

ground water supplies, increases in stormwater generated, increases in impervious surface, increases in stormwater pollutant loading, changes in land use, and changes in vegetative cover;

3. Would cause the minimum feasible interference with the natural functioning of animal, plant, and other natural resources at the site and within the surrounding area, and the minimum feasible individual and cumulative adverse impacts to the environment both onsite and offsite of the major Highlands development;

4. Will result in the minimum feasible alteration or impairment of the aquatic ecosystem including existing contour, vegetation, fish and wildlife resources, and aquatic circulation of a freshwater wetland;

5. Will not jeopardize the continued existence of species listed pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq., the Endangered Plant Species List Act, N.J.S.A. 13:1B-15.151 et seq.), or which appear on the Federal endangered or threatened species list, and will not result in the likelihood of the destruction or adverse modification of habitat for any rare, threatened, or endangered species of animal or plant;

6. Is located or constructed so as to neither endanger human life or property nor otherwise impair public health, safety or welfare;

7. Would result in the minimum practicable degradation of unique or irreplaceable land types, historical or archeological areas, and existing public scenic attributes at the site and within the surrounding area; and

8. Meets all other applicable Department standards, rules, and regulations and State and Federal laws.

(b) Each HPAA issued by the Department shall expire, along with any associated waiver, within five years of the date of issuance unless construction has commenced, in which case the HPAA and waiver shall continue in effect until such time as construction ceases. In no case shall an HPAA remain in effect for longer than 10 years.

(c) An HPAA shall be valid only for the development appearing in the plans approved by the Department. Any change in the plans affecting the number of dwelling units, percentage of impervious surface or commercial square footage, water consumption or wastewater treatment must be approved in writing by the Department prior to commencement of construction.

7:38-6.3 Protecting Highlands preservation area resources from future development

(a) Every HPAA shall require a binding conservation restriction as defined in N.J.A.C. 7:38-1.4 on any area of the lot not authorized for development or disturbance under the HPAA that shall permanently preserve the undeveloped and

undisturbed portion of the lot in its natural state, except for those activities necessary to maintain the conservation restriction to accomplish the purpose for which the conservation restriction was created.

(b) The conservation restriction shall run with the land on which the approved project is located, shall apply to all lots subdivided from that land and sold or transferred to other persons, and shall be binding upon the landowner and his or her successors in interest. To ensure that notice of the conservation restriction is provided to all present and future interested parties, the landowner or contract purchaser receiving the HPAA shall:

1. Record the conservation restriction(s) at the county clerk's office within 10 days after commencement of any work authorized under the HPAA; and

2. Ensure that a copy of the conservation restriction is provided to the Highlands Council and to the municipal clerk with a request that it be placed in the file for the lot containing the approved project.

(c) A conservation restriction shall be enforceable by the Department, by the Highlands Council, their designated representatives, by a local government unit, or by a charitable conservancy whose trustees have no other interest in the land that is the subject of the restriction.

(d) The conservation restriction(s) shall describe and include all regulated features on the property, including all Highlands Resource Areas, stormwater management facilities, any required mitigation and relevant site conditions such as encumbrances or known contamination.

(e) A conservation restriction shall include a survey and a metes and bounds description of the entire restricted area.

7:38-6.4 Waivers

(a) As provided in the Highlands Act at N.J.S.A. 13:20-33b, or in accordance with the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., the Department may, in its discretion, waive any provision contained in this chapter on an individual, case-by-case basis:

1. To protect public health and safety;

2. For redevelopment in certain previously developed areas in the preservation area identified by the Council pursuant to N.J.S.A. 13:20-9b or N.J.S.A. 13:20-11(a)(6)(h);

3. To avoid the taking of property without just compensation; or

4. To permit the construction of a 100 percent affordable housing development as defined by the Council on Affordable Housing pursuant to N.J.A.C. 5:93-5.5 and 5:94-4.6.

(b) A request for a waiver of any requirement of this chapter shall be submitted along with an HPAA application,

as set forth in N.J.A.C. 7:38-6.1. Any waiver approved pursuant to this chapter shall be considered a waiver only of the particular requirement(s) that is identified by the Department in the written approval of the waiver as part of the HPAA.

(c) A person requesting a waiver shall first submit a written request for a pre-application meeting in accordance with N.J.A.C. 7:38-8. Upon completion of the pre-application meeting, the person may submit an application for an HPAA with waiver as set forth at N.J.A.C. 7:38-9.

(d) Any waiver approved pursuant to this chapter shall be conditioned on the Department's determination that the proposed development meets the requirements in N.J.A.C. 7:38-6.2(a) to the maximum extent possible.

(e) The Department shall determine whether a proposed activity is eligible for a waiver for health and safety in accordance with the standards set forth at N.J.A.C. 7:38-6.5.

(f) The Department shall determine whether a proposed activity is eligible for a waiver for redevelopment purposes in accordance with the standards set forth at N.J.A.C. 7:38-6.6 or 6.7.

(g) The Department shall determine whether a proposed activity is eligible for a waiver to avoid a taking without just compensation in accordance with the standards set forth in N.J.A.C. 7:38-6.8.

(h) The Department shall determine whether a proposed activity is eligible for a waiver for the construction of 100 percent affordable housing in accordance with the standards set forth in N.J.A.C. 7:38-6.9.

(i) In cases where the Department determines to approve a waiver in accordance with this chapter, the approval will include specific conditions to restrict any activities that might otherwise occur as a result of the waiver. These conditions include, but are not limited to, conservation restrictions, resolutions from a municipal utilities authority restricting sewage flows, physical limitations on sewer lines and/or pump stations and other mechanisms necessary to preclude secondary impacts that may otherwise result from the approved activities.

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

In the introductory paragraph of (a), inserted "or in accordance with the Fair Housing Act, N.J.S.A. 52:27D-301 et seq.,"; in (a)2, deleted "or" from the end; in (a)3, substituted "; or" for a period at the end; added (a)4; added new (h); recodified former (h) as (i); and in (i), substituted "conservation" for "deed".

7:38-6.5 Waiver for the protection of public health and safety

(a) If an activity is necessary to protect public health and safety and the anticipated threat or loss may occur before the Department can review an application for an HPAA, an applicant shall follow the procedure to obtain an emergency HPAA at N.J.A.C. 7:38-7.

(b) For the purposes of this section, an activity is necessary to protect public health and safety if there is no other practicable means to meet the established public need and the activity:

1. Will correct or avoid a threat to life or health, severe loss of property, or severe environmental degradation that is occurring or will occur if the activity is not permitted;
2. Will serve an essential health or safety need or correct severe environmental degradation; and
3. Is required to serve existing public health and safety needs or to correct existing severe environmental degradation and is not intended or designed to support future development.

(c) Examples of activities that satisfy the requirement of protecting public health and safety include, but are not limited to:

1. The construction of new or expanded police, fire and first aid facilities to serve an existing community;
2. The replacement of failing septic systems with new septic systems or other sewage treatment facilities sized specifically to serve only the existing development currently served by the failing systems; and
3. The replacement of wells or other water supplies serving legally existing development with new wells or water sources when such replacement is necessary for the protection of human health.

(d) An applicant shall not be eligible for a waiver under this section unless he or she demonstrates that a proposed activity:

1. Is necessary to protect public health and safety as described in (b) above;
2. Has no practicable alternative that:
 - i. Would have less or no adverse impact on all Highlands resource areas on the site for which the HPAA is sought; and
 - ii. Would not have other significant adverse environmental consequences, that is, will not merely substitute other significant environmental consequences for those attendant on the original purpose;
3. Is designed to comply with all of the preservation area standards contained at N.J.A.C. 7:38-3 to the maximum extent feasible while still addressing the identified health and safety need; and
4. Has been designed to meet the requirements at N.J.A.C. 7:38-6.2 to the maximum extent possible.

(e) In addition to meeting the requirements at (a) through (d) above, an applicant proposing a regulated activity within a Highlands open water that is also a freshwater wetland or State open water, as defined in the Freshwater Wetlands Pro-

nominally viable use of the property as a whole, designed and built in a manner that will conserve the resources of the Highlands to the maximum extent possible; and

2. Ensure that any part of the property that the Department does not allow to be developed is protected from future development by a recorded conservation restriction containing those terms deemed necessary by the Department to preserve the undeveloped property and the mitigation plantings thereon, if any.

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

In the introductory paragraph of (b), inserted “, all the applicant’s administrative and legal challenges to that determination as set forth in (b)1 below have concluded.”; added (b)1; in (g), inserted “, all legal challenges to the decision that the applicant chooses to bring have concluded pursuant to (b)1, above.”; in (g)3, substituted “an amount no greater than” for “or below”, and inserted “and” following “property as a whole”, and inserted “at an amount determined in compliance with N.J.S.A. 13:8C-26j or 13:8C-38j, as applicable”; in (g)4i(4), inserted “and” at the end; in (g)4i(5), substituted a period for “; and”; and deleted (g)4i(6).

7:38-6.9 Waiver for the construction of a 100 percent affordable housing development

(a) In order to afford Bloomsbury, Califon or Glen Gardner Boros in Hunterdon County, and Ringwood Boro and West Milford Township in Passaic County reasonable opportunity to include housing for low and moderate income households in their Fair Share plans as required by the Mount Laurel Doctrine (67 N.J. 151(1975), the Fair Housing Act (N.J.S.A. 52:27D-301 et seq.), and Council on Affordable Housing (COAH) rules (N.J.A.C. 5:91), the Department may, in its discretion, waive any provision contained in this chapter on an individual case by case basis to permit the construction of housing in these towns that is exclusively comprised of low and moderate income dwelling units, as defined by COAH pursuant to N.J.A.C. 5:93-5.5 and 5:94-4.6.

(b) To be eligible for this waiver, an applicant shall demonstrate that the project meets the criteria in (a) above, and that there is no other practicable means to meet the municipality’s affordable housing requirements as calculated pursuant to COAH regulations and that the proposed project:

1. Has no practicable alternative that:
 - i. Would have less or no adverse impact on all Highlands resource areas on the site for which the HPAA is sought; and
 - ii. Would not have other significant adverse environmental consequences, that is, will not merely substitute other significant environmental consequences for those attendant on the original proposal;
2. Is designed to comply with the preservation area standards contained at N.J.A.C. 7:38-3 to the maximum extent feasible while still addressing the affordable housing need; and

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

(c) In addition to meeting the requirements at (a) and (b) above, an applicant who proposes a regulated activity within a Highlands open water that is also a freshwater wetland or State open water, as defined in the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4, shall provide mitigation in accordance with N.J.A.C. 7:7A.

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

SUBCHAPTER 7. EMERGENCY PERMITS

7:38-7.1 Emergency permits

(a) The Department may issue a temporary, emergency HPAA only if it determines that:

1. An unacceptable threat to human life, a severe loss of property, and/or severe environmental degradation will occur if an emergency HPAA is not issued; and

2. The anticipated threat or loss will likely occur before an HPAA can be issued using the ordinary procedures of this chapter.

(b) The Department shall grant or deny a written request for an emergency HPAA made pursuant to N.J.A.C. 7:38-7.2(a), no later than 10 business days following the day the Department receives a written request for an emergency HPAA. While requests may be faxed to the Director of the Land Use Program, the time within which the Department is obligated to grant or deny the request shall commence on the day the Department receives a mailed or hand-delivered copy of the request.

(c) The permittee shall comply with any condition or requirement contained in an emergency permit issued pursuant to this subchapter. Work under an emergency HPAA may commence upon the permittees receipt of a written emergency HPAA or upon oral authorization by the Director of the Land Use Regulation Program or the Director’s designee. The Department shall fax a letter memorializing the oral authorization to the applicant, who shall post it at the work site until receipt of the written emergency HPAA which shall be issued no later than ten business days after the oral authorization is given.

(d) Any emergency HPAA the Department issues shall include, to the greatest extent practicable under the emergency:

1. The normal application criteria and performance standards of this chapter including mitigation for damage to freshwater wetlands;

2. “As-built” drawings, showing all activities conducted under the emergency permit, including all excavation, grading, structures, and other regulated activities;

3. A complete analysis of compliance with each of the standards contained in N.J.A.C. 7:38-3 and 6.2;

4. The applicable fee specified at N.J.A.C. 7:38-10; and

5. Any other conditions necessary for the Department to ensure compliance with this chapter.

(e) Application review procedures at N.J.A.C. 7:38-11 shall apply to requests for emergency HPAA's to the extent possible, given the gravity of the emergency as documented by the applicant.

(f) The Department may, in its discretion, make the issuance of an emergency HPAA conditional upon the applicant submitting an application for a regular HPAA by a deadline specified by the Department.

(g) An emergency HPAA shall expire:

1. Upon the date stipulated by the Department in the permit;

2. Upon completion of the authorized activity; or

3. Upon the 90th calendar day from the date of the written authorization, whichever shall occur first.

(h) An emergency HPAA shall fully describe the activities authorized by the Department, state the procedures the permittee must follow under N.J.A.C. 7:38-7.2, and any other conditions attached to the issuance of the permit, such as written submissions corroborating oral statements about the emergency made to the Director or his or her staff by professional engineers, consultants or other persons with personal knowledge of the emergency.

(i) A permittee shall post a copy of the written emergency HPAA at a publicly accessible portion of the work site and remove it when the permit expires.

(j) The Director of the Land Use Regulation Program shall provide notice of the issuance of any emergency HPAA:

1. To the clerk of the municipality in which the work is being done to avoid unnecessary complaints of illegal work;

2. To the Highlands Council;

3. To the Coastal and Land Use Enforcement Program so that appropriate site inspections can be made; and

4. If the work authorized pursuant to an emergency HPAA affects a Highlands open water that is also a freshwater wetland or State open water pursuant to N.J.A.C. 7:7A, the Director shall also provide notice to the Regional EPA Administrator.

(k) The Department may immediately terminate any emergency HPAA if necessary to protect human health or the environment, or if it determines that the authorized work no longer meets the criteria for permit issuance under (a) above. The Department shall provide notice of any early termination

of an emergency HPAA to the municipal Clerk, the Highlands Council, the Coastal and Land Use Enforcement Program, and if applicable, the U.S. Environmental Protection Agency.

(l) The Department may extend an emergency HPAA only for the purpose of allowing the permittee to complete mitigation under N.J.A.C. 7:7A.

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

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

In (c), deleted "in the Director's absence," preceding "the Director's designee" and "Director's" following "letter memorializing the"; and in (d)3, inserted "and 6.2" at the end.

7:38-7.2 Obtaining an emergency permit

(a) A person applying for an emergency HPAA shall provide the following information to the Department:

1. The lot, block, street address and municipality of the proposed project, and the name and address of the land owners;

2. The exact nature of the emergency, and why the applicant believes it constitutes an unacceptable threat to human life, a severe loss of property, and/or severe environmental degradation;

3. The reasons why the emergency cannot be controlled or eliminated pending submission and review of a normal HPAA application;

4. The extent of work to be performed, and the names of the contractors performing the work, if known;

5. The extent of work in freshwater wetlands or State open waters and the proposed mitigation for that activity;

6. The number of days within which the proposed work, including mitigation, will be completed;

7. A general description of additional work that will be undertaken after completion of the mitigation and emergency work;

8. Plans depicting the emergency work and mitigation;

9. Photographs of the site depicting the emergency, to the extent possible;

10. The names and contact numbers of persons with factual knowledge of the emergency condition, and a written statement from those persons which documents the existence of the emergency;

11. The names and contact numbers of all professional engineers, consultants, or others with personal knowledge of the emergency condition, and a written statement from those persons as necessary to document the existence of the emergency;

12. When available, "as-built" drawings, showing all activities conducted under the emergency permit, including all excavation, grading, structures, and other regulated