are subject to the requirements of this chapter as set forth in N.J.A.C. 7:7A-2.2:

1. (No change.)

2. The drainage or disturbance of the water level or water table *[including the diversion of surface waters or subsurface waters that would alter the hydrology of a wetland or which would result in the draw down of greater than twelve inches of the water table in a wetland]*;

3.-5. (No change.)

6. The destruction of plant life which would alter the character of a freshwater wetland, including the cutting of trees except the approved harvesting of forest products pursuant to N.J.A.C. 7:7A-2.7(b).

(b) (No change.)

(c) For the purposes of this chapter, the following activities are not considered to result in the alteration of the character of a freshwater wetland:

1. Surveying or wetlands investigation activities, for the purpose of establishing or reestablishing a boundary line or points, which ***use only hand held equipment and*** do not involve the use of motorized *[tools or]* vehicles to either clear vegetation or extract soil borings. The clearing of vegetation along the survey line or around the survey points shall not exceed three feet in width or diameter respectively and shall not be kept clear or maintained once the survey or delineation is completed; ***and***

2. The placement of temporary structures (those not requiring permanent foundations nor the deposition of fill material) not to exceed 32 square feet for the purposes of observing or harvesting fish or wildlife. These activities include the construction of observation or waterfowl blinds and the placement of traps*[; and]***.***

[3. The placement of water level or monitoring devices that require the disturbance of 10 square feet or less of wetlands and/or open water.]

7:7A-2.4 Designation of freshwater wetlands

(a) The designation of freshwater wetlands shall be based upon the three-parameter approach (that is, hydrology, soils and vegetation) enumerated in the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands", and any subsequent amendments thereto.

(b) (No change.)

(c) To aid in determining the presence or absence of freshwater wetlands, the Department may refer to any of the following sources of information:

1. New Jersey Freshwater Wetlands maps (as they become available);

Recodify existing 1.-6. as 2.-7. (No change in text.)

(d) Vegetative species classified as hydrophytes and indicative of freshwater wetlands shall include, but not be limited to, those plants

listed in "National List of Plant Species that Occur in Wetlands: 1988-New Jersey," compiled by the United States Fish and Wildlife Service in cooperation with the United States Army Corps of Engineers, USEPA, and the United States Soil Conservation Service, and any subsequent amendments thereto.

(e) The Department is developing functional, complete, and up-to-date composite freshwater wetlands maps and inventory at a scale of 1:12000 ***to provide guidance*** for freshwater wetlands ***general*** informational purposes. ***These maps do not supersede wetland delineations which have been accepted and approved by DEPE for a specific site.*** The Department will make appropriate sections of this map and inventory available on a periodic basis to the county clerk or register of deeds and mortgages in each county, as appropriate, and to the clerk of each municipality.

(f) When available, the up-to-date composite freshwater wetlands map and inventory shall be used to locate wetlands as definitively as is practicable, as an informational tool in advising the public of the approximate extent and location of wetlands, and in preparing some letters of interpretation. However, exact delineation of wetlands boundaries is required, and measurements shall be made in accordance with the three-parameter approach.

7:7A-2.5 Classification of freshwater wetlands *[or State open waters]* by resource value

(a) (No change.)

(b) Freshwater wetlands of exceptional resource value shall be freshwater wetlands which exhibit any of the following characteristics.

1. Those which discharge into FW-1 waters or FW-2 trout production (TP) waters or their tributaries; or

2. (No change.)

(c) Freshwater wetlands of ordinary value shall be freshwater wetlands which do not exhibit the characteristics enumerated in (b) above, and which are:

1. Isolated wetlands which are more than 50 percent surrounded by development and less than 5,000 square feet in size.

[i. For the purposes of this subsection only, isolated wetlands shall also include tidally influenced wetlands located adjacent to human-made lagoons in areas of "infill development" where at least 75 percent of the upland lots within 200 feet of the property are developed with residential or commercial uses;]

*[ii.]***i.*** For the purposes of this subsection, "development" shall mean ***the following uses that were legally existing prior to July 1, 1988 or were permitted under the Act***:

(1) Lawns;

(2) Maintained landscaping;

(3) Impervious surfaces; *[and]*

(4) *[Railroad]* ***Active railroad*** rights-of-way; ***and***

(5) Gravelled or stoned parking/storage areas and roads;

*[iii.]***ii.*** For the purposes of this subsection, *[the area within 50 feet of the wetland boundary shall be investigated in order to determine whether the wetland meets the "more than 50 percent surrounded by development" criteria]* ***development must occupy more than 50 percent of the area within 50 feet of the wetland boundary in order for the wetland to meet the criterion of more than 50 percent surrounded by development***.

2. Drainage ditches;

3. Swales; or

4. Detention facilities.

(d)-(e) (No change.)

7:7A-2.6 Designation of State open waters

State open waters means those waters of the United States *[in New Jersey]***, as defined at N.J.A.C. 7:7A-1.4, within the boundary of the State or subject to its jurisdiction*** that are not wetlands as defined at N.J.A.C. 7:7A-1.4.

7:7A-2.7 Activities exempted from permit requirement

(a) The exemptions in (b) and (c) below shall not apply to any *[regulated activities in]* ***discharge of dredged or fill material into*** freshwater wetlands*[,]* ***or*** State open water*[, or transition areas]* incidental to any activity which involves bringing an area of freshwater wetlands*[,]* ***or*** State open waters *[or transition area]* into a use to which it was not previously subject, where the flow or circulation patterns of the freshwater wetlands or waters may be impaired, or the extent or values and functions of freshwater wetlands*[,]* ***or*** State open waters *[or transition areas]* is reduced.

(b) Subject to the limitations of this section, the following activities, ***when part of an established, ongoing farming, ranching or silviculture operation,*** on properties which have received or are eligible for a farmland assessment, are exempt from the requirement of a freshwater wetlands permit, open water fill or transition area permit:

1. Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food and fiber, or soil and water conservation practices;

i. For the purposes of this paragraph "minor drainage" means:

(1)-(4) (No change.)

(5) Minor drainage in wetlands is limited to drainage within areas that are part of an established farming or silvicultural operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (for example, wetlands species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area. Any discharge of dredged or fill material into the wetlands or State open waters incidental to the construction of any such structure or waterway requires a freshwater wetlands or State open water permit, and will not be considered minor drainage.

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

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

(c) (No change in text.)

(d) Subject to the limitations of this section, the following are exempt from the requirements of the Act until the State assumes the Federal 404 program. These activities may need Federal 404 permits and/or a *[WOC]* ***WQC***:

1. Projects for which preliminary site plan or *[property for which]* subdivision applications have received formal preliminary approvals from local authorities pursuant to the "Municipal Land Use Law," N.J.S.A. 40:55D-1 et seq., prior to July 1, 1988 provided those approvals remain valid under the Municipal Land Use Law. This excludes approvals which were given prior to the August 1, 1976 effective date of the Municipal Land Use Law*[.]*;

2. Projects for which preliminary site plan or *[property for which]* subdivision applications as defined in N.J.S.A. 40:55D-1 et seq. have been submitted to the local authorities prior to June 8, 1987 and subsequently approved***. If a project meets all criteria under this subsection to qualify for an exemption, except that the project has not yet received municipal approval, the Department***

will issue a letter certifying that the qualifying application was filed prior to June 8, 1987 and the project will receive an exemption upon receipt of preliminary approval from the municipality*;

3. Projects for which permit applications have been approved and Individual permits have been issued by the United States Army Corps of Engineers prior to July 1, 1988, for projects which would otherwise be subject to State regulation on or after July 1, 1988. Such project shall be governed only by the Federal Act, and shall not be subject to any additional or inconsistent substantive requirements of the Act; provided, however that upon the expiration of a permit issued pursuant to the Federal Act any application for a renewal thereof shall be made to the appropriate regulatory agency.

(e) The activities listed in (d)1 and 2 above shall no longer be exempt from the requirement of a freshwater wetlands permit or open water fill permit if significant changes are made to the approved site or subdivision plan. A significant change will be deemed to have been made if, the change would ***void the preliminary approval. In addition, a significant change will be deemed to have been made if the change, while not voiding the approval, would*** require submittal ***to*** or approval of a new or amended application ***from the local authorities*** and:

1. The change would result in a change in land use on the project site, for example from single family houses to *[condominiums]* ***multi-family units,*** or a golf course; or

2. The change in the project as approved by the local authorities, would result in *[increased]* ***more than a de minimus increase in*** impacts to freshwater wetlands, State open waters, or transition areas.

(f) Projects for which preliminary site plan or subdivision applications have been approved prior to July 1, 1989 shall not require transition areas.

(g) Activities authorized under United States Army Corps of Engineers Nationwide Permits prior to July 1, 1988 shall not require a freshwater wetlands permit from the Department provided the property owner can demonstrate that a Nationwide Permit provided authorization for a particular site and use prior to July 1, 1988.

(h) If any discharge of dredged or fill material resulting from the activities exempted by this section contains any toxic pollutant listed under section 307 of the CWA, such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a freshwater wetlands or open water fill permit.

(i) If the USEPA's regulations providing for the delegation to the State of the Federal wetlands program conducted pursuant to section 404 of the Federal Act require a permit for any of the activities exempted by this section, the Department shall require a permit for those activities so identified by the USEPA upon assumption of the Federal program. The exemptions in (d) 1 and 2 ***and (f)*** above shall be void as of the date of assumption by the Department of the Federal 404 program unless all requisite permits or concurrences with Federal permits were received from the United States Army Corps of Engineers prior to July 1, 1988 and remain valid, in which case the exemption will still be valid. ***Upon expiration of a permit issued pursuant to the Federal Act any application for renewal shall be made to the appropriate regulatory agency. The Department shall not require the establishment of a transition area as a condition of any renewal of a permit issued pursuant to the Federal Act prior to July 1, 1988.***

7:7A-2.8 Geographic areas exempted from freshwater wetlands permit requirement

(a) Regulated activities in the following geographic areas shall not require a freshwater wetlands permit***, State open water fill*** or transition area permit, but may require *[an open water fill permit and/or]* a Federal 404 permit *[pursuant to the Act]*. However, upon assumption of the *[Federal]* 404 program, the discharge of dredged or fill material into Waters of the United States in the following areas may require *[an Open Water Fill permit,]* ***a*** *[Federal]* 404 permit or a Water Quality Certificate:

1. Areas under the jurisdiction of the Hackensack Meadowlands Development Commission pursuant to N.J.S.A. 13:17-1 et seq.; and

2. Areas under the jurisdiction of the Pinelands Commission pursuant to N.J.S.A. 13:18A-1 et seq. In addition, the Pinelands Commission may provide for more stringent regualtion of activities in and around freshwater wetland areas within its jurisdiction.

(b) Activities in tidally influenced wetlands *[which have been included on a promulgated map]* ***which are defined as coastal wetlands*** pursuant to the Wetlands Act of 1970, *[N.J.A.C.]* ***N.J.S.A.*** 13:9A-1 et seq. shall not require a freshwater wetlands or open water fill permit.

7:7A-2.9 Exemption letters

(a) A person may obtain a letter from the Department certifying that an activity is exempt from the Act and this chapter. The letter will be based on the information required by this section, and will be void if the information submitted is not complete and accurate, if the approval upon which it was based becomes invalid for any reason, or if the activity is not carried out as represented in the submittal(s) to the Department upon which the letter is based. This exemption will remain valid for the duration of the approval upon which it was based or until the State's assumption of the Federal 404 program, whichever comes first.

(b) To obtain an exemption letter, the following shall be submitted:

1. For a farming, silviculture or ranching exemption pursuant to N.J.A.C. 7:7A-2.7(a):

i. Certification of farmland assessment eligibility ***(The Department will accept a copy of the applicant's tax bill showing farmland assessment to document this requirement)***;

ii. A brief description of the activities, including the total area covered, the types of farming, silviculture, or ranching, best management practices currently employed or to be employed and the length of time the operation has been ongoing; and

iii. The fee specified in N.J.A.C. 7:7A-16.

2. For a forest products harvesting exemption pursuant to N.J.A.C. 7:7A-2.7(c):

i.-ii. (No change.)

3. For a preliminary local approval exemption pursuant to N.J.A.C. 7:7A-2.7(d) ***and a transition area exemption pursuant to N.J.A.C. 7:7A-2.7(f)***:

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

ii. The fee specified in N.J.A.C. 7:7A-16.

4. For a site plan or subdivision application exemption pursuant to N.J.A.C. 7:7A-2.7(d)2:

i. A copy of all of the application materials submitted to the municipality, proof that the municipality received them, and proof from the municipality that the application was under continuous consideration from the time of submittal (prior to June 8, 1987) to *[final]* ***eventual preliminary*** approval ***or to the date of application to the Department for a letter of exemption. For the purposes of this subsection, "continuous consideration" shall mean that the application was either on the municipal board's agenda or was continued with the applicant's and the board's consent from the time of submittal until such time that a decision was made. An application that was withdrawn, or which received a final denial and subsequently resubmitted is not considered to be under "continuous consideration"***;

ii. A folded copy of the approved preliminary site plan or subdivision plan and a copy of the resolution approving the site plan or subdivision; and

(1) If a preliminary site plan or subdivision approval has not yet been received, the applicant shall submit a folded copy of the preliminary site plan or subdivision plat as submitted to the municipality prior to June 8, 1987, see N.J.A.C. 7:7A-2.7(d)2; and

iii. The fee specified in N.J.A.C. 7:7A-16.

5. For a Corps approved individual permit exemption pursuant to N.J.A.C. 7:7A-2.7(d)3:

i. A copy of the valid Corps permit;

ii. A folded copy of a site plan showing all activities authorized by the Individual permit; and

iii. The fee specified in N.J.A.C. 7:7A-16.

6. For an exemption letter under a Corps Nationwide permit exemption pursuant to N.J.A.C. 7:7A-2.7(f):

i. A copy of the valid Corps Nationwide permit authorization issued prior to July 1, 1988, or a copy of all information submitted to the Corps requesting authorization under an issued Nationwide permit, proof that the information was received by the Corps prior to June 10, 1988, and received subsequent authorization;

(1) The Department may inspect the site to confirm that all of the activities included in the exemption request are authorized by the applicable nationwide permits;

ii. A folded copy of a site plan showing all activities authorized by the Nationwide permit and a statement regarding how each activity meets the criteria of the approved Nationwide permit; and

iii. The fee specified in N.J.A.C. 7:7A-16.

***7:7A-2.10 Hearings and appeals**

The applicant or other affected party, if aggrieved by the Department's decision on a exemption request, may request a hearing on this decision pursuant to N.J.A.C. 7:7A-12.7.*

SUBCHAPTER 3. GENERAL STANDARDS FOR GRANTING INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

7:7A-3.1 Requirements for granting individual freshwater wetland and open water fill permits

(a) The Department shall issue a freshwater wetlands or open water fill permit only if it finds that there is no practicable alternative to the proposed activity.

1. An alternative shall be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

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

7:7A-3.2 Requirements for water-dependent activities

(a) The Department shall issue a freshwater wetlands or open water fill permit only if the proposed project meets the criteria at N.J.A.C. 7:7A-3.1 above and it finds that the regulated activity is water-dependent or requires access to freshwater wetlands or State open waters as a central element of its basic function, and has no practicable alternative which would:

1. Not involve a freshwater wetland or State open water; or

2. Involve a freshwater wetland or State open water, but would have a less adverse impact on the aquatic ecosystem; and

3. Not have other significant adverse environmental consequences, that is, it shall not merely substitute other significant environmental consequences for those attendant on the original proposal.

7:7A-3.3 Requirements for non-water dependent activities

(a) The Department shall issue a freshwater wetlands or open water fill permit for a non-water dependent activity only if it finds that the regulated activity has no practicable alternative which would:

1. Not involve a freshwater wetland or State open water; or

2. Involve a freshwater wetland or State open water but would have a less adverse impact on the aquatic ecosystem; and

3. Not have other significant adverse environmental consequences, that is, would not merely substitute other significant environmental consequences for those attendant on the original proposal.

(b) For special aquatic sites as defined in N.J.A.C. 7:7A-1.4 and all freshwater wetlands, it shall be a rebuttable presumption that there is a practicable alternative to any nonwater-dependent regulated activity, which alternative does not involve a freshwater wetland or State open water, and that such an alternative to any regulated activity would have less of an impact on the aquatic ecosystem.

(c) In order to rebut the presumption established in (b) above, an applicant for a freshwater wetlands ***or open water fill*** permit must demonstrate all of the following:

1.-4. (No change.)

7:7A-3.4 Non-water dependent activities in freshwater wetlands of exceptional resource value or in trout production waters

(a) In order to rebut the presumption established for non-water dependent activities (see N.J.A.C. 7:7A-3.3(b)) when the activity will take place in wetlands of exceptional resource value or in trout production waters, an applicant, in addition to complying with the provisions of N.J.A.C. 7:7A-3.3, shall also demonstrate either:

1. That there is a compelling public need for the proposed activity greater than the need to protect the freshwater wetland or trout production water, and that the need cannot be met by essentially similar projects in the region which are under construction or expansion, or which have received the necessary governmental permits and approvals; or

2. That denial of the permit would impose an extraordinary hardship on the applicant brought about by circumstances peculiar to the subject property.

7:7A-3.5 Standard requirements for all regulated activities in freshwater wetlands and State open waters

(a) In addition to the other requirements set forth in this subchapter, the Department shall issue a permit for a regulated activity only if the activity:

1. (No change.)

2. Will not jeopardize present or documented habitat or the continued existence of a local population of a threatened or endangered species listed pursuant to "The Endangered and Nongame Species Conservation Act," N.J.S.A. 23:2A-1 et seq., or those identified pursuant to the Endangered Species Act of 1973, 16 U.S.C. 1531 et al., as defined at N.J.A.C. 7:7A-1.4;

3.-7. (No change.)

8. After assumption of the Federal 404 program, the project will not adversely affect properties which are listed or are eligible for listing on the National Register of Historic Places. If the permittee, before or during the course of authorized work, encounters a ***probable*** historic property that has not been listed or determined eligible for listing on the National Register, but which may be eligible for listing in the National Register, the permittee shall immediately notify the Department and proceed as directed by the Department;

9. Will not violate any provision of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., or implementing rules at N.J.A.C. 7:13;

10. Is otherwise lawful; and

11. Is in the public interest, as determined by the Department in consideration of the following:

i. The public interest in preservation of natural resources and the interest of the property owners in reasonable economic development;

ii. The relative extent of the public and private need for the proposed regulated activity;

iii. Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods, to accomplish the purpose of the proposed regulated activity;

iv. The extent and permanence of the beneficial or detrimental effects which the proposed regulated activity may have on the public and private uses for which the property is suited;

v. The quality and resource value classification pursuant to N.J.A.C. 7:7A-2.5 of the wetland which may be affected and the amount of freshwater wetlands to be disturbed;

vi. The economic value, both public and private, of the proposed regulated activity to the general area; and

vii. The ecological value of the freshwater wetlands and probable individual and cumulative impacts ***of the project*** on public health and fish and wildlife. ***For the purposes of this specific subsection, project shall mean the use and configuration of all buildings, pavements, roadways, storage areas and structures, and the extent of all activities associated with the proposal.***

SUBCHAPTER 4. *[GENERAL STANDARDS FOR GRANTING WATER QUALITY CERTIFICATES]* ***(RESERVED)***

*[7:7A-4.1 Jurisdiction

(a) This subchapter shall apply to all activities, including, but not limited to, construction or operation of any facility or building, which:

1. May result in any discharge of any kind into "waters of the United States" as defined at N.J.A.C. 7:7A-1.4; and

2. Require a Federal license or permit. Example of Federal permits or licenses include, but are not limited to, permits issued pursuant to Section 404 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C.A. 1251 et seq. (1987), permits issued pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899, 33 U.S.C. 403, or licenses issued by the Federal Energy Regulatory Commission under the Federal Power Act, 16 U.S.C.A. 1791 et seq.

(b) Unless obtained as an appendix to another State authorization pursuant to (c), (d) or (e) below, an Individual WQC shall be obtained for all activities described at (a) above, according to the procedures at N.J.A.C. 7:7A-4.3.

(c) If an activity described at (a) above requires a New Jersey Pollution Discharge Elimination System (NJPDES) permit pursuant to N.J.A.C. 7:14A and does not involve the discharge of dredge or fill material into waters of the United States, that is, does not require a Federal 404 permit, the review for the issuance of a WQC may be made concurrently with the review for the issuance of the NJPDES permit. If the decision is made to issue a permit, the WQC may be appended to the permit.

(d) If an activity described at (a) above requires a permit pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., the review for the issuance of a WQC may be made concurrently with the review for the issuance of the applicable permit. If the decision is made to issue a permit, the WQC may be appended to the permit.

(e) If an activity described at (a) above requires a permit pursuant to the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., or the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., the review for the issuance of a WQC may be made concurrently with the review for the issuance of either the CAFRA or Wetlands Act of 1970 permit. If the decision is made to issue a permit, the WQC may be appended to the permit.

7:7A-4.2 Standards for granting a Water Quality Certificate

(a) The Department shall issue a WQC for a project only if it can make the finding that all discharges will comply with the applicable provisions of Section 301, 302, 303, 306 and 307 of the Federal Act. In order for the Department to make this finding, the Department shall issue a WQC for a project only if the activity meets all applicable water quality standards pursuant to the Surface Water Quality Standards (N.J.A.C. 7:9-4) and any subsequent amendments thereto. For projects involving the deposition of fill into waters of the United States, the Department shall use the appropriate rules listed below to assess compliance with the antidegradation policies pursuant to N.J.A.C. 7:9-4.5(d):

1. For projects requiring either a CAFRA or Wetlands Act of 1970 permit, the standards outlined in the Coastal Resource and Development Policies pursuant to N.J.A.C. 7:7E-2 through 8;

2. For projects requiring a freshwater wetlands permit, the standards for granting Individual Freshwater Wetlands and State open water fill permits at N.J.A.C. 7:7A-3, or the general provisions for granting Statewide General Permits and authorization pursuant to N.J.A.C. 7:7A-9;

3. For projects not requiring any of the above-described permits and requiring an Individual WQC, the general provisions for granting Statewide General Permits and authorization pursuant to N.J.A.C. 7:7A-9 or the standards at (b), (c), (d), (e) and (f) below; or

4. For projects requiring more than one of the permits listed above, the most stringent standards of all of the applicable permits.

(b) The Department shall issue an Individual WQC only if it finds that there is no practicable alternative to the proposed project. It shall be a rebuttable presumption that a practicable alternative to the proposed project exists.

1. An alternative shall be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

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

(c) The Department shall issue an Individual WQC for a proposed project only if the project has no practicable alternative which would:

1. Not involve a water of the United States; or

2. Involve a different water of the United States but would have a less adverse impact on the aquatic ecosystem.

(d) In order to rebut the presumption established in (b) above, an applicant for an Individual WQC must demonstrate all of the following:

1. That the basic project purpose cannot reasonably be accomplished utilizing one or more other sites in the general region that would avoid, or reduce, the adverse impact on an aquatic ecosystem;

2. That the basic project purpose cannot reasonably be accomplished if there is a reduction in the size, scope, configuration, or density of the project as proposed;

3. That the basic project purpose cannot reasonably be accomplished by any alternative designs that would avoid, or result in less adverse impact on an aquatic ecosystem; and

4. That in cases where the applicant has rejected alternatives to the project as proposed due to constraints such as inadequate zoning, infrastructure, or parcel size, the applicant has made reasonable attempts to remove or accommodate such constraints.

(e) When the proposed project will impact waters of the United States which discharge into FW-1 waters or FW-2 trout production waters or their tributaries; or which are present habitats for threatened or endangered species, or those which are documented habitats for threatened or endangered species, and which remain suitable for breeding, resting, or feeding by these species during the normal period these species would use the habitat, an applicant, in addition to complying with the provisions of (d) above, shall also demonstrate either:

1. That there is a compelling public need for the proposed project greater than the need to protect the waters of the United States and that the need cannot be met by essentially similar projects in the region which are under construction or expansion, or which have received the necessary governmental permits and approvals; or

2. That denial of the permit would impose an extraordinary hardship on the applicant brought about by circumstances peculiar to the subject property.

(f) In addition to the other requirements set forth in this subchapter, the Department shall issue an Individual WQC for a proposed project only if the project:

1. Will result in minimum feasible alteration or impairment of the aquatic ecosystem including existing contour, vegetation, fish and wildlife resources, and aquatic circulation of the freshwater wetland and hydrologic patterns of the watershed;

2. Will not jeopardize present or documented habitat or the continued existence of a local population of a threatened or endangered species listed pursuant to The Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq., or those identified pursuant to the Endangered Species Act of 1973, 16 U.S.C. 1531 et al., as defined at N.J.A.C. 7:7A-1.4;

3. Will not result in the likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of the United States Department of the Interior or the Secretary of the United States Department of Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, 16 U.S.C. 1531 et seq.;

4. Will not cause or contribute to a violation of any applicable State water quality standard;

5. Will not cause or contribute to a violation of any applicable toxic effluent standard or prohibition imposed pursuant to New Jersey's Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.;

6. Will not violate any requirement imposed by the United States government to protect any marine sanctuary designated pursuant to the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1401 et seq.;

7. Will not cause or contribute to a significant degradation, as defined at 40 C.F.R. 230.10(c), of ground or surface waters; and

8. Is otherwise lawful.

7:7A-4.3 Application Procedures

(a) For projects requiring permits pursuant to the Coastal Area Facility Review Act (CAFRA), and the Wetland Act of 1970, the applicant for a WQC shall follow the application procedures found at N.J.A.C. 7:7, Coastal Permit Program Rules and at (d) below.

(b) For projects requiring a freshwater wetlands or open water fill permit, the applicant for a WQC shall follow the application procedures found at N.J.A.C. 7:7A-11, or at N.J.A.C. 7:7A-9 and at (d) below.

(c) For projects not requiring any of the above described permits and requiring an Individual WQC, the applicant for a WQC shall follow the application procedures found at N.J.A.C. 7:7A-11, or at N.J.A.C. 7:7A-9 and at (d) below and provide the applicable fee specified at N.J.A.C. 7:7A-16.

(d) In addition to the application requirements listed at (a) and (b) above, the following information shall be required at the discretion of the Department:

1. For projects involving the deposition of dredge or fill material, information regarding the quality and source of fill;

2. For projects involving dredging activities, information regarding:

i. The existing, proposed, and adjacent silt and sediment depths;

ii. The method of disposal of solid or liquid waste "generated";

iii. The method of dredging (that is, clam shell, drag line, etc.);

iv. The method of sedimentation (or turbidity) control;

v. The method of and location for dewatering spoils prior to disposal;

vi. The location of the spoils disposal site;

vii. Documentation regarding the environmental sensitivity of the dredge and dredge disposal site including, but not limited to:

(1) The location and description of all wetlands, special aquatic sites as defined at N.J.A.C. 7:7A-1.4, public use areas, wildlife refuges, and public water supply intakes that may require special protection or preservation; and

(2) A list of plants, fish, shellfish and/or wildlife in the proposed dredge or dredge disposal site which may be dependent on water quality and quantity;

viii. Chemical analyses on both water column and sediment samples may be required due to the nature and location of the project; and

3. For projects involving other discharges, pursuant to N.J.A.C. 7:7A-4.1(a)2, the Department may, when necessary due to the nature of the project, request additional scientific information or data necessary to determine compliance with the criteria at N.J.A.C. 7:7A-4.2.

7:7A-4.4 Review of Applications

(a) Upon receipt of an application for projects requiring a WQC and either a CAFRA permit or Wetland Act of 1970 permit, the Department shall follow the review procedures at N.J.A.C. 7:7 Coastal Permit Program Rules.

(b) For projects requiring a WQC and a Freshwater Wetlands or Open Water Fill permit, the Department shall follow the review procedures at N.J.A.C. 7:7A-12 and 13 or at N.J.A.C. 7:7A-9.

(c) For projects not requiring any of the above described permits and requiring an Individual WQC, the applicant for a WQC shall follow the review procedures at N.J.A.C. 7:7A-12 and 13 or at N.J.A.C. 7:7A-9.

(d) When an applicant requires multiple permits for a specific project, including a WQC, the Department shall issue a decision on the WQC application concurrently with the other applicable permits whenever possible. If a decision is made to issue a permit, the WQC may be appended to the permit. However, when this is not possible, or when the WQC is submitted independent of any other Department permits, the Department shall issue a decision on a WQC application within a maximum of 180 days of the submittal of a technically and administratively complete application.

7:7A-4.5 Mitigation

(a) The Department shall require as a condition of all Water Quality Certificates issued independently of other Division of Coastal Resources permits that all appropriate measures have been carried out to mitigate adverse environmental impacts as specified at N.J.A.C. 7:7A-14.

7:7A-4.6 Civil Administrative penalties and requests for adjudicatory hearings

(a) Penalty procedures and fines for Water Quality Certificate violations shall be the same as those for NJPDES permits, set forth at N.J.A.C. 7:14-8.

(b) For procedures to request adjudicatory hearings, see N.J.A.C. 7:7A-17.9.]*

SUBCHAPTER 5. EMERGENCY PERMITS

7:7A-5.1 Emergency permits

(a) The Department may issue a temporary emergency freshwater wetlands, open water fill permit, or transition area *[permit]* ***waiver*** for a regulated activity only if:

1. An unacceptable threat to life, severe loss of property, or severe environmental degradation will occur if an emergency permit is not granted; and

2. The anticipated threat or loss may occur before a permit ***or waiver*** can be issued or modified under the procedures otherwise required by the Act, this chapter, and other applicable State laws.

(b) The emergency permit shall incorporate, to the greatest extent practicable and feasible but not inconsistent with the emergency situation, the standards and criteria required for non-emergency regulated activities ***including mitigation when required by either N.J.A.C. 7:7A-9 or 13*** and shall:

1. Be limited in duration to the time required to complete the authorized emergency activity, not to exceed 90 days; and

2. Require mitigation pursuant to N.J.A.C. 7:7A-14 of the freshwater wetland, State open waters, or transition area within this 90 day period, except that if more than 90 days from the issuance of the emergency permit is required to complete restoration, the emergency permit may be extended to complete this restoration only.

(c) The emergency permit may be issued orally or in writing, except that if it is issued orally, an authorization letter shall be issued within five days thereof.

(d) Notice of the issuance of the emergency permit shall be published and public comments received, in accordance with the provisions of 40 C.F.R. 124.10 and 124.11, and of the Federal Act and applicable State law, provided that this notification shall be *[sent and]* mailed no later than 10 days after issuance of the emergency permit.

(e) (No change.)

7:7A-5.2 Obtaining an emergency permit

(a) A person in need of an emergency permit shall inform the *[Director of the Division]* ***Administrator of the Element*** by telephone as to the extent of work to be performed, the reason for the emergency, and the location of the project. This information shall be presented to the Department in writing within two days following the telephone request.

(b) After the State assumes the Federal 404 program, upon receiving the request for an emergency permit for a major discharge, the *[Director]* ***Administrator*** will notify the Regional Administrator prior to the issuance of an emergency permit and will send a copy of the written permit upon issuance.

(c) If verbal approval is given by the *[Director]* ***Administrator*** the emergency work may be started. Department staff shall be kept informed by telephone (at least once per week) regarding the situation at the site. The Department will offer guidance and instructions in performing the work.

(d) If verbal approval is not given, the Department may issue a written emergency approval at any time within 15 days of the initial request.

(e) Within 15 days of the granting of an emergency approval which has been obtained and complied with in accordance with the Department's instructions, a complete freshwater wetlands, open water fill permit, or transition area *[permit]* ***waiver*** application with appropriate fees and "as built" drawings shall be submitted to the Department for review. After public notice and opportunity for comment pursuant to N.J.A.C. 7:7A-12.4 and 12.1(a), and 11.1(a), a freshwater wetlands, or open water fill permit, or a transition area *[permit]* ***waiver*** shall be issued by the Department for the activities covered by the emergency approval. This permit may contain conditions necessary to compensate for any adverse impacts to the freshwater wetlands, State open waters, or transition areas resulting from the emergency permit or the activity. If required by *[the Act]* ***either N.J.A.C. 7:7A-9 or 13***, mitigation shall be provided pursuant to N.J.A.C. 7:7A-14.

SUBCHAPTER 6. TRANSITION AREAS

7:7A-6.1 General provisions

(a) (No change.)

(b) Acts or acts of omission in a transition area that adversely affect a transition area's ability to serve as any of the areas described below at (b)1 to 7 shall be deemed inconsistent with the provisions of (a) above and with N.J.S.A. 13:9B-16a:

1.-5. (No change.)

6. A corridor area which facilitates the movement of wildlife to and from freshwater wetlands and from and to uplands, streams and other waterways; and

7. (No change.)

(c) (No change.)

(d) The standard width of a transition area adjacent to a freshwater wetland of exceptional resource value shall be 150 feet. This standard width shall only be modified through the issuance of a transition area *[permit]* ***waiver*** by the Department pursuant to the Act and this chapter. The types of transition area *[permits]* ***waivers*** are listed at N.J.A.C. 7:7A-7.1(c).

(e) The standard width of a transition area adjacent to a freshwater wetland of intermediate resource value shall be 50 feet. This standard width shall only be modified through the issuance of a transition area *[permit]* ***waiver*** by the Department pursuant to the Act and this chapter.

(f) A person shall not engage in activities *[regulated]* ***prohibited*** in a transition area as set forth at N.J.A.C. 7:7A-6.2 except pursuant to a transition area *[permit]* ***waiver*** issued by the Department pursuant to this chapter.

(g) A transition area shall be measured outward from a freshwater wetland boundary line on a horizontal scale perpendicular to the freshwater wetlands boundary line as shown in N.J.A.C. 7:7A-6, Appendix A, which is incorporated by reference in this chapter. The outside boundary line of a transition area shall parallel, that is, be equidistant from, the freshwater wetlands boundary line, unless a transition area *[permit]* ***waiver*** is approved under N.J.A.C. 7:7A-7.4 or N.J.A.C. 7:7A-7.5. The width of the transition area shall be measured as the minimum distance between the freshwater wetlands boundary and the outside transition area boundary.

(h) (No change.)

7:7A-6.2 *[Regulated]* ***Prohibited*** activities in transition area

(a) Except as provided in (b) and (c) below, a person shall not conduct the following *[regulated]* ***prohibited*** activities in transition areas:

1.-5. (No change.)

(b) The following activities are not *[regulated]* ***prohibited*** in transition areas, provided that the activities are performed in a manner that minimizes adverse effects to the transition area and adjacent freshwater wetlands:

1. (No change.)

2. Minor and temporary disturbances of the transition area resulting from, and necessary for, normal construction activities on land adjacent to the transition area;

i. For the purposes of this paragraph, "minor and temporary disturbances of the transition area resulting from, and necessary for, normal construction activities on land adjacent to the transition area," means activities which do not result in adverse environmental effects on the transition area or on the adjacent freshwater wetlands and which activities do not continue for a period of more than six months. Normal construction activities which would be minor and temporary disturbances include, but are not necessarily limited to, the placement of scaffolds or ladders, the removal of human-made debris by non-mechanized means which does not destroy woody vegetation, the placement of temporary construction supports, and the placement of utility lines over or under a previously authorized, currently serviceable existing paved roadway.

3. (No change.)

(c) Projects or activities which are exempt from the requirement of a freshwater wetlands permit pursuant to N.J.A.C. 7:7A-2.7(b), (c) and (d) shall also be exempt from transition area requirements. These transition area exemptions are subject to the same limitations as the corresponding freshwater wetlands permit exemptions. These limitations can be found at N.J.A.C. 7:7A-2.7.

(d) To confirm that an activity or project is exempt, an exemption letter may be requested from the Department through the procedures established for freshwater wetlands permit exemptions in N.J.A.C. 7:7A-2.9, including submittal of the fee specified at N.J.A.C. 7:7A-16.

7:7A-6.3 Determination of transition areas due to the presence of freshwater wetlands on adjacent property

(a) Any person engaging in *[regulated]* ***prohibited*** activities in a transition area without Department approval shall be in violation of the Act and this chapter. A transition area may be located on a property even though the freshwater wetlands adjacent to that transition area are located on a different property (see N.J.A.C. 7:7A-6.1(h)).

(b) To determine whether a transition area is required on a parcel, where freshwater wetlands may exist on other nearby parcels, a person may follow the procedures at (c) below or follow those procedures at (b)1 through 6 below as applicable.

1.-3. (No change.)

4. If the freshwater wetlands on the subject parcel or within 150 feet of the subject parcel property boundary are freshwater wetlands of exceptional resource value, a transition area exists on the subject parcel. In order to determine the size and shape of the transition area, obtain a delineation of the freshwater wetlands on neighboring land within 150 feet of the subject parcel boundary and determine the shape and size of the standard transition area on the subject parcel according to N.J.A.C. 7:7A-6.1(d).

i. To avoid the necessity of delineating exceptional resource value freshwater wetlands on other properties, a person may ensure compliance with transition area requirements arising from freshwater wetlands on other properties by refraining from *[regulated]* ***prohibited*** activities on the subject parcel within 150 feet of the *[wetland]* ***property*** boundary.

5. If there are freshwater wetlands of intermediate resource value on land within 50 feet of the subject parcel boundary, a transition area exists on the subject parcel. In order to determine the size and shape on the transition area, obtain a delineation of the freshwater wetlands on neighboring land within 50 feet of the subject parcel boundary and determine the shape and size of the standard transition area on the subject parcel according to N.J.A.C. 7:7A-6.1(e).

i. To avoid the necessity of delineating intermediate resource value freshwater wetlands on other properties, a person may ensure compliance with transition area requirements arising from freshwater wetlands on other properties by refraining from *[regulated]* ***prohibited*** activities on the subject parcel within 50 feet of the *[wetland]* ***property*** boundary.

6. It may be necessary to obtain written permission from *[neighboring]* ***adjacent*** property owners to investigate their land to within 150 feet of the subject parcel boundary. If a transition area *[permit]* ***waiver*** or letter of interpretation is needed, the applicant shall provide written notice to adjacent landowners that the Department may conduct an onsite field inspection as part of

the application process. This notification shall be included as part of the notification process pursuant to N.J.A.C. 7:7A-7.6(a)7v, Application contents for transition area permits; N.J.A.C. 7:7A-8.3(a)10iv, Application for a letter of interpretation; N.J.A.C. 7:7A-9.5(b), Application for Statewide general permit authorization; or N.J.A.C. 7:7A-11.1(b)9, Application contents.

(c) Instead of following the procedures at (b)1 to 6 above, a person may ensure compliance with transition area requirements arising from freshwater wetlands on other properties by refraining from *[regulated]* ***prohibited*** activities on the subject parcel within 150 feet of the subject parcel property line.

SUBCHAPTER 7. TRANSITION AREA *[PERMIT]* ***WAIVER***

7:7A-7.1 General provisions

(a) A transition area *[permit]* ***waiver*** shall not be granted by the Department pursuant to the Act and this chapter unless it includes conditions as necessary to ensure that a particular project or activity results in minimal environmental impact and unless the purposes and functions of transition areas as set forth in N.J.A.C. 7:7A-6.1(a) and (b) are satisfied.

(b) Any person proposing to engage in a *[regulated]* ***prohibited*** activity within 150 feet of an exceptional resource value wetland, or within 50 feet of an intermediate resource value wetland shall apply to the Department for a transition area *[permit]* ***waiver***.

(c) The Department may authorize the following through a transition area *[permit]* ***waiver***:

1. (No change.)

2. A modification in the shape, but not the square footage, of the standard transition area through a transition area averaging plan pursuant to N.J.A.C. 7:7A-7.5. This *[permit]* ***waiver*** is available for transition areas adjacent to both exceptional and intermediate resource value freshwater wetlands;

3. A partial elimination of the standard transition area width along a portion of the freshwater wetland to allow special activities as established in N.J.A.C. 7:7A-7.4. This *[permit]* ***waiver*** is available for transition areas adjacent to both exceptional and intermediate resource value freshwater wetlands; or

4. Any combination of (c)1, 2, and 3 above.

(d) Reduction or modification of a transition area shall be based solely on the transition area adjacent to a particular freshwater wetland. For property with more than one freshwater wetland, the standard transition area width and the criteria for reducing or modifying the standard width shall be applied separately to each freshwater wetland. In no case may expansion of a transition area adjacent to one freshwater wetland compensate for reduction of a transition area adjacent to a separate freshwater wetland. However, one transition area *[permit]* ***waiver*** application may be used to request transition area *[permits]* ***waivers*** for more than one transition area located on a single property.

(e) In determining whether to issue or deny a transition area *[permit]* ***waiver***, the Department shall consider information submitted by the applicant; local, county, state, and federal government agencies; and interested citizens, and may consider any other available information.

(f) The Department's authorization of activities under a Statewide general permit, individual freshwater wetlands permit or mitigation plan shall automatically include a transition area *[permit]* ***waiver***. In addition, the approval of a mitigation plan in a transition area as a result of either a permit approval or resolution of an enforcement action under the Act and Federal Act will automatically include a transition area *[permit]* ***waiver***. No fee or application will be required for these *[permits]* ***waivers***. The transition area *[permit]* ***waiver*** will allow encroachment only in that portion of the transition area bordering on that portion of the freshwater wetland in which the authorized activity is to take place which the Department determines is necessary to accomplish the authorized activity. Any additional *[regulated]* ***prohibited*** activities in the transition area not directly required for the authorized activity shall require a separate transition area *[permit]* ***waiver*** from the Department pursuant to the Act and this chapter.

(g) Every approved transition area *[permit]* ***waiver***, except for those issued pursuant to (f) above and N.J.A.C. 7:7A-7.4, Special Activity *[Permits]* ***waivers***, shall be conditioned on the *[prior]* recording *[in the office of the clerk of the county in which the premises are situated]* of a Department-approved deed restriction of activities which may be undertaken in the transition area. ***Prior to construction, the deed restriction shall be recorded in the office of the clerk of the county or through the register of deeds and mortgages in which the premises are situated***. The restriction shall run with the land and be binding upon the applicant and the applicant's successors in interest in the premises or in any part thereof and shall include the following:

1. The Department-approved restriction shall provide that no *[regulated]* ***prohibited*** activities will occur in the modified transition area unless the Department finds that:

[i. The regulated activity has no practicable alternative which would not involve a transition area; or]

*[ii.]***i.*** There is compelling public need for the activity greater than the need to protect the modified transition area*[,]***;*** and *[that the activity has no practicable alternative which would:]*

ii. That the activity has no practicable alternative which would:

(1) Not involve a transition area;

*[(1)]***(2)*** Involve a transition area but would have less adverse impact on the transition area and the adjacent wetland; and

*[(2)]***(3)*** Not have other significant adverse environmental consequences, that is, it shall not merely substitute other significant environmental consequences for those attendant on the original proposal.

2. The applicant shall provide proof that the deed restriction is recorded in the office of the clerk of the county or through the register of deeds and mortgages in which the premises are situated, or provide documentation that the restriction has been accepted for recording at the above offices.

7:7A-7.2 Exceptional resource value freshwater wetlands: standards for transition area width reduction

(a) This section addresses standards for overall width reduction of transition areas adjacent to exceptional resource value wetlands. A transition area adjacent to a freshwater wetland of exceptional resource value shall be 150 feet wide except pursuant to a transition area *[permit]* ***waiver*** approved by the Department. Except pursuant to a transition area *[permit]* ***waiver*** for access to an authorized activity, granted by the Department pursuant to N.J.A.C. 7:7A-7.1(f), a transition area adjacent to a freshwater wetland of exceptional resource value shall not be reduced to less than 75 feet wide unless the applicant demonstrates, to the satisfaction of the Department, that if the activity was instead proposed in the exceptional resource value wetland it would meet the standards for granting a freshwater wetlands permit.

(b) The Department shall grant a transition area *[permit]* ***waiver*** to reduce a transition area adjacent to a freshwater wetland of exceptional resource value from the standard transition area width only if:

1. The proposed activity would have no substantial impact as determined pursuant to (c), (d) or (e) below, on the adjacent freshwater wetland; or

2. The *[permit]* ***waiver*** is necessary to avoid an extraordinary hardship to the applicant, as described at (g) below.

(c) For the purposes of N.J.A.C. 7:7A-7, a substantial impact shall be deemed to exist on a freshwater wetland of exceptional resource value if one or more of the following is true, unless the applicant demonstrates otherwise to the Department's satisfaction pursuant to (h) below:

1. The freshwater wetland contains a present or "documented habitat for threatened or endangered species" as defined at N.J.A.C. 7:7A-1.4;

2. The freshwater wetland is located adjacent to FW1 waters or FW2 trout production waters;

3. The freshwater wetland is located adjacent to a component of either the Federal or State Wild and Scenic River System designated

pursuant to 16 U.S.C. §1271 et seq. or N.J.S.A. 13:8-45 et seq.; or adjacent to a waterway officially designated by Congress or the State Legislature as a "study river" for possible inclusion in either system, while the river is in an official study status;

4. The proposed project would cause the disturbance or exposure of acid producing deposits as defined at N.J.A.C. 7:13-5.10;

5. The property is located adjacent to a local, county, State, or federal park, wildlife refuge, sanctuary, management area or area listed on the New Jersey Register of Natural Areas; or

6. The proposed activity or project includes one or more of the following:

i. Construction or expansion of a commercial or industrial facility within the following Standard Industrial Classification (SIC) major groups as designated in the Standard Industrial Classification Manual prepared by the Office of Management and Budget in the Executive Office of the President of the United States.

SIC	Industry Category
22	Textile Mill Products
23	Apparel
24	Lumber & Wood Products
25	Furniture & Fixtures
26	Paper & Allied Products
27	Printing, Publishing & Allied Industries
28	Chemicals & Allied Products
29	Petroleum Refining & Related Industries
30	Rubber & Miscellaneous Plastics Products
31	Leather & Leather Products
32	Stone, Clay, Glass & Concrete Products
33	Primary Metal Industries
34	Fabricated Metal Products
35	Machinery
36	Electrical & Electronic Machinery
37	Transportation Equipment
38	Measuring Analyzing & Controlling Instruments, Photographic, Medical & Optical Goods
39	Miscellaneous Manufacturing Industries
47	Transportation Services
48	Communications
49	Utilities (Electric, Gas, Sewer), excluding linear Equipment
51	Nondurable Goods Wholesaling
55	Automotive Dealers and Gasoline Service Stations*;*

ii. Establishment of new or expansion of existing mineral extraction and/or processing operations. This includes mining or processing of construction sand, industrial sand, gravel, ilmenite, glauconite, limestone, or other minerals; or

iii. Construction or expansion of wastewater treatment or septic systems which are located within 150 feet of an exceptional resource value wetland or within *[100]* ***50*** feet of an intermediate resource value wetland;

iv. Establishment of a new or expansion of an existing solid waste facility.

(d) The Department will consider the proposed project to have no substantial impact, and will issue a transition area *[permit]* ***waiver*** reducing the standard transition area width to 100 feet, if no activity *[regulated]* ***prohibited*** pursuant to N.J.A.C. 7:7A-6.2 is conducted within the reduced 100 foot transition area and if all of the following transition area characteristics and proposed project factors are true:

1. The property or proposed project or activity does not fall into any of the categories indicating a substantial impact as listed at N.J.A.C. 7:7A-7.2(c)1, 2, 4, or 6.

2. (No change.)

3. The property has been part of an established ongoing farming, ranching or silviculture operation" as defined at N.J.A.C. 7:7A-1.4 within the two years before the transition area *[permit]* ***waiver*** application is submitted; and

4. The proposed project will include the planting of native trees and shrubs in the reduced 100 foot transition area pursuant to a plan approved by the Department. The planting shall achieve no less than an 85 percent area coverage in the entire 100 foot transition area and ensure no less than 85 percent survival of the plants for no less than three years.

*[(e) The Department will consider the proposed project to have no substantial impact, and will issue a transition area permit reducing the standard transition area width to 75 feet, if all of the following transition area characteristics and proposed project factors are true:

1. The transition area to be reduced is adjacent to a tidally influenced wetland;

2. The applicant intends to construct a single family residence which will become their residence;

3. The area of proposed reduction is in an area of "infill residential development" meeting the following criteria:

i. On the same side of the road as the proposed project, at least 75 percent of the upland lots within 200 feet of the property line and adjacent to the wetlands are developed with residential or commercial uses;

ii. Lots are located directly adjacent to and have direct access to a paved public road (this criteria excludes flag lots); and

iii. Lots are serviced by a municipal wastewater treatment system;

4. The applicant shall demonstrate that the reduced transition area is equivalent or wider than that observed by the structures on the adjacent lots and that a wider transition area cannot be feasibly accommodated onsite through alternative design or a variance to local set back requirements;

5. All new bulkheads and retaining structures shall be located upland of the required transition area;

6. The reduced transition area shall be an undeveloped, vegetated area where native vegetation is preserved or indigenous coastal species are planted as appropriate; and

7. The reduction of the transition area will not result in adverse impacts to threatened or endangered species or their habitats.]*

*[(f)]***(e)*** If the project, activities and/or property do not result in a substantial impact as determined in (c) above, the Department shall determine the transition area width based on the slope and dominant vegetational community type of the transition area and the development intensity of the proposed project, as described below at *[(f)]* ***(e)*** 1 to 3, as indices of impact on a freshwater wetland of exceptional resource value, using the matrix below.

Dominant Vegetational Community		Slope %	Development Intensity: Low (0-10%)	Moderate (> 10-40%)	High (> 40%)
	Herbaceous	0-2	100	120	140
		>2	150	150	150
	Scrub-Shrub	0-2	75	75	80
		>2-5	95	115	130
		>5	150	150	150
	Forest	0-2	75	75	75
		>2-5	75	75	85
		>5-10	75	85	95
		>10-15	95	105	115
		>15-20	115	125	135
		>20	135	145	150

1.-3. (No change.)

*[(g)]***(f)*** An extraordinary hardship to the applicant will be considered to exist when:

1. The subject property is not susceptible to a reasonable use as is presently developed or as authorized by the provisions of the Act and this chapter and this limitation results from unique and extreme circumstances peculiar to the subject property which:

i.-ii. (No change.)

2. For single family residential lots which are unbuildable due to the presence of transition areas, the Department may grant a transition area reduction *[permit]* ***waiver*** to reduce the transition area

to a minimum of 75 feet based on hardship if the following conditions are met:

i. The lot was subdivided prior to July 1, 1988 and was owned by the applicant since that time;

ii. The applicant has not received a *[permit]* ***waiver*** for a reduction of a transition area based on this hardship criteria for the past five years;

iii. The applicant shall demonstrate that adjacent properties cannot be purchased for fair market value to create a buildable lot;

iv. The applicant shall demonstrate that the subject property was offered for sale at fair market value to adjacent landowners and that the offer was refused;

v. The subject parcel is not contiguous with an adjacent improved parcel which was owned by the applicant on July 1, 1988; and

vi. The applicant shall demonstrate that the subject property was offered for sale at fair market value to interested public or private conservation organizations and that the offer was refused. ***The Department will provide applicants with a listing of conservation organizations upon request.***

*[(h)]**(g)* (No change in text.)

7:7A-7.3 Intermediate resource value freshwater wetlands: standards for transition area width reduction

(a) This section addresses standards for overall width reduction of transition areas adjacent to intermediate resource value wetlands. A transition area adjacent to a freshwater wetland of intermediate resource value shall be 50 feet wide except pursuant to a transition area *[permit]* ***waiver*** approved by the Department. Except pursuant to a Department-approved transition area averaging plan issued pursuant to N.J.A.C. 7:7A-7.5, a transition area permit for access to an authorized activity granted by the Department pursuant to N.J.A.C. 7:7A-7.1(f), or a special activity permit pursuant to N.J.A.C. 7:7A-7.4, a transition area adjacent to a freshwater wetlands of intermediate resource value shall not be reduced to less than 25 feet wide.

(b) The Department shall grant a transition area *[permit]* ***waiver*** to reduce a transition area adjacent to a freshwater wetland of intermediate resource value from the standard transition area width only if:

1. The proposed activity would have no substantial impact, as determined pursuant to (c)*[,]* ***and*** (d) *[and (e)]* below, on the adjacent freshwater wetland; or

2. The *[permit]* ***waiver*** is necessary to avoid a substantial hardship to the applicant, as defined in *[(f)]**(e)* below.

(c) For the purposes of this subchapter, a substantial impact shall be deemed to exist on a freshwater wetland of intermediate resource value if one or more of the following is true, unless the applicant demonstrates otherwise to the Department's satisfaction pursuant to N.J.A.C. 7:7A-7.2*[(h)]**(g)*:

Recodify 2.-5. as 1.-4. (No change in text.)

5. The proposed activity or project includes one or more of the operations or activities at N.J.A.C. 7:7A-7.2(c)6.

*[(d) The Department will consider the proposed project to have no substantial impact, and will issue a transition area permit reducing the standard transition area width to 25 feet, if all of the following transition area characteristics and proposed project factors are true:

1. The transition area to be reduced is adjacent to a tidally influenced wetland;

2. The applicant has not received a permit for a reduction of a transition area based on this hardship criteria for the past five years;

3. The area of proposed reduction is in an area of "infill residential development" meeting the following criteria:

i. On the same side of the road as the proposed project, at least 75 percent of the upland lots within 200 feet of the property line and adjacent to the wetlands are developed with residential or commercial uses;

ii. Lots are located directly adjacent to and have direct access to a paved public road (this criteria excludes flag lots); and

iii. Lots are serviced by a municipal wastewater treatment system;

4. The applicant shall demonstrate that the reduced transition area is equivalent or wider than that observed by the structures on the adjacent lots and that a wider transition area cannot be feasibly accommodated onsite through alternative design or a variance to local set back requirements;

5. All new bulkheads and retaining structures shall be located upland of the required transition area;

6. The reduced transition area shall be an undeveloped, vegetated area where native vegetation is preserved or indigenous coastal species are planted as appropriate; and

7. The reduction of the transition area will not result in adverse impacts to critical habitat as defined at (c)2 above.]*

*[(e)]**(d)* If the project, activities and/or property do not meet any of the criteria in (c) *[or (d)]* above, the Department shall determine the transition area width reduction from that of the standard transition area width based on the slope and dominant vegetational community type of the transition area and the development intensity of the proposed project, as described at N.J.A.C. 7:7A-7.2*[(f)]**(e)*1 through 3, as indices of the impact on a freshwater wetland of intermediate resource value, using the criteria below:

1. A transition area *[permit]* ***waiver*** reducing the transition area width to 25 feet shall be granted if all of the following are true:

i. The dominant vegetational community type, as described in N.J.A.C. 7:7A-7.2*[(f)]**(e)*1, of the standard transition area is a forested vegetational community;

ii. The slope of the standard transition area, as determined pursuant to N.J.A.C. 7:7A-7.2*[(f)2]**(e)2*, is less than or equal to one percent;

iii. The development intensity of the project, as determined N.J.A.C. 7:7A-7.2*[(f)3]**(e)3*, is less than 20 percent.

2. A transition area *[permit]* ***waiver*** reducing the transition area width to 35 feet shall be granted if all of the following are true:

i. The dominant vegetational community type, as described at N.J.A.C. 7:7A-7.2*[(f)1]**(e)1*, of the standard transition area is a forested vegetational community;

ii. The slope of the standard transition area, as determined pursuant N.J.A.C. 7:7A-7.2*[(f)2]**(e)2*, is less than or equal to three percent; and

iii. The development intensity of the project, as determined pursuant N.J.A.C. 7:7A-7.2*[(f)3]**(e)3*, is less than 40 percent.

3. A transition area *[permit]* ***waiver*** reducing the transition area width to 35 feet shall be granted if all of the following are true:

i. The dominant vegetational community type, as described at N.J.A.C. 7:7A-7.2*[(f)1]**(e)1*, of the standard transition area is scrub-shrub or herbaceous vegetational community;

ii. The slope of the standard transition area, as determined pursuant to N.J.A.C. 7:7A-7.2*[(f)2]**(e)2*, is less than or equal to one percent; and

iii. The development intensity of the project, as determined pursuant to N.J.A.C. 7:7A-7.2*[(f)3]**(e)3*, is less than 20 percent.

4. A substantial impact on the freshwater wetland shall be deemed to exist, and a transition area *[permit]* ***waiver*** shall not be granted pursuant to this section, if the conditions in (d)1, 2 or 3 above are not met.

*[(f)]**(e)* A substantial hardship to the applicant shall be considered to exist when:

1. The subject property is not susceptible to a reasonable use as authorized by the provisions of the Act and this chapter and this limitation results from unique circumstances peculiar to the subject property which:

i.-ii. (No change.)

2. For single family residential lots which are unbuildable due to the presence of transition areas, the Department may grant a transition area reduction *[permit]* ***waiver*** to reduce the transition area to a minimum of 25 feet based on hardship if the following conditions are met:

i. The lot was subdivided prior to July 1, 1988 and was owned by the applicant since that time;

ii. The applicant has not received a *[permit]* ***waiver*** for a reduction of a transition area based on this hardship criteria for the past five years;

iii. The applicant shall demonstrate that adjacent properties cannot be purchased to create a buildable lot for fair market value;

iv. The applicant shall demonstrate that the subject property was offered for sale at fair market value to adjacent landowners and that the offer was refused;

v. The subject parcel is not contiguous with an adjacent improved parcel which was owned by the applicant on July 1, 1988; and

vi. The applicant shall demonstrate that the subject property was offered for sale at fair market value to interested public or private conservation organizations and that the offer was refused. ***The Department will provide applicants with a listing of conservation organizations upon request.***

7:7A-7.4 Special activities: Standards for granting transition area *[permits]* ***waivers***

(a) The Department will issue transition area *[permits]* ***waivers*** for certain special activities meeting the criteria in this section. *[Permits]* ***Waivers*** under this section are not subject to the criteria in N.J.A.C. 7:7A-7.2, 7.3 or 7.5. The Department will issue a transition area *[permit]* ***waiver*** to reduce or partially eliminate the standard transition area to allow for the special activities listed below at (a)1 through 3, provided the applicable conditions for each activity set forth below at (b), (c), (d), (e) and (f) are met; provided the project is designed to minimize impacts to the freshwater wetland and transition area; and provided the transition area continues to serve the purposes set out at N.J.A.C. 7:7A-6.1(a) and (b). Reductions or partial eliminations authorized under this section shall not require compensation pursuant to N.J.A.C. 7:7A-7.5. Except pursuant to a transition area *[permit]* ***waiver*** for access to an authorized activity issued by the Department pursuant to N.J.A.C. 7:7A-7.1(f), a transition area adjacent to freshwater wetlands of exceptional resource value shall not be reduced to less than 75 feet wide unless the applicant demonstrates, to the satisfaction of the Department, that if the activity was instead proposed in the exceptional resource value wetland it would meet the standards for granting a freshwater wetlands *[permit]* ***waiver***. The special activities are:

1. Stormwater management facilities as defined at (b) below;

2. Linear development as defined at N.J.A.C. 7:7A-1.4;

3. Activities performed in the transition area which are permitted under specific Statewide general permits listed in (e) below; and

4. Activities performed in the transition area which can be defined as redevelopment as specified in (f) below.

(b) If the proposed activity is the construction of a stormwater management facility, the Department will approve a transition area *[permit]* ***waiver*** for the reduction or partial elimination of a transition area if there is no feasible alternative on-site location for the facility.

1.-3. (No change.)

(c) If the proposed activity is the construction of a linear development as defined at N.J.A.C. 7:7A-1.4, the Department will approve a further transition area *[permit]* ***waiver*** for the reduction or partial elimination of transition area if there is no feasible alternative location for the linear development.

1. An alternative location shall be considered feasible when the proposed linear development can be located outside of the transition area by:

i. Modifying the route of the linear development to avoid or reduce impacts to freshwater wetlands and transition areas; or

ii. Reducing the width of the linear development.

2.-3. (No change.)

(d) (No change.)

(e) No substantial impact will be deemed to exist on a freshwater wetland, and a transition area *[permit]* ***waiver*** will be granted for the reduction or partial elimination of transition area in order to conduct activities in the transition area which are covered by the Statewide general permits at N.J.A.C. 7:7A-9.2(a) 2, 3, 4, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, and 25.

1. With the exceptions listed below at (e)1i through iii, all limitations and conditions contained in the description of Statewide general permit activities at N.J.A.C. 7:7A-9.2(a) will also apply to those activities when authorized by a permit pursuant to this subsection. For example, where the Statewide general permit at N.J.A.C. 7:7A-9.2(a)10, minor road crossings, is limited to 0.25 acres of wetland or open water disturbance, the special activity *[permit]* ***waiver*** for this activity will be limited to 0.25 acres of transition area disturbance. The following exceptions to this provision will apply:

i. For a special activity transition area *[permit]* ***waiver*** authorizing activities listed in Statewide general permit number 10, the 200 cubic yard fill limitation does not apply;

ii. For a special activity transition area *[permit]* ***waiver*** authorizing construction of stormwater structures that include a swale designed for water quality as listed in Statewide general permit number 11, the limitation at N.J.A.C. 7:7A-9.2(a)11vii, concerning backfill, does not apply; and

iii. For a special activity transition area *[permit]* ***waiver*** authorizing activities listed in Statewide general permit number 16, the 10 cubic yard fill limitation does not apply.

2. The limits at N.J.A.C. 7:7A-9.4 on the use of multiple Statewide general permits in freshwater wetlands also apply to the use in transition areas of multiple special activity *[permits]* ***waivers*** issued under this subsection. For example, pursuant to N.J.A.C. 7:7A-9.4(d), an approval under the Statewide general permit at N.J.A.C. 7:7A-9.2(a)8 will be authorized only once for a single property. Likewise, only one special activity *[permit]* ***waiver*** for the activity covered by that Statewide general permit shall be approved in a transition area.

3. The authorization of the special activity *[permit for]* ***waiver for general permit activities in*** transition areas listed under this subsection does not eliminate the possibility that activities in freshwater wetlands or State open waters may be authorized under Statewide general permits. *[However, the combined acreage of wetlands and transition areas to be disturbed under Statewide general permit(s) and special activity permits pursuant to N.J.A.C. 7:7A-7.4(e), onsite shall not exceed a total of one acre. For example, a project may qualify for a special activity permit involving 0.25 acres for a minor road crossing through the transition area, a Statewide general permit for a second road crossing through the wetlands at a different location involving 0.25 acres, and a Statewide general permit authorizing 0.5 acres of fill in a non-surface water connected wetland for a total impact of 1.0 acre of transition area and wetland disturbance.]* ***However, these waivers shall not be used to double the impact of a specific activity by combining the allowed wetland and transition area impacts. For example, one minor road crossing shall not exceed 0.25 acres of disturbance or 100 linear feet regardless of whether the crossing is entirely in wetlands and open waters, entirely in the transition area, or traverses both. The 0.25 acre limitation does not include the transition area that is necessary for access to a wetland crossing. For example the Department shall not approve an application that combines a minor road crossing (Statewide general permit number 10) in the wetlands with a minor road crossing in the transition area (Special activity waiver number 10) which results in a minor road crossing designed to cross 100 feet of wetlands and open waters and then parallels the wetland for an additional 100 feet through the transition area.***

(f) A special activity *[permit]* ***waiver*** may be granted for the reduction or partial elimination of a transition area in order to allow redevelopment, as defined at N.J.A.C. 7:7A-1.4, of a transition area, if the following conditions are met:

1. The applicant must demonstate to the satisfaction of the Department that the proposed activity will not result in substantial impact to the adjacent freshwater wetland;

2. The area of proposed activity must be covered by pavements or impervious surfaces legally existing in the transition area prior to July 1, 1989, or permitted under the Act. This does not include expansion of impervious surfaces or any additional disturbance of the transition area; and

3. Where practicable, a portion of the developed transition area adjacent to the wetland shall be revegetated and restricted pursuant to *[7:7A-7.5(d)]* ***N.J.A.C. 7:7A-7.1(g)***.

(g) A person shall not commence a *[regulated]* ***prohibited*** activity in a transition area pursuant to (e) above prior to obtaining

a transition area *[permit]* ***waiver*** from the Department pursuant to the Act and this chapter. The limitations of N.J.A.C. 7:7A-7.2(c) and 7.3(c) do not apply to transition area *[permit]* ***waivers*** granted under (e) above.

7:7A-7.5 Transition area *[permit]* ***waiver***, averaging plans: Standards for modifying the shape of a transition area

(a) A transition area averaging plan, a type of transition area *[permit]* ***waiver***, is a plan to modify the overall shape of the transition area without reducing the total square footage of the transition area. A transition area averaging plan may be approved for activities adjacent to either an intermediate or exceptional resource value freshwater wetlands. An example of a transition area averaging plan is shown in N.J.A.C. 7:7A-7 Appendix A, which is incorporated by reference in this subchapter.

(b) Subject to the limitations contained in this subsection and to the limitations of (c) *[and (d)]* below, an applicant may change the shape of a transition area consistent with a Department approved transition area averaging plan. Portions of the required transition area width may be reduced provided that the reduction in width is compensated, on a square footage basis, by the expansion of another portion of the same transition area on property owned or legally controlled by the applicant, and provided that the resulting transition area continues to serve the purposes of a transition area set forth in N.J.A.C. 7:7A-6.1(a) and (b).

1. The Department shall not approve any transition area averaging plan for exceptional resource value wetlands if ***any of*** the following site conditions exist because the Department has determined that the resultant transition area will no longer serve the purposes of a transition area set forth in N.J.A.C. 7:7A-6.1(a) and (b):

i.-ii. (No change.)

iii. The transition area averaging plan proposes to:

(1) Compensate for the reduction of the transition area by increasing the width of any portion of the transition area to more than 50 percent of the stardard transition area width;

(2) Reduce the transition area in order to place or construct a new septic system which discharges onsite; or

(3) Reduce the transition area to place or construct an outfall structure that is discharging or will discharge unfiltered or otherwise untreated stormwater into the adjacent wetlands.

2. For an exceptional resource-value-wetland, in the case where an averaging plan is applied for in conjunction with a transition area reduction, regardless of the reduction width approved, the averaging plan shall be calculated on a minimum 100 foot width; or

3. In no case shall the width of any part of a transition area adjacent to a freshwater wetland of exceptional resource value be reduced to less than 75 feet except pursuant to N.J.A.C. 7:7A-7.1(f) (transition area *[permits]* ***waivers*** for access to authorized activities), or N.J.A.C. 7:7A-7.2(a) (standards for width reduction) unless the applicant demonstrates, to the satisfaction of the Department, that if the activity was instead proposed in the exceptional resource value wetland it would meet the standards for granting a freshwater wetlands permit.

4. The Department shall not approve any transition area averaging plan for intermediate resource value wetlands if the following site conditions exist because the Department has determined that the resultant transition area will no longer serve the purposes of a transition area set forth in N.J.A.C. 7:7A-6.1(a) and (b):

i. The slope of the existing, pre-activity transition area where the reduction is proposed is greater than 25 percent;

ii. The transition area averaging plan proposes to:

(1) Reduce any portion of the transition area to less than 10 feet:

(2) Reduce the transition area to less than 25 feet in areas of critical habitat;

(3) Reduce the transition area to *[less than]* 10 feet wide for a continuous distance of 100 linear feet or more along the freshwater wetlands boundary;

(4) Compensate for the reduction of the transition area by increasing the width of any portion of the transition area to more than 50 percent of the standard transition area width;

(5) Reduce the transition area to place or construct a new septic system in the transition area which discharges onsite;

(6) Reduce the transition area to place or construct an outfall structure that is discharging unfiltered or otherwise untreated stormwater into the adjacent wetlands;

(7) Place structures, impervious surfaces or stormwater management facilities as defined at N.J.A.C. 7:7A-7.4 within 20 feet of the freshwater wetlands; or

(8) Reduce the transition area to less than 25 feet within the drainage basins of currently existing or proposed National Wildlife Refuges.

(c) (No change.)

7:7A-7.6 Application contents for transition area *[permits]* ***waivers***

(a) ***Except for applications for a special activity waiver based on Statewide general permit number 25 for repair or alteration of malfunctioning individual subsurface sewage disposal systems pursuant to N.J.A.C. 7:7A-7.4(e),*** *[The]* ***the*** application for a transition area *[permit]* ***waiver*** shall include the applicable fee for the review and processing of a transition area *[permit]* ***waiver*** application specified at N.J.A.C. 7:7A-16 and *[five]* ***three*** copies of the following information***. Applicants seeking authorization pursuant to N.J.A.C. 7:7A-7.4(e), shall comply with the notification procedures found at (c)4 below***:

1. A completed application form, obtainable at the address at N.J.A.C. 7:7A-1.3, filled out as directed for a transition area *[permit]* ***waiver*** in the instructions accompanying the application form;

2. A written description of the location of the proposed activity and property including county, municipality, municipal lot(s), block(s) and street address;

3. A copy or photocopy of a portion of the U.S. *[Geodetic]* ***Geologic*** Survey (U.S.G.S.) 7.5 minute quadrangle map (available from the Department's Maps and Publications Office, CN 402, Trenton, NJ 08625) with the property clearly outlined, and a determination of the State Plane Coordinates for the center of the property. ***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 end-points of those projects which are 1,999 feet or less, and for those projects which are 2,000 feet and longer, additional coordinates at each 1,000 foot interval***;

4. A folded preliminary site plan or subdivision map of the property, or folded out-bound survey map of the property if no preliminary site plan or subdivision map exists, clearly identifying all proposed activities on the entire property, all existing structures on the property, and the freshwater wetland boundary as verified through a letter of interpretation;

i. Note: If the freshwater wetlands boundary shown on the site plan or subdivision map has not been verified by a letter of interpretation, the freshwater wetland boundary shall be visibly flagged and/or staked in the field.

5. A detailed written description of the proposed activity or activities, describing the total area to be modified by the entire project, and the total square footage of the transition area potentially affected, either temporarily or permanently.

6. A certified mail return receipt card, *[signed by the receiver]* ***white receipt or green card is acceptable***, from the U.S. Post Office, showing that a complete copy of the submittal to the Department requesting a transition area *[permit]* ***waiver***, including all materials required by this subsection, has been submitted to the clerk of each municipality in which the *[regulated]* ***prohibited*** activity is proposed to take place.

7. A certified mail return receipt card, *[signed by the receiver]* ***white receipt or green card is acceptable***, from the U.S. Post Office, showing that a written notice has been forwarded to the municipal construction official, the environmental commission, or any other public body with similar responsibilities, planning board of each municipality***, and the planning board of each county*** in which the activity is to occur and all landowners within 200 feet of the subject property. ***One written notice may be submitted for***

multiple applications so long as all notification requirements for each separate subsection is met.* The written notice shall include, at a minimum, the following information and statement:

i.-iv. (No change.)

v. The following statement:

"This letter is to provide you with legal notification that the referenced property owner is applying to the *[Division of Coastal Resources]* ***Land Use Regulation Element***, Department of Environmental Protection ***and Energy***, for a transition area *[permit]* ***waiver***. The rules governing transition areas are found at N.J.A.C. 7:7A (Freshwater Wetlands Protection Act Rules).

A transition area *[permit]* ***waiver***, if approved by the Department, will allow certain *[regulated]* ***prohibited*** activities, as defined in N.J.A.C. 7:7A-6.2, to occur in a transition area. A transition area is an area adjacent to a freshwater wetlands which minimizes adverse environmental impacts on the freshwater wetlands and serves as an integral component of the freshwater wetlands ecosystem. A transition area can extend up to 150 feet from the freshwater wetlands boundary depending on the resource value classification of the freshwater wetlands.

A copy of the application can be viewed at the Municipal Clerk's Office or by appointment at the address below during normal business hours. The Department welcomes comments on the transition area *[permit]* ***waiver*** application. Procedures for the Department's review of transition area *[permit]* ***waiver*** applications can be found at N.J.A.C. 7:7A-7.7. ***Written comments should be submitted to the Department within 15 days of receiving notice. Comments will be accepted until the Department makes a decision on the application.*** Please submit your written comments *[within 15 days of receiving this letter]* along with a copy of this letter to:

New Jersey Department of Environmental Protection and Energy
Land Use Regulation Element
Bureau of Regulation
*[Division of Coastal Resources
New Jersey Department of Environmental Protection]*
CN 401
Trenton, New Jersey 08625
att: (County in which the property is located)
Section Chief

As part of the Department's review of this application, Department personnel may perform a site inspection on your property. This site inspection will involve only that area of your property within 150 feet of the applicant's property line. This site visit will involve a visual inspection and possibly minor soil borings using a 4" ***diameter*** hand auger. The inspection will not result in any damage to vegetation or to improvements on your property.

The Department will notify the environmental commission or any other public body with similar responsibilities, and the planning board ***and the municipal construction official*** of each municipality and *[each municipal construction official]* ***the planning board of each county*** in which the activity is to occur of the Department's final decision concerning this transition area *[permit]* ***waiver*** application";

vi. If the proposed project involves a linear facility such as a pipeline or road of more than .5 miles, instead of notifying all landowners within 200 feet of the property(ies) lines, the applicant shall give public notice by publication of a display advertisement. The advertisement shall be a minimum of four column inches and be published in at least one newspaper of local circulation and one of regional circulation in the municipality. In addition, notice shall be given to owners of all real property within 200 feet of any above surface structure related to the linear facility, such as pumping stations, treatment plants, power substations, grade separated interchanges or similar structures. This does not include utility support structures or conveyance lines.

8. Written consent by the applicant to allow access to the subject property by representatives or agents of the Department for the purpose of conducting site inspections or surveys of the freshwater wetlands and transition areas thereon; and

9. Any information establishing a claim of hardship as determined pursuant to N.J.A.C. 7:7A-7.2*[(g) or 7.3(f)]****(f) or 7.3(e)***, if applicable.

(b) If the freshwater wetlands boundary on the property has not been confirmed or delineated by the Department through a letter of interpretation pursuant to N.J.A.C. 7:7A-8 and the property is greater than one acre, the applicant shall also provide as part of the transition area *[permit]* ***waiver*** application the information required in N.J.A.C. 7:7A-8.3(a)***, except for the notice requirements at 8.3(a)8 and 9,*** and 8.3(b)2, Application for letters of interpretation. ***For Special Activity Waivers based on Statewide general permits pursuant to N.J.A.C. 7:7A-7.4(e), a wetlands delineation is only required for the area of the proposed activity.***

(c) In addition to the information required in (a) and (b) above, the following information shall be submitted depending on the type of transition area *[permit(s)]* ***waiver(s)*** requested in the application:

1. To reduce the standard transition area *[which]* ***width*** pursuant to N.J.A.C. 7:7A-7.2 and 7.3 (except pursuant to 7.2(d)):

i. A description of the dominant vegetational community in the standard transition area, as described at N.J.A.C. 7:7A-7.2*[(f)1]* ***(e)1***;

ii. The slope of the standard transition area, as determined pursuant to N.J.A.C. 7:7A-7.2*[(f)2]****(e)2***; and

iii. The development intensity of the proposed project, as determined pursuant to N.J.A.C. 7:7A-7.2*[(f)3]****(e)3***.

2. (No change.)

*[3. To reduce the standard transition area width pursuant to N.J.A.C. 7:7A-7.2(e), a proposal containing:

i. The location of all existing adjacent structures, municipal wastewater treatment systems, paved roadways and other development adjacent to the wetlands;

ii. Documentation regarding the response to all applications for variances to local set back requirements; and

iii. Plans for proposed planting in reduced transition area if currently unvegetated.]*

*[4.]****3.*** For a special activity transition area *[permit]* ***waiver*** for the construction of a stormwater management facility or a linear development pursuant to N.J.A.C. 7:7A-7.4:

i. (No change.)

*[5.]****4.*** For a special activity transition area *[permit]* ***waiver*** for a general permit activity pursuant to N.J.A.C. 7:7A-7.4(e)***, except for those based on Statewide general permit number 25 as described below at (c)4ii****:

i. All of the information required for determining compliance with the criteria of the specific general permit activity pursuant to N.J.A.C. 7:7A-9.2(a).

ii. A person proposing to engage in activities pursuant to N.J.A.C. 7:7A-7.4(e), based on Statewide general permit number 25, repair or alteration of malfunctioning individual subsurface sewage disposal systems, shall submit written notice containing a description of the proposed activities to the Department at least 30 days prior to commencement of work. This notification shall include a description and plan of the activities and their location including municipality, county, block, and lot; and an approval from the Board of Health or its designated agent for the proposed activities. If the Department fails to notify the applicant within 30 days of receiving the notification, the special activity waiver shall be deemed to have been approved, to the extent that the activity does not violate other statutes or regulations then in effect, and subject to any standard terms and conditions pursuant to N.J.A.C. 7:7A-9.3.

*[6.]****5.*** For a special activity transition area *[permit]* ***waiver*** for redevelopment of a transition area pursuant to N.J.A.C. 7:7A-7.4(f):

i. Plans showing the location and extent of existing impermeable surfaces in relation to transition area; and

ii. Plans showing the location and extent of proposed development and attendant features including, but not limited, to septic systems discharging onsite, and stormwater outfalls and a proposed mechanism to treat stormwater runoff prior to leaving the site.

*[7.]****6.*** For a transition area averaging plan pursuant to N.J.A.C. 7:7A-7.5, a statement that includes:

i. The total square footage of the standard transition area;

ii. The total square footage of the transition area to be disturbed by the proposed project;

iii. The total square footage proposed for transition area reduction, and proposed for transition area expansion in compensation for the proposed reduction, pursuant to the transition area averaging plan; and

iv. A site plan showing and clearly labeling the standard transition area, the proposed area of reduction of the standard transition area, and the proposed areas adjacent to the standard transition area that will be added to the standard transition area as square footage compensation for the reduction. The transition area shown on the site plan shall be reproducible in the field.

(d) Applicants shall perform recordkeeping activities for transition area *[permit]* ***waiver*** applications according to the requirements at N.J.A.C. 7:7A-11.2.

(e) All transition area *[permit]* ***waiver*** applications shall be signed according to the signatory requirements at N.J.A.C. 7:7A-11.3.

(f) All transition area application fees shall be paid according to the requirements set forth for payment of permit fees at N.J.A.C. 7:7A-16.

7:7A-7.7 Procedure for review of transition area *[permit]* ***waiver*** applications

(a) Within 30 days of the receipt of an application for a transition area *[permit]* ***waiver***, the Department shall review the application for completeness and may return all materials contained in a deficient application with a request for additional information, or declare the application complete. If the application does not include the fee specified at N.J.A.C. 7:7A-16, no action shall be taken by the Department under this section, the submittal will not be considered an application, and completeness review will not begin.

(b) (No change.)

(c) Except as indicated in (d) and (h) below, the Department shall issue or deny a transition area *[permit]* ***waiver*** within 90 days of receiving a complete transition area *[permit]* ***waiver*** application or within 90 days after receipt of the requested additional information or clarification sufficient for the application to be considered complete.

(d) If the transition area *[permit]* ***waiver*** application is submitted together with an individual freshwater wetlands permit application concerning the same property, the Department shall approve or deny the transition area *[permit]* ***waiver*** within the time period set forth in N.J.A.C. 7:7A-12 for the approval or denial of the individual freshwater wetlands permit application.

(e) Applications may be cancelled by the Department or withdrawn, amended, or resubmitted by the applicant pursuant to N.J.A.C. 7:7A-7.10.

(f) When a transition area *[permit]* ***waiver*** is issued pursuant to this subchapter, the Department shall send copies to all municipal and county agencies which received copies of the transition area *[permit]* ***waiver*** application.

(g) The Department will provide notice of application for a transition area *[permit]* ***waiver***, the status of all applications, and the final decision concerning all applications in the DEP***E*** Bulletin, as set forth in N.J.A.C. 7:7A-12.4.

1. Copies of all transition area *[permit]* ***waiver*** applications will be available for public review by interested persons at the municipal clerk's office and in the offices of the Department in Trenton (see N.J.A.C. 7:7A-1.3 for address) by appointment during normal business hours.

(h) Within 20 days of publication of the notice of application in the DEP***E*** Bulletin, interested persons may request in writing that the Department hold a public hearing on a particular application. The Department will set a time, place and date for the public hearing after the close of the 20 day hearing request period, and shall so notify the applicant. The Department will hold the public hearing within 60 days from the close of the 20 day period. The hearing shall be in the county wherein the transition area is located whenever practicable. The applicant is responsible for the cost of the hearing.

1. The Department may issue or deny a *[permit]* ***waiver*** without a public hearing unless there is a significant degree of public interest in the application. If the Department grants a hearing, the application shall not be considered complete until 15 days after the public hearing.

2. The Department and the applicant shall follow the public hearing procedures for freshwater wetlands permits established N.J.A.C. 7:7A-12.4(d) through (i).

(i) The Department shall establish conditions in transition area *[permits]* ***waivers*** as required on a case-by-case basis, to assure compliance with all applicable provisions of this chapter and the Act.

7:7A-7.8 Hearings and appeal

[(a)] The applicant or other affected party, if aggrieved by the ***Department's*** decision *[to authorize the activities specified in the transition area permit]* ***regarding a transition area waiver***, may request a hearing on this decision pursuant to N.J.A.C. 7:7A-12.7.

7:7A-7.9 Duration, effect, modification and transfer of transition area *[permits]* ***waivers***

(a) A transition area *[permit]* ***waiver*** issued by the Department shall be effective for a fixed term of five years.

(b) If construction is begun during the valid five year term of the *[premit]* ***waiver*** and performed on a continuous basis, the applicant may apply for an extension of the effective date of the *[permit]* ***waiver***.

(c) If construction does not begin in the transition area within the five year term of the *[permit]* ***waiver***, a new *[permit]* ***waiver*** application will be required.

(d) The issuance of a transition area *[permit]* ***waiver*** does not convey property rights of any sort, or any exclusive privilege.

(e) In the event of rental, lease, sale or other conveyance of the site by the permittee, the *[permit]* ***waiver*** shall be continued in force and shall apply to the new tenant, lessee, owner or assignee so long as there is no change in the site, proposed construction or proposed use of the facility, as described in the original application, and as long as a *[permit]* ***waiver*** modification pursuant to N.J.A.C. 7:7A-13 has been approved.

7:7A-7.10 Cancellation, withdrawal, resubmission and amendment of applications

(a) Applications may be cancelled by the Department; or withdrawn, amended, or resubmitted by an applicant.

(b) If an application is not complete for final review within 60 days of a request for additional information, the Department shall send a letter canceling the application and stating that the application will be purged from Department files and that a new application will be required to reactivate the Department's review. If the applicant sends the Department a letter documenting good cause for not supplying the requested information within the 60 day period the Department will grant an automatic extension of 30 days. ***The Department will grant additional 30-day extensions upon receiving a written request for such extension from the applicant.***

1. All fees submitted with an application subsequently cancelled shall be non-refundable.

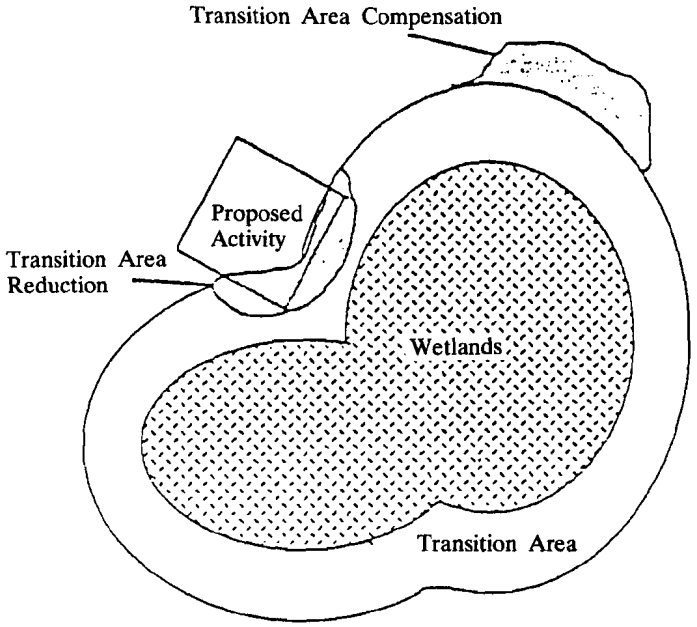
(c) An applicant may withdraw an application at any time in the application review process. All fees submitted with such applications are non-returnable when a significant portion of the review has been completed. In some cases however (see (d) below) the fees may be credited toward future applications.

(d) If an application is cancelled, denied or withdrawn, the applicant may resubmit an application for a revised project on the same site. The resubmitted application will be treated as a new application, although references may be made to the previously submitted application. A new fee will be required unless application is resubmitted within one year of the date of denial or withdrawal, in which case the original permit fee may be credited to the new application.

(e) A *[permit]* ***waiver*** application may be amended at the applicant's discretion at any time as part of the *[permit]* ***waiver*** review process. Copies of amendments and amended information shall be distributed by the applicant to the same persons to whom copies of the initial application were distributed. All amendments to pending applications shall constitute a new submission and may at the Department's discretion require reinitiation of the entire review process.

7:7A-7 Appendix A

Example of a transition area averaging plan.



The square footage in the compensation area is equal to that of the reduction area.

SUBCHAPTER 8. LETTERS OF INTERPRETATION

7:7A-8.1 Purpose

(a) A person proposing to engage in a regulated activity in a freshwater wetland and/or open water, or in a regulated activity which requires a transition area *[permit]* ***waiver***, or desiring the information for other purposes, may request from the Department a letter of interpretation (LOI) to establish either the presence or absence, of freshwater wetlands, State open waters or transition areas or the verification of the boundary of wetlands, open waters, and/or transition areas on a project site. The information provided by this letter then may be used in applying for a permit from the Department, for activities proposed in a freshwater wetland, State open water, or transition area.

(b) In addition to the information, in (a) above if the subject property has wetlands within or adjacent to its boundaries, or transition areas located within its boundaries, a resource value classification will be provided with the letter of interpretation.

(c) A letter of interpretation only provides information on the location or presence of wetlands, open waters, and/or transition areas and does not grant an approval to the applicant to conduct any regulated activities.

7:7A-8.2 Types of letters of interpretation

(a) Various types of letters of interpretation are available from the Department, depending on the type of information requested by the applicant, the size of the right-of-way or size of the parcel (based on municipal tax block and lot), or the project (based on the proposed limits of disturbance) for which the letter will be issued. The types of letters of interpretation are as follows:

1. Presence or absence determination: The Department will issue an LOI determining whether any freshwater wetlands, State open waters or transition areas exist on a right-of-way or parcel (limits defined by municipal tax block and lot boundaries ***or ROW description***). This LOI will not determine the location of these features, but only whether they are present ***and the resource value classification if wetlands are present***. This LOI will be issued for any size parcel *[over one acre in size]*.

2. Footprint of disturbance—Presence or absence determination: The Department will issue an LOI determining only the presence or absence of wetlands, State open waters or transition areas for projects which have proposed limits of disturbance totally contained within an area of one acre or less. The limits of disturbance of the proposed project shall be flagged in the field and indicated on an out bound survey. The Department may at its discretion require that the limits of disturbance be surveyed upon completion of the field inspection. The project limits shall include all possible disturbances, either temporary or permanent in nature, that are a result of the proposed regulated activities listed in N.J.A.C. 7:7A-2.3, *[Regulated]* ***Prohibited*** activities, and N.J.A.C. 7:7A-6.2, Regulated activities in transition areas. Examples of activities that shall be indicated on the plans include, but are not limited to, the following: clearing of vegetation, grading or earth work, construction of any buildings, location of wells and septic systems, placement of any impervious surfacing for walkways, driveways, or parking lots, and any landscaping.

3. Regulatory line delineation: The Department will issue a letter of interpretation, delineating the limits of any wetlands, State open water or transition areas present on a parcel or right of way of one acre or less, whose limits are defined by municipal tax block(s) and lot(s) boundaries ***or ROW description***. The Department may require that the wetlands line be surveyed upon completion of the field inspection.

4. Regulatory line verification: The Department will issue a letter of interpretation verifying an applicant's delineation of the boundaries of a wetland, open water and/or transition area present on parcels or rights-of-way over one acre in size. The limits of the parcel or right of way must be defined by municipal tax block(s) and lot(s) boundaries ***or ROW description***.

7:7A-8.3 Application for letters of interpretation

(a) The application for a letter of interpretation shall include the applicable fee for the review and processing of a letter of interpretation application specified at N.J.A.C. 7:7A-16.2 and three copies of the following information:

1. Name and address of owner(s) of the property, municipality, county, block and lot number(s) ***or ROW description***;

2. A folded out-bound survey of the property or a folded site plan, if available. ***If the applicant is applying for a presence or absence determination pursuant to N.J.A.C. 7:7A-8.2(a)1, a tax map may be substituted to satisfy this requirement.*** The survey or site plan should include all natural or human-made features such as structures, fences, streams, ponds, treelines, etc. In addition, the corners of the property boundary shall be visibly flagged and/or staked in the field to facilitate the on-site inspection;

3. A copy of the current municipal tax map for the subject property;

4. A copy of the appropriate county road map or other local street map clearly indicating the location of the subject property;

5. A folded copy of the appropriate ***portion of a*** U.S. *[Geodetic]* ***Geologic*** Survey Quadrangle Map for the parcel site with the boundaries of the parcel (defined by tax block and lot) or project (limits of disturbance) clearly outlined, and a determination of the State Plane Coordinates for the center of the parcel. ***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 end-points of those projects which are 1999 feet or less, and for those projects which are 2000 feet and longer, additional coordinates at each 1000-foot interval***;

6. A copy of the appropriate United States Department of Agriculture, Soil Conservation Service County Soil Survey ***sheet***, with the boundaries of the subject parcel (defined by tax block and lot) or project (limits of disturbance) clearly outlined. The sheet number of the Soil Survey shall be included;

7. ***For the copies of the applications submitted to the Department,*** *[Clear]* ***clear*** color photographs of the property (a minimum of four views is recommended) with a description and the location of each view;

8. Verification that a certified mail notice with return receipt requested (white receipt or green card is acceptable) and a complete copy of the request for a letter of interpretation including all materials required by this subsection, have been forwarded to the clerk of the municipality in which the parcel or project is located;

9. Verification that certified mail notice with return receipt requested (white receipt or green card is acceptable) has been forwarded to the environmental commission, or any public body with similar responsibilities, the planning board and the municipal construction official of each municipality, ***and the planning board of each county*** in which the parcel or project is located and landowners within 200 feet of the legal boundary line of the subject property or properties. Applicant must also provide a list of landowners within 200 feet. The written notices satisfying this item and item 9 above may be filed concurrently with notices required pursuant to N.J.S.A. 40:55D-1 et seq. (The Municipal Land Use Law), but should be mailed no sooner than two working days before the application package is delivered to the Department. This will allow ample time for the application to be processed to accommodate public review. The written notice shall include, at a minimum, the following information and statement:

i. The name(s) and address(es) of the property owner(s);

ii. The property location described by block(s) and lot(s), municipality, county, and street address;

iii. A description of the proposed project or the reason for applying for a letter of interpretation; and

iv. The following statement:

"This letter is to provide you with legal notification that the referenced property owner is applying to the New Jersey Department of Environmental Protection ***and Energy***, *[Division of Coastal Resources]* ***Land Use Regulation Element*** for a letter of interpretation.

A letter of interpretation is a legal document that establishes either the presence or absence or limits of wetlands, open water or transition areas on a subject property as defined at N.J.S.A. 13:9B-1 et seq. The width of the transition area adjacent to a wetland is determined by the resource value classification of the wetland. This information is also provided by a letter of interpretation. If any of these features are present on a parcel the Department will regulate many aspects of development on those areas as defined in N.J.A.C. 7:7A-1.4, Regulated activities.

The complete letter of interpretation application package can be reviewed at either the municipal clerk's office or by appointment at the *[Division of Coastal Resources]* ***Land Use Regulation Element*** office at the address listed below. The Department welcomes comments and any information that you may provide concerning the presence of wetlands, open water or transition areas on the referenced parcel. ***Written comments should be submitted within 15 days of receiving this letter. Comments will be accepted until the Department makes a decision on the application.*** Please submit your written comments *[within 15 days of receiving this letter]* along with a copy of this letter to:

*[New Jersey Department of Environmental Protection
Division of Coastal Resources]*
New Jersey Department of Environmental Protection and Energy
Land Use Regulation Element
Bureau of Regulation
CN 401
5 Station Plaza
Trenton, New Jersey 08625
att: (County in which the property is located) Section Chief

As part of the Department's review of this application, Department personnel may perform a site inspection on your property. This site inspection will involve only land within 150 feet from the applicant's property line. This site visit will involve a visual inspection and possibly minor soil borings using a 4" ***diameter*** hand auger. The inspection will not result in any damage to vegetation or any improvements on your property.

The Department *[may]* ***will*** notify the environmental commission, the planning board of the municipality and the municipal construction official of the Department's determination in the letter of interpretation.";

v. If the proposed project involves a linear facility such as a pipeline or road of more than .5 miles, instead of notifying all landowners within 200 feet of the property(ies) lines, the applicant shall give public notice by publication of a display advertisement. The advertisement shall be a minimum of four column inches and be published in at least one newspaper of local circulation and one of regional circulation in the municipality. In addition, notice shall be given to owners of all real property within 200 feet of any above surface structure related to the linear facility, such as pumping stations, treatment plants, power substations, grade separated interchanges or similar structures. This does not include utility support structures or conveyance lines.

10. Unconditional written consent by the owner of the subject property to allow access to the site by representatives or agents of the Department for the purpose of conducting a site inspection or survey of the freshwater wetlands, State open waters or transition areas thereon; and

11. A fee pursuant to N.J.A.C. 7:7A-16, as indicated on the printed fee schedule which is available from the Department.

(b) In addition to the information required in (a) above, the following information shall be submitted depending on the type of letter of interpretation requested in the application:

1. For a letter of interpretation for a footprint of disturbance—presence or absence determination pursuant to N.J.A.C. 7:7A-8.2(a)2:

i. The limits of all disturbance of any proposed regulated activities, including grading, shall be clearly indicated and labeled on an out-bound survey with a scale of one inch equals no more than 50 feet. These limits must encompass no more than one acre in total. In addition, the project limits shall be visibly flagged and/or staked in the field with numbered flags and referenced by matching numbers on the out-bound survey. The flags and/or stakes shall be set in relation to known points and landmarks ***if available*** so that the limits can be reestablished. The Department may at its discretion require that the limits of disturbance be surveyed upon completion of the field inspection.

2. For a letter of interpretation for a regulatory line verification pursuant to N.J.A.C. 7:7A-8.2(a)4:

i. The applicant shall provide a folded out-bound survey or folded site plan of the property. The scale of the survey shall be *[no smaller than]* one inch equals ***no more than*** 100 feet. If the subject parcel is located in either Middlesex or Mercer County or north of these counties, the survey must include topography depicting contours at no greater than five foot intervals. For counties south of Middlesex and Mercer, the survey must include topography depicting, at a minimum, *[one]* ***two*** foot contours.

(1) The proposed wetlands and/or open waters boundary must be clearly indicated and labeled on the out-bound survey. The boundary must be accurate enough to allow Department personnel to locate the wetland boundary in the field*.* *[but a]* ***A*** surveyed line will only be required *[once it is verified by the Department for properties of five acres or more.]* ***after the line has been verified by the Department and only for properties of five acres or more;***

(2) The locations of all soil borings or pits, if applicable, shall be indicated on the survey and numbered. Soil logs should be presented with an indication of the depth to the seasonal high water table. Soil borings must be to a minimum depth of 24 inches on transects perpendicular to the wetlands boundary starting in the definite wetlands area and moving towards the uplands. In wetlands with atypical characteristics, or in wetlands which have been disturbed by human activities or as otherwise deemed appropriate, the Department may require deeper borings as needed;

(3) Vegetative species, recorded at soil boring locations, and classified using United States Fish and Wildlife Service categories *[(P. Reed, 1986)]* as listed under "R/IND" and "NAT-IND" (Regional and National Indicators) columns ***in the "National List of Plant Species that Occur in Wetlands: 1988-New Jersey" and amendments thereto, compiled by the USFWS, United States Army Corps of Engineers (Corps), USEPA and the United States Soil Conservation Service***;

(4) The wetlands and/or open water boundary line shall be visibly flagged and/or staked in the field with numbered flags, placed no greater than 75 feet apart, and referenced by matching numbers on the out-bound survey. The flags and/or stakes are to be set in relation to known points and landmarks ***if available*** so that the boundary can be re-established;

(5) Name of the person who prepared the proposed wetland and/or open water boundary.

7:7A-8.4 Onsite inspections

(a) For properties greater than one acre in size, the Department shall require an applicant for a letter of interpretation to submit to the Department an onsite wetlands delineation *[prepared by a qualified professional]* using the three-parameter method to determine or verify the location of the freshwater wetland boundary. The line shall be subject to approval and verification by the Department.

(b) (No change.)

(c) (No change in text.)

7:7A-8.5 Local review

The Department, in determining the presence or absence of freshwater wetlands, State open waters and transition areas and the location of their boundaries if they are present, shall consider comments filed by municipal and county governments and interested citizens. Comments filed by the clerk, environmental commission or any public body with similar responsibilities and planning board of a municipality ***or county***, or municipal construction official will be actively considered as part of all determinations***.*** *[Comments must be filed with the Department within 15 days after the municipal clerk's office receives a complete copy of all information submitted to the Department or until the Department issues a letter of interpretation.]* ***Written comments should be submitted to the Department within 15 days of receiving notice. Comments will be accepted until the Department makes a decision on the application.***

7:7A-8.6 Effect of a letter of interpretation

[(a)] A person who receives a letter of interpretation pursuant to this subchapter shall be entitled to rely on the determination of the Department, concerning the presence or absence, or the extent of freshwater wetlands and/or State open waters, for a period of five years unless the letter of interpretation is determined to have been based on inaccurate information, in which case it shall be void.

[(b) The determination of resource value classification, issued with a letter of interpretation, is subject to change for a one year period following the issuance of the letter of interpretation regardless of any actions taken in reliance upon the notice of classification. During this one year period the Department may change the resource value classification if it finds that the information on which the resource value was based is no longer accurate or if new information is made available to the Department from any source, which the Department finds sufficient to justify a reclassification. At the end of the one year period the resource value classification may be relied upon for a period of four years, the effective duration of the letter of interpretation. The Department may waive the one year review period, and the resource value classification may be relied upon for the entire effective duration of the letter of interpretation if the Department concurs with conclusive evidence of resource value classification, in the form of a comprehensive habitat evaluation performed by a qualified biologist or botanist.]

7:7A-8.7 Reissuance of a letter of interpretation

A letter of interpretation may be extended beyond the five year time period, but not to exceed five years from the original expiration date. Requests for extensions shall be made in writing to the Department before the letter has expired and shall include the file number, a copy of the originally approved plans and fee as specified at N.J.A.C. 7:7A-16.2. Applicants will be required to submit a new application if an extension is not applied for prior to the expiration date of the letter of interpretation. The term of the letter may be extended provided that the information upon which the original letter was based remains valid.

7:7A-8.8 Effect of non-issuance of a letter of interpretation within time allotted

***(a) Within 20 days after receipt of a request for a letter of interpretation, the Department may require the submission of any additional information necessary to issue the letter of interpretation.**

(b) If no additional information is requested, the Department shall issue a letter of interpretation within 30 days after receiving the request.

(c) If additional information is requested by the Department in order to issue a letter of interpretation, the Department shall issue a letter of interpretation within 45 days after receipt of the information sufficient to declare the application complete.*

*[(a)]***(d)*** Any person who requests a letter of interpretation pursuant to the provisions of the Act and this chapter, and does not receive a response from the Department within the deadlines imposed in this subchapter, shall not be entitled to assume that the site of the proposed activity which was the subject of the request for a letter of interpretation is not in a freshwater wetland or a transition area.

*[(b)]***(e)*** A person who requests a letter of interpretation and does not receive a response within the above deadlines may directly apply for a freshwater wetlands permit. In the event that a letter of interpretation is not issued within the deadlines imposed in this subchapter, the letter of interpretation fee will be applied to a permit application fee at the applicant's request.

7:7A-8.9 Cancellation and resubmission of applications

If an application is not complete for final review within 60 days of a request for additional information, the Department shall send a letter cancelling the application ***and requiring the application for a freshwater wetlands permit or transition area waiver.*** *[and a]* ***A*** new application will be required to reactivate the Department's review. If the applicant sends the Department a letter documenting good cause for not supplying the requested information within the 60 day period the Department will grant an automatic extension of thirty days. ***The Department will grant additional 30-day extensions upon receiving a written request for such extension from the applicant.***

SUBCHAPTER 9. GENERAL PERMITS

7:7A-9.1 General standards for issuing Statewide general permits

(a) This section details the process for the issuance of new Statewide General permits and the readoption of previously issued Statewide General permits ***(except for Statewide general permits numbers 6 and 7)***. The remaining sections in this subchapter detail the process for authorizing various activities under the issued Statewide general permits. Before issuing or reissuing a Statewide general permit, the Department will propose a draft Statewide general permit in the form of a rule proposal pursuant to the New Jersey Administrative Procedure Act. N.J.S.A. 52:14B-1 et seq. In addition to these public notice and comment procedures, the Department will send a copy of the draft general permit to USEPA, and will issue a public notice meeting the requirements of N.J.A.C. 7:7A-11.1(a).

(b) The Department may issue Statewide general permits only if all of the following conditions are met:

1. The activities meet the limitations specified in (c)1 below;

2. After conducting an environmental analysis *[that]***, the Department*** determines ***that*** the regulated activities will cause only minimal adverse environmental impacts when performed separately *[and]***,*** will have only minimal cumulative adverse impacts on the environment, ***and*** will cause only minor impact***s*** on freshwater wetlands and State open waters;

3. After determining that the activity will be in conformance with the purposes of the Act, and will not violate the Federal Act; and

4. After providing public notice and opportunity for a public hearing.

(c) In addition to the conditions in N.J.A.C. 7:7A-13.1, N.J.A.C. 7:7A-9.3, and the applicable requirements of N.J.A.C. 7:7A-13.2, each general permit shall contain limitations as follows:

1.-2. (No change.)

(d) (No change.)
(e) (No change in text.)
(f) The Department shall review each general permit a minimum of every five years. This review shall include public notice and opportunity for public hearing. Upon this review the Department shall either modify, reissue or revoke all general permits.
(g) If a general permit is not modified or reissued within five years of publication in the New Jersey Register, it shall automatically expire.

7:7A-9.2 Statewide General Permit Authorization

(a) The following activities in freshwater wetlands and State open waters may be authorized under the following Statewide General Permits provided the activity is in compliance with specific conditions contained in the Statewide General Permit and with the provisions in (b) below and the standard**s and*** conditions for all Statewide General Permits in N.J.A.C. 7:7A-9.3 and provided the activities are in compliance with the Act, this chapter, and the Federal Act:

1. The repair, rehabilitation, replacement, maintenance or reconstruction of any previously authorized, currently serviceable structure, fill, roadway, public utility, active irrigation or drainage ditch, or stormwater management facility lawfully existing prior to July 1, 1988 or permitted under the Act, provided such activities do not deviate from plans of the original activity and further provided that the previously authorized structure, fill, roadway, utility, ditch or facility has not been and will not be put to uses differing from those specified in any permit authorizing its original construction. 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;

2. Discharge of material for backfill or bedding for utility lines, provided there is no change in preconstruction elevation and bottom contours. Excess material must be removed to an upland disposal area. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. The activities allowed by this Statewide General Permit shall comply with the following conditions:

i. The activity encompasses no more than one acre of wetlands;
ii. The width of the area of disturbance within the right-of-way for the project is no more than 20 feet *[wide]*;
iii. The project is not located in a wetland of exceptional resource value;
iv. *[Any]* ***The upper-most 18 inches of any*** excavation is backfilled with the original soil material if feasible and otherwise with suitable material *[to within 18 inches of the surface]*. The excavation must be backfilled to the preexisting elevation;
v. The area above the excavation is replanted in accordance with applicable BMPs with *[native]*, indigenous wetland species; and
vi. The activity is designed so as not to interfere with the natural hydraulic characteristics of the wetland and watershed;

3. (No change.)

4. All regulated activities, including work, discharges, and the construction or placement of structures, which are undertaken, authorized or otherwise expressly approved in writing by the Department for the investigation, cleanup or removal of hazardous substances as defined by or pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., or pollutants, as defined by the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., provided the following conditions are met.

i. (No change.)
ii. Mitigation shall be performed according to the procedures for mitigation at N.J.A.C. 7:7A-14 for all disturbance or destruction of freshwater wetlands or State open waters caused by a cleanup authorized under this general permit. The mitigation plan may be incorporated as part of the document by which the Department approves the cleanup or it may be submitted as part of the Statewide General Permit authorization application. The Statewide General Permit authorization will not be issued until the mitigation plan is submitted and approved by the *[Division]* ***Element*** according to the standards at N.J.A.C. 7:7A-14.

5. (No change.)

6. Regulated activities in *[an isolated]* freshwater wetland**s (applicants should be advised that these wetlands may not qualify for filling under Nationwide permit number 26 in areas below NGVD elevation 10)*** or State open waters *[as defined at N.J.A.C. 7:7A-1.4]* ***which are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream,*** provided:

i. The activity would not result in the loss or substantial modification of more than one acre of freshwater wetland or State open waters;
ii. The activity will not take place in a wetland of exceptional resource value as defined in N.J.A.C. 7:7A-2.5(a)1 nor in State open waters defined as a special aquatic site; ***and***
iii. The activity will not take place in wetlands designated as priority wetlands by the USEPA*[; and]***.***
[iv. The disturbance of greater than 0.25 acres of wetlands or State open waters shall be mitigated as specified at N.J.A.C. 7:7A-14, Mitigation. The mitigation plan shall be submitted as a part of the General Permit authorization application and approved by the Department before the proposed activity may be authorized.]

7. Regulated activities in ditches of human construction or swales provided:

i. They are located in headwater areas;
ii. They are not exceptional resource value wetlands;
iii. They are not designated a priority wetlands by the USEPA;
iv. The activity would not result in the loss or substantial modification of more than one acre of wetlands or State open waters; ***and***
v. The proposed activity will not result in a disruption of a surface water connection and the isolation of adjacent wetlands or State open waters*[;]***.***
*[vi. The activity would not result in a violation of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 or implementing rules at N.J.A.C. 7:13-1; and
vii. The disturbance of greater than 0.25 acres of wetlands or State open waters classified as natural swales (not of human construction) shall be mitigated as specified at N.J.A.C. 7:7A-14.1 (Mitigation). The mitigation plan shall be submitted as a part of the General Permit authorization application and approved by the Department before the proposed activity may be authorized.]*

8. The construction of additions or appurtenant improvements to be constructed within 100 feet of 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 disturbance*[;]* *.*

9. The construction of State or Federally funded roads which:

i. Were planned and developed in accordance with the "National Environmental Policy Act of 1969", the Federal Act, and Executive Order Number 53 (approved November 21, 1983); and
ii. Were the subject of an application made prior to July 1, 1988 to ***and were subsequently approved by*** the United States Army Corps of Engineers for an individual or general permit under the Federal Act, provided that:

(1) Upon expiration of a permit, any application for a renewal or modification thereof shall be made to the Department; ***and***
(2) The Department shall not require transition areas as a condition of the renewal or modification of the permit*[; and
(3) All disturbed wetlands and State open waters shall be mitigated as specified at N.J.A.C. 7:7A-14, Mitigation. The mitigation plan shall be submitted as a part of the General Permit authorization application and approved by the Department before the proposed activity will be authorized]*.

10. Minor road crossing fills and expansion of existing road crossing fills including attendant features, both temporary and permanent, that are part of a single and complete project for crossing a freshwater wetland or State open water, provided that:

i. The crossing is bridged, culverted or otherwise designed to prevent the restriction of, and to withstand, expected high flows;

ii. *[Except for widening existing roadways, the]* ***The*** disturbance of any freshwater wetlands does not extend more than 50 feet on either side of the ordinary high water mark of State open waters. Where no State open waters are present, the total length of the disturbance or modification of freshwater wetlands caused by the crossing shall be no greater than 100 feet***. The 50 or 100 foot crossing length limit does not apply to widening of existing roadways***;

iii. The total area of freshwater wetlands and/or State open waters disturbed or modified does not exceed 0.25 acres;

iv. The total fill (gross) to be placed, per crossing, in State open waters does not exceed 200 cubic yards of fill below the top of bank or high water mark;

v. The crossing is designed to minimize disturbance and other detrimental effects upon freshwater wetland or State open waters through the use of best management practices including, but not limited to:

(1)-(3) (No change.)

(4) Designing the crossing so as not to impede fish passage, when a watercourse is present, by maintaining the existing gradient and bottom contours of the watercourse; using open arch or box culverts; and using single large open arches or culverts to span the watercourse*[; and

vi. The activity would not result in a violation of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 or implementing rules at N.J.A.C. 7:13-1]*.

11. Construction of stormwater outfall structures and associated stormwater conveyance structures such as pipes, headwalls, rip-rap and other energy dissipation structures, provided the following conditions are met:

i.-v. (No change.)

vi. The total amount of rip-rap or any other material used for energy dissipation at the end of the headwall placed in the freshwater wetland or State open water does not exceed 10 cubic yards per outfall structure;

vii. *[The upper 18 inches of material in any backfilled area must consist of the original topsoil and the backfilled area for pipes shall be returned to the pre-existing elevation and revegetated with indigenous wetland species]* ***Excavated areas for the placement of conveyance pipes shall be returned to the pre-existing elevation using the original topsoil to backfill from a depth of 18 inches to the original grade and revegetated with indigenous wetland species (indigenous includes species found on a particular site as well as those found in a particular physiographic region of the State***;

viii. Pipes used for stormwater conveyance through the wetlands shall be properly sealed with anti-seep collars ***at a spacing sufficient to prevent drainage of the surrounding wetlands and designed not to exceed the pre-existing elevation***;

ix. If a detention basin is being proposed as the method of pretreatment for water quality, routing calculations shall show that the basin has been designed for the one-year storm event according to the Stormwater Management Regulations (N.J.A.C. 7:8) and all subsequent amendments thereto; and

x. If a swale is being proposed to convey stormwater through the wetlands, profiles from the outlet to the receiving water body, cross-sections, and design support information shall show that the proposed swale will not result in drainage of the wetlands. Swales in wetlands will only be permitted where *[no other alternative exists]* ***onsite conditions prohibit the construction of a buried pipe to convey stormwater to the outfall***.

12. Surveying activities such as soil borings and the cutting of vegetation for narrow (three to five feet in width) survey lines. Survey lines of less than three feet in width shall not require Department authorization. Soil borings dug by hand, using non-mechanized means, no greater than three feet in diameter or in depth, shall not require Department authorization pursuant to N.J.A.C. 7:7A-2.3(c).

13. Dredging activities in wetland for lake maintenance or restoration provided:

i. The lake is lowered in accordance with a lake lowering permit approval by the Division of Fish, Game and Wildlife;

ii. The lake remains lowered for the minimal amount of time necessary to accomplish the desired maintenance activities;

iii. Documentation ***(documentation may include aerial photography, original construction plans, core borings, etc.)*** shows that the area to be dredged will be confined to the original configuration and bottom contours of the lake;

iv. The total wetlands area to be disturbed for access is no more than 0.25 acre. Temporary effects on adjacent wetlands due to the draw down of the lake to perform maintenance activities are not included in the acreage calculation;

v. ***The Department may require sediment sampling and laboratory analysis if the project site is known or suspected to be contaminated with toxic substances.*** The results of representative *[core]* sample***s*** *[borings]* shall indicate that the spoil materials to be removed are non-contaminated;

vi. There is no detrimental effect to spawning of resident or downstream fish populations;

vii. If located in exceptional resource value wetlands, the activity will not negatively impact the documented threatened or endangered species or its habitat;

viii. No spoil material will be deposited and no dewatering will occur in freshwater wetlands, open waters or other environmentally sensitive areas; ***and***

ix. Dredging for a specific lake will not be authorized more than once every five years*[; and

x. The activity will not violate the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 or implementing rules at N.J.A.C. 7:13-1]*.

14. Placement of water level recording devices, water quality monitoring and testing devices, and similar scientific devices, and the drilling of monitoring wells. *[The placement of water level or monitoring devices that require the disturbance of wetlands or State open waters of one square yard or less shall not require Department authorization as stated at N.J.A.C. 7:7A-2.3(c).]*

15. (No change.)

16. Fish and wildlife management activities which do not involve the discharge of more than 10 cubic yards of clean fill, carried out in publicly owned or controlled wildlife management areas, parks or reserves. These activities include, but are not limited to:

i.-iii. (No change.)

17. Trail and/or boardwalk construction on publicly owned or controlled park land, wildlife management areas or reserves, in freshwater wetlands or State open waters, provided:

i.-iv. (No change.)

18. The repair, rehabilitation, replacement, maintenance or reconstruction as required by the Dam Safety Standards (N.J.A.C. 7:20-1), of any previously authorized, currently serviceable dam structure, as defined at N.J.A.C. 7:20-1.2, including appurtenant structures, lawfully existing prior to July 1, 1988 or permitted under the Act, provided that the previously authorized structure has not been put to uses differing from those specified in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repairs, rehabilitation, replacement, maintenance or reconstruction are allowed provided that:

i. The activity is conducted in accordance with a Dam Permit issued pursuant to N.J.A.C. 7:20-1;

ii. The activity results in the filling of no more than one acre of wetlands or State open waters;

iii. If located in exceptional resource value wetlands, the activity will not negatively impact the documented threatened or endangered species or its habitat;

iv. The activity is designed to minimize disturbance and other detrimental effects upon freshwater wetlands or State open waters through the use of best management practices including, but not limited to:

(1) Stabilizing all disturbed areas; and

(2) Using suitable, clean, non-toxic fill material; and

v. *[The disturbance of greater than 0.25 acres of wetlands or State open waters shall be mitigated as specified at N.J.A.C. 7:7A-14, Mitigation. However, the resubmerging of wetlands which may form during construction will not require mitigation. The mitigation plan shall be submitted as a part of the General Permit authorization

application. The Statewide General Permit authorization will not be issued until the mitigation plan is approved by the Division according to the standards at N.J.A.C. 7:7A-14.]* ***The activity will not increase the normal water surface elevation. The normal water surface elevation is the historic level as of the date of completed dam construction and inundation.***

19. The construction of ***public or private*** recreational and fishing docks, or piers on pilings, cantilevered or floating *[piers]*, and public boat ramps that meet the following criteria:

i. The following criteria shall be met for the construction of docks and piers:

(1) *[The proposed dock will be the only one to serve a single residential lot]* ***There shall be a maximum of one dock per lot****;

(2) If located in exceptional resource value wetlands, the activity will not have a negative impact on a documented threatened or endangered species or its habitat;

(3) The proposed activity does not fill or disturb more than 0.10 acres ***of wetlands or State open waters. This limitation includes the area shaded directly under the dock****;

(4) The width of the dock or pier does not exceed six feet, will be constructed perpendicular to the shoreline***, where feasible,*** and the maximum allowable length will be the minimum length necessary to reach deep water ***from the shoreline*** for launching. However, structures shall be constructed a minimum of 50-feet outside of any authorized navigation channel and shall not hinder navigation. ***The 50 foot limitation does not apply to construction of docks or piers in human-made lagoons****;

(5) Space between horizontal planking is no less than 0.25 inches and the width of horizonal planking is no more than four inches; and

(6) The height of the dock or pier above the ground surface shall be no less than four feet.

ii. The following criteria shall be met for the construction of a boat ramp:

(1) It shall be demonstrated that there is no feasible onsite alternative location that will involve less or no disturbance of wetlands;

(2) The boat ramp shall be constructed of concrete or natural materials such as crushed stone or shells and placed at a location requiring *[negligible]* ***the minimum feasible*** cut or fill;

(3) The proposed activity does not fill or disturb more than 0.10 acres ***of wetlands or State open waters****; and

(4) If located in exceptional resource value wetlands, the activity will not impact a documented threatened or endangered species or its habitat.

20. The placement of gabions, rip-rap, geo-textiles, or other binding mat material for the purpose of bank stabilization activities in State open waters provided:

i. The bank stabilization activity is less than 150 feet in length;

ii. The activity is required by and designed in accordance with the *[Soil Conservation Service,]* Standards for Soil Erosion and Sediment Control in New Jersey, N.J.S.A. 4:24-42;

iii. The activity is limited to an average of less than one cubic yard of rip-rap per running foot placed along the bank within State open waters;

iv. The material to be placed is the minimum necessary for erosion protection according to the *[Soil Conservation Service]* ***1982 Standards for Soil Erosion and Sediment Control in New Jersey****;

v. No material is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;

vi. Only suitable, clean, non-toxic fill material is used;

vii. The activity is a single and complete project, not associated with any other construction activity. For example, this activity cannot be used at the same location as a minor road crossing or a stormwater outfall structure; and

viii. The activity will not violate the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 or implementing rules at N.J.A.C. 7:13-1.

21. The construction or installation of new ***above ground*** utility lines including the installation of wood poles, steel poles, lattice towers, conductors, guy anchors, and pad mount transformers for the transport of electrical energy, telephone or telegraph messages, radio or television communication, or the discharge of fill to provide access to these new lines. The activities allowed by this Statewide General Permit shall comply with the following conditions:

i. The *[activity]* ***construction of the line (which constitutes a single and complete project of independent utility) including installation of structures, placement of fill for access and the clearing and maintenance of vegetation which would alter the character of the freshwater wetland, including the clearing of trees*** disturbs no more than one acre of wetlands or State open waters;

ii. The limits of clearing for construction is no more than 60 feet wide;

iii. The area to be maintained ***including vegetative clearing and maintenance of fill*** as a permanent right-of-way is a maximum of 20 feet in width;

iv. If located in exceptional resource value wetlands, the activity will not negatively impact associated water quality or the documented threatened or endangered species or its habitat;

v. When practicable, installation is done from outside wetland areas. If installation requires encroachment in wetlands, the activity shall be performed when the ground is frozen or extremely dry; otherwise only matting or track equipment shall be used. Matting will remain in place for no more than five days ***to the maximum extent practical****;

vi. After completion the area used to gain access to the installation location is replanted ***as required*** in accordance with applicable BMPs with *[native,]* indigenous *[species;]* ***wetland species; and***

vii. The activity is designed so as not to interfere with the natural hydraulic characteristics of the wetland and watershed*[; and]***.***

[viii. The disturbance of greater than 0.25 acres of wetlands or State open waters shall be mitigated as specified at N.J.A.C. 7:7A-14, Mitigation. The mitigation plan shall be submitted as a part of the General Permit authorization application. The Statewide General permit authorization will not be issued until the mitigation plan is approved by the Division according to the standards at N.J.A.C. 7:7A-14.]

22. *[The modification of existing dam or dike structures or the construction of new dam or dike structures for the detention of stormwater surges on a regional or watershed basis, as part of a county-approved plan in freshwater wetlands and/or State open waters. The activities allowed by this Statewide General Permit shall comply with the following standards:

i. The modification or construction of the dam or dike structure will not result in the loss or substantial modification of more than one acre of freshwater wetland or State open water;

ii. The activities will not take place in a wetland of exceptional resource value as defined in N.J.A.C. 7:7A-2.5(b), in a State open water defined as a special aquatic site (in 40 CFR 230.1), or in trout associated waters;

iii. The activities shall meet with Stormwater Management Regulations (N.J.A.C. 7:8) and be consistent with the water quality provisions. Specifically, all stormwater which is detained in a freshwater wetland or State open water shall first be filtered or otherwise treated outside of the freshwater wetland or State open water, to minimize sediment, pollutants, and any other detrimental effects upon the freshwater wetland or State open water. Detention basins, contour terraces and grassed swales are examples of pre-discharge treatment techniques which may be required by the Department;

iv. The activities shall not result in a duration of inundation exceeding 36 hours for the 100 year storm;

v. The activities shall not result in an increase in water surface elevation exceeding five feet; and

vi. The placement of greater than 0.25 acres of fill in wetlands or State open waters for the modification of existing dam or dike structures or the construction of new dam or dike structures shall be mitigated as specified at N.J.A.C. 7:7A-14, Mitigation. The mitigation plan shall be submitted as a part of the General Permit authorization application and approved by the Department before the proposed activity may be authorized.]* ***(Reserved)***

23. *[Regulated activities in freshwater wetlands or State open waters which are the result of the construction or reconstruction of affordable housing provided:

i. The project is part of a housing plan that has received substantive certification, pursuant to N.J.S.A. 52:27D-301 et seq., that the project meets affordable housing criteria by the New Jersey Council on Affordable Housing; or the project is part of a municipal housing compliance plan that was part of a settlement approved by the New Jersey Superior Court, resulting from *Mt. Laurel* litigation;

ii. If the proposed activity is to take place in an exceptional resource value wetland, the applicant shall demonstrate to the Department's satisfaction that there is no practicable alternative to the proposed activity that would reduce or eliminate impacts to wetlands or State open waters;

iii. The activity would not result in the loss or substantial adverse modification of more than one acre of freshwater wetlands or State open waters; and

iv. The disturbance of greater than 0.25 acres of wetlands or State open waters shall be mitigated as specified at N.J.A.C. 7:7A-14, Mitigation. The mitigation plan shall be submitted as a part of the General permit authorization application and approved by the Department before the proposed activity may be authorized.]* ***(Reserved)***

24. The placement of bulkheads adjacent to human-made lagoons provided that:

i. The bulkhead is to be placed between two lawfully existing bulkheads which are not more than 75 feet apart;

ii. The connecting bulkhead shall not extend waterward of a straight line connecting the ends of the existing bulkheads;

iii. The width of wetlands on the subject lot, adjacent to the lagoon does not exceed an average of five feet;

iv. The total area of wetlands to be filled or disturbed does not exceed 375 square feet; and

v. The activities will not take place in a wetland of exceptional resource value as defined in N.J.A.C. 7:7A-2.5(b) or in a State open water defined as a special aquatic site (in 40 CFR 230.1).

25. The repair or alteration of malfunctioning individual subsurface sewage disposal systems provided:

i. There is no expansion or change in the use of the building or facility which will result in an increase in the volume of sanitary sewage;

ii. Alterations made to correct a malfunctioning system shall meet the requirements of N.J.A.C. 7:9A-3.3(c) and shall be undertaken only at the authorization of the administrative authority (the board of health having jurisdiction or its authorized agent acting on its behalf);

iii. It is demonstrated to the administrative authority that there is no alternative location ***onsite*** available with a seasonally high water table deeper than 1.5 feet from the existing ground surface which can support a properly functioning subsurface sewage disposal system; and

iv. The total wetland area to be affected by the repair or alteration does not exceed 0.25 acres.

(b) The Department may require an application for an Individual permit if the Department finds that additional permit conditions would not be sufficient, or that special circumstances make this action necessary to ensure compliance with the Act, this chapter, any permit or order issued pursuant thereto, or the Federal Act. In addition, when the regulated activity(ies) of a project exceed either the individual limits allowed under the issued Statewide general permits or the cumulative limit of stacked Statewide general permits, then the impacts of the entire project shall require an Individual Permit and will be reviewed under the standards at N.J.A.C. 7:7A-3.

(c) Under no circumstances shall a project's impacts be segmented and a portion of the project submitted for review under Statewide general permits while the remainder of the project is submitted for review under an Individual Permit.

7:7A-9.3 Standards and Conditions for all Statewide General Permit Authorizations

(a) All regulated activities authorized under Statewide General Permits listed in N.J.A.C. 7:7A-9.2 are subject to the specific conditions listed under each permit. In order to be authorized to conduct activities under these general permits, persons must comply with the standard conditions set forth at (b) below, as well as the conditions at N.J.A.C. 7:7A-13.1 and 13.2, the procedures in N.J.A.C. 7:7A-9.4 and mitigation pursuant to N.J.A.C. 7:7A-14 where specified must be followed.

(b) The following standards must be met in order for a regulated activity to be authorized under the Statewide General Permits identified in N.J.A.C. 7:7A-9:

1. The request for authorization to fill or modify wetlands or State open waters is associated with a proposed project or construction activity and is not solely being requested for the purpose of eliminating a natural resource in order to avoid future regulation*. **For the purposes of this specific subsection, project shall mean the use and configuration of all buildings, pavements, roadways, storage areas and structures, and the extent of all activities associated with the proposal***;

2. The regulated activity shall not occur in the proximity of a public water supply intake;

3. The regulated activity shall not jeopardize a threatened or endangered species and the activity shall not destroy, jeopardize, or adversely modify the historic or documented habitat of such species;

4. The activity will not occur in a component of either the Federal or State Wild and Scenic River System; nor in a river officially designated by Congress or the State Legislature as a "study river" for possible inclusion in either system while the river is in an official study status; and

5. The activity shall not adversely affect properties which are listed or are eligible for listing on the National Register of Historic Places. If the permittee, before or during the course of work authorized, encounters a ***probable*** historic property that has not been listed or determined eligible for listing on the National Register, but which may be eligible for listing in the National Register, the permittee shall immediately notify the Department and proceed as directed by the Department.

(c) The following conditions shall be met in order for a regulated activity to be authorized under the Statewide General Permits identified in N.J.A.C. 7:7A-9:

1. Any discharge of dredged or fill material shall consist of suitable material free from toxic pollutants (see section 307 of the Federal Act) in toxic amounts;

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

3. In order to protect the fishery resources and/or the spawning of the downstream resident fish population, any activity within or adjacent to a stream channel which may introduce sediment into the stream or cause the stream to become turbid is prohibited during the time frames listed below or any subsequent updates to this listing as provided by the New Jersey Division of Fish, Game and Wildlife. The total restriction period will not exceed six months:

Timing restrictions:

Stream Classification	Dates of Restriction
Trout Production	
general ***brook/brown***	September 15-March 15
*[brook trout	September 15-February 28
brown trout	September 15-February 28]*
rainbow trout	February 1-April 30
Trout Maintenance	March 15-June 15
Trout Stocked	March 15-June 15

Anadromous

American Shad—For the Delaware River upstream of the Delaware Memorial Bridge, and for tidal Rancocas and Raccoon Creeks

April 1-June 30 and
September 1-November 30

American Shad—For the Delaware River from the Delaware Bay to the Delaware Memorial Bridge, and tidal Maurice River
March 1-April 30 and
October 1-November 30

All other waterways classified for anadromous fish
April 1-June 30;

For waterways classified, on a case by case basis, as spawning areas for warm water fish
May 1-June 30.

4. During construction activities, all excavation must be monitored to check for the presence of acid-producing deposits pursuant to N.J.A.C. 7:13-5.10 of the Flood Hazard Area Control Rules. If any such deposits are encountered, the mitigation and disposal standards described in N.J.A.C. 7:13-5.10 must be implemented. If any such deposits are encountered, an annual post-planting monitoring program shall be established to ensure that the reestablishment of vegetation in ***temporarily*** disturbed areas, shall have a minimum 85 percent plant survival and coverage rate after two complete growing seasons. Failure to achieve this survival rate will require implementation of additional corrective measures and/or reevaluation of the acid producing soils mitigation proposal to ensure the 85 percent survival rate requirement.

5. The activity will not result in a violation of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 or implementing rules at N.J.A.C. 7:13-1.

*[5.]***6.*** Best management practices shall be followed whenever applicable.

7:7A-9.4. Use of multiple Statewide General Permits

(a) The Department may approve activities under the authority of more than one Statewide General Permit onsite as defined at N.J.A.C. 7:7A-1.4, Definitions. No activity is authorized by a Statewide General Permit without an approval letter from the Department indicating that a Statewide General Permit authorizes the particular activity at the particular location.

(b) The Department may issue an approval letter, authorizing activities covered under a single Statewide General Permit, for more than one location on a single property, provided that the total area of wetlands or State open waters disturbed or modified by activities covered by the Statewide General Permit does not exceed the maximum allowed under that general permit.

(c) The Department may approve activities covered by different general permits onsite, provided that the individual limits of each general permit are complied with and that the total area of wetlands, ***and*** State open waters*[, and transition areas]* disturbed or modified does not exceed one acre ***with the exception of Statewide general permit number 17***. For example, the Department could approve on-site a minor road crossing disturbing 0.25 acres, stormwater outfall structures disturbing a total of 0.25 acres, and the filling of 0.5 acres of a ditch.

(d) An individual permit will be required for review of all regulated impacts onsite (as defined at N.J.A.C. 7:7A-1.4) if the cumulative impact of one acre will be exceeded by any combination of Statewide General Permits, or if the individual limits of Statewide General Permits 2, 6, 7, 8, 10, 11, 19, *[20,]* 21, *[22, 23]* or 24 will be exceeded by the proposed activities.

(e) For Statewide General Permits at N.J.A.C. 7:7A-9.2(a)1, 3, 4, 5, 12, 14, 16 and 17, the Department may issue approvals for any number of activities on a single property covered by any number of these general permits. Later activities on the same property will also be eligible for approval under these Statewide general permits.

(f) *[No property will be the subject of Department approvals under Statewide General Permits 13, 15, 18, and 20 or more often than once every five years.]* ***Statewide general permit numbers 13, 15, 18, and 20 shall be authorized onsite only once every five years.***

7:7A-9.5 Application for activities under Statewide General Permits

(a) Except for Statewide General Permit number 25 pursuant to N.J.A.C. 7:7A-9.2(a)25, a person proposing to engage in an activity covered by a Statewide General Permit shall provide a fee pursuant to N.J.A.C. 7:7A-16 and three copies of the following information to the Department ***at least 30 working days prior to commencement of work. Applicants seeking authorization pursuant to N.J.A.C. 7:7A-9.2(a)25, shall comply with the notification procedures found at (f) below***:

1. An application form completed as per the instructions for a Statewide general permit;

2. Any information necessary to determine whether the conditions of the general permit will be satisfied, including, but not limited to, the following information:

i. Complete wetlands delineation including field delineation, folded plans at an appropriate scale, and wetlands field data sheets including soils and vegetation information (no formal report is required) for the area to be disturbed under the Statewide general permit application;

ii. A copy of the appropriate ***portion of the*** U.S. *[Geodetic]* ***Geologic*** Survey Quadrangle (USGS) Map for the project site and a determination of the State Plane Coordinates for the center of the project***. 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 end-points of those projects which are 1,999 feet or less, and for those projects which are 2,000 feet and longer, additional coordinates at each 1,000 foot interval***;

iii. For projects that are located in municipalities listed below at *[N.J.A.C. 7:7A-9.5(a)1ii(1)]* ***(a)2iii(1)*** and all amendments thereto***, pursuant to (a)2iii(2) below***, the applicant shall submit a signed statement certifying that the proposed activities will not result in any direct or indirect adverse impacts to Swamp pink (Helonias bullata) or its documented habitat; and

(1) Municipalities which have documented record of Helonias bullata:

Atlantic County
Egg Harbor Township
[Hammonton Township]
Town of Hammonton
Mullica Township

Burlington County
Evesham Township
Maple Shade Township
Medford Township
Pemberton Township
Southampton Township
Woodland Township
Medford Township

Camden County
Berlin Township
Clementon Borough
Gibbsboro Borough
Gloucester Township
Haddonfield Borough
Lindenwold Borough
Pine Hill Borough
Pine Valley Borough
Runnemede Borough
Voorhees Township
Waterford Township
Winslow Township

Cape May County
Cape May Point Borough
Dennis Township
Lower Township
Middle Township
Upper Township

Cumberland County
Bridgeton City
Downe Township
Fairfield Township
Hopewell Township
Lawrence Township
Millville City
Stow Creek Township
Upper Deerfield Township
Vineland City

Gloucester County
Clayton Borough
Deptford Township
East Greenwich Township
Elk Township
Franklin Township
Glassboro Borough
Mantua Township
Monroe Township
Newfield Borough
Washington Township
Wenonah Borough
West Deptford Township
Woodbury Heights Borough
Woolwich Township

Mercer County
West Windsor Township

Middlesex County
East Brunswick Township
Edison Township
New Brunswick City
Sayreville Borough

Monmouth County
Brielle Borough
Colts Neck Township
Freehold Township
Howell Township
Wall Township

Morris County
Mount Olive Township

Randolph Township
Roxbury Township
Ocean County
Barnegat Township
Brick Township
Dover Township
Jackson Township
Lacey Township
Lakewood Township
Little Egg Harbor Twp.
Manchester Township
Plumsted Township
Stafford Township
Salem County
Alloway Township
Lower Alloways Township
Pittsgrove Township
Quinton Township
Upper Pittsgrove Township

(3) The Department will publish notice in the New Jersey Register of any amendments to the list at (a)2iii(1) above based upon updated information and make such information available at its offices and through the Office of Administrative Law.

*[3.]**4.* Photographs of the ***portion of the*** property ***for which authorization is being requested*.**

(b) In addition, a person proposing to engage in an activity covered by a Statewide General Permit shall provide verification that a certified mail notice with return receipt requested and a complete copy of the application has been forwarded to the clerk of the municipality and that a certified mail notice with return receipt requested (white receipts or green cards are acceptable) has been forwarded to the environmental commission***, or any public body with similar responsibilities***, municipal planning board, ***county planning board,*** municipal construction official, and landowners within 200 feet of the legal boundary lines of the property(ies) on which the proposed activity will occur. Applicant must also provide a list of landowners within 200 feet. The notice shall contain:

1. A description of the proposed activity;
2. A description of the location of the activity including county, municipality, lot(s), block(s), and a plan of the site detailing existing structures, wetlands boundaries and proposed structures or activities, or both; and
3. The following statement:

"This letter is to provide you with legal notification that the referenced property owner is applying to the New Jersey Department of Environmental Protection ***and Energy***, *[Division of Coastal Resources]* ***Land Use Regulation Element*** for a Statewide general permit.

A Statewide general permit will allow the property owner to conduct certain limited activities in freshwater wetlands or State open waters.

The complete Statewide general permit application package can be reviewed at either the municipal clerk's office or by appointment at the *[Division of Coastal Resources]* ***Land Use Regulation Element*** office at the address listed below. The Department of Environmental Protection ***and Energy*** welcomes comments and any information that you may provide concerning the wetlands or open waters on the referenced parcel. ***Written comments should be submitted to the Department within 15 days of receiving notice. Comments will be accepted until the Department makes a decision on the application.*** Please submit your written comments *[within 15 days of receiving this letter,]* along with a copy of this letter to:

*[New Jersey Department of Environmental Protection
Division of Coastal Resources]*
***New Jersey Department of Environmental Protection and Energy**
Land Use Regulation Element*
Bureau of Regulation
CN 401
5 Station Plaza
Trenton, New Jersey 08625
att: (County in which the property is located) Section Chief

As part of the review of this application, Department personnel may perform a site inspection on your property. This site inspection will involve only that area within a maximum of 150 feet from the border of the applicant's property. This site visit will involve a visual inspection and possibly minor soil borings using a 4" ***diameter*** hand auger. The inspection will not result in any damage to the vegetation or improvements on your property.

The Department will notify your municipal environmental commission, planning board and the municipal construction official***, as well as the county planning board*** of the Department's approval or denial of the Statewide general permit application."

(c) If the *[regulated activity]* ***proposed project*** involves a linear facility such as a pipeline or road of more than .5 miles, instead of notifying all landowners within 200 feet of the property(ies) lines, the applicant shall give public notice by publication of a display advertisement. The advertisement shall be a minimum of four column inches and be published in at least one newspaper of local circulation and one of regional circulation in the municipality. In addition, notice shall be given to owners of all real property within 200 feet of any above surface structure related to the linear facility, such as a pumping station or treatment plant***, power substations, grade separated interchanges or similar structures. This does not include utility support structures or conveyance lines.***

(d) The Department, within 30 days of receipt of this notification, shall either return the package as incomplete or accept the application as administratively complete and notify in writing the person proposing to engage in the activity covered by a general permit as to whether they are covered by the Statewide General Permit, or whether an individual permit is required for the activity pursuant to (e) below. Activities begun or carried out without this written notification shall be a violation of the Statewide General Permit, the Act and this chapter. Issuance of authorizations shall be published in the DEP*E* Bulletin.

(e) Upon receiving an application for a general permit, the Department may require that the owner apply for an individual permit. Cases where an individual permit may be required include, but are not limited to:

1. The activity has more than a minimal adverse environmental effect;
2. The cumulative effects on the environment of the authorized activities are more than minimal;
3. The applicant or project is not in compliance with the conditions of the general permit; or
4. Public comment indicates that the application does not meet general permit criteria.

(f) A person proposing to engage in activities pursuant to N.J.A.C. 7:7A-9.2(a)25, repair or alteration of malfunctioning individual subsurface sewage disposal systems, shall submit written notice containing a description of the proposed activities to the Department at least 30 days prior to commencement of work. This notification shall include a description and plan of the activities and their location including municipality, county, block, and lot; and an approval from the Board of Health or its designated agent for the proposed activities. If the Department fails to notify the applicant within 30 days of receiving the notification, the activity shall be deemed to have been authorized, to the extent that the activity does not violate other statutes or regulations then in effect, and subject to any standard terms and conditions pursuant to N.J.A.C. 7:7A-9.3.

7:7A-9.6 Hearings and appeal

An applicant or other affected party may request an administrative hearing on any decision to issue or deny an authorization made by the Department pursuant to N.J.A.C. 7:7A-12.7.

7:7A-9.7 Duration of permit authorizations

(a) Authorizations for Statewide general permits shall be effective for a fixed term not to exceed five years from the date of authorization.

(b) The term of an authorization shall not be extended beyond the maximum duration specified in this section. However, if necessary, an authorization may be renewed through the application process set forth in this chapter.

***(c) If the term of the authorization exceeds the expiration date of the issued general permit, and the permit upon which the authorization is based is modified to include more stringent stan-**

dards or conditions, or is not reissued, the applicant must comply with the requirements of the new regulations by applying for a new GP authorization or an Individual permit. For those applicants whose activities will no longer comply with the new regulations, if prior to the expiration date of the GP, the applicant is able to document that the activity was either under contract or under construction, the Department will allow the applicant one additional year, from the date of expiration of the issued general permit (not the authorization date), to complete the authorized activity. If the GP authorizing a particular activity is reissued without amendments, or with amendments expanding the authorized scope of activities, the authorization remains effective for the authorized five-year term.*

7:7A-9.8 Cancellation, withdrawal, resubmission and amendment of applications

(a) Applications may be cancelled by the Department; or withdrawn, amended, or resubmitted by an applicant.

(b) If an application is not complete for final review within 60 days of a request for additional information, the Department shall send a letter canceling the application and stating that the application will be purged from Department files and that a new application will be required to reactivate the Department's review. If the applicant sends the Department a letter documenting good cause for not supplying the requested information within the 60 day period the Department will grant an automatic extension of 30 days. ***The Department will grant additional 30-day extensions upon receiving a written request for such extension from the applicant.***

1. All fees submitted with an application subsequently cancelled shall be non-refundable.

(c) An applicant may withdraw an application at any time in the application review process. All fees submitted with such applications are non-returnable when a significant portion of the review has been completed. In some cases however (see (d) below) the fees may be credited toward future applications.

(d) If an application is cancelled, denied or withdrawn, the applicant may resubmit an application for a revised project on the same site. The resubmitted application will be treated as a new application, although references may be made to the previously submitted application. A new fee will be required unless application is resubmitted within one year of the date of denial or withdrawal, in which case the original permit fee may be credited to the new application.

(e) A permit application may be amended at the applicant's discretion at any time as part of the permit review process. Copies of amendments and amended information shall be distributed by the applicant to the same person to whom copies of the initial application were distributed. All amendments to pending applications shall constitute a new submission and may at the Department's discretion require reinitiation of the entire review process.

SUBCHAPTER 10. PRE-APPLICATION CONFERENCES

7:7A-10.1 Purpose

A pre-application conference is optional, but highly recommended. It allows the Department to inform potential applicants of the various procedures and policies which apply to the freshwater wetlands, open water fill, stream encroachment, and coastal program permitting process. Department staff will candidly discuss the apparent strengths and weaknesses of the proposed permit application at this conference, but the Department shall in no way commit itself to approval or rejection of a proposed project as a result of these discussions.

7:7A-10.2 Request for a pre-application conference

(a) Potential applicants may request a pre-application conference with the Department. A request for a pre-application conference shall be made in writing and shall include a project description, a tax lot and block designation of the site, the location of the project site, including the municipality and county, the general location of freshwater wetlands and State regulated waters, a copy of the appropriate United States Soil Conservation Service map(s) locating the project, and a United States Geological Survey quadrangle map showing the site. The Department encourages the applicant to obtain a letter of interpretation prior to the preapplication conference.

(b) The Department shall, within 15 days of receipt of such request, schedule a pre-application conference.

SUBCHAPTER 11. APPLICATION PROCEDURE

7:7A-11.1 Application contents for Individual Freshwater Wetlands and Open Water Fill Permits, *[and Individual Water Quality Certificates]*

(a) The *[Division]* ***Element*** will issue joint permits for projects requiring more than one *[Division]* ***Element*** permit whenever possible. It is strongly recommended that an applicant requiring more than one *[Division]* ***Element*** permit submit all applications materials simultaneously to facilitate joint permit processing. For example, the submission of all information necessary for both a Freshwater Wetlands permit and a Stream Encroachment permit at the same time will facilitate the issuance of a joint permit.

(b) The application for a freshwater wetland permit or open water fill permit shall include 10 copies of the following information:

1. A completed freshwater wetlands permit or open water fill permit application form including the names and addresses of all owners of property adjacent to the property which is the site of the proposed project. All activities which the applicant plans to undertake which are reasonably related to the same project should be included in the same permit application and will be considered simultaneously with the review of the individual permit. Only one application fee will be required to review all regulated activities in freshwater wetlands, State open waters and transition areas associated with the project;

2. A folded preliminary site plan or subdivision map of the proposed regulated activities, or other map of the site if no preliminary site plan or subdivision map exists;

3. A written description of the proposed regulated activity, the total area to be used, filled or modified, the total area of the freshwater wetland or State open waters potentially affected, identification of the watershed in which the project is located, and the relationship of the area affected to the area of the entire freshwater wetland or State open waters complex, for example, one-half acre to be filled of a 15 acre freshwater wetland. In addition, project elements affecting transition areas should be detailed;

4. A description of the source of any fill material and a description of the type, composition and quantity of the material. For dredge projects, submit the information as listed at N.J.A.C. 7:7A-4.3(c)2;

5. A description of alternatives to the proposed activity or discharge, including alternative sites, construction methods, methods of discharge, and reasons for rejecting the alternatives pursuant to N.J.A.C. 7:7A-3, General Standards for Granting Individual Freshwater Wetlands and Open Water Fill Permits;

6.-7. (No change.)

8. A copy or photocopy of a portion of the U.S.G.S. 7.5 minute quadrangle map (available from the Department's Maps and Publications Office, CN 402, Trenton, NJ 08625) showing the location of the property and its general vicinity, indicating and labeling the location of the proposed activity and the property boundaries, and a determination of the State Plane Coordinates for the center of the property*[;]**. **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 end-points of those projects which are 1,999 feet or less, and for those projects which are 2,000 feet and longer, additional coordinates at each 1,000 foot interval;***

9. ***Verification that a complete copy of the application for an Individual permit, including all materials required by this subsection, has been submitted to the clerk of the municipality in which the proposed regulated activity will occur.*** Verification that a certified mail notice with return receipt requested (white receipt or green card is acceptable) and a copy of the vicinity map in (a)8 above have been forwarded to the *[clerk,]* environmental commission or any other public body with similar responsibilities, and planning board of the municipality in which the proposed regulated activity will occur; the planning board, environmental commission

and county mosquito control agency of the county in which the proposed regulated activity will occur; landowners within 200 feet of the property or properties on which the proposed regulated activity will occur (applicant shall also provide a list of all landowners within 200 feet), and all persons as identified by the Department who requested to be notified of proposed regulated activities ***(the Department will furnish a list of such persons upon request)***, which notice may, at the applicant's option, be filed concurrently with notices required pursuant to N.J.S.A. 40:55D-1 et seq. A copy of the notice shall be included in the application to the Department. The notice shall include the following:

i. The name and address of the applicant and, if different, the address or location of the activity or activities regulated by the permit;

ii. The name, address, and telephone number of the applicant or agent to contact for further information;

iii. A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills, and a description of the type, composition and quantity of materials to be discharged;

iv. A plan and elevation drawing showing the general and specific site location ***(drawings may be 8.5 by 11 inches)***;

v. Any other information which *[would assist interested parties in evaluating]* ***is necessary to evaluate*** the likely impact of the proposed activity;

vi. The following statement:

"This letter is to provide you with legal notification that the referenced property owner is applying to the New Jersey Department of Environmental Protection ***and Energy***, *[Division of Coastal Resources]* ***Land Use Regulation Element*** for an Individual Freshwater Wetlands permit.

An Individual permit will allow the property owner to conduct activities in freshwater wetlands or State open waters.

The complete Individual permit application package can be reviewed at either the municipal clerk's office or by appointment at the *[Division of Coastal Resources]* ***Land Use Regulation Element*** office at the address listed below. The Department of Environmental Protection ***and Energy*** welcomes comments and any information that you may provide concerning the wetlands or open waters on the referenced parcel. Please submit your written comments within 15 days of receiving this letter. In addition, interested persons may request in writing that the Department hold a public hearing on this application. Requests shall be made in writing within 30 days after the notice of application in the *[DEP]* ***DEPE*** Bulletin and shall state the nature of the issues proposed to be raised at the hearing. Both comments and hearing requests should be sent along with a copy of this letter to:

New Jersey Department of Environmental Protection
and Energy
[Division of Coastal Resources]
Land Use Regulation Element
Bureau of Regulation
CN 401
5 Station Plaza
Trenton, New Jersey 08625
att: (County in which the property is located) Section Chief

As part of the review of this application, Department personnel may perform a site inspection on your property. This site inspection will involve only that area within a maximum of 150 feet from the border of the applicant's property. This site visit will involve a visual inspection and possibly minor soil borings using a 4" ***diameter*** hand auger. The inspection will not result in any damage to the vegetation or improvements on your property.

The Department will notify your municipal environmental commission, planning board and the municipal construction official of the Department's approval or denial of the Individual permit application";

10. Verification that notice of the proposed activity has been published as a display advertisement in *[a newspaper of local circulation.]* ***an official newspaper used by the municipality, in which the activity is proposed, for legal notice.*** For projects proposing more than 10 acres of fill, notification shall also be published in a newspaper of regional circulation;

11. A statement detailing any potential adverse environmental effects of the regulated activity and any measures necessary to prevent and/or minimize those effects, and any information necessary for the Department to make the findings pursuant to N.J.A.C. 7:7A-3. Applicants should review N.J.A.C. 7:7A-3 in great detail and provide all the listed information to avoid unnecessary delays in permit processing;

12.-15. (No change.)

16. A description of technologies or management practices by which the applicant proposes to minimize adverse environmental effects of the activity or discharge.

(NOTE: The Department shall upon request provide permit applicants with guidance, either through the application form or on an individual basis, regarding the level of detail of information and documentation required under this subsection. The level of detail shall be reasonably commensurate with the type and size of the proposed project, proximity to critical areas, and degree of environmental degradation.)

(c) The application shall also include 10 copies (including one of reproducible quality—a mylar copy is not required) of a site plan, on 8½ inch by 11 inch paper if appropriate (if larger than 8½ inch by 11 inch, all copies shall be folded) indicating the following:

1. All existing structures and related appurtenances on the lot and immediately adjacent lots;

2. Distances and dimensions of areas, structures and lots, including freshwater wetlands, State open waters, transition areas, limits of inundation for the 100 year flood for non-delineated streams or flood hazard area flood for delineated streams (if applicable), mean high water line (if appropriate), upland property, roads and utility lines;

3. A complete delineation of the wetlands boundary(ies) in accordance with the requirements of N.J.A.C. 7:7A-8.3(a) and (b). A letter of interpretation issued by the Department may be submitted to satisfy this requirement;

4. The proposed area which will be used for the activity or discharge;

5. The general site location in relation to development in the region;

6. The scale of the plan and a north arrow; and

7. A title block for each sheet containing the following information:

i. The name of the applicant and the name or the proposed project (if any):

ii. Identification of the proposed activity;

iii. County and municipality;

iv. Lot and block;

v. Number of the sheet and the total number of sheets in set; and

vi. Preparer, and date of the drawing and all revisions.

(d) The application shall also include color photographs of sufficient quality and quantity to show the project site including:

1. Location of known freshwater wetlands and State open waters; and

2. Proposed location of the regulated activity.

(e) If the proposed project involves the discharge of dredged or fill material, the application shall include a cross-sectional view of the proposed project showing the following:

1.-4. (No change.)

5. Location of wetlands; and

6. Delineation of disposal site.

(f) A mitigation plan meeting the requirements of N.J.A.C. 7:7A-14.4 may be submitted with the permit application. The Department requires an approved mitigation plan as a condition precedent to engaging in a regulated activity.

7:7A-11.3 Signatories to permit applications and reports

(a)-(c) (No change.)

(d) Any person signing a document under (a) or (b) above shall make the following certification:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

7:7A-11.4 Confidentiality

(a) Any information submitted to the Department pursuant to these regulations may be claimed as confidential by the submitter at the time of submittal.

(b) Claims of confidentiality for the following information will be denied:

1. The name and address of any permit applicant or permittee;
2. Effluent data;
3. Permit application; and
4. Permit decision.

(c) Claims of confidentiality for all information not listed in (b) above will be denied unless the claimant can show that the information should be kept confidential under the requirements and procedures of 40 CFR Part 2.

SUBCHAPTER 12. REVIEW OF APPLICATIONS

7:7A-12.1 Initial Department action for Individual Freshwater Wetlands and Open Water Fill Permits*[, and Individual Water Quality Certificates]*

(a) Upon receipt of an application, which includes the fee specified in N.J.A.C. 7:7A-16, the Department shall, if appropriate, transmit copies to other reviewing agencies. In addition, the Department will publish notice of the application in the DEP***E*** Bulletin. If the application does not include the appropriate fee, no action will be taken by the Department under this section, and the submittal will not be considered an application, and completeness review will not begin.

(b) Within 30 days of receipt of the application, the Department shall review the application for completeness and may return the application as incomplete, make any necessary requests for more information, or declare the application complete. However, after assumption by the State of the 404 program, this deadline for requesting additional information shall not apply if requests for more information are made by the Department because of comments received from the USEPA.

1. If the application is returned as incomplete a new application will be required;
2. New notices meeting the requirements at N.J.A.C. 7:7A-11.9 will be required if the new application is not filed within 60 days.

(c) (No change.)

7:7A-12.2 USEPA review

(a) The Federal Act requires that, after assumption by the State of the 404 program, the USEPA oversees the State's administration of the program. The procedures in (b) through (j) below explain USEPA's oversight role, and the procedures which the State will follow to facilitate USEPA's oversight.

(b) Permits for at least the following categories of activities will require USEPA review. *[Anything not listed will be considered to be waived from the requirement of EPA review]* ***Generally, any projects not meeting the criteria listed below will be considered waived from the requirement of EPA review. However, any permits either individually or as a category may be elevated for EPA review****:

1. Discharges with reasonable potential for adverse impacts on waters of another state, as provided in N.J.A.C. 7:7A-12.3(d);
2. Major discharges as defined at N.J.A.C. 7:7A-1.4;
3. Discharges into or within critical areas established under State or Federal law including, but not limited to, fish and wildlife sanctuaries or refuges, national and historic monuments, wilderness areas and preserves, national and State parks, components of State and Federal Wild and Scenic River systems, and sites identified or proposed under the National Historic Preservation Act of 1966, 16 U.S.C. *[§]*§470 et seq.;
4. Proposed Statewide general permits;
5. Discharges known or suspected to contain toxic pollutants in toxic amounts under Section 307(a)(1) of the Federal Act, or hazardous substances in reportable quantities under Section 311 of the Federal Act;
6. Discharges located in proximity of a public water supply; and
7. Discharges with potential for adversely affecting threatened or endangered species, identified pursuant to the Endangered Species Act of 1973, 16 U.S.C. 1531 et al. and subsequent amendments thereto.

(c) The Department shall promptly transmit to the Regional Administrator:

1. A copy of the complete permit application received by the Department for which permit review has not been waived under (b) above. The Department shall supply the Regional Administrator with copies of the complete permit applications for which permit review has been waived whenever requested by USEPA;
2. A copy of a draft Statewide general permit whenever the Department intends to propose a general permit;
3. Notice of every significant action taken by the State agency related to the consideration of any permit application for which Federal review has not been waived, or of any draft Statewide general permit; and
4. A copy of every permit decision for which review has not been waived.

(d) If USEPA intends to comment upon, object to, or make recommendations with respect to a permit application, draft Statewide general permit, or the State's failure to accept the recommendations of an affected state pursuant to N.J.A.C. 7:7A-12.3(d); USEPA may notify the State of this intent within 30 days of receipt of the permit application. If the State has been so notified, the permit shall not be issued until after the receipt of such comments or within 90 days of the USEPA's receipt of the application, draft Statewide general permit or State response, whichever comes first. The USEPA may notify the State within 30 days of receipt that there is no comment but that USEPA reserves the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a hearing.

(e) When the Department has received a USEPA objection or requirement for a permit condition to a permit application or draft Statewide general permit under this section, the State shall not issue the Federal 404 permit unless the steps required by the USEPA to eliminate the objection have been taken.

(f) Within 90 days of receipt by the Department of an objection or requirement for a permit condition by the USEPA, the State or any interested person may request that the USEPA hold a public hearing on the objection or requirement. USEPA shall conduct a public hearing whenever requested by the state proposing to issue the permit, or if warranted by significant public interest based on requests received.

(g) If a public hearing is held under (f) above, USEPA shall, following that hearing, reaffirm, modify or withdraw the objection or requirement for a permit condition, and notify the *[Director]* ***Administrator*** of this decision.

1. If the USEPA withdraws the objection or requirement for a permit condition, the State may issue the Federal 404 permit.
2. If the USEPA does not withdraw the objection or requirement for a permit condition, the Department must either issue a revised permit satisfying the USEPA's objection or including the required permit condition, or notify USEPA of its intent to deny the permit within 30 days of receipt of the USEPA's notification.

(h) If no public hearing is held under (f) above, the Department shall, within 90 days of receipt of the objection or requirement for a permit condition, either issue the revised permit to satisfy USEPA's objections or notify USEPA of its intent to deny the permit.

(i) In the event that the Department neither satisfies USEPA's objections or requirement for a permit condition nor denies the

permit, the Federal 404 permit application will no longer be processed by the Department and shall be transferred to the Army Corps of Engineers for processing.

(j) No Federal 404 permit shall be issued by the Department in the following circumstances:

1. When the Regional Administrator has objected to issuance of the permit and the objection has not been resolved;

2. When the proposed discharges would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the USEPA under Section 404(c) of the Federal Act, or when the discharge would fail to comply with a restriction imposed thereunder; or

3. If the Army Corps of Engineers determines, after consultation with the Secretary of the Department in which the Coast Guard is operating, that anchorage and navigation of any of the navigable waters would be substantially impaired.

7:7A-12.3 Soliciting public comment

(a) The Department shall provide notice of application pursuant to N.J.A.C. 7:7A-12.1 for an individual freshwater wetlands or open water fill permit, ***or*** transition area *[permit or Water Quality Certificate]* ***waiver***, in addition to the applicant's notice requirements in N.J.A.C. 7:7A-11.1(a), in the DEP***E*** Bulletin upon receipt of the application. The public shall have 30 days from publication to submit written comments.

(b) Copies of all freshwater wetlands and open water fill permit applications, ***and*** transition area *[permit, or Water Quality Certificate]* ***waiver*** applications will be available for public scrutiny by interested persons in the municipal clerk's office and by appointment in the offices of the Department in Trenton (see N.J.A.C. 7:7A-1.3 for address) during normal business hours.

(c) The status of all permit applications shall be published in the *[DEP]* ***DEPE*** Bulletin, and shall constitute notice to all interested persons except those specifically provided with notice in this chapter.

(d) If a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any state(s) other than New Jersey, the Department shall provide an opportunity for such state(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted, the Department shall notify the affected state and the USEPA in writing, prior to permit issuance, of the State's failure to accept these recommendations, together with the reasons for so doing. The Regional Administrator shall then have the time provided for in N.J.A.C. 7:7A-12.2(d) to comment upon, object to, or make recommendations.

7:7A-12.4 Hearings on applications

(a) Within 30 days after publication of the notice of application in the DEP***E*** Bulletin, interested persons may request in writing that the Department hold a public hearing on a particular application. Requests shall state the nature of the issues proposed to be raised at the hearing.

(b) The Department may issue or deny a permit without a public hearing, unless there is a significant degree of public interest in the application as manifested by written requests for a hearing within 20 days after the publication of notice of the permit application in the DEP***E*** Bulletin or unless a hearing is requested by USEPA.

(c) If a hearing is to take place, the Department shall, within 15 days of declaring the application complete or within 30 days of publication in the DEP***E*** Bulletin (whichever is later), set a date, place, and time for the public hearing and shall so notify the applicant, in accordance with the following:

1. The hearing shall be in the county wherein the freshwater wetland or State open waters is located whenever practicable.

(d) The Department shall publish a notice announcing the date, place, and time of the public hearing in the DEP***E*** Bulletin.

(e) The applicant shall give public notice of the public hearing at least 30 days before the hearing.

1. This notice shall comply with the notice requirements for applications found at N.J.A.C. 7:7A-11.1(b)7, 9 and 10 using the following format:

"NOTICE OF STATE FRESHWATER WETLANDS INDIVIDUAL PERMIT APPLICATION PUBLIC HEARING

TAKE NOTICE that the New Jersey Department of Environmental Protection*[, Division of Coastal Resources]* ***and Energy, Land Use Regulation Element*** will hold a public hearing on the following permit application submitted under the Freshwater Wetlands Protection Act N.J.S.A. 13:9B-1 et seq.

APPLICANT: Name
FILE NUMBER: *[Division's]* ***Element's*** file number
PROJECT NAME: Name (if any)
PROJECT DESCRIPTION: Detailed description of the proposed improvements including all construction activities
LOCATION: Block and Lot
MUNICIPALITY: Municipality in which project is located
COUNTY: County in which project is located
PROJECT ADDRESS: Street address of project

The *[Division of Coastal Resources]* ***Land Use Regulation Element*** invites the public to attend the hearing and present written or oral comments on the application.

HEARING DATE & TIME: As assigned by *[Division]* ***Element***
HEARING LOCATION: As assigned by *[Division]* ***Element***
HEARING OFFICER: Your project review officer
DATE OF PREVIOUS HEARING (If one was held):

A copy of the complete application is available for review at the township clerk's office. *[Division of Coastal Resources]* ***The Land Use Regulation Element*** invites the public to submit written comments on the Freshwater Wetlands Individual Permit application within fifteen (15) days of the hearing to:

Your project review officer
[Division of Coastal Resources] ***Department of Environmental Protection and Energy Land Use Regulation Element***
CN 401/501 E. State St., 5 Station Plaza
Trenton, NJ 08625

DATE OF THIS NOTICE: Date";

2. (No change in text.)

(f) The Department shall maintain a copy of the hearing transcript and all written comments received. The transcript and written comments shall be made part of the official record on the application and shall be available for public inspection in its Trenton Office. See N.J.A.C. 7:7A-1.3 for address.

(g) The applicant shall provide a court reporter, bear the cost of the hearing and provide the Department with a transcript.

(h) (No change in text.)

(i) Any interested person may submit information and comments, in writing, concerning the application within 15 days after the hearing.

7:7A-12.5 Final decisions

(a)-(b) (No change.)

(c) The Department may issue a permit imposing conditions necessary for compliance with the Act, this chapter, the Federal Act and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. Any regulated activities undertaken under authority of any issued permit shall constitute an acceptance by the applicant of the entire permit including all conditions therein.

(d) Decisions by the Department shall be published in the DEP***E*** Bulletin and a copy of every issued individual permit for which USEPA review has not been waived shall be transmitted to USEPA.

(e) (No change.)

7:7A-12.6 Cancellation, withdrawal, resubmission and amendment of applications

(a) (No change.)

(b) If an application is not complete for final review within 60 days of a request for additional information, the Department shall send a letter canceling the application and stating that the application

will be purged from Department files and that a new application will be required to reactivate the Department's review. If the applicant sends the Department a letter documenting good cause for not supplying the requested information within the 60 day period, the Department will grant an automatic extension of 30 days. ***The Department will grant additional 30-day extensions upon receiving a written request for such extension from the applicant.**

1. All fees submitted with an application subsequently cancelled shall be non-refundable.

(c) An applicant may withdraw an application at any time in the application review process. All fees submitted with such applications are non-returnable when a significant portion of the review has been completed. In some cases however (see (d) below) the fees may be credited toward future applications.

(d) If an application is cancelled, denied or withdrawn, the applicant may resubmit an application for a revised project on the same site. The resubmitted application will be treated as a new application, although references may be made to the previously submitted application. A new fee will be required except for applications that are withdrawn and resubmitted within one year of the withdrawal date.

(e) A permit application may be amended at the applicant's discretion at any time as part of the permit review process. Copies of amendments and amended information shall be distributed by the applicant to the same person to whom copies of the initial application where distributed. All amendments to pending applications shall constitute a new submission and may at the Department's discretion require reinitiation of the entire review process.

7:7A-12.7 Hearings and appeal of permit decisions

(a) An applicant *[for a freshwater wetlands or open water fill permit]* ***who receives a final agency action*** or other affected party may request of the Commissioner an administrative hearing on any decision to issue or deny a permit made by the Department pursuant to the Act and this chapter. When a request for an administrative hearing is filed by an affected party contesting an approved permit, the effective date of the approved permit may be stayed at the discretion of the Commissioner until the matter is resolved.

(b) Such request shall be submitted in writing within 30 days of the DEP***E*** Bulletin publishing date, or the date of receipt of the permit decision, whichever is later. The request shall state in what way the Department has acted improperly in issuing or denying the permit, and what issues will be raised by the requestor should a hearing be held.

(c) The request for a hearing shall be sent to:

*[Adjudicatory Hearings
Division of Coastal Resources
501 East State Street, CN 401
Trenton, NJ 08625]*
***Office of Legal Affairs**
ATTENTION: Adjudicatory Hearing Requests
Department of Environmental Protection and Energy
401 East State Street
CN 402
Trenton, New Jersey 08625-0402*

1. Upon receipt of such a request, the Commissioner may refer the matter to the Office of Administrative Law, which shall assign an administrative law judge to conduct a hearing on the matter in the form of a contested case hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

2.-3. (No change.)

SUBCHAPTER 13. PERMIT CONTENTS

7:7A-13.1 Conditions applicable to all permits

(a) The following conditions apply to all individual and Statewide general freshwater wetlands and open water fill permits:

1. Duty to comply: The permittee shall comply with all conditions of the permit. Any permit noncompliance constitutes a violation of the Act and this chapter, and is grounds for enforcement action, for permit termination, revocation and reissuance, or modification, or for denial of a permit renewal application. In some cases, permit noncompliance may also constitute a violation of the Federal Act.

2.-3. (No change.)

4. Duty to minimize environmental impacts: The permittee shall take all reasonable steps to prevent, minimize or correct any adverse impact on the environment resulting from activities conducted pursuant to the permit, or from noncompliance with the permit. Mitigation consistent with N.J.A.C. 7:7A-14 will also be required for freshwater wetlands permits, open water fill permits and those Statewide General permits described at N.J.A.C. 7:7A-9.2(a).

5.-17. (No change.)

7:7A-13.2 Establishing permit conditions

(a)-(b) (No change.)

(c) In addition to the requirements in N.J.A.C. 7:7A-13.6, each permit shall include information meeting the following requirements, when applicable:

1. A specific identification and description of the authorized activity, including:

i.-iii. (No change.)

iv. Any structures proposed to be erected;

v. The location and boundaries of the activity site(s), including a detailed sketch and the name and description of affected freshwater wetlands, State open waters, and transition areas, identification of the major watershed and subwatershed; and

vi. A reference to the specific site plans depicting the approved regulated activity(ies);

2.-8. (No change.)

(d) (No change.)

7:7A-13.3 Duration of permits

Freshwater wetlands and open water fill permits shall be effective for a fixed term not to exceed five years.

7:7A-13.6 Modification or revocation and reissuance of permits

(a) (No change.)

(b) Any permit modification not processed as a minor modification must be made for cause and with the public notice and hearings procedures required for permit applications under N.J.A.C. 7:7A-11.1(a)7, 9 and 10, 12.1(a), 12.3, 12.4, and 12.5.

(c)-(d) (No change.)

(e) When a permit is modified, only the conditions subject to modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision, public hearings and comments, and the permit may be reissued for a new term.

(f) No Federal 404 permit shall be modified or revoked and reissued if USEPA objects (see N.J.A.C. 7:7A-12.3).

(g) Any modification except for those issued pursuant to N.J.A.C. 7:7A-13.9(b)4 will be published in the DEP***E*** Bulletin.

(h) Except for minor modifications of permits as described at N.J.A.C. 7:7A-13.9, a fee shall be submitted for modifications according to the requirements set forth for permit fees at N.J.A.C. 7:7A-16.

7:7A-13.9 Minor modifications of permits

(a) (No change.)

(b) Minor modifications may only:

1.-3. (No change.)

4. Allow for a change in materials or construction techniques required by another permitting agency provided the change will not result in additional wetland, State open water or transition area impacts from that of the originally approved permit.

SUBCHAPTER 14. MITIGATION

7:7A-14.1 Mitigation goals

(a) The Department shall require mitigation as a condition of an individual freshwater wetlands or State open water fill permit, *[Water Quality Certifications]* and certain Statewide general permits. Mitigation may include restoration, creation, enhancement, or donation of money or land or both to the Mitigation Bank, or *[through]* ***to*** other public or ***private*** non-profit *[mechanisms]* ***conservation organizations*** *[approved by the Division]*. ***Donations of land to public or private non-profit con-***

servation organizations shall first be approved by the Mitigation Council and the Department in consultation with USEPA.*

(b) When an individual freshwater wetlands permit, State open water fill permit*[, Water Quality Certification]* or certain Statewide general permits allow the disturbance or loss of wetlands or State open waters, this disturbance or loss shall be compensated for as specified below at N.J.A.C. 7:7A-14.2, unless the applicant can prove, through the use of productivity models or other similar studies, that by restoring or creating a lesser area, there will be a replacement of wetlands or State open water of equal ecological value. In order to demonstrate equal ecological value, the applicant shall survey and provide written documentation regarding, at a minimum, existing soil, vegetation*, **water quality functions, flood storage capacity, soil erosion and sediment control functions,*** and wildlife habitat conditions and detail how the proposed mitigation plan will replace the ecological values of the wetland to be lost or disturbed.

(c) Mitigation must be performed prior to or concurrently with permitted activities that will permanently disturb wetlands or State open waters, and immediately after activities that will temporarily disturb wetlands or State open waters. Applicants shall be required to obtain a secured bond, or other surety acceptable to the Department including an irrevocable letter of credit or money in escrow, that shall be sufficient to hire an independent contractor to complete and maintain the proposed mitigation should the applicant default. The performance bond for the construction of the proposed mitigation shall be posted in an amount equal to 115 percent of the estimated cost of *[the]* ***construction of the mitigation*** activity. In addition, a maintenance bond to assure the success of the mitigation shall be posted in an amount equal to 30 percent of the estimated cost of construction. The performance and maintenance bonds will be reviewed annually and shall be adjusted to reflect current economic factors.

1. The performance bond or other surety will be released upon an inspection by the Department confirming completion of construction and planting of the mitigation site. The maintenance bond will be released upon the Department's confirmation that the three-year, post-planting monitoring period has been successfully completed and that no additional maintenance is required in order to meet the specifications of the approved mitigation plan.

(d) (No change in text.)

(e) As a condition of every creation or enhancement plan authorized under this subchapter, an applicant shall sign a Department approved conservation easement and register this restriction on the deed for the subject parcel. This restriction will provide that no regulated activities will occur in the created or enhanced wetland area. This restriction shall be memorialized in a deed restriction meeting the Department's requirements and shall run with the land and be binding upon the applicant and the applicant's successors in interest in the premises or any part thereof. The freshwater wetland permit will not become effective until the deed restriction is registered with the county clerk. Any regulated activities undertaken on the site before a copy of the registered restriction is submitted to the Department will be considered in violation of the Act and this chapter.

1. No future development will be permitted on the mitigation site unless the Department finds that the regulated activity has no practicable alternative which would:

i. Not involve a freshwater wetland or State open water; or

ii. Involve a freshwater wetland, or State open water but would have a less adverse impact on the aquatic ecosystem;

iii. Not have other significant adverse environmental consequences, that is it shall not merely substitute other significant environmental consequences for those attendant on the original proposal; and

iv. That there is a compelling public need for the activity greater than the need to protect the mitigation site.

2. To satisfy this condition the applicant shall provide a receipt showing that the restriction has been registered at the county clerk's office.*

(f) Except for publicly funded projects, as described at *[(f)2]* ***(f)1*** below, any mitigation carried out offsite shall be on private property.

*[1. No future development will be permitted on the mitigation site unless the Department finds that the regulated activity has no practicable alternative which would:

i. Not involve a freshwater wetland or State open water; or

ii. Involve a freshwater wetland, or State open water but would have a less adverse impact on the aquatic ecosystem;

iii. Not have other significant adverse environmental consequences, that is it shall not merely substitute other significant environmental consequences for those attendant on the original proposal; and

iv. That there is a compelling public need for the activity greater than the need to protect the mitigation site.]*

*[2.]***1.* Mitigation for publicly funded projects may be carried out on public lands *[if the following conditions are met:]* ***provided that these lands were private lands purchased by a public agency expressly for the purpose of performing mitigation.***

*[i. If the lands are encumbered by Green Acres funding, the use of the land for mitigation must be approved by the Green Acres Administration and the State House Commission;

ii. If the lands are not encumbered, the use of the land as mitigation must be approved by the public agency administering the land; and

iii. The Department must determine that the use of the public land for mitigation will result in a net gain in environmental value and does not simply provide equal ecological value.]*

(g) When loss or disturbance of freshwater wetlands or State open waters results from a violation of the Act, this chapter, or any permit, order or approved mitigation plan issued pursuant thereto, the mitigation portion of the penalty shall be that specified in N.J.A.C. 7:7A-15. The Department may, at its discretion, condition approval of a mitigation plan, or a permit, or both, on the resolution of the violation.

7:7A-14.2 Wetland or State open water mitigation options

(a) The Department distinguishes between four types of mitigation: restoration, creation, enhancement, and contribution. Depending on the circumstances under which wetlands or State open waters are lost or disturbed, different types of mitigation may be required by the Department. The types of mitigation are explained below:

1. Restoration refers to actions performed on the site of a regulated activity, within six months of the regulated activity, in order to reverse or remedy the effects of the activity on the wetland or State open waters, and to restore the site to pre-activity condition.

i. Restoration will be required at a ratio of one acre restored to one acre lost, modified or disturbed. If restoration type actions are performed more than six months after the regulated activity which disturbed the wetland, these actions will no longer be considered restoration, but will be considered creation, and will be governed by the provisions of (a)2 below. At the Department's discretion, restoration activities may exceed six months in cases where a violation has occurred.

2. Creation refers to actions performed to establish freshwater wetland or State open water characteristics, habitat and functions on upland areas. The creation of freshwater wetlands or State open waters shall be governed by the following provisions:

i. Creation will be required at a ratio of two acres created to one acre lost or disturbed unless the applicant demonstrates equal ecological value pursuant to N.J.A.C. 7:7A-14.1(b). Where the Department permits mitigation on less than a 2:1 basis, frequent monitoring will be required by the permittee. In such cases, the Department will require additional mitigation or further remedial action if a net loss of equal ecological value occurs *[over time.]* ***during the three-year monitoring period.*** Under no circumstances shall the mitigation area be smaller than the disturbed area. Creation of wetlands from other existing climax habitats is discouraged.

ii. Creation shall not be permitted on a site that retains wetlands characteristics. Rather such a site is only eligible for enhancement activities pursuant to (a)3 below.

iii. In addition to the wetlands created in the ratio required, the mitigation site shall include the appropriate transition area. The transition area width will be that which is required for the resource value classification of the closest adjacent wetland areas and will be a minimum of 50 feet.

3. Enhancement refers to actions performed to improve the characteristics, habitat and functions of an existing, degraded wetland such that the enhanced wetland will have resource values and functions similar to an undisturbed wetland. The ratio of enhanced wetlands to wetlands disturbed or modified will be determined based on the documented assessment of the loss of ecological value of the wetlands disturbed or modified.

4. Contribution refers to the donation of money or land to the Mitigation Bank ***or to other public or private non-profit conservation organizations as approved by the Mitigation Council and the Department in consultation with EPA. Donations shall only be considered if the Department in consultation with USEPA determines that other forms of mitigation are not feasible onsite or offsite in the same watershed. For the purposes of this subsection only, feasible shall include a determination of whether other types of mitigation would be as ecologically beneficial as the donation.*** *[The Department will permit the donation of land only after determining that, other forms of mitigation are not practicable or feasible or would not be as ecologically beneficial as the land donation. If creation, restoration, or enhancement cannot be carried out in the same watershed, the Department may make the finding that a land contribution to the Mitigation Bank is more ecologically beneficial. The Department will consider the contribution of money to the Mitigation Bank only after determining that creation or restoration of wetlands onsite is not feasible. The Department will consult with USEPA in making this determination for projects for which USEPA review has not been waived.]*

i. If money is donated, the donation shall be *[in an amount equivalent to the cost of purchasing an area and creating a functional freshwater wetland, at a ratio of two acres of wetlands created for each acre disturbed unless the applicant demonstrates equal ecological value pursuant to N.J.A.C. 7:7A-14.1(b).]* ***equivalent to the lesser of the following costs:**

(1) Purchasing and enhancing existing degraded freshwater wetlands, resulting in preservation of freshwater wetlands of equal ecological value to those which are being lost; or

(2) Purchase of property and the cost of creation of freshwater wetlands of equal ecological value to those which are being lost.*

ii. If the Department determines that land donation is appropriate, as part or all of a contribution, only land which has been determined by the *[Department or the]* Mitigation Council to have the potential to be a valuable component of the freshwater wetlands ecosystem will be acceptable to satisfy the mitigation requirement.

7:7A-14.3 Location of mitigation sites

(a) All mitigation projects shall be carried out on-site to the maximum extent practicable.

1. For the purposes of this subsection, the term practicable shall mean that all efforts have been exhausted after taking into consideration cost, existing technology, and logistics in light of the overall project purposes.

(b) If on-site mitigation is found to be impracticable, the mitigation shall be carried out within the same watershed to the maximum extent practicable.

(c) If the Department determines that mitigation onsite ***or in the same watershed*** is not feasible or less ecologically beneficial, the Department may approve mitigation in a different watershed.

7:7A-14.4 Wetland mitigation proposal requirements

(a) A proposal for mitigation shall include the following information, as appropriate:

1. A description of the size and type of mitigation project proposed, including a transition area, a description of the freshwater wetlands which are being lost or disturbed and how the proposal satisfies the requirement for creation of wetlands of equal ecological value within the same watershed;

2. The names and addresses of current and proposed owner(s) of the mitigation project site;

3. (No change.)

4. A monitoring and maintenance plan to ensure 85 percent survival and 85 percent areal coverage of the mitigation plantings for at least three years after planting;

5.-8. (No change.)

9. A metes and bounds description of the proposed mitigation site, which will form the basis for the deed restriction;

10. Five folded copies of a site plan for the mitigation project which includes:

i. Project location within the region and in relation to adjacent development;

ii. The lot and block number of the project location;

iii. Existing and proposed elevations and grades of the project shown in one foot intervals; and

iv. Plan views and cross sectional views; and

*[ii.]***11.*** A copy or photocopy of a portion of the U.S.G.S. 7.5 minute quadrangle map (available from the Department's Maps and Publications Office, CN 402, Trenton, NJ 08625) showing the location of the property and its general vicinity, indicating and labeling the location of the proposed mitigation and the property boundaries, and a determination of the State Plane Coordinates for the center of the property. ***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 end-points of those projects which are 1999 feet or less, and for those projects which are 2000 feet and longer, additional coordinates at each 1000 foot interval.***

7:7A-14.5 Acceptability of wetlands mitigation proposals

(a) Wetlands and State open water mitigation proposals shall be reviewed by the Department for acceptability. The Department will base the acceptibility determination upon the following criteria:

1.-3. (No change.)

4. Suitability of the monitoring program and maintenance to ensure 85 percent survival and 85 percent areal coverage of the mitigation plantings for at least three years following planting;

5.-9. (No change.)

(b) When a mitigation plan is submitted subsequent to the permit decision, within 30 days of the receipt of the submission, the Department shall review the submission for completeness and make any necessary requests for additional information, or declare the submission complete. Within 60 days of accepting a submission as complete, the Department shall issue a decision on the acceptability of a proposed mitigation plan unless extended by consent of the permittee.

7:7A-14.6 Wetlands Mitigation Council

(a) The Wetlands Mitigation Council shall have oversight of the creation and implementation of the Wetlands Mitigation Bank. The Wetlands Mitigation Bank will serve all programs within the *[Division of Coastal Resources]* ***Land Use Regulation Element*** for which wetlands and open water mitigation is required as a condition of a permit. The Council duties and functions shall include:

1. Accepting donations of money or land when the Department has determined donation to be an acceptable form of mitigation for a permit or a violation;

2. Determining if land to be donated has the potential to be a valuable component of the wetlands or surface water ecosystem;

3. Disbursement of funds from the Wetlands Mitigation Bank to finance mitigation projects;

4. Purchasing land to provide areas for restoration of degraded freshwater wetlands and to preserve wetlands, and surface waters and transtion areas determined to be of critical importance; and

5. Reviewing and approving the establishment of private mitigation banks.

(b) The Council may transfer any funds or lands restricted by deed, easement or other appropriate means to mitigation and freshwater wetlands conservation purposes, to a State or Federal conservation agency that consents to the transfer, to expand or provide for:

1.-3. (No change.)

4. Research to determine more successful mitigation techniques.

(c) Under no circumstances will the resources of the Mitigation Bank be used to aid permittees or violators in locating mitigation sites required of them because of their permit or violation.

SUBCHAPTER 15. ENFORCEMENT

7:7A-15.1 General provisions

The burden of proof and degrees of knowledge or intent required to establish a violation of the Act or of any permit, order, rule or regulation promulgated pursuant thereto shall be no greater than the burden of proof or degree of knowledge or intent which USEPA must meet in establishing a violation of the Federal Act or implementing regulations.

7:7A-15.2 USEPA review

The Department shall make available without restriction any information obtained or used in the implementation of the Act to USEPA upon request.

7:7A-15.3 Administrative order

(a) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Act, or of any permit, order, rule or regulation issued pursuant thereto, the Department may issue an order:

1.-2. (No change.)

3. Requiring immediate compliance with the provision or provisions violated;

4.-5. (No change.)

7:7A-15.4 Civil action

(a) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Act, or of any rule or regulation adopted, or permit or order issued, pursuant to the Act, the Department is authorized to institute a civil action in Superior Court for appropriate relief. Such relief may include, singly or in combination:

1.-2. (No change.)

3. Assessment of the violator for any costs incurred by the State in removing, correcting, or terminating the adverse effects upon the freshwater wetlands, State open waters or transition areas resulting from any unauthorized regulated activity for which legal action under this section may have been brought;

4. Assessment against the violator for compensatory damages for any loss or destruction of wildlife, fish or aquatic life, and for any other actual damages caused by an unauthorized regulated activity. Assessments under this section shall be paid to the State Treasurer except that compensatory damages shall be paid by specific order of the court to any persons who have been aggrieved by the unauthorized regulated activity; and/or

5. (No change.)

7:7A-15.5 Civil administrative penalty

(a) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Act, or of any rule or regulation adopted, or permit or order issued, pursuant to the Act, the Department is authorized to assess a civil administrative penalty of not more than $10,000 for each violation. Each day during which each violation continues shall constitute an additional, separate, and distinct offense. Specific penalty amounts, and procedures for their assessment and for adjudicatory hearings on penalties assessed, can be found at N.J.A.C. 7:7A-17.

1.-2. (No change.)

3. The ordered party shall have 20 days from receipt of the notice within which to deliver to the Department a written request for a hearing in accordance with N.J.A.C. 7:7A-17.9. Such hearing shall be conducted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

4. (No change.)

5. Any civil administrative penalty assessed under this section may be compromised by the Department upon the posting of a performance bond by the violator, or upon such terms and conditions as the Department may establish by regulation.

7:7A-15.6 Civil penalty

(a) Each person who violates the Act or this chapter, or an administrative order or a court order issued pursuant to the Act, and who fails to pay a civil administrative assessment in full pursuant to N.J.A.C. 7:7A-15.5, shall be subject, upon order of a court, to a civil penalty not to exceed $10,000 per day of such violation. Each day during which the violation continues shall constitute an additional, separate, and distinct offense.

(b) (No change.)

7:7A-15.8 Notice of violation recorded on deed to property

In addition to the penalties prescribed in this subchapter, a notice of violation of the Act shall be recorded on the deed of the property wherein the violation occurred, on order of the Department, by the clerk or register of deeds and mortgages of the county wherein the affected property is located and with the clerk of the Superior Court and shall remain attached thereto until such time as the violation has been remedied and the Department orders the notice of violation removed.

7:7A-15.9 "After the fact" permit

(a) The Department may issue an "after the fact" permit for the regulated activity that has already occurred only when:

1. The Department has determined that the restoration or rehabilitation of the site to its previolation condition would increase the harm to the freshwater wetlands, State open waters or its ecology; or the regulated activity meets the standards for permit approval pursuant to the Act ***or the Federal Act***;

2. Assessment against the violator for costs or damages enumerated in N.J.A.C. 7:7A-15.4 has been made and collected;

3. The creation or enhancement of freshwater wetlands or State open waters at another site has been required of the violator;

4. An opportunity has been afforded for public hearing and comment; and

5. The reasons for the issuance of the "after the fact" permit are published in the DEP***E*** Bulletin and in a newspaper of general circulation in the geographic area of the violation.

[(c)]**(b) Any person violating an "after the fact" permit issued pursuant to this section shall be subject to the provisions of this chapter.

7:7A-15.10 Termination of permits

(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

1. Noncompliance by the permittee with the permit or any condition of the permit;

2. The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; or

3. The permit has unanticipated negative environmental impacts ***such as, but not limited to, excessive erosion and subsequent siltation, destruction of vegetation not covered by the permit, die-off of aquatic biota, etc.*** which become apparent during construction.

(b) Prior to a termination, the Department shall furnish written notice to the permittee by certified mail. The notice shall provide 10 days within which the permittee shall either remedy the violations, or unanticipated negative environmental impacts, offer a plan as to how to bring the permit back into compliance or correct the unanticipated impact, or request a hearing ***pursuant to (e) below***. Within 60 days of Department approval of a plan, the violations or unanticipated impact shall be remedied.

(c) If the requirements of (b) above have not been met within 10 days of the Department's notice, the permit shall automatically terminate and the unanticipated negative environmental impacts or violations shall be remedied. Once the violations are remedied, the Department may reinstate the permit or require the applicant to apply for a new permit, following the application procedures in this chapter.

(d) (No change.)

***[**(e) The State shall provide for public participation in the State enforcement process by providing assurance that the State agency or enforcement authority will:

1. Investigate and provide responses to all citizen complaints submitted pursuant to State procedures;

2. Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

3. Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action in the DEP Bulletin.]*

*[(f)]***(e)*** (No change in text.)

***7:7A-15.11 Public participation**

(a) The State shall provide for public participation in the State enforcement process by providing assurance that the State agency or enforcement authority will:

1. Investigate and provide responses to all citizen complaints submitted pursuant to State procedures;

2. Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

3. Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action in the DEPE Bulletin.*

SUBCHAPTER 16. FEES

7:7A-16.1 Payment of fees

(a) Except when submitted by an agency of the State, each request for a letter of interpretation, or freshwater wetlands permit application, open water fill permit application, letter of authorization for a Statewide general permit activity, transition area permit application, or request for a letter of exemption shall be accompanied by the appropriate fee as set forth at N.J.A.C. 7:7A-16.2 to 16.6. Except when submitted by an agency of the State, no request, application, or notice will be considered complete, and therefore will not be acted on by the Department, unless accompanied by the appropriate fee.

(b) All fees shall be paid by personal check, certified check, attorney check, or money order. Checks and money orders shall be payable to "Treasurer, State of New Jersey" and submitted with the application.

(c) Each check or money order shall be marked to identify the nature of the submittal (for example, freshwater wetlands Individual permit application) for which the fee is paid and the name of the applicant.

7:7A-16.2 Fees for review of requests for letters of interpretation

(a) If a request is made for a letter of interpretation to determine:

*[i.]***1.*** Whether freshwater wetlands, State open waters or transition areas are present or absent on a parcel of land or right-of-way, pursuant to N.J.A.C. 7:7A-8.2(a)1, the fee shall be $100.00;

*[ii.]***2.*** Whether freshwater wetlands, State open waters or transition areas are present or absent on a footprint of land, pursuant to N.J.A.C. 7:7A-8.2(a)2, the fee shall be $200.00.

(b) Any request for a letter of interpretation which requires any freshwater wetlands or State open water boundary delineation, or verification of a delineation, shall be accompanied by the following fee:

1. For a parcel of land or right-of-way which is smaller than one acre, pursuant to N.J.A.C. 7:7A-8.2(a)3, the fee shall be $250.00 or

2. For parcel of land or right-of-way, with total acreage of one acre or more, pursuant to N.J.A.C. 7:7A-8.2(a)4, the fee shall be $250.00 plus $35.00 per acre or any fraction thereof, with a total not to exceed $50,000. For example, the fee for line verification of a parcel with a total acreage of 7.2 acres would be $250.00 + (8 acres × $35.00) = $530.00.

(c) For a request for the reissuance of a letter of interpretation pursuant to N.J.A.C. 7:7A-8.7, the fee shall be 25 percent of the original fee or $100.00, whichever is larger.

(d) (No change in text).

7:7A-16.3 Fees for review of individual freshwater wetlands and open water fill permits *[or individual water quality certificate applications]*

(a) The fee for the review and processing of an individual freshwater wetlands and open water fill permit or individual water quality certificate application shall be $1,000 plus $100.00 per one-tenth acre, or any fraction thereof, of freshwater wetlands or State open waters affected by any regulated activities. For a permit requiring both an individual freshwater wetlands and open water fill permit, the fee shall be $1,000 plus $100.00 per one-tenth acre, or any fraction thereof, of freshwater wetlands and State open waters affected by any regulated activities.

(b) For projects that require both an individual freshwater wetlands/open water fill permit and a transition area permit, only one fee for the review and processing of the permit shall be required, the higher of the two fees.

(c) (No change.)

7:7A-16.4 Fees for review of Statewide general permit authorization applications

(a) The fee for review of a Statewide general permit authorization application pursuant to N.J.A.C. 7:7A-9.4(a) shall be $250.00.

(b) If a proposed project requires more than one type of general permit, the fee shall be $250.00 for the first general permit and $100.00 for each additional general permit.

7:7A-16.5 Fees for review and processing of transition area *[permit]* ***waiver*** applications

(a) Each request for a transition area *[permit]* ***waiver*** shall be accompanied by the appropriate fee as follows:

1. If a letter of interpretation has been performed on the property by the Department pursuant to N.J.A.C. 7:7A-8 confirming or delineating the freshwater wetlands boundary, the transition area *[permit]* ***waiver*** application fee shall be:

i. For a property or right of way of one acre or less: $100.00;

ii. For a property or right of way over one acre: $250.00 plus $20.00 per acre, or any fraction thereof, of the standard transition area affected or disturbed by the proposed activity; and

iii. For review of applications for more than one type of transition area *[permit]* ***waiver***, the fee shall be $250.00 plus $20.00 per acre, or any fraction thereof of the standard transition area affected or disturbed by the proposed activity, plus $100.00 for each additional special activity *[permit]* ***waiver***.

2. If no letter or interpretation for the property has been prepared by the Department pursuant to N.J.A.C. 7:7A-8 confirming or delineating the freshwater wetlands boundary, the transition area *[permit]* ***waiver*** application fee shall be:

i. For a property or right of way of one acre or less: $350.00;

ii. For a property or right of way over one acre: $450.00 plus $40.00 per acre, or any fraction thereof, of the total property; and

iii. For review of applications for more than one type of transition area *[permit]* ***waiver***, the fee shall be $450.00 plus $40.00 per acre, or any fraction thereof of the total property plus $100.00 for each additional special activity *[permit]* ***waiver***.

3. If a letter of interpretation for the property which provides only a determination of the presence or absence of freshwater wetlands has been prepared for a property by the Department pursuant to N.J.A.C. 7:7A-8, the transition area *[permit]* ***waiver*** application fee shall be:

i. For a property or right of way of one acre or less: $350.00; and

ii. For a property or right of way over one acre: $450.00 plus $40.00 per acre, or any fraction thereof, of the total property.

4. For special activity permits for activities covered by Statewide general permits, the *[permit]* ***waiver*** application fee shall be:

i. For the review of a special activity *[permit]* ***waiver*** pursuant to N.J.A.C. 7:7A-7.4(e): $250; and

ii. If a proposed project requires more than one type of special activity *[permit]* ***waiver***, the fee shall be $250.00 for the first special activity *[permit]* ***waiver*** and $100.00 for each additional special activity *[permit]* ***waiver***.

5. If, in order to review and process a transition area *[permit]* ***waiver*** application, more than one site inspection by the Department is necessary because of any act or omission of the applicant, the Department may assess an additional fee for each additional visit in an amount not to exceed $1,000. No transition area *[permit]* ***waiver*** shall be issued until this additional fee is paid.

7:7A-16.6 Fees for the review and processing of requests for exemption letters

(No change in text.)

7:7A-16.7 Fees for the review and processing of requests for permit modifications

Except for minor modifications pursuant to N.J.A.C. 7:7A-13.9 for which no fee will be charged, the fee for the review and processing of a request for permit modification shall be 25 percent of the original fee.

7:7A-16.8 Fee refunds

All fees submitted with an application that is declared administratively complete shall be non-refundable.

SUBCHAPTER 17. CIVIL ADMINISTRATIVE PENALTIES AND REQUESTS FOR ADJUDICATORY HEARINGS

7:7A-17.1 General penalty provisions

(a) This subchapter shall apply only to violations of the Act and this chapter which involve freshwater wetlands and transition areas. This subchapter shall not apply to regulated activities in State open waters. The penalty procedures and amounts for State open water fill violations are set by N.J.A.C. 7:14-8. This subchapter shall also govern the procedures for requesting an adjudicatory hearing on a notice of civil administrative penalty assessment or an administrative order.

(b) Each violation of any provision of the Act or any rule, administrative order, approved mitigation plan, *[permit]* ***waiver*** or permit issued pursuant thereto, shall constitute an additional, separate, and distinct violation for which a separate penalty may be assessed.

(c) Each day during which such violation exists and/or continues shall constitute an additional, separate, and distinct violation for which a separate civil administrative penalty may be assessed. A violation shall be considered to continue as long as it is not rectified, remedied, repaired, or removed, to the satisfaction of the Department. For example, each day that an obstruction, structure, piling, fill or discharge placed or constructed in violation of the Act remains in place shall constitute an additional, separate, and distinct violation. Also for example, for destruction, dredging, or removal of freshwater wetland components such as soil or vegetation, each day between the destruction or removal and the replacement, restoration, or remediation to the satisfaction of the Department shall constitute an additional, separate, and distinct violation.

*[i.]***1.*** For the purposes of calculating the duration of any violation, the first day of the violation shall be the day which is the earliest point in time that the Department can establish that the violation occurred, had occurred, or was occurring.

*[ii.]***2.*** The last day of the violation shall be as follows:

*[(1)]***i.*** The day upon which a complete application for a permit ***or waiver*** to pursue the activity is submitted to the Department;

*[(2)]***ii.*** The day upon which a complete restoration plan is submitted to the Department (in the case of an unpermittable activity); or

*[(3)]***iii.*** The first day upon which a good faith effort was made to comply with the Department's requirements. If such a good faith effort is shown, the Department may, in its sole discretion, consider the first day of such efforts to be the last day of the violation.

*[iii.]***3.*** To demonstrate a good faith effort, the violator shall show that all regulated ***and prohibited*** activity has been halted, shall promptly submit any information required by the Department, shall promptly remedy all deficiencies in any application or other materials submitted to the Department, and shall otherwise promptly comply with all Department requirements.

*[iv.]***4.*** For the purposes of penalty assessment, the number of days required by the Department to render a decision and give notice of such decision on a submitted permit application or restoration proposal shall be excluded from the per day penalty calculation.

(d)-(e) (No change.)

7:7A-17.2 Civil administrative penalty determination

(a) Except for those violations set forth in N.J.A.C. 7:7A-17.4 through 17.6, the Department may assess a civil administrative penalty for violations described in this section using three factors: conduct of violator, acreage of impact, and the resource value classification of impacted wetland. Point values are assigned to the three ranges within each factor, as described below. For each violation, the total number of points are determined and the total is used at (c) below to determine penalty amount per day.

(b) The following is a description of the factors to be used in penalty determination and the point values assigned to them:

1. The conduct factor of the violation shall be determined as major, moderate or minor as follows:

i. Major shall include an intentional, deliberate, purposeful, knowing or willful act or omission by the violator and is assigned three points;

ii. Moderate shall include any unintentional but foreseeable act or omission by the violator and is assigned two points; and

iii. Minor shall include any other conduct not identified in (b)1i or ii above and is assigned one point.

2. The acreage of wetlands impacted by the violation factor shall be determined as:

i. An impact to greater than three acres of wetlands is assigned three points;

ii. An impact to one to three acres of wetlands is assigned two points;

iii. An impact to less than one acre of wetlands is assigned one point.

3. The resource value classification factor shall be determined as:

i. An impact to exceptional resource classification wetlands is assigned three points;

ii. An impact to intermediate resource classification wetlands is assigned two points;

iii. An impact to ordinary resource classification wetlands is assigned one point.

(c) The total points from the above factors shall be used to determine the penalty assessment per day according to the following table:

Total Points	Penalty Amount Per Day
9	$10,000
8	9,000
7	7,500
6	6,000
5	4,500
4	3,000
3	1,500

*[(d) The Department may, in its discretion, adjust the amount determined pursuant to (a) above to assess a civil administrative penalty in an amount no greater than the maximum amount nor less than the minimum amount in the range on the basis of the following factors:

1. The compliance history of the violator;
2. The number, frequency and severity of the violation(s);
3. The measures taken by the violator to mitigate the effects of the current violation or to prevent future violations;
4. The deterrent effect of the penalty; and/or
5. Other relevant factors.]*

7:7A-17.3 Civil administrative penalty for engaging in regulated activities without approval

(a) The Department may assess a civil administrative penalty in accordance with the provisions of this section against each violator who engages in a *[regulated]* ***prohibited*** activity in a freshwater wetland without a freshwater wetlands permit or engages in a regulated activity in a transition area without a transition area *[permit]* ***waiver***.

(b) For each violation under this section, the Department may assess a penalty of up to $10,000. Each day, from the day the *[regulated]* ***prohibited*** activity begins to the day its effects are

rectified, remedied, repaired, or removed to the satisfaction of the Department, shall constitute an additional, separate, and distinct violation.

7:7A-17.4 Civil administrative penalty for submitting inaccurate or false information

(a) The Department may assess a civil administrative penalty pursuant to this section against each violator who submits inaccurate information or who makes a false statement, representation, or certification in any application, record, or other document required to be submitted or maintained, under the Act or any rule, administrative order, permit, mitigation plan, or *[permit]* ***waiver*** issued pursuant thereto.

(b) Each day, from the day that the violator knew or had reason to know that it submitted inaccurate or false information to the Department until the day of receipt by the Department of a written correction by the violator, shall be an additional, separate, and distinct violation.

(c) The Department shall determine the amount of the civil administrative penalty for violations decribed in this section based on the conduct of the violator as follows:

1. For each intentional, deliberate, purposeful, knowing, or willful act or omission by the violator, the civil administrative penalty shall be in an amount of not more than $10,000 nor less than $8,000 for violations described in N.J.A.C. 7:7A-15; and

2. For each other violation, the penalty shall be in the amount of $1,000.

7:7A-17.5 Civil administrative penalty for failure to allow entry and inspection

(a) The Department may assess a civil administrative penalty pursuant to this section against each violator who refuses, inhibits or prohibits immediate lawful entry and inspection of any premises, building or place by any authorized Department representative.

(b) Each day that a violator refuses, inhibits or prohibits immediate lawful entry and inspection shall be an additional, separate, and distinct violation.

(c) The Department shall determine the amount of the civil administrative penalty for violations described in this section as follows:

1. For refusing, inhibiting or prohibiting immediate lawful entry and inspection of any premises, building or place for which an administrative order, freshwater wetlands permit, open water fill permit, transition area *[permit]* ***waiver***, approved mitigation plan or general permit authorization notification exists for the property in question under the Act, the civil administrative penalty shall be no more than $10,000 nor less than $7,000; and

2. For any other refusal, inhibition or prohibition of immediate lawful entry and inspection, the civil administrative penalty shall be in an amount not more than $7,000 nor less than $1,500.

7:7A-17.7 Economic benefit factor

The Department may, in addition to any other civil administrative penalty assessed pursuant to this subchapter, include as a civil administrative penalty the economic benefit (in dollars) which the violator has realized as the result of not complying, or by delaying compliance with the requirements of the Act or any rule, permit, mitigation plan, ***waiver*** or administrative order issued pursuant thereto. If the total economic benefit was derived from more than one violation, the total economic benefit amount may be apportioned among the violations from which it was derived so as to increase each civil administrative penalty assessment to an amount no greater than $10,000 per violation.

7:7A-17.8 Procedures for assessment of civil administrative penalties under the Act

(a) To assess a civil administrative penalty under the Act, the Department shall notify the violator by certified mail (return receipt requested) or by personal service. This Notice of Civil Administrative Penalty Assessment shall:

1. Identify the section of the Act, rule, mitigation plan, permit or administrative order violated;

2. Concisely state the facts alleged to constitute the violation;

3.-4. (No change.)

(b) (No change.)

(a)

DIVISION OF FISH, GAME AND WILDLIFE

Marine Fisheries

Weakfish Management

Adopted Amendments: N.J.A.C. 7:25-18.1 and 18.5

Adopted New Rule: N.J.A.C. 7:25-18.12

Proposed: January 6, 1992 at 24 N.J.R. 4(c).

Adopted: February 25, 1992 by Scott A. Weiner, Commissioner, Department of Environmental Protection and Energy.

Filed: February 25, 1992 as R.1992 d.143 **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 23:2B-6.

DEPE Docket Number: 049-91-12.

Effective Date: March 16, 1992.

Expiration Date: February 15, 1996.

The New Jersey Department of Environmental Protection and Energy (Department) is adopting the amendments of N.J.A.C. 7:25-18.1 and 18.5 and new rule N.J.A.C. 7:25-18.12 proposed on January 6, 1992 at 24 N.J.R. 4(c). A public hearing was held at Stockton State College in Pomona, New Jersey on January 21, 1992 and the comment period closed on February 5, 1992. Approximately 130 individuals attended the public hearing at which 22 presented oral comments. Another 388 individuals submitted written comments. Of those, 352 individuals submitted identical form letters. Commenters consisted of commercial fishermen, crabbers, party and charter boat representatives and recreational fishing clubs and fishermen and outdoor writers.

The following is a list of those persons and organizations that made either written or oral comments directly related to the proposal.

Individual—Organization

Gary Dickerson, Jersey Coat Anglers Association
Neil Robbins, Cape May County Party & Charter Boat Assoc.
Alex Ogden, Delaware Bay Waterman's Assoc.
Kenneth W. Bailey, Delaware Bay Waterman's Assoc.
Robert E. Munson, Delaware Bay Waterman's Assoc.
Stephen G. Crane, Delaware Bay Waterman's Assoc.
John Bradford, Jenkins Seafood
Bob Olivio, Delaware Bay Rod & Reel Assoc.
Capt. George Kumor, Consumer's United
Ralph Knissell, Outdoor Writer
Charles Burke, Lund's Fisheries, Inc.
Tim Kriegsmann, K&K Fisheries Inc.

Individuals

Raymond Bernd
Eric Anderson
Edward Ahearn, Jr.
Walter Chew
Fred Layton
John Bailey
William Boyle
William Dickinson
Marvin Harris
Ron Hawthorne
Jean Tharp
Charles Walzer
Roger Wolleyhan
Charles Givens
Charles Law
Edward Ahearn, III
Earl Jackson
Wayne Jeanette
Fred Clark
Bill Conway
Charles Esher
Donald Hart
Robert Smith
Patricia Walzer
Mike Wintjen
John Andia

The following list represents individuals who provided comments by submission of form letters mailed by the Delaware Bay Waterman's Association.

Marson Aeay
Henry Aljter
O. Aulill
Gerc Barn
William Alcom
Aorro Arno, Sr.
Douglas Ball
Pearl Bayout

Oliver Beck
Lenny Benson
Doug Bertucci
Chocer Blount
Presker Bohannan
Brian Boyce
Tashilia Bragg
Lorraino Brown
Russell Brown
Margaret Bryant
Julia Burnight
Barbara Burnight
Willard Burnight, III
Nui Cen
Beonn Chinnice
Leona Chinnice
Brenda Clan
Charles Clark
Robert Collier
Terry Cueno
Bill Daves
Vivian Dentis
John Doe
Linwood Donelson
Clern Durham
William Ecret
James Edwards
Sandra Fakinbach
Lee Finlaw
James Floyd
Dawn Fogg
Michael Forman
Wayne Forrest
Nelson Franklin
Charles Franklin
Martin Franklin
Lynn Franklin
Linda Franklin
Evelyn Franklin
David Franklin
John Franklin
Dolores Franklin
Mark Franklin, Sr.
Mann Freduh
Mamie Gabriel
Joe Gandy
Robert Gibbins
Alfred Green
Gabrial Guzzer
Joe Hamilton
Arthur Hannald
Angela Harris
Lorrane Harris
Michael Harris
Debra Hayes
Alice Hayes
Donnie Hemple
Charlotte Hemple
Lee Hickman
Clifford Higbee
James Hill
Theo Hitchaer
Tracy Hitchin
Joseph Hostor
William Hussen
Walter Hutchins
Robert Hyes
Hartley Hymer
Carl Hymer
Benjamin Hyson
Tracy James
Joe James
David Jenkins
Samuel Jenkins
Kelly Jiramhlim

Raymond Bee
Lisa Bertucci
John Blifford
Michael Bohannan
Nicall Bowner
Conahl Bragg
Kesha Bragg
Philip Brown
Conald Bruzz
James Bryant
David Burnight
Willard Burnight, II
Carol Carr
Andy Chanza
Dennis Chinnice
Terry Cicero
Edward Clark
George Coleman
Laura Crane
Louise Cunningham
Mike DelRosse
Amy Dixon
Dale Donelson
Carl Durham
Brent Durham
Vanessa Edward
Charles Eptuy
Cynthia Faruler
R.E. Fisher
Lewis Fogg
Joseph Ford
Larry Forrest
Davy Forth
Tracy Franklin
Heather Franklin
Anna Franklin
Owen Franklin
Mark Franklin
Barbara Franklin
Martha Franklin
Harry Franklin
Donald Franklin
Frank Franklin, Sr.
James Futtys
Ralph Gali
Darlene Garrison
Bob Grant
Mabel Griffith
Pictoria Hagan
Tim Hamilton
Steve Hannan
Steven Harris
Betty Jean Harris
Cheyer Hayes
Bobby Hayes
Charles Hayes
Barbara Hemple
Hope Hess
James Hickman
Shea Hiles
Al Hill
Mary Hitchaer
Kim Holding
Donald Hunt
Theodore Hitchin
A. Hutinski
Emma Hymer
Eddie Hymer
Cecebe Hymer
John James
Lucille James
Marlene Jenkins
Kass Jenkins
Clarence Jenkins, III
Linda Jones

Curtis Joyner
Carl Kerry
John King
Runell Kirkland
Russell Koxromblin
Helene Kuhn
Vicki Kuhn
Pattie Levick
Minnie Lincoln
George Lope
Pesrlie Lowler
Ella Mad
Mike Marine
Jack Marrow
Everett Marvin
Jannie Mauio
Earl Mauris
K. McCal
Shelly McCann
Annie McCoy
Barbara Meehan
Daidre Mercato
Barbara Messer
Sally Ann Mills
Lorri Mills, Sr.
Rammin Monteleone
Russel Morrin
R.W. Mounts
John Murphy
Chris Nastasi
Deidre Newkirk
Heather Newkirk
Kenneth Norman
George O'Neill
Dominick Pael
Kurt Parks
Richard Paz
John Perdry
Richard Perkins
Jones Pew
Jain Phampen
John Pherson
Edward Pipptin
George Porks
Martin Powell
Gregory Price
Joseph Rainner
Juanita Ramsey
Karl Renne
Margin Richard
Willie Ritchie
Lorraine Robinson
John Robinson
Hecty Rolon, Jr.
Eugene Sabo
Gilbert Schwegal
Donald Sheet
Edward Sheppard
Donna Sheppard
Robert Temmons
Perry Thulson
Richard Tinlow
Gary Tinpin
Dave Tull
Judy Turner
John Ueedles
Francis Vincent
Brian Wanbas
Joe Weats
Johnny Webber
Audrey Weber
Thomas Webster
Harold Weisgerber
Charles Weisgerber
Kenneth Weisgerber

Ralph Kates
John Kierman
Michelle Kingland
Frank Knight
William Kugler
Angela Kuhn
Kenneth Kuhn
Ruth Levy
Robert Lloyd
Kenneth Lore
Gary Mack
Angel Marchese
Thelma Markey
Bessy Marvin
Elocee Mash
Robert Maul
Gina Mave
Terri McCann
Patti McCann
Hazel McCoy
Kenneth Melvi
Naomi Merritt
Lewis Messer
Charles Mills
Robert Molwaneski
Henry Moon
Lyann Morris
Gus Murphy
Tod Naprava
Howard Nathan
Raymond Newkirk
Douglas Newton
Pruce Northan
Hettie Ortiz
C. Parf
Edward Thomas Parks
Vincent Peed
Ivan Pere
Christina Pew
Thomas Pew
Lawrence Pharoy
H.A. Pierce
James Pitna
George Porks, Jr.
Scott Parcell
R.H. Quan
Angelo Rambone
Bobby Raymond
Audrey Reynolds
Brian Richardson
Helen Ritchin
William Robinson
Pat Rodriguez
Edward Rymtin
Todd Salva
Andrew Shaker
Canmah Shepkand
Carolyn Sheppard
F.A. Shute
Rosula Thompson
Kenneth Thurjman
Robert Tinphung
Jaffrey Todd
Joseph Tupine
Joseph Tyme
Bion Ulmori
Sarn Vinuto
James Watson
Jonathan Webb
David Weber
Keith Weber
Jeff Weisgerber
Elizabeth Weisgerber
Arthur Weisgerber
Denise Weisgerber

Arthur Weisgerber, Jr.	Sherby Wells
Geraldine Wheaton	April Wheeln
Harvey White	Ella Wiggins
James Wilber	A. Will
Jesse Williams	Malcolm Williams
Jack Williams	Sharon Williams
Gwen Williams	Sheryl Williams
Alphonse Williams	Darrell Wilson
Perc Wilson	Loy Wine
Thama Wondword	John Wood
Donald Wood	Melissa Wood
Mary Ellen Wood	Philip Yarick
Ann Yarick	James Zeghen

Summary of Hearing Officer Recommendations and Agency Response;

Steve Herb, Assistant Director, Division of Fish, Game and Wildlife, served as hearing officer at the January 21, 1992 public hearing. After receiving testimony presented at the public hearing and written comments received during the comment period, Mr. Herb recommended that the Department adopt N.J.A.C. 7:25-18.12 and adopt the amendments to N.J.A.C. 7:25-18.1 and 18.5 with the following changes:

1. The language in N.J.A.C. 7:25-18.5(g) should be modified to clarify how the delayed entry system for gill nets will operate. These modifications should include expanding the eligibility requirements from those who purchased a gill net license in 1990 and 1991 to those who purchased a gill net license in 1990, 1991 and 1992 up to and including May 1, 1992. In addition, this section should be modified to indicate that beginning in license year 1993 an individual must have purchased a gill net license in one of the two previous years in order to avoid the two year waiting period.

2. In N.J.A.C. 7:25-18.5(g)5, 6vi and viii, minor editorial changes should be made to clarify those sections regarding the use of specific net mesh sizes during various seasons.

3. In N.J.A.C. 7:25-18.5(g)6vi and viii language should be incorporated to provide an exemption to the 3.25 inch mesh in Delaware Bay. This exemption should permit the use of staked and anchored gill nets with a minimum mesh of 2.75 inches stretch set within two nautical miles of the mean high water line in Delaware Bay. This modification would allow the same exemption to mesh size for staked and anchored gill nets as was provided for drifting gill nets and was unintentionally omitted from the proposal.

4. In N.J.A.C. 7:25-18.12(b) the language "Possession of hand line or rod and line with more than 10 weakfish shall be prima facie evidence of violation of this section," should be deleted.

5. In N.J.A.C. 7:25-18.12(e) and (i)2 the phrase, "After advertisement and public distribution of the Council meeting agenda and consultation with the Marine Fisheries Council," should be added to ensure that the public is aware and the Marine Fisheries Council has been consulted prior to the Commissioner modifying the weakfish closed seasons and/or otter trawl mesh size.

6. In N.J.A.C. 7:25-18.12(g) the words "landed in New Jersey" should be added to clarify that the "no sale" prohibition during the closed season only applies to fishermen landing their catch in New Jersey (otter trawl exempted during the fall closure). All references in this section to the wholesale or retail sale of fresh or frozen weakfish during the closed seasons should be deleted.

Mr. Herb's recommendations were accepted by the Department, and are set forth in more detail in the hearing officer's report. A copy of the hearing officer's report is available upon payment of the Department's normal changes for copying. Persons requesting copies should contact:

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Summary of Public Comments and Agency Responses:

The following is a summary of comments received on the Department's proposal and the Department's responses to the comments.

General

1. COMMENT: Several commercial gill net fishermen criticized the Department for not consulting with their segment of the fishery during the development of the proposal and indicated that the gill net fishery as a whole was not adequately considered.

RESPONSE: The Department disagrees with the commenter's statement. In developing the proposal, the Department actively solicited and obtained input from members of the regulated community. At several Marine Fisheries Council meetings, the Department and the public discussed a variety of options to protect and manage weakfish populations. In addition, the Department, along with the Council's Weakfish Committee, met with representatives of the party and charter boat associations, otter travel fishermen, fish dealers and gill netters from both the Atlantic Coast and Delaware Bay. Many of the provisions included in the proposal, especially the exemptions to the gill net mesh size and closed season in the Delaware Bay, were the result of specific recommendations by these user groups.

2. COMMENT: The Atlantic States Marine Fisheries Commission (ASMFC) asks for a 10 to 25 percent reduction in catch. Why is the State (New Jersey) going for the maximum reduction of 25 percent when some states are apparently reducing their catches by 15 percent?

RESPONSE: The ASMFC recommended a 25 percent reduction in annual exploitation be maintained for the next three years and directed that each state with directed weakfish fisheries (Massachusetts to North Carolina) implement a control strategy to achieve up to 25 percent reduction but not less than a 15 percent reduction in annual exploitation in 1992. These same states are to ensure that a control strategy is in effect to achieve a reduction in annual exploitation by 25 percent in 1993 and continue this reduction in exploitation through at least 1994.

Delaware and New Jersey are working cooperatively to implement management measures for Delaware Bay. Each is committed to a 25 percent reduction provided the other complies. A change now would result in the collapse of the bi-state agreement. Compatible regulations in New Jersey and Delaware were a major concern of the Delaware Bay Bi-State Weakfish Action Commission.

Most of the states have submitted proposals to the ASMFC to reduce mortality by at least 25 percent. North Carolina, which may be implementing lesser reductions in catch, will however, be required to reduce bycatch mortality in its shrimp trawl fisheries. Measures such as this will result in a significant reduction in the exploitation of juvenile weakfish. The only other state that may implement reductions of less than 25 percent would be Virginia.

In light of the agreement with Delaware, the present condition of the stock and the compliance of most states with the ASMFC recommentation, the Department feels that responsible management calls for the higher reduction rate to be implemented immediately.

3. COMMENT: If there is a resource problem all fisheries should be closed down, not just gill netting.

RESPONSE: The gill net fishery is not being singled out for restrictions to solve a resource problem, nor is gill netting being "closed down." The gill net catch of weakfish is being reduced 25 percent in keeping with the management recommendation of the Atlantic States Marine Fisheries Commission's (ASMFC) Weakfish Management Plan as are all other fisheries involved in weakfish harvests. The mechanism to achieve this reduction in the gill net fishery is the 13 inch minimum size limit, minimum mesh size and seasonal closures. However, some exemptions have been made to allow gill netting for other species to continue during the seasons when the harvest of weakfish is prohibited (see N.J.A.C. 7:25-18.12). The 25 percent reduction in the otter trawl fishery is being achieved through an 11 inch minimum size limit and a minimum mesh of three inches. The recreational fishery is being reduced by a 13 inch minimum size limit in combination with a 10 fish possession limit.

4. COMMENT: Why has no allowance been made for reductions caused by the Brandywine Shoal Restricted Area, the limited entry system in Delaware Bay or the increase in minimum length from nine to 13 inches.

RESPONSE: The Department disagrees with the commenter's assertion that the regulations make no allowance for the factors listed.

In developing the other aspects of the weakfish management program, the Department considered the effect of the increase in minimum size from nine to 13 inches. The Department has determined that the increase in minimum size will result in eight percent reduction in weakfish landings. Therefore, the other aspects (seasonal closures) of the program are designed to reduce landings by an additional 17 percent. Together, the actions set forth in the regulations are expected to achieve the goal of a 25 percent reduction.

In developing the weakfish management program, the Department also considered the effect of the establishment of the Brandywine Shoal Restricted Area and the effect of the limited entry system in Delaware

Bay. As discussed below, the Department has determined that these previous actions have not and most likely will not limit the catch of weakfish, and therefore cannot rely upon them to assist in achieving the 25 percent reduction.

The establishment of the Brandywine Shoal Restricted Area was designed to reduce the conflict between recreational and commercial fishermen in the area not to reduce weakfish landings. This restriction did not result in a reduction in weakfish landings. Total weakfish landings for several years following establishment of this area actually increased.

The limited entry provision was designed to reduce conflict in Delaware Bay not to limit the catch of weakfish. This provision, implemented in June 1991, has resulted in the authorization of in excess of 1900 nets in lower Delaware Bay. The desire of this restriction is to reduce the number of nets through attrition to a target level of 1000. Implementation of this aspect of the regulation has not reduced the potential fishing effort or weakfish harvest.

5. COMMENT: Commenters indicated that the proposal was not restrictive enough and recommended higher size limits, lower possession limits, greater mesh sizes and longer closed seasons.

RESPONSE: The intent of these regulations is to comply with the recommendation of the ASMFC to maintain an annual reduction in exploitation on weakfish by 25 percent over the next three years. Although the Department, as previously indicated, believes that a reduction of less than 25 percent would not be responsible, it also realizes that additional restrictions will place an unfair burden of management on New Jersey fishermen, as compared to the other states. In addition, more stringent restrictions in New Jersey would adversely impact enforcement of the regulations in both New Jersey and Delaware by creating significantly different provisions.

6. COMMENT: There has to be some form of quota used to keep from exceeding target catch.

RESPONSE: The concept of an aggregate quota was used in the sense that the Department used the average of the 1988, 1989 and 1990 gill net landings as a base figure to determine a 25 percent reduction in gill net landings. The recreational reduction was also determined using the average of the total recreational landings for 1989 and 1990 as the basis for determining creel and size limits that should reduce the catch the required amount. While the otter trawl fishery's reduction was based upon the percentage of fish that were less than a certain length, the three year average catch will be compared to this year's landings to determine if the intended reduction was achieved. The same sort of comparison between past landings and current landings will be used to determine whether the intended reductions were achieved in the other fisheries.

An attempt to establish an individual quota system was the subject of a proposal to manage weakfish in 1991 (see: 23 N.J.R. 1989(b)). At this point in time the Department does not have individual landing records or a mechanism for collecting this information which is necessary to implement an individual quota system. This proposal was therefore abandoned because accurate information upon which to base an individual quota system was not available. Legislation authorizing a permit to sell is being pursued. This will give the Department the information required to develop quota system if that is deemed appropriate at some future time.

7. COMMENT: One comment was received indicating that no consideration was given for the pound net fishery in Raritan Bay and the pound netters should not be included in the weakfish closed seasons.

RESPONSE: As discussed in the proposal, the Department believes that the burden of weakfish management should be imposed equitably upon all user groups, including recreational hook and line, commercial otter trawl, and all other commercial methods (which include gill nets and pound nets). Therefore, the regulations are intended to reduce weakfish exploitation by 25 percent for each of these groups. Based upon consultation with the regulated communities through the Marine Fisheries Council, the Department determined that the 25 percent reduction for pound netters could best be achieved through the 13-inch minimum size limit and the seasonal closures. Although only monthly landing data exists for pound net harvest, the data suggests that the pound net harvest can best be reduced by the seasonal closures.

The Department also determined that exempting pound netters from the seasonal closures would impair enforcement of the seasonal closures. If pound nets were exempted from seasonal closures, individuals could purchase pound net licenses or transfer catches to pound net harvesters and use these means to circumvent the closure on gill nets. Unless an enforcement officer was observing the actual harvest, it would be difficult to prove the method of harvest of any weakfish landed.

8. COMMENT: There is nothing in this proposal that addresses the impact of the Salem Nuclear Generating Station (SNGS) on weakfish. SNGS's weakfish "catch" should also be reduced 25 percent.

RESPONSE: This proposal is designed to reduce the catch of weakfish by New Jersey fishermen in accordance with the ASMFC Weakfish Management Plan. This effort is part of a coastwide effort to reduce pressure on the existing weakfish stock. The impact of SNGS is not part of the proposal. The Department is attempting to address the issue of the SNGS and its effects on the bay biota and does not feel that either action should be delayed until the other has been resolved. To ignore continued reduction of the weakfish stocks until the SNGS issue is resolved would be irresponsible management.

9. COMMENT: There appears to be a discrepancy in the figures indicating pounds of weakfish landed by gill net fishermen. In the economic impact section of the "quota proposal" (July 1, 1991), the figure of 470,000 pounds is attributed to the gill net fishery. In this proposal the number is 829,603 pounds.

RESPONSE: The 470,000 pounds cited in the economic impact section of the July "quota proposal" referred to the pounds of weakfish landed by gill net fishermen in 1989. The 829,603 pound figure in the economic impact section of the current proposal refers to the average gill net landings for all species for 1988, 1989 and 1990. Weakfish accounted for approximately 60 percent of this figure.

10. COMMENT: The proposal should include a three year sunset clause to insure that the regulation does not remain in effect for an extended period of time. The ASMFC plan only calls for a three year reduction. The proposed regulation should contain a scientific definition of recovery of the weakfish stock in order to avoid keeping the reduction to the catch in place longer than necessary.

RESPONSE: The Department does not agree with the commenters assertion that the ASFMC plan recommends that reductions in fishing mortality need only be implemented for a three year period. The ASMFC plan calls for a 25 percent reduction in the weakfish catch through 1994 at which time the data will be reviewed. If the stock has not begun a significant recovery, more stringent reductions may be recommended. If a recovery seems underway, the plan will be adjusted accordingly.

New Jersey administrative rules are currently subject to a "sunset" provision established by Governor Byrne's Executive Order No. 66, April 14, 1978. The entire chapter, including these regulations, will be reviewed in less than four years for effectiveness and applicability. In addition, in the case of this regulation, the ASMFC requires that a plan showing that the recommendation of the Weakfish Plan will be achieved, be prepared and submitted annually by each state to the ASMFC's Technical Committee for review and approval. Under these circumstances the department will be reviewing the effectiveness of this regulation annually and does not believe a three year "sunset clause" is necessary or appropriate.

The Department does not feel that a definition of stock recovery is feasible at this time or that the absence of such definition would work to keep the restrictions on harvest in place longer than necessary to ensure the recovery of the weakfish stock. Each state is required to prepare and submit to ASMFC's Technical Committee a plan to achieve the recommendations of the plan annually. In addition, various state and Federal agencies will continue to monitor weakfish landings and recruitment. This information will be reviewed annually to determine the status of the stock and any adjustments in management measures that may be required, including liberalizing management regimes as stock recovery is documented.

11. COMMENT: There should be a period of time during which changes in gill net mesh sizes are phased in so that old nets can be replaced by nets of the new mesh size as they wear out. It is expensive to have to buy new nets on short notice when you already have smaller mesh nets ready to use. The 3.25 inch minimum mesh size will make nets of a smaller size obsolete, effectively resulting in the loss of their purchase price.

RESPONSE: The Department recognizes this point and will make every effort to consider it for future changes in net mesh size. However, due to the depressed status of the weakfish stock, the implementation of the mesh restriction cannot be delayed as it would permit the taking of undersize fish thereby jeopardizing the recovery of the weakfish stock. Since 2.75 inches is the minimum size mesh that may be used in gill nets under the present regulation and 2.75 inch mesh gill nets may be used in the area of Delaware Bay extending two miles from the mean

high water line under the proposed regulation, gill net fishermen can use any legal nets they currently own to fish in this two mile area. Fishermen who do not or cannot fish this area might sell their smaller mesh nets to fishermen who do.

12. COMMENT: The otter trawl industry should have a quota not a minimum length because weakfish under the minimum length that are caught in the net will be thrown overboard.

RESPONSE: The Department recognizes that a minimum length alone would not necessarily reduce exploitation of the required amount. However, a minimum length in conjunction with a minimum trawl mesh site can accomplish this objective. The proposed regulation includes a minimum mesh size of three inches inside stretched mesh as well as an 11 inch minimum weakfish length for any otter trawl vessel in possession of 100 pounds or more of weakfish during the period September 1 through December 31. For the rest of the year otter trawl vessels will be subject to the 13 inch minimum size limit. It also includes provisions for adjusting the mesh size if new information warrants it and/or if the minimum length is increased. North Carolina is presently conducting studies on the retention of different length weakfish by different size mesh. The Department will utilize the results of that study to evaluate, and if necessary, adjust mesh size. A quota system for the otter trawl fishery would not address the concerns of the commenter, since undersized fish taken in the fishery without the implementation of a mesh requirement would still be killed and thrown overboard.

Also, as previously indicated in response to Comment 6, the Department does not currently have the detailed harvest information to establish a quota system nor does it have any mechanism in place to provide the timely reporting of harvest information upon which to monitor and enforce such a quota system.

N.J.A.C. 7:25-18.5(g)

13. COMMENT: Several comments were received concerning the delayed entry provision. Commenters indicated it should not be a part of this proposal because it affects all gill net fisheries and the delayed entry provision is not being implemented for other types of gear.

RESPONSE: The delayed entry provision for the gill net fishery is designed to benefit those individuals currently in the fishery. This provision requires that an applicant for a gill net license who did not purchase a license during 1990, 1991 or 1992 up to and including May 1, 1992 (or was in active military service during that time) is not eligible to receive a license until the second calendar year after applying for a license. Under these regulations, existing participants in the fishery will be working with a reduced catch, which is expected to increase the number of available fish. Without the delayed entry provision, newcomers to the fishery could reap the benefits of that increase. This result would be unfair to the existing participants, and would cause further stress on coastwide stocks. When the weakfish stock increases, participants in the fishery, who have had to reduce their catch, will be given the opportunity to benefit by increased harvests before new participants enter the fishery.

The number of gill net licenses issued has more than doubled since 1986 and increased 23 percent between 1990 and 1991 alone. No other gear has shown this pattern of rapid growth; thus, the concept of delayed entry was not as critical in fisheries involving the use of gear other than gill nets.

14. COMMENT: One commenter expressed concern that the delayed entry provisions will make it difficult for a fisherman to find a buyer for his gear if no return can be realized for two years.

RESPONSE: The Department recognizes that the delayed entry provision will somewhat diminish the number of buyers for gill netting equipment if an individual wishes to leave the fishery within the next two years. Potential buyers will be limited to those individuals currently in the fishery in New Jersey along with current and new fishermen from other jurisdictions. By 1995 new participants will be permitted into the gill net fishery and a fisherman will be able to deal with individuals entering the fishery in New Jersey under the delayed entry provision.

Although it is possible that this provision may have an adverse impact upon an existing participant who elects to leave the fishery in the near future, the Department believes that this is the most balanced approach to ensure fair treatment of existing participants in the fishery. As discussed in the previous comment, those participants in the fishery who have had to reduce their catch should be provided the opportunity to benefit from recovery of weakfish stocks before new participants enter the fishery.

15. COMMENT: Several commenters expressed concern that those fishermen who had not purchased license in 1990 or 1991 would be subject to the delayed entry provision. Under this provision, individuals who had purchased 1992 gill net licenses prior to the adoption of this rule, would not be eligible for a 1993 license and would be subject to the two year waiting period.

RESPONSE: The Department agrees with the comment that individuals who have already purchased a license in 1992 should not be subject to the waiting period and has modified the rule to include those individuals who purchased a gill net license in 1990, 1991 and 1992 up to and including May 1, 1992.

N.J.A.C. 7:25-18.5(g)6

16. COMMENT: Several individuals indicated that N.J.A.C. 7:25-18.5(g)6vi and viii should be changed to include reference to the exception to the 3.25 inch mesh size in Delaware Bay.

RESPONSE: The Department inadvertently omitted the exception in the above referenced sections. The intent was to include an exemption in mesh size for staked and anchored gill nets in Delaware Bay as was proposed for the section on drifting gill nets since these nets can be used interchangeably and capture fish in the same way. The adoption has been so modified.

17. COMMENT: The 3.25 inch mesh required by the regulation is too large for the taking of weakfish.

RESPONSE: The 3.25 inch minimum mesh size was chosen to capture the majority of 13 inch weakfish and release the majority of small fish. Available data from ASMFC indicate that a 3.25 inch stretch mesh is the appropriate size to utilize in conjunction with a 13 inch weakfish minimum length.

COMMENT: The minimum mesh size of 3.25 inches for all ocean gill net fisheries is too large. A smaller mesh size such as the 2.75 inch allowed within two nautical miles of the mean high water line (MHWL) of Delaware Bay is also needed in the ocean for the taking of menhaden, butterfish, croaker, kingfish and porgies. Why cannot the same type of exception be made for the ocean fisheries?

RESPONSE: The Department established the mesh exemptions for Delaware Bay as a result of discussions with the various user groups (including ocean gill net representatives) and the Council's Weakfish Committee. The 3.25 inch minimum mesh size was chosen to capture the majority of 13 inch weakfish and release the majority of small fish. Available data from ASMFC indicate that a 3.25 inch stretch mesh net is the appropriate size to utilize in conjunction with a 13 inch weakfish minimum length.

In the Department's discussions with user groups and the Council's Weakfish Committee, there was no suggestion that an exemption from the 3.25 inch mesh requirement was necessary for the ocean. Furthermore, the Department currently has no data to support the conclusion that such an exemption is necessary, or that the environmental impact of such an exemption would be minimal. However, the Department will continue to investigate this issue, and propose an exemption as an amendment to this rule if that investigation shows that an exemption would be appropriate.

19. COMMENT: The exemption to the 3.25 mesh size within two miles of the Delaware Bay shoreline should be extended to include the tributaries of Delaware Bay.

RESPONSE: This exemption already exists under the current rule. Those sections (N.J.A.C. 7:25-18.5(g)6v and vii) of the rule applicable to the use of gill nets in the tributaries of Delaware Bay already indicate that a minimum mesh of 2.75 inches is permitted. These sections were indicated as "No change" in the proposal. It should be noted that these existing provisions prohibit the use of gill nets in the tributaries of Delaware Bay during the period of May 16 through July 14. Nothing in the weakfish management section permits the use of gill nets in the tributaries of Delaware Bay during this period and this prohibition will be continued.

N.J.A.C. 7:25-18.12(a) and (b)

20. COMMENT: The minimum length for weakfish taken in the otter trawl fishery should remain at 12 inches and the minimum mesh size at 3.5 inches as originally proposed at 23 N.J.R. 1989(b) on July 1, 1991 instead of being lowered to 11 inches minimum length and 3 inches mesh.

RESPONSE: The intent of this superseding proposal is to equitably reduce the weakfish catch 25 percent for each of three major user groups. Data collected by the National Marine Fisheries Service (NMFS) and by the Department indicate that a minimum length of 11 inches for the otter trawl fishery would accomplish a 25 percent reduction. Any increase in the size limit would cause a much greater reduction in the otter trawl catch. The 11 inch size limit is only in effect September 1 through

December 31. The rest of the year the minimum size limit will be the same for all fisheries—13 inches. While the 3.5 inch mesh was appropriate for the 12 inch minimum length, the three inch mesh is appropriate for the 11 inch size limit. The Department is awaiting the results of an ongoing North Carolina study on weakfish retention in various mesh trawls. The Commissioner, after consulting with the Marine Fisheries Council, will have the ability to change the mesh size if new information indicates a more appropriate mesh. Prior to consulting with the Marine Fisheries Council, the Department will provide notice of the intent to discuss the potential adjustment in mesh size by placing the issue on the agenda of the Council meeting. The agenda is routinely distributed to interested parties no later than seven days prior to the meeting date. The distribution list includes recreational fishermen, fishing clubs, commercial fishermen, commercial fishing docks, other interested persons, and the Division designated newspapers, The Newark Star Ledger and The Press (Atlantic City). This arrangement allows for public input into the process at Marine Fisheries Council Meetings. In addition, the Department will provide notice to any person who provides the Department with his or her name and address and requests to be included on the mailing list for such notices.

The Department's intent is to raise the otter trawl minimum size limit over time until the size is consistent with other weakfish fisheries both within New Jersey and between other states. The minimum mesh size will be adjusted accordingly to minimize the catch of weakfish less than the legal minimum length.

21. COMMENT: The recreational catch of weakfish average 18 inches in length and 6.9 fish per boat from 1980-1987. How does a 10 fish, 13 inch minimum length reduce the catch by 25 percent?

RESPONSE: Current stock conditions have changed dramatically since the 1980-1987 period cited by the commenter; large fish no longer compose a significant portion of the population. Therefore, the Department has determined the minimum length requirement and possession limit will reduce the catch. The Department's choice of a 10 fish creel limit and a 13 inch minimum length is based on a table developed by the Weakfish Scientific and Statistical Committee formed by the ASMFC's Weakfish Management Board to review the Weakfish Plan. The table is based on coastwide recreational landings of weakfish in 1989 and 1990 and shows the reduction in catch achieved by various combinations of creel and length limits.

22. COMMENT: This provision of the proposal effectively ends the hook and line commercial fishery for weakfish. Some provision should be made to allow this fishery to continue.

RESPONSE: The Department recognizes that the daily possession limit of 10 weakfish at least 13 inches in length would substantially limit the potential income to be earned from the sale of weakfish by a hook and line fisherman. However, the Department has not made an exception to this limit for hook and line fishermen who sell their catch, because doing so would make it impossible to enforce the limits for recreational fishermen who do not.

New Jersey currently has no laws regarding the sale of fish (other than striped bass) caught by recreational hook and line fishermen; any hook and line fisherman can sell what he or she legally catches. The Department has no individual catch or sale records and, therefore, no way of distinguishing between commercial and recreational hook and line fishermen to allow the agency to address this issue. Accordingly, if a separate possession limit existed for commercial hook and line fishermen without such records, any recreational hook and line fisherman could avoid the recreational possession limit and take advantage of the larger commercial limit and reduce or eliminate the value of the creel limit proposed.

The Department supports pending legislation to authorize a permit to buy and sell fish. This legislation would also require purchasers to provide records regarding the weight by species of each transaction coded to the seller's permit number. The legislation would enable the Department to obtain the detailed harvest record needed to address this issue.

23. COMMENT: N.J.A.C. 7:25-18.12(b) should be changed to allow an individual tending his gill nets to have on board and to use a rod and line to fish for other species even if he is in possession of more than 10 weakfish.

RESPONSE: The provision to limit the number of weakfish to 10 for anyone in possession of a rod and line was intended to more effectively enforce the regulation by closing any potential loopholes regarding the recreational creel limit (10 fish). The Department agrees that commercial netters should not be subject to this provision and has deleted this provision from the regulation. At this time the Department does not believe this modification will significantly impact the enforceability of the recreational possession limit.

24. COMMENT: Several comments were received from otter trawl vessels and fish dealers that indicated support for the proposal. They emphasized the importance of the 11 inch minimum size limit for otter trawl vessels so they would be able to compete in the market with vessels from southern states.

RESPONSE: The Department, in agreement with the Marine Fisheries Council, proposed the 11 inch size limit for the otter trawl fishery based upon the rationale expressed by the commenters. However, the intent of the Department, over time, is to increase the size limit for the otter trawl fishery until the same size limit for weakfish exists for all fisheries in New Jersey. The proposal in North Carolina is to increase the size limit for its otter trawl fishery from 10, to 11 and finally to 12 inches. New Jersey's proposal of 11 inches was, in part, to permit New Jersey otter trawl fishermen to compete with those from North Carolina. As the minimum size limit is increased in North Carolina, it will be likewise increased in New Jersey. However, at this time the Department agrees that the 11 inch minimum size limit is appropriate.

N.J.A.C. 7:25-18.12(e)

25. COMMENT: If the spring closure is for the Delaware Bay fishery and the fall closure is for the ocean fishery, why are both areas closed during both closures?

RESPONSE: The proposal never intended that the closures would apply only to one area. Although the majority of the spring gill net harvest has occurred in Delaware Bay and the majority of the fall gill net harvest takes place in the ocean, the resultant closures were determined based on their being in effect in both places at both times. To modify the regulation so that the fall closure applies only to the ocean and the spring closure only to Delaware Bay would require that each closed season be lengthened. In addition, permitting the harvest of weakfish in one area but not the other would very seriously hamper enforcement of the regulation. It would be virtually impossible for enforcement personnel to determine the source of weakfish after they had been landed.

26. COMMENT: Several commenters suggested that the dates for the spring closure are wrong and indicated the closures should be between the end of April and the end of May. Most weakfish taken by gill net are taken during this time. The big weakfish in the Bay at this time are the "spawners" and should be protected.

RESPONSE: The purpose of the regulation is to equitably reduce the weakfish catch 25 percent. While May has historically been the month for large catches of weakfish, in recent years June landings have increased in both Delaware and New Jersey. Working in concert with Delaware, as requested by the ASMFC, the Department developed the proposed closed seasons to achieve the required reduction. The spring and fall closures accomplish this goal. It should be emphasized that the closures are designed to reduce the gill net harvest in accordance with the plan and not to necessarily protect spawning fish. The big weakfish that used to enter the Bay in late April and remain through May have drastically decreased in number over the last few years. The June closure, although not designed for the purpose of protecting spawners, may actually provide protection for the smaller fish that now make up the bulk of the spawning population.

27. COMMENT: The Commissioner of the DEPE should not have sole authority to set the closed seasons without public input.

RESPONSE: The provision to which the commenter refers states that the Commissioner may modify the closed seasons, within specified limits, upon notice published in the New Jersey Register. The Department believes that the rule must contain some provision for the Commissioner to act expeditiously to modify the timing and/or the length of the closed season in order to respond to the changes in the status of the stock. However, in an effort to provide the public the opportunity to have input into any changes, the Department has modified the language of this provision so the Commissioner may make modifications only after consulting with the Marine Fisheries Council. Prior to consulting with the Marine Fisheries Council, the Department will provide notice of the intent to discuss the potential adjustment of seasons by placing the issue on the agenda of the Council meeting. The agenda is routinely distributed to interested parties no later than seven days prior to the meeting date. The normal distribution list includes recreational fishermen and fishing clubs, commercial fishermen, commercial fishing docks, other interested persons, and the Division designated newspapers, The Newark Star Ledger and The Press (Atlantic City). In addition, the

Department will provide notice to any person who provides the Department with his or her name and address and requests to be included on the mailing list for such notices. This arrangement allows for public input into the process at Marine Fisheries Council meetings while retaining the ability for expeditious modifications to the closed season and otter trawl mesh size.

N.J.A.C. 7:25-18.12(f)

28. COMMENT: The two mile limit for the use of small mesh gill nets along the edge of Delaware Bay should be measured from the mean low water line, which is shown on the charts, instead of the mean high water line which is not.

RESPONSE: The Department has not made the suggested change, because the mean high water line is, in fact, shown on commonly used charts. On charts published by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Survey, the mean high water line is depicted by a solid black line. The Department will use this line on chart 12304 (Delaware Bay) as the starting point for measuring the two nautical mile exception in Delaware Bay. This chart is a standard nautical chart of Delaware Bay and is readily available for purchase at larger marinas or for inspection at Division of Fish, Game and Wildlife field stations.

29. COMMENT: Allowing staked and anchored nets within two miles of the shoreline will cause a problem with striped bass since they hug the shoreline.

RESPONSE: The exception to permit the use of 2.75 inch stretched mesh gill nets within two miles of the mean high water line does not open a new area to gill netting. Gill nets of this size have previously been permitted in this area, as well as the rest of the Bay. The purpose of this section of the regulation is to allow a gill net fishery for smaller species such as mehnaden, croaker, spot, etc., to continue at a time when the taking of weakfish is prohibited. The Department will be monitoring this fishery to ensure that the potential by-catch of non-target species such as striped bass and weakfish is minimal.

30. COMMENT: Several individuals requested that an ocean gill net fishery for species other than weakfish be permitted during the fall closed season.

RESPONSE: The rule does not restrict this activity. The fall closure prohibits the taking and possession of weakfish. Netting and harvest of other species during the fall weakfish closure is permitted.

31. COMMENT: Several commenters addressed the mesh sizes of gill nets in Delaware Bay stating that the proposal will prohibit the use of both staked and anchored gill nets with mesh sizes smaller than 3.25 inches during most of the fishing season. They further stated that the area of the bay (Delaware Bay) from the mean high water line out to two miles has a smaller mesh limit than the rest of the Bay and that the use of gill nets with smaller mesh (2.75 to 3.0 inches) will be permissible only within two miles of shore during the spring closure period.

RESPONSE: The commenters statements regarding the mesh size of gill nets in Delaware Bay are basically correct but there appears to be some confusion. The minimum mesh size for gill nets Statewide is 3.25 inches stretched except in Delaware Bay within two miles of the shoreline where the minimum mesh is 2.75 inches stretched. These mesh sizes are in effect year round. During the spring weakfish closed season, the mesh of nets used in Delaware Bay within two miles of the shoreline must be between 2.75 and 3 inches stretched.

N.J.A.C. 7:25-18.12(g)

32. COMMENT: Seafood dealers, fish markets and restaurants should be able to sell weakfish from other states during the spring closed season. Allowing only the sale of frozen weakfish is unfair to small dealers who do not have large freezer capacity. A reduction in the supply of fish created by a total ban on sale will increase the price to the consumer.

RESPONSE: The Department agrees with the commenter's statements concerning the sale of weakfish and has modified this section to allow for the sale of weakfish landed outside New Jersey during the spring closure. The Department does not anticipate that this reveison will significantly impact enforceability of the regulation.

N.J.A.C. 7:25-18.12(i)

33. COMMENT: One comment was received indicating that the "100 pounds of weakfish" was not the appropriate figure to represent a directed weakfish fishery for otter trawl vessels. The commenter suggested a percentage of the catch or 500 pounds be used instead.

RESPONSE: The Department has had experience with utilizing a percentage of the catch as a means of determining whether or not a vessel is in a directed fishery. Use of a percentage figure makes the regulation virtually uneforceable because of the difficulty to quantify the entire catch. Recent fishery management recommendations for Federal waters utilize the 100 pound figure to represent a directed fishery. In an effort to be consistent with these recommendations the Department believes that the 100 pound figure to indicate a directed fishery is appropriate. During meetings the Department and the Council's Weakfish Committee held with representatives from the otter trawl fishery, this part of the proposal was supported.

Summary of Agency-Initiated Changes;

1. N.J.A.C. 7:25-18.5(g)

The Department has incorporated language in this section to clarify how the delayed entry system for gill nets will operate. It indicates that anyone who does not pruchase a gill net license at least every other year will be subject to the two year waiting period before being able to purchase a gill net license in subsequent years.

2. N.J.A.C. 7:25-18.5(g)6

The Department inadvertently ommitted the words "and subject to the additional conditions specified in N.J.A.C. 7:25-18.12" in the proposal and has incorporated them into the adoption to make this section concerning drifting gill nets consistent with the sections concerning staked and anchored gill nets (N.J.A.C. 7:25-18.5(g)6vi and viii) considering these nets can be fished interchangeably and capture fish in the same way. The effect of this change is minimal. It will clarify that the mesh of drifting gill nets used in the Delaware Bay within two nautical miles of the Delaware Bay shoreline during the spring gill net closure in the bay must be between 2.75 inches and 3 inches stretched mesh as specified in N.J.A.C. 7:25-18.12(f)3.

3. N.J.A.C. 7:25-18.5(g)5, 6vi and viii

Minor editorial changes have been incorporated in these sections for the purpose of clarity.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

7:25-18.1 Size and possession limits

(a) A person shall not purchase, sell, offer for sale, or expose for sale any sea sturgeon measuring less than 42 inches in length, codfish measuring less than 12 inches in length, bluefish measuring less than nine inches in length, sea bass or kingfish measuring less than eight inches in length, or blackfish, mackerel or porgy measuring less than seven inches in length.

(b) A person shall not take from the marine waters in the State or have in his possession any summer flounder, commonly called fluke, under 13 inches in length, winter flounder under 10 inches in length, red drum under 14 inches in length, or weakfish under 13 inches in length except as provided in N.J.A.C. 7:25-18.12.

(c)-(o) (No change.)

7:25-18.5 General net regulations

(a)-(f) (No change.)

(g) Individuals intending to take fish with a net in the marine waters of this State pursuant to N.J.S.A. 23:5-24.2 shall, as required, apply to the Commissioner for a license and/or permit. To be eligible to purchase a ***1992*** license for a drifting, staked or anchored gill net the applicant shall have purchased a gill net license during 1990 ***,*** *[or]* 1991 ***or a 1992 license prior to May 1, 1992*** or provide documented proof of active military service within one year of application. An applicant who does not meet the above requirements must file an application, in person, with the Department in each of two consecutive years during the month of January. Such an applicant shall be eligible for gill net licenses in the following calendar year. ***Beginning in the license year (January 1-December 31) 1993, an applicant for a gill net license must have possessed a gill net license in one of the two previous years. Failure to purchase a gill net license in one of the prior two years shall subject the applicant to the two year waiting period described above.*** Availability of Delaware Bay Gill Net Permits shall be determined pursuant to N.J.A.C. 7:25-18.6 through 18.11. Upon receipt of the application, and the prescribed license fee, the Commissioner may,

in his or her discretion, issue single season licenses and/or permits as specified for each net type for the taking of fish with nets only as follows:

1.-4. (No change.)

5. Drifting gill nets shall be used only in the Atlantic Ocean, Delaware Bay, and the tributaries of Delaware Bay. The smallest mesh of any drifting gill net shall be not less than five inches stretched beginning February 12 through February 29*.* *[and not less than 3.25 inches stretched beginning]* ***From*** March 1 through December 15 ***the smallest mesh of any drifting gill net shall be not less than 3.25 inches stretched*** except in the tributaries of Delaware Bay and in Delaware Bay within two nautical miles of the mean high water line where the smallest mesh shall be not less than 2.75 inches stretched ***and subject to the additional conditions specified in N.J.A.C. 7:25-18.12***. These nets shall not individually exceed 200 fathoms in length. Individual drifting gill nets shall not be fastened together to form a series of nets exceeding 400 fathoms in length beginning February 12 through May 15 or exceeding 200 fathoms in length beginning May 16 through December 15. Drifting gill nets may be used for all species except those specifically protected.

i.-iv. (No change.)

v. Drifting gill nets shall be used in Delaware Bay only from February 12 through December 15, subject to the additional conditions specified in N.J.A.C. 7:25-18.12. For the purpose of this section, that portion of Delaware Bay defined by the New Jersey-Delaware boundary on the west, Loran C27180 on the east, and Loran C42830 on the north, during the period from May 15 through June 15, shall be known as the Brandywine Shoal Restricted Area.

(1)-(2) (No change.)

vi. (No change.)

6. Staked and anchored gill nets shall be used only in the Atlantic Ocean, Raritan Bay, Sandy Hook Bay, and the Delaware Bay and its tributaries. Staked or anchored gill nets shall not be fastened together to form a series of nets exceeding 400 fathoms in length from the beginning of the season through May 15 or exceeding 200 fathoms in length beginning May 16 through December 15, subject to the additional conditions specified in N.J.A.C. 7:25-18.12.

i.-ii. (No change.)

iii. Staked and anchored gill nets may be used in the Atlantic Ocean for any species except those specifically protected only beginning February 12 through December 15, where individual gill net length shall not exceed 50 fathoms. The smallest mesh of any such net used in the Atlantic Ocean shall not be less than five inches stretched beginning February 12 through February 29 and not less than 3.25 inches stretched beginning March 1 through December 15. Staked or anchored gill nets shall not be used in the Atlantic Ocean within 100 fathoms of the marked channel of any inlet;

iv.-v. (No change.)

vi. Staked gill nets may be used in Delaware Bay only from February 1 through December 15, except as further limited by statute and/or rule. Individual staked gill net length shall not exceed 30 fathoms. The mesh of any such net used in Delaware Bay shall be 2.75 inches stretched beginning February 1 through February 29*.* *[and shall not be less than 3.25 inches beginning]* ***From*** March 1 through December 15 ***the smallest mesh of any staked gill net shall not be less than 3.25 inches stretch except within two nautical miles of the mean high water line where the smallest mesh shall not be less than 2.75 inches stretched and**[,]*** subject to the additional conditions specified in N.J.A.C. 7:25-18.12. Staked gill nets shall not be used in that portion of Delaware Bay known as the Brandywine Shoal Restricted Area as defined in (g)5v above;

vii. (No change.)

viii. The use of anchored gill nets is permitted in the Delaware Bay only from February 12 through December 15, except as further limited by statute and/or rule. Individual anchored gill net length shall not exceed 30 fathoms. The smallest mesh of any such net used in the Delaware Bay shall not be less than five inches stretched beginning February 12 through February 29*.* *[and not less than 3.25 inches from]* ***From*** March 1 through December 15 ***the smallest mesh of any anchored gill net shall not be less than 3.25 inches stretched except within two nautical miles of the mean high water line where the smallest mesh shall not be less than 2.75 inches stretched*** and subject to the additional conditions specified in N.J.A.C. 7:25-18.12. Anchored gill nets shall not be used in that portion of the Delaware Bay known as the Brandywine Shoal Restricted Area as defined in (g)5v above;

ix. (No change.)

7.-12. (No change.)

(h) (No change.)

7:25-18.12 Weakfish management

(a) A person shall not possess any weakfish less than 13 inches in length; provided, however, a person may possess a weakfish that was harvested by otter trawl and that measures not less than 11 inches in length from September 1 through December 31.

(b) A person angling with hand line or with rod and line shall not possess more than ten weakfish at any time. *[Possession of hand line or rod and line with more than 10 weakfish shall be prima facie evidence of violation of this section.]*

(c) A person shall not remove the head, tail or skin or otherwise mutilate to the extent that its length or species cannot be determined any weakfish, except after such weakfish has been landed to any ramp, pier, wharf, dock or other shore structure where it may be inspected for compliance with the appropriate size limits, except that weakfish fillets with the skin attached may be landed provided they are not less than the minimum size specified at N.J.A.C. 7:25-18.1(b) and at (a) above.

(d) Any person violating the provisions of (a), (b) or (c) above shall be liable to a penalty of $20.00 for each fish taken or possessed. Each fish taken or possessed shall constitute an additional separate and distinct offense.

(e) A person shall not take, or attempt to take, any weakfish by any means other than angling, and a person shall not possess more than ten weakfish, during the closed seasons beginning June 7 through June 30 and October 20 through December 31 except as provided in (g) and (i) below. ***After advertisement and public distribution of the Council meeting agenda and consultation with the Marine Fisheries Council, the**** *[The]* Commissioner may modify the closed seasons specified above upon notice provided the spring closure established is between May 15 and June 30 and the fall closure established is between October 1 and December 31. The Department shall provide notice of any change by filing and publishing in the New Jersey Register. All such notices shall be effective when the Department files notice with the Office of Administrative Law or as specified otherwise in the notice.

(f) A person shall not set, tend, or attempt to set or tend a drifting, staked or anchored gill net in Delaware Bay during the spring closed season specified in (e) above or as modified by the Commissioner by notice except as follows:

1. The use of drifting, staked or anchored nets with a stretched mesh not less than 10 inches is permitted;

2. The use of drifting, staked or anchored nets with a stretched mesh not less than 5.5 inches is permitted south of Loran C42800;

3. The use of drifting, staked or anchored nets with a stretched mesh not less than 2.75 inches or greater than 3.0 inches is permitted in Delaware Bay within two nautical miles of the mean high water line.

(g) A person shall not sell, barter, possess for sale or barter, or offer for sale or barter any weakfish ***landed in New Jersey**** during the closed seasons specified in (e) above, or as modified by the Commissioner, except *[for:

1. Weakfish]* ***weakfish**** harvested by otter trawl during the fall closure*.**[;

2. The wholesale or retail sale of fresh weakfish by fish dealers within seven days of the beginning of the spring closure; or

3. Frozen weakfish.]*

(h) Possession of greater than 10 weakfish at any time during the closed seasons shall be prima facie evidence of violation of the no sale provision (g) above.

(i) The following provisions shall apply to the use of otter or beam trawls for the taking of weakfish;

1. The possession of at least 100 pounds of weakfish on board a vessel or landed from a vessel shall constitute a directed fishery for weakfish.

2. A person utilizing an otter or beam trawl in a directed fishery for weakfish shall not use a net of less than 3.0 inches stretched mesh inside measurement applied throughout the cod end for at least 75 continuous meshes forward of the terminus of the net. ***After advertisement and public distribution of the Council meeting agenda and consultation with the Marine Fisheries Council, the*** *[The]* Commissioner may modify the mesh size, by notice as specified in (e) above, if more current scientific data indicate a more appropriate size. The possession of any net less than the minimum mesh specified above in this paragraph, or as modified by the Commissioner, on board a vessel in a directed fishery for weakfish is prohibited.

3. The procedures for determining compliance with the minimum mesh size and enforcement of this subsection shall be consistent with procedures prescribed pursuant to N.J.A.C. 7:25-18.1(c)2, 3, 5 and 6.

(a)

DIVISION OF SOLID WASTE MANAGEMENT

Notice of Administrative Correction

Division of Waste Management Rules

Fees for Solid Waste, Excluding Hazardous Waste Fees

Fee Schedule for Solid Waste Facilities

N.J.A.C. 7:26-4.3

Take notice that the Department of Environmental Protection and Energy has discovered an error in the text of N.J.A.C. 7:26-4.3(b) as currently published in the New Jersey Administrative Code (pages 26-70.119 and 70.120, Supp. 7-15-91). As proposed and adopted effective July 15, 1991, N.J.A.C. 7:26-4.3(b) was substantially amended, with a new table for annual fees for compliance monitoring services effective and operative July 15, 1991, except for the fees for those services pertaining to thermal destruction facilities which were to become operative March 1, 1992 (see 22 N.J.R. 3079(a) and 23 N.J.R. 2166(b)). Through a notice published in the February 18, 1992 New Jersey Register (24 N.J.R. 584(a)), the Department postponed the operative date of the fees pertaining to thermal destruction facilities until at least July 1, 1992. As currently published, N.J.A.C. 7:26-4.3(b) does not contain those amendments adopted effective and operative July 15, 1991. Through this notice of administrative correction, subsection (b) will be corrected to reflect those operative compliance monitoring fees. This notice is published in accordance with N.J.A.C. 1:30-2.7.

Full text of N.J.A.C. 7:26-4.3 as effective and operative July 15, 1991 follows:

7:26-4.3 Fee schedule for solid waste facilities

(a) (No change.)

(b) The permittee of a solid waste facility shall pay the annual fees listed in the following table for compliance monitoring services. The fees are payable in equal quarterly installments, due on January 1, April 1, July 1 and October 1 of each year.

Type of Facility	Compliance Monitoring Fees
Sanitary Landfill—operating at 31,200 tons per year (tpy) or more	$ 39,087
Sanitary Landfill—operating at less than 31,200 tpy	$ 6,013
Transfer Stations and Materials Recovery Facilities—operating at 31,200 tpy or more	$ 12,027
Transfer Stations and Materials Recovery Facilities—operating at less than 31,200 tpy	$ 4,510

(c)-(h) (No change.)

OTHER AGENCIES

(b)

DELAWARE RIVER BASIN COMMISSION

Notice of Administrative Correction

Comprehensive Plan and Water Code of the Delaware River Basin: Retail Water Pricing to Encourage Conservation

Take notice that the Delaware River Basin Commission has discovered an error in the notice of adoption concerning retail water pricing to encourage conservation, published in the February 18, 1992 New Jersey Register at 24 N.J.R. 647(e). The heading of the notice of adoption reflects an erroneous adoption date of February 22, 1992; the correct adoption date is January 22, 1992. This notice of administrative correction is published pursuant to N.J.A.C. 1:30-2.7.

PUBLIC NOTICES

EDUCATION

(a)

STATE BOARD OF EDUCATION

Notice of Public Testimony Session April 15, 1992

Take notice that the following agenda items are scheduled for Notice of Proposal in the April 6, 1992 New Jersey Register and are, therefore, subject to public comment. Pursuant to the policy of the New Jersey State Board of Education, a public testimony session will be held for the purpose of receiving public comment on Wednesday, April 15, 1992 from 4:00 P.M. to 6:00 P.M. in the State Board Conference Room, Department of Education, 225 West State Street, Trenton, New Jersey.

To reserve time to speak call the State Board Office at (609) 292-0739 by 12:00 noon Friday, April 10, 1992.

Rule Proposals: N.J.A.C. 6:28, Special Education Code amendments (Plan-to-Revise). N.J.A.C. 6:26, Establishment of Pupil Assistance Committees Code, new rules.

Please Note: Publication of the above items are subject to change depending upon the actions taken by the State Board of Education at the March 4, 1992 monthly public meeting.

ENVIRONMENTAL PROTECTION AND ENERGY

(b)

NEW JERSEY LOW-LEVEL RADIOACTIVE WASTE DISPOSAL FACILITY SITING BOARD

Notice of Public Meeting on Approval of Annual Budgets for Fiscal Years 1992 and 1993

Take notice that, pursuant to N.J.A.C. 7:60-1.4(b), the New Jersey Low-Level Radioactive Waste Disposal Facility Siting Board will hold its annual meeting to approve the budget for Fiscal Years 1992 and 1993, July 1, 1991 through June 30, 1992 and July 1, 1992 through June 30, 1993, respectively. The public meeting will be held on April 23, 1992, in the Tenth Floor Conference Room at Station Plaza III, 44 South Clinton Avenue, Trenton, New Jersey. The public meeting will begin at 9:30 A.M. At the public meeting, the Board will take comments on the proposed budget. A copy of the proposed budget may be obtained from the N.J. Low-Level Radioactive Waste Disposal Facility Siting Board, CN 410, Trenton, N.J. 08625-0410, or call (609) 777-4247.

(c)

NEW JERSEY CLEAN AIR COUNCIL

Notice of Public Hearing Impact on the Public of the New Clean Air Act Requirement

Take notice that the New Jersey Clean Air Council pursuant to the New Jersey Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq., will hold a public hearing entitled "Impact on the Public of the New Clean Air Act Requirement." **The public hearing** will be held at the following time and place:

Tuesday, April 21, 1992
9:00 A.M. to Noon; 1:00 P.M. until the end of testimony
Lewis Herrmann Labor Education Center Auditorium
Ryders Lane west of Route #1
Rutgers University, New Brunswick, NJ

The 1990 Clean Air Act Amendments (CAAA) will have significant impacts on the citizens of New Jersey. The Clean Air Council (CAC) believes the citizens of New Jersey need to fully understand how the CAAA requirements will affect them personally and how much it will cost. A difficult consequence of the requirements will be the need for individual social change.

The Clean Air Council seeks statements and comments from the public on such topics as: 1) new requirements for; your trip to work, your new car, getting your car inspected, and the gasoline you buy; and 2) Public Transportation—current problems and future plans.

Persons wishing to make oral presentations are asked to reserve a 15 minute time period by telephoning or writing to the following addressee:

Ms. Valerie Powers
New Jersey Department of Environmental Protection and Energy
Office of Energy
CN027
401 East State Street
Trenton, New Jersey 08625
(609) 292-6710

Presenters should bring 15 copies of their remarks to the hearing for use by the Council members, the hearing transcriber, and the press. The hearing record will be held open for 15 days following the date of the public hearing so that additional written testimony can be received. **Submit written comments** by May 6, 1992 to the following addressee:

Mr. Irwin Zonis
Peridot Chemicals (NJ) Inc.
1680 Route 23 North
Wayne, NJ 07470

The Clean Air Council wants to explore the following questions at the hearing:

1. How can the public help solve air pollution problems in New Jersey? What will the public be required to do?
2. What are the possible impacts—of having to get your car inspected under the new proposed more extensive vehicle inspection procedures? Of having to buy the California Car? Of having to use reformulated fuels? Of driving an old car?
3. How can you change your driving habits to reduce air pollution? What will you be required to do?
4. What are State and public transportation agencies doing?
5. What are the expected benefits of improving air quality? What will it cost?

(d)

BUREAU OF RELEASE PREVENTION

Notice of Receipt of Petition For Rulemaking N.J.A.C. 7:1E-4.6

Petitioner: Fuel Merchants Association of New Jersey.

Take notice that on February 10, 1992, the Department of Environmental Protection and Energy (Department) received a petition for rulemaking concerning the Department's regulations governing discharges of petroleum and other hazardous substances, N.J.A.C. 7:1E. Specifically, the petitioner seeks an amendment extending the deadline for submitting the maps to be included in the discharge prevention, containment and countermeasure (DPCC) plans and the discharge cleanup and removal (DCR) plans required under N.J.A.C. 7:1E-4. N.J.A.C. 7:1E-4.6 requires that all major facilities with a storage capacity for hazardous substances of all kinds of at least 300,000 gallons, but less than one million dollars, must submit a DPCC plan and DCR plan by February 1, 1992.

The petitioner, the Fuel Merchants Association of New Jersey, asserts that there is a lack of commercially available basemaps and that there is no guideline document from the Department; the petitioner concludes that in the absence of the basemaps and guideline document, its members cannot create the required maps in a prompt and economically feasible manner.

(a)

OFFICE OF REGULATORY POLICY

Amendment to the Ocean County Water Quality Management Plan

Public Notice

Take notice that on February 5, 1992, pursuant to the provisions of the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., and the Statewide Water Quality Management Planning rules (N.J.A.C. 7:15-3.4), an amendment to the Ocean County Water Quality Management Plan was adopted by the Department. This amendment, which was proposed by Karl Held, changes the designation in the Stafford Township Wastewater Management Plan of the site of Cedar Grove Estates, Lot 26, Block 133, from "Sewer Service Area to Existing Development Only" to "Sewer Service Area". The wastewater will be treated at the Ocean County Utility Authority's Southern Water Pollution Control Facility. The proposed use of the site is 18 single family dwellings.

(b)

OFFICE OF REGULATORY POLICY

Amendment to the Ocean County Water Quality Management Plan

Public Notice

Take notice that the New Jersey Department of Environmental Protection and Energy (NJDEPE) is seeking public comment on a proposed amendment to the Ocean County Water Quality Management (WQM) Plan. This amendment, which was proposed by the Jackson Township Board of Education, would designate the site of the Jackson Township public facilities, located at the junction of Conventry and Van Hiseville Roads, as a sub-regional service area of the Ocean County Utility Authority's (OCUA) Northern Water Pollution Control Facility (WPCF). This site is presently designated in the Jackson Township Wastewater Management Plan (WMP) as served by an on-site treatment facility with discharge to surface water (NJPDES Permit Number NJ0029513). The permitted flow from this existing facility is 100,000 gallons per day. Currently the site is within the Ocean County Central Wastewater Management Planning Area but not within the OCUA Central Service Area as delineated in the Jackson Township WMP. Also, as part of this amendment, it is proposed that a dedicated force main be built to convey wastewater to the OCUA Northern WPCF.

The public facilities to be served include the following Board of Education buildings: Switlik School, Switlik School portables, Clayton Building-High School, Memorial Building-High School, administration building and field house; the Jackson Township municipal building and the police station.

This notice is being given to inform the public that a plan amendment has been proposed for the Ocean County WQM Plan. All information related to the WQM Plan and the proposed amendment is located at the Ocean County Planning Board, Court House Square, CN 2191, Toms River, New Jersey 08754; and the NJDEPE, Office of Regulatory Policy, 3rd Floor, 401 East State Street, CN-029, Trenton, New Jersey 08625. It is available for inspection between 8:30 A.M. and 4:00 P.M., Monday through Friday. An appointment to inspect the documents may be arranged by calling the Office of Regulatory Policy at (609) 633-7021.

Interested persons should submit written comments on the proposed amendment to Mr. Alan Avery, Ocean County Planning Board, at the address cited above. A copy of the comments should be sent to Mr. Ed Frankel, Office of Regulatory Policy, at the NJDEPE address cited above. All comments must be submitted within 30 days of the date of this notice. All comments submitted by interested persons in response to this notice, within the time limit, shall be considered by NJDEPE with respect to the amendment request.

Any interested person may request in writing that NJDEPE hold a nonadversarial public hearing on the amendment or extend the public comment period in this notice up to 30 additional days. These requests must state the nature of the issues to be raised at the proposed hearing or state the reasons why the proposed extension is necessary. These requests must be submitted within 30 days of this notice to Mr. Frankel at the NJDEPE address cited above. If a public hearing is held, the public comment period in this notice shall be extended to close 15 days after the public hearing.

(c)

OFFICE OF REGULATORY POLICY

Amendment to the Upper Raritan Water Quality Management Plan

Public Notice

Take notice that on February 5, 1992, pursuant to the provisions of the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., and the Statewide Water Quality Management Planning rules (N.J.A.C. 7:15-3.4), an amendment to the Upper Raritan Water Quality Management Plan was adopted by the Department. This amendment, which was submitted by Duke Farms, expands the sewer service area of the Somerset-Raritan Valley Sewerage Authority to include approximately 54 acres of Lot 1, Block 49 of Hillsborough Township. Service will be provided to the Duke Farms main residence and four existing cottages.

(d)

OFFICE OF REGULATORY POLICY

Amendment to the Upper Raritan Water Quality Management Plan

Public Notice

Take notice that the New Jersey Department of Environmental Protection and Energy (NJDEPE) is seeking public comment on a proposed amendment to the Upper Raritan Water Quality Management (WQM) Plan. This amendment, which was proposed by the Glen Meadows/Twin Oaks Homeowners Association, would amend the Clinton Township Wastewater Management Plan with respect to the proposal for the Glen Meadows and Twin Oaks developments. It is proposed that a single wastewater treatment plant be constructed to serve a total of not more than 63 homes within the two developments. The design capacity of the new facility will be 25,000 gallons per day. The facility will discharge treated effluent to an intermittent tributary of the South Branch Raritan River. The existing Twin Oaks community septic system will be abandoned.

This notice is being given to inform the public that a plan amendment has been proposed for the Upper Raritan WQM Plan. All information related to the WQM Plan and the proposed amendment is located at the NJDEPE, Office of Regulatory Policy, 401 East State Street, 3rd Floor, CN-029, Trenton, New Jersey 08625. It is available for inspection between 8:30 A.M. and 4:00 P.M., Monday through Friday. An appointment to inspect the documents may be arranged by calling the Office of Regulatory Policy at (609) 633-7021.

Interested persons may submit written comments on the proposed amendment to Mr. Edward Frankel, at the NJDEPE address cited above with a copy sent to Mr. James F. Cosgrove Jr., Omni Environmental Corporation, The Princeton Corporation Center, Three Independence Way, Princeton, New Jersey 08540. All comments must be submitted within 30 days of the date of this notice. All comments submitted by interested persons in response to this notice, within the time limit, shall be considered by NJDEPE with respect to the amendment request.

Any interested person may request in writing that NJDEPE hold a nonadversarial public hearing on the amendment (or extend the public comment period in this notice up to 30 additional days). These requests must state the nature of the issues to be raised at the proposed hearing and must be submitted within 30 days of the date of this notice to Mr. Frankel at the NJDEPE address cited above. If a public hearing for the amendment is held, the public comment period in this notice shall be extended to close 15 days after the public hearing.

(e)

OFFICE OF REGULATORY POLICY

Amendment to the Lower Delaware Water Quality Management Plan

Public Notice

Take notice that the New Jersey Department of Environmental Protection and Energy (NJDEPE) is seeking public comment on a proposed amendment to the Lower Delaware Water Quality Management (WQM)

Plan. This amendment, which was proposed by the Deerfield Township Board of Education, would identify an on-site expansion of the existing ground water discharge from the Deerfield Township Elementary School located at Block 44, Lot 16, in Deerfield Township, Cumberland County to serve a proposed 24,400 square foot building addition. The proposed school expansion will bring the total functional school capacity to 560 students and staff.

This notice is being given to inform the public that a plan amendment has been proposed for the Lower Delaware WQM Plan. All information related to the WQM Plan and the proposed amendment is located at the NJDEPE, Office of Regulatory Policy, 401 East State Street, 3rd Floor, CN-029, Trenton, New Jersey 08625. It is available for inspection between 8:30 A.M. and 4:00 P.M., Monday through Friday. An appointment to inspect the documents may be arranged by calling the Office of Regulatory Policy at (609) 633-7021.

Interested persons should submit written comments on the proposed amendment to Mr. Ed Frankel of the Office of Regulatory Policy, at the NJDEPE address cited above. A copy of the comments should be sent to Mr. John Helbig, Adams, Rehmann and Heggan Associates Inc., 850 South White Horse Pike, P.O. Box 579, Hammonton, New Jersey 08037. All comments must be submitted within 10 days of the date of this public notice. All comments submitted by interested persons in response to this notice, within the time limit, shall be considered by NJDEPE with respect to the amendment request.

Any interested person may request in writing that NJDEPE hold a nonadversarial public hearing on the amendment or extend the public comment period in this notice up to 30 additional days. These requests must state the nature of the issues to be raised at the proposed hearing or state the reasons why the proposed extension is necessary. These requests must be submitted within 10 days of this public notice to Mr. Frankel at the NJDEPE address cited above. If a public hearing is held, the public comment period in this notice shall be extended to close 15 days after the public hearing.

(a)

OFFICE OF REGULATORY POLICY

Amendment to the Sussex County Water Quality Management Plan

Public Notice

Take notice that an amendment to the Sussex County Water Quality Management (WQM) Plan has been submitted for approval. This amendment, submitted by Canger & Cassera, Inc., proposes new on-site ground water disposal systems to serve the Lake Ridge Townhouses, a residential townhouse development in the Borough of Hopatcong, Sussex County. The 18 unit townhouse development includes 12 two-bedroom units and six three-bedroom units.

This notice is being given to inform the public that a plan amendment has been developed for the Sussex County WQM Plan. All information dealing with the aforesaid WQM Plan and the proposed amendment is located at the Sussex County Planning Department, 55-57 High Street, Newton, New Jersey 07860; and the New Jersey Department of Environmental Protection and Energy (NJDEPE), Office of Regulatory Policy, CN-029, 3rd Floor, 401 East State Street, Trenton, N.J. 08625. It is available for inspection between 8:30 A.M. and 4:00 P.M., Monday through Friday. An appointment to inspect the documents may be arranged by calling either the Office of Regulatory Policy at (609) 633-7021 or the Sussex County Planning Department at (201) 579-0500.

The Sussex County Board of Chosen Freeholders will hold a **public meeting** on the proposed Sussex County WQM Plan amendment at which time all interested persons may appear and shall be given an opportunity to be heard. The public meeting will be held on Wednesday, April 15, 1992 at 6:10 P.M. in the Freeholder meeting room, County Administration Building, Plotts Road, Newton, New Jersey.

Interested persons may submit written comments on the amendment to Ms. Lyn Halliday at the Sussex County Planning Department address cited above, with a copy sent to Mr. Ed Frankel, Office of Regulatory Policy, at the NJDEPE address cited above. All comments must be submitted within 15 days following the public meeting. All comments submitted by interested persons in response to this notice, within the time limit, shall be considered by the Sussex County Board of Chosen Freeholders with respect to the amendment request. In addition, if the amendment is adopted by Sussex County, the NJDEPE must review the amendment prior to final adoption. The comments received in reply to this notice will also be considered by the NJDEPE during its review. Sussex County and the NJDEPE thereafter may approve and adopt this amendment without further notice.

HEALTH

(b)

ALCOHOLISM, DRUG ABUSE AND ADDICTION SERVICES

Notice of Public Forum on New Jersey's Environmental Tobacco Smoke and Youth Tobacco Use Control Issues and Laws

Take notice that the State Department of Health and the Department's Advisory Commission on Smoking OR Health announce a public forum to give concerned persons opportunity to discuss New Jersey's Environmental Tobacco Smoke and Youth Tobacco Use Control issues and laws.

Environmental tobacco smoke issues include:
- Protecting the nonsmokers' health
- Indoor air laws and enforcement methods
- Clear implementation provisions
- New Jersey Clean Indoor Air laws and violation penalties
- Indoor places for discussion include: government and private sector workplaces, restaurants and other public places.

Proposed youth tobacco use control discussion issues include:
- Increasing public awareness of tobacco use and health consequences
- Increasing public understanding of tobacco use as a major threat to children's health
- Counteracting cultural and social influences that encourage tobacco use
- Restricting children's access to tobacco

New Jersey has enacted over a dozen laws protecting the rights of all to breathe clean indoor air, as well as laws restricting cigarette sales to minors. The State Department of Health and the Commission on Smoking OR Health invite all concerned persons to speak out about these issues.

The meeting will be held on Wednesday, April 22, 1992 from 9 A.M. to 4 P.M. at Human Resources Development Institute
600 College Road, East, Auditorium
Princeton, New Jersey 08540

Persons wishing to present testimony or to request further information on this subject, please contact:
Ms. Janice Marshall, R.N., M.S.N.
Chief, Tobacco Use Control Program
Alcoholism, Drug Abuse and Addiction Services
129 East Hanover Street, CN 362
Trenton, New Jersey 08625
(609) 292-4414

Submit written comments to Ms. Marshall by May 1, 1992, 4:00 P.M.

(c)

HOSPITAL RATE SETTING

Financial Elements and Reporting Health Care for the Uninsured Appropriate Collection Procedures

Proposed Amendment: N.J.A.C. 8:31B-4.40

Authorized By: Frances J. Dunston, M.D., M.P.H., Commissioner, Department of Health (with approval of the Health Care Administration Board).

Authority: N.J.S.A. 26:2H-18.24, specifically 26:2H-18.33e (P.L. 1991, c.187) and N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5b and 26:2H-18(d).

Proposal Number: PRN 1992-119.

Submit written comments by April 15, 1992 to:
Kathleen A. Brennan, Esq.
Acting Director
Health Care for the Uninsured Program, Room 403
New Jersey Department of Health
CN 360
Trenton, NJ 08625

The agency proposal follows:

Summary

The proposed amendment to N.J.A.C. 8:31B-4.40 adds a supplemental collection step to those required for accounts reported as bad debt and paid as uncompensated care through the Chapter 83 system and the Health Care Trust Fund.

Hospitals are currently required to do certain in-house collection steps. They are required to take legal action on delinquent accounts when warranted and may also use outside collection agencies. Eventually, the agency or attorney either collects the account or determines that the account is not collectible. At that point, it is returned to the hospital. Generally no further work is done on these accounts or on the small number of accounts that the hospital does not send for outside collection efforts.

The proposed amendment requires hospitals to transfer these inactive accounts to the State or its agents for further collection activity. At this point, hospitals have been paid for these accounts by the Health Care Trust Fund. Under current law, the amounts collected by the State or its agents would be returned to the hospital and reported as a recovery of bad debt.

Social Impact

The proposed amendment will enhance the equity of the payment system by ensuring that insurers and persons able to pay hospital bills do so. Patients who may have had their bills deemed uncollectible by the hospital's collection agency or attorneys will be subject to additional collection efforts.

Economic Impact

The proposed amendment will have a positive economic impact on hospitals and the Health Care Trust Fund because all amounts collected will increase the hospital's collections and cash flow, and ultimately reduce the hospitals uncompensated care draw. The proposed amendment may have a negative economic impact on insurers and patients who pay amounts that previously would have been deemed uncollectible and gone inactive.

Regulatory Flexibility Statement

The proposed amendment affects only those hospitals whose rates are set by the Hospital Rate Setting Commission. There are no hospitals subject to the amendment with fewer than 100 full-time employees. Therefore, the amendment has no impact on any institution which would qualify as a small business pursuant to the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. and a regulatory flexibility analysis is not required.

Full text of the proposal follows (additions indicated in boldface **thus**):

8:31B-4.40 Appropriate collection procedures

(a)-(h) (No change)

(i) After a hospital has determined that further in-house collection efforts or outside collection action would be futile or has otherwise ceased collection efforts, the hospital shall transfer the record of the account, in an automated format specified by the Department, to the Department or its agent for supplemental collection activities.

HUMAN SERVICES

(a)

DIVISION OF YOUTH AND FAMILY SERVICES

Notice of Availability of Grant Funds
Facility Repairs and Renovations to Meet Child Care Center Life/Safety Requirements

Take notice that in compliance with N.J.S.A. 52:14-34.4, 34.5 and 34.6, the Department of Human Services announces the following availability of funds:

A. Name of grant program: Facility Repairs and Renovations to Meet Child Care Center Life/Safety Requirements.

B. Purpose for which the grant program funds shall be used: This program is intended to complete one-time repairs or minor renovations to, or to purchase equipment for, new or existing child care facilities, so that these facilities may comply with licensing life/safety regulations and applicable state and local fire and health codes.

C. Amount of money in the grant program: Funding in the amount of $500,000 in Federal funds under the Child Care and Development Block Grant is available for this program. The minimum for each grant awarded to licensed child care centers is $5,000, the maximum is $50,000. There is no match requirement.

D. Organizations which may apply for funding under this program: Public or private, not-for-profit or for-profit licensed child care centers within the State of New Jersey, as defined in N.J.A.C. 10:122, Manual of Requirement for Child Care Centers (N.J.S.A. 30:5B-1 et seq.).

E. Qualifications needed by an applicant to be considered for funding: Applicants must make a commitment to serve children who are eligible for the "New Jersey Cares for Kids" child care certificate program, children in protective services, children with special needs, and children with parents who are participating in the REACH program.

F. Procedure for eligible organizations to apply: Agencies interested in applying for these funds may obtain a copy of the Request for Proposal from:

George Kobil, Policy Analyst
Office of Policy, Planning and Support
New Jersey Division of Youth and Family Services
CN 717
50 East State Street
Trenton, New Jersey 08625-0717
Telephone number (609) 984-0459.

Additional information and technical assistance concerning life/safety requirements for licensure is available by contacting:

Day Programs Unit
DYFS Bureau of Licensing
CN 717
Trenton, New Jersey 08625-0717
Telephone: (609) 292-1021 or (609) 292-9220

G. Address to which applications must be submitted: Agencies interested in applying for these funds should submit one (1) signed original and four (4) copies of the completed Request for Proposal and all required supporting materials and copies to the appropriate DYFS Regional Administrator listed below:

- For projects located in Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester and Salem Counties:

William Readel, Regional Administrator
DYFS Southern Regional Office
392 North White Horse Pike
P.O. Box 594
Hammonton, New Jersey 08037

- For projects located in Essex, Hunterdon, Mercer, Middlesex, Monmouth, Ocean, Somerset and Union Counties:

Colleen Maguire, Regional Administrator
DYFS Central Regional Office: Trenton
50 East State Street, 5th Floor
CN 717
Trenton, New Jersey 08625-0717

- For projects located in Bergen, Hudson, Morris, Passaic, Sussex, and Warren Counties:

Charles Venti, Regional Administrator
DYFS Northern Regional Office
100 Hamilton Plaza, Room 710
Paterson, New Jersey 07505

H. Deadline by which applications must be submitted: The completed application and all required supporting materials and copies must be postmarked by April 15, 1992, or, if hand-delivered, by 5:00 P.M. on April 15, 1992, to the appropriate DYFS Regional Administrator listed above.

I. Date by which applicants shall be notified of acceptance or rejection: May 1, 1992.

(a)

DIVISION OF MENTAL HEALTH AND HOSPITALS

Notice of Availability of Grant Funds
Hospital Census Reduction/Community Expansion Project (450 Plan)

Take notice that, in compliance with N.J.S.A. 52:14-34.4, 34.5 and 34.6, the Department of Human Services hereby announces the availability of the following grant program funds:

Name of Program: Division of Mental Health and Hospitals—Hospital Census Reduction/Community Expansion Project (450 Plan).

Purpose: The purpose of the funding is to establish intensive mental health services in a structured residential setting within the community for 20 Middlesex County clients discharged from state psychiatric hospitals under the Hospital Census Reduction/Community Expansion Project (450 Plan). These services include, but are not limited to, day treatment, outpatient programming, medication monitoring, transportation, semi-independent living skills, self-care skills, communication, and vocational/educational opportunities. Individuals suffering from mental illness who can benefit from a less restrictive environment but require a highly structured supportive environment may reenter the community through this program.

Amount of available funding under this program: The Division anticipates that program funding will not exceed $309,060. This amount is net of third party income and/or fees which are expected to offset program operational costs.

Organizations which may apply for funding under this program: Any non-profit agency/hospital in New Jersey which meets qualifications of Department of Human Services as specified in the Contract Policy and Information Manual and currently provides mental health services, or is capable of providing Mental Health services needed by clients. Such an agency/hospital may itself provide residential services or subcontract for such service to a licensed Residential Health Care Facility (RHCF) or Class C Boarding Home. A Residential Health Care Facility is licensed by the Department of Health. A Class C boarding home shall be one licensed by the Department of Community Affairs. If a new community residence is to be developed for 15 or fewer clients, the final site selected must comply with Division of Mental Health and Hospitals licensing regulations and, if applicable, be in compliance with Department of Community Affairs or Department of Health licensing. If acquisitions through DMH&H capital funding is anticipated, an interim location of the program must be provided. The award of capital funds is not guaranteed and applications must be made separately once awards of program funding have been made. Consideration for capital funding will be based on available resources and capital feasibility requirements.

Procedure for eligible organizations to apply: Interested applicants may request an "application package" to be mailed to them by contacting Dale M. Watson, Program Analyst, Division of Mental Health and Hospitals (DMH&H) at (609) 777-0685 or by visiting the DMH&H offices at Capital Center, 3rd Floor, 50 East State Street, Trenton, New Jersey 08625. Applications may also be obtained between 8:30 A.M. and 4:00 P.M. (pick-up only) from the office of the County Mental Health Administrator, 701 Amboy Avenue, Woodbridge, New Jersey 07095.

Completed applications (five copies) must be submitted to:
Theresa C. Wilson, Assistant Director
Division of Mental Health and Hospitals
Central Region
Capital Center—3rd Floor
CN727
Trenton, New Jersey 08625-0727

A copy of the completed application must be also submitted to:
Tina McCormack, Mental Health Administrator
County of Middlesex
Department of Human Services
Mental Health Administration
701 Amboy Avenue
Woodbridge, New Jersey 07095

Deadline by which applications must be submitted: May 1, 1992.

Date the applicant is to be notified of acceptance or rejection: May 29, 1992.

STATE

(b)

NEW JERSEY STATE COUNCIL ON THE ARTS

Notice of Availability of Grants
Organization Grant Application
Fiscal Year 1993 (July 1, 1992-June 30, 1993)

Take notice that the New Jersey State Council on the Arts, acting under the authority of Public Law 1966, Chapter 214, hereby announces the availability of the following grant program.

Name of Program: Organization Grant Application, Fiscal Year 1993.
General Operating Support
Special Project Support
Arts Basic to Education Grant

Purpose: To stimulate and encourage the production and presentation of the arts in New Jersey, and to foster public interest in and support of the arts in New Jersey, through the award of matching grants to eligible organizations.

Eligible Applicants: Must be a New Jersey incorporated, nonprofit organization that is tax exempt 501(c)(3) or (4) by determination of the Internal Revenue Service; must have been in existence and active for at least two years prior to making application; must have a board of trustees empowered to formulate policies and be responsible for the administration of the organization, its programs and its finance; and must comply with all existing State and Federal regulations and laws as described in the Guidelines and Application.

Ineligible Applicants: Organizations that are unincorporated, incorporated in another state or incorporated as profit-making entities.

Grant Size: Grants will range in size, but generally will not exceed 20 percent of projected general operating expenses or 50 percent of project expenses.

Amount of Available Funding for the Program: Will depend on the finalization of the Council's legislative appropriation for FY 93.

Match: All grants offered under this program must be matched at least dollar-for-dollar. In-kind contributions are not allowed as any part of the match. All grants offered through this program must be matched with cash. General Operating Support applicants should project a 4:1 match of applicant cash to NJSCA dollars, Special Project applicants, (who are arts organizations), a 1:1 match of applicant cash to NJSCA dollars and Special Project applicants, (who are **not** an arts organization), a 3:1 match of applicant cash to NJSCA dollars. Indirect Costs, however, cannot be included.

Deadline for Submission: Complete applications, including all support materials, must be postmarked or delivered to Council Offices no later than April 3, 1992, (5:00 P.M. if delivered in person to office). All prospective applicants that **are not** direct recipients of FY 92 NJSCA Grants must submit a Letter of Intent.

Decisions: All complete applications by eligible applicants will be evaluated by an independent panel of experts and by the NJSCA according to the published criteria for evaluation. The Council's grants committee working in conjunction with the policy and planning committee reviews the evaluations of all applicants as well as Council funding priorities and issues. Its final recommendations are voted upon by the full Council at its regularly scheduled annual meeting, tentatively scheduled for July 28, 1992. Applicants are notified in writing of the Council's decision within six (6) weeks of the annual meeting.

To Receive a Set of Guidelines and Application Forms: Call (609) 292-6130 or write GRANTS 93, New Jersey State Council on the Arts, CN-306, Trenton, NJ 08625.

REGISTER INDEX OF RULE PROPOSALS AND ADOPTIONS

The research supplement to the New Jersey Administrative Code

A CUMULATIVE LISTING OF CURRENT PROPOSALS AND ADOPTIONS

The **Register Index of Rule Proposals and Adoptions** is a complete listing of all active rule proposals (with the exception of rule changes proposed in this Register) and all new rules and amendments promulgated since the most recent update to the Administrative Code. Rule proposals in this issue will be entered in the Index of the next issue of the Register. **Adoptions promulgated in this Register have already been noted in the Index by the addition of the Document Number and Adoption Notice N.J.R. Citation next to the appropriate proposal listing.**

Generally, the key to locating a particular rule change is to find, under the appropriate Administrative Code Title, the N.J.A.C. citation of the rule you are researching. If you do not know the exact citation, scan the column of rule descriptions for the subject of your research. To be sure that you have found all of the changes, either proposed or adopted, to a given rule, scan the citations above and below that rule to find any related entries.

At the bottom of the index listing for each Administrative Code Title is the Transmittal number and date of the latest looseleaf update to that Title. Updates are issued monthly and include the previous month's adoptions, which are subsequently deleted from the Index. To be certain that you have a copy of all recent promulgations not yet issued in a Code update, retain each Register beginning with the February 3, 1992 issue.

If you need to retain a copy of all currently proposed rules, you must save the last 12 months of Registers. A proposal may be adopted up to one year after its initial publication in the Register. Failure to adopt a proposed rule on a timely basis requires the proposing agency to resubmit the proposal and to comply with the notice and opportunity-to-be-heard requirements of the Administrative Procedure Act (N.J.S.A. 52:14B-1 et seq.), as implemented by the Rules for Agency Rulemaking (N.J.A.C. 1:30) of the Office of Administrative Law. If an agency allows a proposed rule to lapse, "Expired" will be inserted to the right of the Proposal Notice N.J.R. Citation in the next Register following expiration. Subsequently, the entire proposal entry will be deleted from the Index. See: N.J.A.C. 1:30-4.2(c).

Terms and abbreviations used in this Index:

N.J.A.C. Citation. The New Jersey Administrative Code numerical designation for each proposed or adopted rule entry.

Proposal Notice (N.J.R. Citation). The New Jersey Register page number and item identification for the publication notice and text of a proposed amendment or new rule.

Document Number. The Registry number for each adopted amendment or new rule on file at the Office of Administrative Law, designating the year of adoption of the rule and its chronological ranking in the Registry. As an example, R.1992 d.1 means the first rule adopted in 1992.

Adoption Notice (N.J.R. Citation). The New Jersey Register page number and item identification for the publication notice and text of an adopted amendment or new rule.

Transmittal. A series number and supplement date certifying the currency of rules found in each Title of the New Jersey Administrative Code: Rule adoptions published in the Register after the Transmittal date indicated do not yet appear in the loose-leaf volumes of the Code.

N.J.R. Citation Locator. An issue-by-issue listing of first and last pages of the previous 12 months of Registers. Use the locator to find the issue of publication of a rule proposal or adoption.

MOST RECENT UPDATE TO THE ADMINISTRATIVE CODE: SUPPLEMENT JANUARY 21, 1992

NEXT UPDATE: SUPPLEMENT FEBRUARY 18, 1992

Note: If no changes have occurred in a Title during the previous month, no update will be issued for that Title.

N.J.R. CITATION LOCATOR

If the N.J.R. citation is between:	Then the rule proposal or adoption appears in this issue of the Register	If the N.J.R. citation is between:	Then the rule proposal or adoption appears in this issue of the Register
23 N.J.R. 799 and 924	March 18, 1991	23 N.J.R. 2899 and 3060	October 7, 1991
23 N.J.R. 925 and 1048	April 1, 1991	23 N.J.R. 3061 and 3192	October 21, 1991
23 N.J.R. 1049 and 1226	April 15, 1991	23 N.J.R. 3193 and 3402	November 4, 1991
23 N.J.R. 1227 and 1482	May 6, 1991	23 N.J.R. 3403 and 3548	November 18, 1991
23 N.J.R. 1483 and 1722	May 20, 1991	23 N.J.R. 3549 and 3678	December 2, 1991
23 N.J.R. 1723 and 1854	June 3, 1991	23 N.J.R. 3679 and 3840	December 16, 1991
23 N.J.R. 1855 and 1980	June 17, 1991	24 N.J.R. 1 and 164	January 6, 1992
23 N.J.R. 1981 and 2071	July 1, 1991	24 N.J.R. 165 and 318	January 21, 1992
23 N.J.R. 2079 and 2204	July 15, 1991	24 N.J.R. 319 and 508	February 3, 1992
23 N.J.R. 2205 and 2446	August 5, 1991	24 N.J.R. 509 and 672	February 18, 1992
23 N.J.R. 2447 and 2560	August 19, 1991	24 N.J.R. 673 and 888	March 2, 1992
23 N.J.R. 2561 and 2806	September 3, 1991	24 N.J.R. 889 and 1138	March 16, 1992
23 N.J.R. 2807 and 2898	September 16, 1991		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
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1:1	Uniform administrative procedure	24 N.J.R. 321(a)		
1:1-10.6	Discovery in conference hearings	24 N.J.R. 675(a)		
1:1-18.1	Initial decision in contested cases	23 N.J.R. 3406(a)	R.1992 d.46	24 N.J.R. 404(a)
1:6, 1:7, 1:10, 1:10A, 1:11, 1:13, 1:20, 1:21	Special hearing rules	24 N.J.R. 321(a)		
1:13A-18.2	Lemon Law hearings: exception to initial decision	23 N.J.R. 3682(a)		
1:31	Organization of OAL	24 N.J.R. 321(a)		
Most recent update to Title 1: TRANSMITTAL 1992-1 (supplement January 21, 1992)				
AGRICULTURE—TITLE 2				
Most recent update to Title 2: TRANSMITTAL 1991-6 (supplement August 19, 1991)				
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3:1-16	Mortgage processing rules: extension of comment period	24 N.J.R. 3(a)		
3:1-19	Consumer checking accounts	23 N.J.R. 3682(b)		
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3:6-4.5, 4.6	Banks and savings banks: extension of comment period regarding reporting of crimes	24 N.J.R. 3(a)		
3:12-1.1, 1.2, 1.3, 2.1, 2.2, 2.3, 2.5, 3.1, 3.2, 3.3, 4.1, 4.2, 4.3, 5.1–5.5, 5.7	Qualified corporations as fiscal or transfer agents	24 N.J.R. 675(b)		
3:21	Credit unions	23 N.J.R. 3686(b)	R.1992 d.92	24 N.J.R. 580(b)
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3:21-1	Low-income credit unions: correction to comment period deadline	23 N.J.R. 3196(a)		
3:21-1	Low-income credit unions: extension of comment period	24 N.J.R. 3(a)		
3:26-3.1, 3.2	Savings and loan associations: reporting of crimes	23 N.J.R. 2903(a)	R.1992 d.73	24 N.J.R. 580(a)
3:26-3.1, 3.2	Savings and loan associations: extension of comment period regarding reporting of crimes	24 N.J.R. 3(a)		
3:38-1.1, 1.9, 4.1, 5	Mortgage financing activities and real estate licensees	23 N.J.R. 3406(b)		
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5:18-1.1, 1.5, 2.4A, 2.6, 2.9, 4.1, 4.7, 4.11, 4.17	Uniform Fire Code: compliance and enforcement	23 N.J.R. 3552(a)	R.1992 d.104	24 N.J.R. 739(a)
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5:18-3	State Fire Prevention Code	23 N.J.R. 3554(a)	R.1992 d.105	24 N.J.R. 740(a)
5:18A-2.6	Fire Code enforcement: collection of fees	23 N.J.R. 3552(a)	R.1992 d.104	24 N.J.R. 739(a)
5:18A-2.9, 4.6	Fire Code enforcement: conflict of interest	24 N.J.R. 678(a)		
5:18C-4.2	Firefighter I certification	23 N.J.R. 2084(a)		
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5:23-1.1, 3.4, 3.11, 3.20, 3.20A	Uniform Construction Code: indoor air quality	24 N.J.R. 167(a)		
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5:23-2.23, 3.4, 3.11, 4.24, 12.4, 12.5, 12.6	Elevator Safety Subcode: exempt structures	24 N.J.R. 170(a)		
5:23-3.8A, 3.15	Uniform Construction Code: sale of nonconforming toilets	23 N.J.R. 3602(a)	R.1992 d.67	24 N.J.R. 404(b)
5:23-3.21	UCC: one and two family dwelling subcode	23 N.J.R. 3444(b)		
5:23-3.21	Uniform Construction Code: one and two-family dwellings in flood zones	24 N.J.R. 680(a)		
5:23-4.5	Municipal enforcing agencies: UCC standardized forms	24 N.J.R. 168(a)		
5:23-4.5, 4.11, 4.14	UCC enforcement: conflict of interest	24 N.J.R. 678(a)		
5:23-4.5, 4.19	Uniform Construction Code: electronic reporting by municipal enforcing agencies	23 N.J.R. 3440(a)	R.1992 d.47	24 N.J.R. 405(a)
5:23-4.14, 4A.17, 8.18	Uniform Construction Code: pre-proposal regarding private enforcing agencies	23 N.J.R. 1985(a)		
5:23-4.14, 4A.17, 8.18	Uniform Construction Code: preproposal regarding private enforcing agencies	23 N.J.R. 2908(a)		
5:23-4.17	Municipal construction officials: annual budget report	24 N.J.R. 169(a)		
5:23-4.18, 4.20	UCC enforcing agencies: minimum fees	24 N.J.R. 169(b)		
5:23-5.25	Uniform Construction Code: revocation of licenses and alternative sanctions; review committees	23 N.J.R. 3441(a)	R.1992 d.68	24 N.J.R. 406(a)
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5:25-1.3	New home warranties: "major structural defect"	23 N.J.R. 3603(a)		
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5A:3-1, 2	Military service medals: reopening of comment period	23 N.J.R. 3409(a)		
5A:4	Brigadier General William C. Doyle Veterans' Memorial Cemetery	23 N.J.R. 1491(a)	R.1992 d.57	24 N.J.R. 410(a)
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7:1E-1.6, 1.9, 7, 8, 9, 10	Discharges of petroleum and other hazardous substances: confidentiality of information	23 N.J.R. 2848(a)		
7:1E-5.3	Discharges of petroleum and other hazardous substances: administrative correction	———	———	24 N.J.R. 581(a)
7:1F	Industrial Survey Project	24 N.J.R. 717(a)		
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7:4	New Jersey Register of Historic Places: procedures for listing of historic places	23 N.J.R. 2103(a)		
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7:7A-9.2	Freshwater wetlands protection: public hearing and request for public comment on Statewide general permits	24 N.J.R. 975(a)		
7:9-5.8	Water pollution control: minimum treatment requirements	23 N.J.R. 1493(a)		
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7:11-2.2, 2.3, 2.9	Sale of water from Delaware and Raritan Canal and Spruce Run/Round Valley Reservoirs System	23 N.J.R. 3686(d)		
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7:11-4.3, 4.4, 4.9, 4.13	Sale of water from Manasquan Reservoir Water Supply System: change of public hearing and extension of comment period	24 N.J.R. 344(a)		
7:13	Flood hazard area control: opportunity to comment on draft revisions	23 N.J.R. 1989(a)		
7:13-7.1	Redelineation of Coles Brook in Hackensack and River Edge	23 N.J.R. 647(a)		
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7:25-18.5	Haul seining and fyke netting regulation	24 N.J.R. 207(a)		
7:26-1.2, 1.4, 8.2, 8.13, 9.1, 9.4, 9.5, 9.7, 9.10, 10.4, 10.7, 10.8, 11.5, 12.1, 12.2, 12.4, 12.5, 12.9, 17.4	Hazardous waste management	23 N.J.R. 2453(b)	R.1992 d.100	24 N.J.R. 788(a)

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7:26-4.3	Fee schedule for solid waste facilities: administrative correction	———	———	24 N.J.R. 1120(a)
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7:26-4.6	Solid waste program fees	23 N.J.R. 3690(a)		
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7:26-4A.3, 4A.5	Fee schedule for hazardous waste generators, facilities, and transporters	23 N.J.R. 814(a)	R.1992 d.65	24 N.J.R. 412(a)
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7:26-8.2	Hazardous waste exclusions: household waste	23 N.J.R. 3410(a)		
7:26-8.2	Hazardous waste exclusions: used chlorofluorocarbon refrigerants	23 N.J.R. 3692(a)		
7:26-8.16	Hazardous constituents in waste streams	23 N.J.R. 3093(b)		
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7:26D	Cleanup standards for contaminated sites	24 N.J.R. 373(a)		
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8:31A-7.4, 7.5	SHARE Hospital system: rebasing and Minimum Base Period Challenge	24 N.J.R. 734(b)		
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8:31B-5.3	Hospital reimbursement: Diagnosis Related Groups	23 N.J.R. 3114(a)	R.1992 d.43	24 N.J.R. 452(a)
8:31C-1	Residential alcoholism treatment facilities: cost accounting and rate evaluation	23 N.J.R. 3609(a)		
8:33-5.1	Certificate of Need moratorium: exceptions	24 N.J.R. 173(a)		
8:33I	Megavoltage radiation oncology units	23 N.J.R. 1906(a)		
8:33J-1.1, 1.2, 1.3, 1.6	Magnetic Resonance Imaging (MRI) services	23 N.J.R. 1906(b)		
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8:39-4.1, 9.1, 9.5, 11.2, 13.4, 35.2	Long-term care facilities: patient advance directives	23 N.J.R. 3611(a)	R.1992 d.128	24 N.J.R. 935(a)
8:39-9.2	Long-term care facilities: mandatory administration policies and procedures	23 N.J.R. 3613(a)	R.1992 d.129	24 N.J.R. 937(a)
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8:43E-3.10, 3.15	Adult closed acute psychiatric beds: liaison participation and discharge planning	23 N.J.R. 3128(a)	R.1992 d.64	24 N.J.R. 465(a)
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8:43G-5.1, 5.2, 5.9, 15.2	Hospital licensing standards: patient advance directives	23 N.J.R. 3256(a)	R.1992 d.132	24 N.J.R. 942(a)
8:43H-3.4, 5.3, 5.4, 17.2, 19.3, 19.5	Rehabilitation hospitals: patient advance directives	23 N.J.R. 3614(a)	R.1992 d.133	24 N.J.R. 945(a)
8:57-2.1, 2.2, 2.3	AIDS prevention and control: reporting requirements	23 N.J.R. 3735(a)		
8:57-2.1, 2.2, 2.3	AIDS prevention and control: clarification of proposal summary regarding reporting of HIV infection	24 N.J.R. 59(a)		
8:65-2.5	Controlled Dangerous Substances: physical security controls	24 N.J.R. 174(a)		
8:65-2.4, 2.5, 6.6, 6.13, 6.16	Controlled dangerous substances: handling of carfentanil, etorphine hydrochloride, and diprenorphine	23 N.J.R. 1911(a)		
8:65-7.5, 7.10	Controlled dangerous substances: partial filling of prescriptions for Schedule II substances	23 N.J.R. 3618(a)		
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8:71	Interchangeable drug products (see 23 N.J.R. 3334(b); 24 N.J.R. 144(b))	23 N.J.R. 2610(a)	R.1992 d.135	24 N.J.R. 948(a)
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8:71	Interchangeable drug products	24 N.J.R. 61(a)	R.1992 d.134	24 N.J.R. 947(b)
8:71	Interchangeable drug products	24 N.J.R. 735(a)		
8:80	HealthStart Plus: eligibility criteria	24 N.J.R. 62(a)		

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10:81-8.2	Securing information from Social Security Administration: administrative correction	———	———	24 N.J.R. 466(b)
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10:82-5.3	Assistance Standards Handbook: child care rates	24 N.J.R. 213(a)		
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10:123A	Youth and Family Services: Personal Attendant Services Program	23 N.J.R. 2091(b)		
10:133	DYFS: initial response and service delivery	23 N.J.R. 3714(a)		
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