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

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

Amended by R.2006 d.420, effective December 4, 2006.
See: 37 N.J.R. 4767(a), 38 N.J.R. 5011(a).
Rewrote the introductory paragraph of (a); in (a)1, substituted "a" for "an" preceding "lot owned"; in (a)2, substituted "a lot" for "an lot" and "one acre or more of land" for "more than one acre"; in (a)4, inserted "on August 10, 2004"; in the introductory paragraph of (a)5, substituted "lawfully" for "legally"; deleted (a)5i; in (a)6, inserted "or association" preceding "organized"; in (a)7, deleted "for public lands," preceding "the normal"; added (a)11i; in (a)16, substituted "Region" for "region"; and added new (b) and recodified former (b) as (c).

Case Notes

ALJ erred in finding that petitioner was entitled to an exemption where petitioner failed to supply documentation of the current validity of its local Municipal Land Use Law approval, which had to have been obtained prior to March 29, 2004, and had to have remained valid in order to support an exemption (rejecting 2009 N.J. AGEN LEXIS 133). Lakeside Manor v. N.J. Dep't of Envtl. Prot., OAL Dkt. No. ELU-WM 11544-07 and ELU-WM 11545-07 (Consolidated), 2009 N.J. AGEN LEXIS 1122, Final Decision (September 4, 2009).

ALJ erred in concluding that petitioner did not violate the conditions of the Treatment Works Applications where there was no dispute that petitioner initiated construction of the sewer system without requesting or ensuring the acquisition of a grant waiver or a mapping revision under the provisions of the TWA either prior to commencing construction or at any time thereafter; because construction was initiated prior to obtaining the required approvals, the TWA became null and void (rejecting 2009 N.J. AGEN LEXIS 133). Lakeside Manor v. N.J. Dep't of Envtl. Prot., OAL Dkt. No. ELU-WM 11544-07 and ELU-WM 11545-07 (Consolidated), 2009 N.J. AGEN LEXIS 1122, Final Decision (September 4, 2009).

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

7:38-2.4 Highlands applicability determination

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

1. Is the proposed development or activity a major Highlands development pursuant to N.J.A.C. 7:38-2.2?

2. Is the proposed development or activity a major Highlands development that is exempt from the Highlands Act, pursuant to N.J.A.C. 7:38-2.3?

3. Regardless of the answer to (a)1 or 2 above, is the proposed development or activity consistent with the applicable areawide Water Quality Management Plan?

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

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

i. Driveway, garage or shed;

ii. An addition for residential purposes attached to the home;

iii. Deck, patio or porch;

iv. Swimming pool; or

v. Septic system;

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

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

i. Does not result in a cumulative increase in impervious surface by 0.5 acres or more;

ii. Does not involve the ultimate disturbance of one or more acres of land; and

iii. Does not create new travel lanes or increase the length of an existing travel lane by more than 2,640 feet, not including tapers;

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

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

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

ii. Result in a cumulative increase in impervious surface of one acre or more; or

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

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

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

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

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

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

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

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

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

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

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

Amended by R.2006 d.420, effective December 4, 2006.
See: 37 N.J.R. 4767(a), 38 N.J.R. 5011(a).
Section was "Applicability determination". Rewrote (a) and (b); in (c), substituted "or" for a comma following "TWA" and inserted the last sentence; and in (d), substituted "if required by" for "pursuant to".
Special amendment, R.2009 d.361, effective November 4, 2009 (to expire May 4, 2011).
See: 41 N.J.R. 4467(a).
In (b)8, substituted "58:10C-1 et seq." for "58:10B-1 et seq. conducted in accordance with a memorandum of agreement or remedial action workplan".
Administrative correction.
See: 42 N.J.R. 1862(a).
Readoption of special amendment, R.2011 d.251, effective September 8, 2011.
See: 43 N.J.R. 1077(a), 43 N.J.R. 2581(b).
Provisions of R.2009 d.361, readopted with changes incorporated at 42 N.J.R. 1862(a).

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

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

development in the preservation area is prohibited except to serve development that:

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

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

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

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

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

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

(c) This chapter does not apply to:

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

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

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

Amended by R.2006 d.420, effective December 4, 2006.
See: 37 N.J.R. 4767(a), 38 N.J.R. 5011(a).
In the introductory paragraph of (a), substituted "preservation area" for "Preservation Area"; in (a)2, substituted "an" for "a" and inserted "with waiver"; deleted (b)2; recodified (b)3 and (b)4 as (b)2 and (b)3; in (b)2, inserted "as of March 29, 2004 for a diversion within the preservation area who diverts water in an amount" and "under N.J.A.C. 7:38-3.2(i)2"; in (b)3, inserted "in the preservation area" and updated N.J.A.C. reference.

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

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

1. Development that is exempt from the Highlands Act pursuant to N.J.A.C. 7:38-2.3; or

2. Major Highlands development that is approved in accordance with an HPAA with a waiver in accordance with N.J.A.C. 7:38-6.

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

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

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

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

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

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

Amended by R.2006 d.420, effective December 4, 2006.
See: 37 N.J.R. 4767(a), 38 N.J.R. 5011(a).
Section was "Applicability for purposes of wastewater discharges and treatment systems". In (a)2, substituted "an HPAA with a waiver in

accordance with N.J.A.C. 7:38-6" for "N.J.A.C. 7:38-6.4"; in (b), inserted 'NJPDES" twice"; in the introductory paragraph of (c), substituted "a major Highlands development" for "an activity"; and in (d), inserted "(RFA)", substituted "RFA forms" for "applications" and "Notwithstanding N.J.A.C. 7:38-2.4(b) and (c), requests" for "Except as provided at N.J.A.C. 7:38-2.4(b), a request".
Administrative change.
See: 41 N.J.R. 2789(a).

Case Notes

Petitioner violated a condition of the Treatment Works Applications where no mapping revision or grant waiver was ever obtained prior to construction of the sewer lines; therefore, the designated sewer service areas were revoked and the associated TWAs issued for the projects expired by operation of law (rejecting 2009 N.J. AGEN LEXIS 133). Lakeside Manor v. N.J. Dep't of Envtl. Prot., OAL Dkt. No. ELU-WM 11544-07 and ELU-WM 11545-07 (Consolidated), 2009 N.J. AGEN LEXIS 1122, Final Decision (September 4, 2009).

SUBCHAPTER 3. PRESERVATION AREA STANDARDS

7:38-3.1 Scope and applicability

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

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

Amended by R.2006 d.420, effective December 4, 2006.
See: 37 N.J.R. 4767(a), 38 N.J.R. 5011(a).
In (b), substituted "disturbed" for "removed from the lot".

7:38-3.2 Standards for water supply diversion sources

(a) Any person applying for a new or modified water supply allocation or an increased diversion under an existing water use registration as established under (i) below where at least one of the diversion sources is located within the preservation area shall obtain an HPAA including compliance with the standards and requirements in the Water Supply Allocation Permit Rules, N.J.A.C. 7:19.

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

1. Individual and cumulative impacts of multiple diversions are fully assessed;

2. Existing stream base flows are maintained;

3. Depletive use within the sub-drainage basin is minimized. For the purposes of this section, sub-drainage area is defined as the HUC 14;

4. Existing water quality is maintained; and

5. Ecological uses are protected.

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

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

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

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

1. The applicant documents that, within the same sub-drainage area, there is an equivalent reduction in a non-potable use that is greater than 50 percent consumptive that is achieved by:

i. Groundwater recharge of storm water;

ii. Beneficial reuse of reclaimed water; or

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

2. Water allocated in accordance with a water supply allocation to a water purveyor or other potable user shall not be used to serve new activities in the preservation area that are greater than 50 percent non-potable and greater than 50 percent consumptive.

(f) In accordance with N.J.S.A. 13:20-32d, the Department may revoke an existing unused water supply allocation

approval for non-potable purposes if it determines that the permittee is not implementing demand reduction measures to the maximum extent practicable.

(g) In accordance with N.J.S.A. 13:20-32d, and pursuant to (h) below, the Department may reduce an approved water allocation to eliminate any unused portion as follows:

1. Monthly and/or annual allocations may be reduced through a Department-initiated minor permit modification, or during the review of a permit renewal or modification application, if usage is less than 80 percent of the allocation, based on records for the previous five years; or

2. If all practicable water conservation measures are not undertaken. Practicable water conservation measures include:

i. Implementation of best management practices to ensure maximum water use efficiency and reduction in water losses, including:

(1) On-going leak detection; and

(2) State-of-the-art (industry-specific) equipment and techniques; and

ii. A maximum limit on unaccounted-for water of 15 percent.

(h) Before reducing an allocation pursuant to (g) above, the Department shall:

1. Consider projected water demands associated with approved water main extensions, approved water supply contracts, and facility expansions planned within the next five years;

2. Provide the permittee with an opportunity for a public hearing pursuant to N.J.A.C. 7:19-2.8, prior to final permit modification; and

3. Depending on the purpose of the diversion, allow the permittee to implement a water-use practice during the term of the renewed or modified permit that will significantly improve water conservation.

(i) Any person in the preservation area who has the capability to divert more than 50,000 gallons of water per day (1.55 million gallons of water per month), but who does not

currently do so, shall submit a water use registration to the Department in accordance with these rules and N.J.A.C. 7:19 to the address listed at N.J.A.C. 7:38-1.2. The "capability to divert more than 50,000 gallons of water per day" means the ability to divert more than 35 gallons of water per minute from a single source or a combination of sources, at least one of which is located all or partly within the preservation area.

1. Any holder of a valid Water Use Registration issued under N.J.A.C. 7:19 for diversion sources in the preservation area, who was in compliance with the Water Use Registration for the period between March 29, 1999 and March 29, 2004, and whose allocation limit was established at less than 100,000 gallons per day (3.1 million gallon per month), may continue to divert water at the current diversion level under the valid Water Use Registration.

i. For purposes of this paragraph, the Department will determine the current diversion level to be the highest amount of water diverted in any one month for the March 29, 1999 to March 29, 2004 period. The current annual diversion level is the highest annual amount of water diverted for the March 29, 1999 to March 29, 2004 period. At no time will the current diversion level be established at less than 50,000 gallons of water per day.

2. The Department will modify existing Water Use Registrations for diversion sources in the preservation area to include as conditions the current source locations and the allowable diversion amount, based on the current diversion level. If after the effective date of such modification a registration holder exceeds the diversion amount or changes source locations and such change would not qualify as a minor permit modification under N.J.A.C. 7:19-1.5(a), an HPAA will be required.

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

7:38-3.3 Public community water systems

(a) Construction of a new public community water system or extension of an existing public community water system to serve development in the preservation area is prohibited unless the Department determines that the development to be served:

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

2. Qualifies for an emergency HPAA pursuant to N.J.A.C. 7:38-7; or

3. Qualifies for an HPAA with waiver in accordance with N.J.A.C. 7:38-6.

(b) Construction of any new public water system shall comply with the Safe Drinking Water Act rules at N.J.A.C. 7:10.

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 "to serve development in the preservation area" and deleted "within the preservation area" following "prohibited"; in (a)1, deleted "in the preservation area," following "Is"; in (a)2, substituted "Qualifies" for "Is in the preservation area and qualifies" and inserted "or" at the end; in (a)3, substituted "Qualifies" for "Is in the preservation area and qualifies", inserted "with waiver", and substituted a period for "; or" at the end; and deleted (a)4.

7:38-3.4 NJPDES permitted discharges and wastewater facilities

(a) Any new discharge to surface water or ground water, except discharges from water supply facilities, that would require an individual or general NJPDES permit and any extension of a sewer line that requires a Treatment Works Approval is prohibited within the preservation area unless the development in the preservation area that satisfies any one of the following criteria:

1. Is exempt from the Highlands Act pursuant to N.J.A.C. 7:38-2.3, and is consistent with the applicable areawide Water Quality Management Plan;

2. Receives an HPAA in accordance with N.J.A.C. 7:38-6; or

3. Is not a major Highlands development.

(b) A new individual subsurface disposal system or aggregate of equivalent disposal units where the sanitary wastewater design flow is 2,000 gallons per day or less is permitted within the preservation area as set forth at (b)1 through 4 below. Forest under this subsection shall be identified and calculated in accordance with N.J.A.C. 7:38-3.9. For the purposes of this subsection, "equivalent disposal unit" means: for residential development, one system serving one single-family home sized in accordance with the Standards for Individual Subsurface Sewage Disposal Systems, Volume of sanitary sewage, at N.J.A.C. 7:9A-7.4; or for nonresidential development or residential development comprising structures other than single-family homes, 500 gallons of wastewater per day generated for the development type, as determined in accordance with N.J.A.C. 7:9A-7.4:

1. On a lot that contains all forest, the applicant proposes no more than one individual subsurface disposal system or equivalent disposal unit for each 88 acres of the lot;

2. On a lot that does not contain forest, the applicant proposes no more than one individual subsurface disposal system or equivalent disposal unit for each 25 acres of the lot;

3. For the purposes of this subsection, the acreage of a lot shall be the total area of the lot(s) on which the proposed development is located as described by deed(s) or subdivision plat(s) on file with the municipal or county clerk.

4. For a lot containing both forest and nonforest areas, the total number of allowable individual subsurface dis-

posal systems or equivalent disposal units permitted on the lot shall be determined by calculating the number of acres of the lot that are forest (as determined in accordance with the method at N.J.A.C. 7:38-3.9) and dividing that number by 88; calculating the remaining number of acres of the lot that are not forest and dividing that number by 25; and then summing the results. If the sum results in a fraction, the number shall be rounded down to the nearest whole number in order to determine the number of permitted individual subsurface disposal systems or equivalent disposal units.

5. For purposes of this section, non-contiguous lots in existence as of August 10, 2004 may be aggregated such that the number of individual subsurface disposal systems or equivalent disposal units that would be permitted under this section on one or more of the aggregated lots is transferred to one or more of the aggregated lots provided:

i. The proposed development on the lot or lots to receive the transferred individual subsurface disposal systems or equivalent disposal units complies with all Federal, State and local laws;

ii. The proposed development on the lot or lots to receive the transferred individual subsurface disposal systems or equivalent disposal units does not require a waiver of any requirement of this chapter;

iii. The proposed development on the lot or lots to receive the transferred individual subsurface disposal systems or equivalent disposal units is constructed in accordance with the Highlands Act and this chapter;

iv. The lots to be aggregated under this paragraph are all located in the preservation area and within the same HUC 14; and

v. The lot or lots from which the individual subsurface disposal systems or equivalent disposal units are to be transferred are subject to a conservation restriction against future disturbance in accordance with N.J.A.C. 7:38-6.3.

(c) In addition to the requirements at (b) above, individual subsurface sewage disposal systems or equivalent disposal units shall satisfy the Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A, without extraordinary measures, including replacement of disposal field soil with permeable material or mounding of a disposal field to achieve the required depth to groundwater or confining layer.

Amended by R.2006 d.420, effective December 4, 2006.
See: 37 N.J.R. 4767(a), 38 N.J.R. 5011(a).
Section was "Wastewater treatment facilities". Rewrote the section.

7:38-3.5 Impervious surfaces

(a) The Department shall not issue an HPAA if a proposed development or activity will result in impervious surface of greater than three percent of the land area of a lot. As to lots created by subdivision after August 10, 2004, calculation of this limit shall include all impervious surface existing on the entire land area of the lot which existed on August 10, 2004. For example, if a lot in existence as of August 10, 2004 currently has two percent impervious surface within its August 10, 2004 boundary, only one percent additional impervious surface will be permitted within that boundary, assuming the new impervious surface is placed in accordance with the Highlands Act and this chapter and any other applicable Federal, State and local law. Thus, if that lot is further subdivided, the newly created lot(s) could only receive an HPAA for a cumulative total of additional impervious surface equal to one percent of the area of the original lot that existed on August 10, 2004.

1. No impervious surface shall be permitted on a lot created by subdivision after August 10, 2004, if the lot of which the lot was a part as of August 10, 2004 contains three percent or more impervious surface.

2. For purposes of this subsection, non-contiguous lots in existence as of August 10, 2004, that contain less than three percent impervious surface may be aggregated such that the percentage of impervious surface that would have otherwise been permitted under this subsection on one or more of the aggregated lots is transferred to one or more of the aggregated lots, provided:

i. The proposed development on the lot or lots to which the percentage impervious surface is transferred complies with all Federal, State and local law;

ii. The proposed development on the lot or lots to which the percentage impervious surface is transferred does not require a waiver of any requirement of this chapter;

iii. The septic density standards of this chapter as set forth at N.J.A.C. 7:38-3.4(b) are met;

iv. The non-contiguous lots to be aggregated under this paragraph are all located in the Highlands Preservation Area and within the same HUC 14; and

v. The lot or lots from which the percentage impervious surface is transferred are permanently subject to a conservation restriction against future disturbance in accordance with N.J.A.C. 7:38-6.3.

(b) For purposes of this section, the calculation of the land area of a lot shall exclude Highlands open waters.

(c) An applicant for an HPAA shall calculate impervious surface area based upon the impervious surface existing on the date the HPAA application is submitted to the Department.

(d) Where impervious surface on a lot in existence as of August 10, 2004 exceeds three percent of the area of the lot, all lawfully existing impervious surface may remain but no additional impervious surface shall be permitted.

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

See: 37 N.J.R. 4767(a), 38 N.J.R. 5011(a).
Rewrote the introductory paragraph of (a); rewrote (a)2; deleted (d); recodified (e) as new (d); and in (d), substituted "lawfully" for "legally".

7:38-3.6 Highlands open waters

(a) There shall be a 300-foot buffer adjacent to Highlands open waters in which no disturbance is permitted, except as provided in this chapter.

(b) All new major Highlands development is prohibited within a Highlands open water and its adjacent 300-foot buffer except for linear development, which shall be permitted provided that there is no feasible alternative for the linear development outside the Highlands open water or Highlands open water buffer.

1. In order to demonstrate "no feasible alternative for linear development" the applicant shall demonstrate that there is no other location, design and/or configuration for the proposed linear development that would reduce or eliminate the disturbance to a Highlands open water or the adjacent buffer. The additional limitations at (b)1i and ii below apply for proposed linear development that would provide access to an otherwise developable lot.

i. The proposed linear development is the only point of access for roadways or utilities to an otherwise developable lot; and

ii. Shared driveways are used to the maximum extent possible to access multiple lots, especially in areas containing steep slopes, Highlands open water or Highlands open water buffers.

2. For a driveway, the applicant shall, in addition to (b)1 above, demonstrate that:

i. The applicant has made a good faith effort to transfer development rights for the lot pursuant to N.J.S.A. 13:20-13, and has not obtained a commitment from the Highlands Council or a receiving zone municipality to purchase said development rights;

ii. The lot has been offered for sale at an amount no greater than the specific fair market value to all property owners within 200 feet of the lot, and to the land conservancies, environmental organizations, the Highlands Council and all other government agencies on a list provided by the Department, at an amount determined in compliance with N.J.S.A. 13:8C-26j or 13:8C-38j, as applicable by letter sent by certified mail, return receipt requested, with a copy to the Highlands Council, using the form provided by the Department, disclosing the location on the lot of all Highlands resource areas as defined in N.J.A.C. 7:38-1.4 and stating that an application to develop the lot has been filed and enclosing a copy of a fair market value appraisal, in accordance with (b)2iv(5) below, performed by a State-licensed appraiser based on the minimum beneficial economically viable use of the property allowable under local law; and

iii. No reasonable offer for the lot has been received; and

iv. Documentation for (b)2i through iii above shall include:

(1) A copy of each letter that the applicant sent under this paragraph;

(2) A copy of all responses received. Each response shall be submitted to the Department within 15 days after the applicant's receipt of the response;

(3) A list of the names and addresses of all owners of real property within 200 feet of the lot, as certified by the municipality, including owners of easements as shown on the tax duplicate;

(4) Receipts indicating the letters were sent by certified mail;

(5) For submittal to all property owners within 200 feet, a copy of the fair market value appraisal required under (b)2ii above; and

(6) A copy of a written response or a resolution from the Highlands Council demonstrating that it has considered and rejected the offer;

3. An alternative shall not be excluded from consideration under this subsection merely because it includes or requires an area not owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed linear development.

4. After consideration of the information required in (b)1 through 3 above, the Department shall not issue an HPAA under this section if an applicant has refused a fair market value offer to purchase the property for which the driveway linear development is sought or if the Department finds that there is an alternative to the proposed linear development.

(c) An applicant shall provide mitigation in accordance with N.J.A.C. 7:7A for each Department-approved linear development proposed within a Highlands open water that is also a freshwater wetland or State open water, as defined in the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4.

(d) Structures or land uses in a Highlands open water buffer existing on August 10, 2004 may remain, provided that the area of disturbance is not increased.

(e) Nothing in this section shall be construed to limit the authority of the Department to establish buffers of any size or any other protections for Category One waters designated by the Department pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., or any other law, or rule or regulation adopted pursuant thereto for major Highlands development or for other development that does not qualify as major Highlands development.

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

7:38-3.7 Flood hazard areas

(a) A flood hazard area is any land in a flood plain as defined under the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., and its implementing rules, N.J.A.C. 7:13.

(b) A major Highlands development in a flood hazard area shall meet the requirements of either (b)1 or 2 below:

1. The proposed activities, both individually and cumulatively, displace no flood storage volume whatsoever onsite, as calculated according to (c) and (d) below, based on site conditions as of August 10, 2004; or

2. The proposed activities, both individually and cumulatively, displace no more than 20 percent of the flood storage volume onsite, as calculated according to (c) and (d) below, based on site conditions as of January 31, 1980, and an equal or greater volume of flood storage is created offsite in accordance with (e) below.

(c) The flood storage volume of a site is the volume of space outside the floodway, as defined at N.J.A.C. 7:13-1.2, between the ground surface and the flood plain elevation as determined under N.J.A.C. 7:13. Additional flood storage can be created either by excavating material from below the surface of the ground and removing the material to outside of the flood plain so that floodwaters can freely enter and exit the excavated area, and/or by removing fill or structures that have been previously and lawfully placed within the flood plain and outside the floodway.

(d) Flood storage volume can be created onsite to compensate for regulated activities that displace flood storage provided the onsite compensation:

1. Is created within or adjacent to the flood plain of the same water as the proposed fill, or a tributary to the same water as the proposed fill if the flood plain of both waters connect on site;

2. Is not created in a floodway, as defined at N.J.A.C. 7:13-1.2;

3. Is not created within 300 feet of a Highlands open water, unless the area where the compensation will be created has been subject to previous, lawful disturbance; and

4. Would not have other significant adverse environmental consequences, that is, shall not merely substitute the adverse effects of the proposed activities with adverse impacts upon other Highlands resource areas.

(e) Flood storage volume can be created offsite to compensate for regulated activities that displace flood storage as described in (b)2 above provided the offsite compensation:

1. Is of equal or greater volume than the flood storage displaced by the regulated activities onsite;

2. Is created within or adjacent to the flood plain of the same water as the proposed fill, or a tributary to the same water as the proposed fill if the flood plain of both waters connect on site;

3. Is situated within the same HUC 14 watershed as the proposed fill;

4. Is not separated from the proposed fill by a water control structure, such as a bridge, culvert or dam, unless the applicant demonstrates that the water control structure causes no significant change in the flood plain elevation;

5. Is not created in a floodway, as defined at N.J.A.C. 7:13-1.2;

6. Is not created within 300 feet of a Highlands open water, unless the area where the compensation will be created has been subject to previous, lawful disturbance;

7. Would not have other significant adverse environmental consequences, that is, shall not merely substitute the adverse effects of the proposed activities with adverse impacts upon other Highlands resource areas;

8. Is agreed to in writing by the owners of the land on which the offsite compensation is proposed; and

9. Is proposed on land that is subject to a conservation restriction against future flood storage volume displacement in accordance with N.J.A.C. 7:38-6.3.

Amended by R.2006 d.420, effective December 4, 2006.
See: 37 N.J.R. 4767(a), 38 N.J.R. 5011(a).
In (e)9, substituted "subject to a conservation restriction" for "deed restricted" and inserted "in accordance with N.J.A.C. 7:38-6.3".

7:38-3.8 Steep slopes

(a) A major Highlands development on a steep slope shall meet the requirements of this section.

(b) The percent of slope (rise in feet per horizontal distance) shall be established by measurement of distance perpendicular to the contour of the slope. The percent of slope shall be calculated for each two-foot contour interval. For example, any location on the site where there is a one-foot rise over a 10-foot horizontal run constitutes a 10 percent slope; a 1.5 foot rise over a 10-foot horizontal run constitutes a 15 percent slope; a two-foot rise over a 10-foot horizontal run constitutes a 20 percent slope.

(c) Linear development as defined at N.J.A.C. 7:38-1.4 shall be permitted on a slope with a grade of 20 percent or greater provided that there is no feasible alternative for the linear development outside the steep slope. In order to demonstrate "no feasible alternative for linear development," the applicant shall demonstrate that there is no other location, design and/or configuration for the proposed linear development that would reduce or eliminate the disturbance to a slope

with a grade of 20 percent or greater. The additional limitations at (c)1 and 2 below apply for proposed linear development that would provide access to an otherwise developable lot.

1. The proposed linear development is the only point of access for roadways or utilities to an otherwise developable site;

2. Shared driveways are used to the maximum extent possible to access multiple lots, especially in areas containing steep slopes, Highlands open water or Highlands open water buffers; and

3. For a driveway, the applicant shall, in addition, demonstrate that:

i. The applicant has made a good faith effort to transfer development rights for the lot pursuant to N.J.S.A. 13:20-13, and has not obtained a commitment from the Highlands Council or a receiving zone municipality to purchase said development rights;

ii. The lot has been offered for sale at an amount no greater than the specific fair market value to all property owners within 200 feet of the lot, and to the land conservancies, environmental organizations, the Highlands Council and all other government agencies on a list provided by the Department, at an amount determined in compliance with N.J.S.A. 13:8C-26j or 13:8C-38j, as applicable by letter sent by certified mail, return receipt requested, with a copy to the Highlands Council, using the form provided by the Department, disclosing the location on the lot of all Highlands resource areas as defined in N.J.A.C. 7:38-1.4 and stating that an application to develop the lot has been filed and enclosing a copy of a fair market value appraisal, performed by a State-licensed appraiser based on the minimum beneficial economically viable use of the property allowable under local law; and

iii. No reasonable offer for the lot has been received; and

iv. Documentation for (c)4i through iii above shall include:

(1) A copy of each letter that the applicant sent under this paragraph;

(2) A copy of all responses received. Each response shall be submitted to the Department within 15 days after the applicant's receipt of the response;

(3) A list of the names and addresses of all owners of real property within 200 feet of the lot, as certified by the municipality, including owners of easements as shown on the tax duplicate;

(4) Receipts indicating the letters were sent by certified mail;

(5) For submittal to all property owners within 200 feet, a copy of the fair market value appraisal required under (c)4ii above; and

(6) A copy of a written response or a resolution from the Highlands Council demonstrating that it has considered and rejected the offer;

4. 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 be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed linear development; and

5. After consideration of the information required in (c)1 through 4 above, the Department shall not issue an HPAA under this section if an applicant has refused a fair market value offer to purchase the property for which the driveway linear development is sought, or if the Department finds that there is an alternative to the proposed linear development.

(d) For a steep slope with a grade greater than 10 percent but less than 20 percent:

1. If the steep slope is a forest as defined at N.J.A.C. 7:38-1.4, linear development as defined at N.J.A.C. 7:38-1.4 shall be permitted if there is no feasible alternative for the linear development outside the steep slope;

2. If the steep slope is not a forest and the appropriate Soil Survey for the onsite soil series and percent slope states that the soil capability class of the soil is III or higher or the soil capability class and subclass are IIe or IIs, linear development shall be permitted provided that there is no feasible alternative for the linear development outside the steep slope; or

3. If the steep slope is not a forest and the appropriate Soil Survey for the onsite soil series and percent slope states that the soil capability class is I or the soil capability class and subclass is IIw, major Highlands development shall be permitted provided:

i. The proposed development meets all other standards in this chapter; and

ii. The applicant demonstrates that there is no other location, design and/or configuration for the proposed development that would reduce or eliminate the disturbance to steep slopes and still fulfill the basic purpose of the proposed development.

Amended by R.2006 d.420, effective December 4, 2006.
See: 37 N.J.R. 4767(a), 38 N.J.R. 5011(a).
Rewrote (c); in (d)2, inserted "the soil capability class and subclass are"; in (d)3, inserted "the soil capability class and subclass is" and "major Highlands"; in (d)3i, substituted "development" for "activity".

7:38-3.9 Upland forested areas

(a) A major Highlands development in an upland forested area shall meet the requirements of this section.

(b) The applicant shall identify on a site plan submitted to the Department all forest in existence on the lot as of August 10, 2004 as well as those forest areas that have subsequently developed.

1. The limit of the forest shall be identified using aerial photographs obtained from the Department, free of charge, at www.state.nj.us/dep/gis/; and

2. If the aerial photograph contains areas of sporadic coverage that have not been identified as forest by the applicant, the applicant shall lay a one-half acre grid system over the photograph. A standard 142 foot square grid block provided by the Department at its website shall be used. Any grid block containing 33 percent or greater forest cover, shall be considered as forest for the purposes of this chapter, unless the applicant demonstrates otherwise using the procedure established in (c) below.

(c) If the Department identifies forest areas on a lot that have not been so identified by the applicant, the Department shall require an applicant to measure the trees and determine density of the trees on the lot using the following method:

1. Select two 25-foot by 25-foot plots in every acre of the site suspected of being a forest.

i. The plots shall be located in the portion of each acre with the highest density of trees as determined by a visual inspection.

ii. If the tree size and density are very uniform over some or all of the site, one plot may be selected in the area of uniformity. However, the point total from the one plot shall be doubled to determine the total point value for the sampled acre under (c)5 below.

2. In each plot, measure the diameter of each tree at four and one-half feet above ground (dbh).

3. Score each tree as follows:

Diameter of tree	Points
One to three inches	2
>Three to seven inches	4
>Seven to 12 inches	6
>12 inches	8

4. Add together the scores for all of the trees in each plot.

5. If the total score for both plots is equal to or greater than 16, the sampled acre is regulated as a forest under this chapter. For example, if the two 25-foot by 25-foot plots contain a total of three trees which are two inches in diameter, two trees which are six inches in diameter, and one tree which is 15 inches in diameter, the score for the sampled area would be: (3x2)+(2x4)+(1x8) = 22, and the sampled acre is considered a forest.

6. If a sampled acre is a forest, the Department shall assume that a half-acre of ground surrounding all sides of the sampled acre is also forest except for the surrounding areas that are sampled by the applicant and score under 16. In that case, a sufficient number of plots in the surrounding area shall be sampled by the applicant to delineate the forest portion of the surrounding area.

7. For a newly planted or regenerating forest, an area shall be considered forest if there are 408 seedlings or saplings per sampled acre, that is, the total number of seedlings or saplings in the two sample plots is 12 or more. For the purposes of this section, a tree will be considered a seedling or sapling if it is has a caliper (diameter) of less than one-inch.

8. Orchards, Christmas tree farms and nurseries are not considered forest under this section. As agricultural or horticultural uses, they are not regulated under this chapter. See N.J.A.C. 7:38-2.2(b).

(d) The limit of the forest shall be the outermost edge of the canopy of the forest area identified in (a) through (c) above.

(e) The Department shall not issue an HPAA for an activity that would result in disturbance to an upland forest located on a slope greater than 10 percent, except for linear development which meets the criteria in N.J.A.C. 7:38-3.6(b)1 and 2.

(f) The Department shall issue an HPAA for an activity that would result in disturbance to an upland forest if:

1. The proposed activity complies with all of the other standards of this chapter;

2. There is no alternative that:

i. Would have less adverse impact on the upland forest or could be located outside the upland forest. To minimize impact, disturbance shall be located outside the drip line of a tree canopy and at least 100 feet away from all trees of four inches or greater dbh; shall not result in a significant increase in the amount of forest edge; and shall avoid mature specimens; and

ii. Would not merely substitute adverse consequences to other Highlands resource areas for those caused by the proposed activity;

3. The disturbance to the upland forested area is limited to:

i. Twenty feet directly next to a lawfully constructed structure or the perimeter of a septic disposal bed; or

ii. Ten feet on each side of a driveway width that is required by municipal code; and

4. The total acreage of upland forested area to be removed or damaged as a result of an activity approved under an HPAA is mitigated in accordance with (g) below.

(g) Mitigation for upland forested areas shall comply with all other standards of this chapter and replace upland forest with forest of equal ecological value and function. The Department will require mitigation in accordance with the following hierarchy:

1. Planting trees onsite;

2. If planting trees onsite is not feasible, planting trees offsite in the preservation or planning area, provided that the mitigation site is in the same HUC 14 as the site where upland forest was removed or damaged by the activity approved under the HPAA;

3. If (g)1 and 2 are not feasible, planting trees offsite in the preservation area; or

4. If (g)1 through 3 are not feasible, paying into a fund dedicated to the purchase of upland forested areas in the Highlands Region.

(h) In order to be considered successful, an 85 percent survival rate of the planted trees shall be demonstrated at the end of three years. Tree planting as described in (g)1, 2 and 3 above shall be conducted in accordance with the following:

1. The replacement of trees shall be determined by a tree replacement factor (TRF) resulting in 204 trees per acre of tree cover;

2. In implementing the TRF, the following number of stems shall be calculated for seeding, caliper and whip/ container trees. TRF equals:

i. 204 (two-inch to 2.5-inch) caliper trees per acre; or

ii. 408 whip/container (four-foot to six-foot) trees per acre;

3. Trees shall be planted in a cluster, spaced from six to 10 feet apart, and shall be planted in a staggered, non-linear pattern;

4. All trees shall be native and adapted to the substrate and other environmental conditions of the site. More than one species shall be included in the planting;

5. Two thirds of the trees planted shall be:

i. Canopy or dominant tree species, which typically grow taller than 50 feet at maturity; and

ii. A minimum of two inches in diameter at the base;

6. The remaining one third of the trees planted shall be:

i. Understory or subcanopy tree species, which typically grow to a height of less than 50 feet at maturity; and

ii. A minimum of four to six feet in height;

7. Newly planted trees shall be monitored by the applicant for a period of two years in accordance with the following:

i. Trees shall be weeded, watered and protected from deer grazing and deer rubs;

ii. If a tree has lost more than 50 percent of its canopy at the end of two years, it shall be replaced with another tree as large as the first tree when planted;

iii. Trees shall be supported by staking with guy wires, that shall be removed after two years;

8. The boundaries of the tree cluster shall be clearly marked with permanent, visible markers such as concrete blocks or posts, metal stakes, or other easily seen, permanent, immovable markers;

9. The tree cluster shall be protected from any future development by a recorded conservation restriction; and

10. An annual post-planting monitoring report shall be submitted to the Department each year for a period of three years following the planting. The monitoring report shall include:

i. A brief description of the tree planting that was approved, when it was completed, and the types of maintenance activities that have been conducted;

ii. A statement whether the mitigation has successfully achieved the required survival rate and if not, the remedial actions that will be taken to accomplish the survival rate; and

iii. For the final report, an analysis of the mitigation, and whether it has successfully achieved the required 85 percent survival rate. If it has not, the Department will require additional planting and additional years of monitoring until the 85 percent survival rate is achieved.

(i) If the applicant is proposing mitigation in accordance with (g)4 above, the applicant shall specify the total area for which mitigation is required, the number and size of trees that would be required using the TRF in (h) above, and an estimate of the cost to purchase and plant trees at the required TRF, including a cost quotation from a tree farm or nursery.

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

7:38-3.10 Historic and archaeological areas

(a) Historic and archaeological areas are those historic or archaeological properties that are listed or are eligible for listing on the New Jersey or National Register of Historic Places pursuant to N.J.A.C. 7:4-2.3.

(b) An HPAA application for a proposed regulated activity as described at (b)1 through 4 below shall include an

intensive-level architectural survey completed by an architectural historian whose qualifications meet the Secretary of the Interior's Professional Qualifications Standards and related guidance as part of the larger Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation as referenced at 36 CFR 61, incorporated herein by reference. Guidance regarding intensive-level architectural surveys is available at the State Historic Preservation Office's website at www.state.nj.us/dep/hpo/1identify/gaspart1.pdf.

1. A proposed regulated activity within or adjacent to a site or sites containing known historic or archaeological properties, based upon information contained within the application, or as identified on copies of historic property maps on file at the Department's Historic Preservation Office;

2. A proposed regulated activity on a site for which available maps, photographs, or other information, or observations made during a site visit indicate the presence of buildings, structures, or ruins over 50 years old within the project area;

3. A proposed regulated activity including new, replacement, reconstructed, or rehabilitated bridges or culverts; and/or

4. A proposed regulated activity on a site where citizens, local units of government, historic preservation organizations, or others have indicated the possible presence of historic or archaeological properties.

(c) An HPAA application for a proposed regulated activity as described at (c)1 through 5 below shall contain a Phase I (identification of resources) archaeological survey completed by an archaeologist whose qualifications meet the Secretary of the Interior's Professional Qualifications Standards and related guidance as part of the larger Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation as referenced in 36 CFR 61, incorporated herein by reference:

1. A proposed regulated activity within or adjacent to a site containing known historic or archaeological properties, based upon information contained within the HPAA application or as identified on copies of historic property maps on file at the Department's Historic Preservation Office or the New Jersey State Museum;

2. A proposed regulated activity on a site situated wholly or partially within the floodplain as defined at N.J.A.C. 7:13 or wholly or partially within 1,000 feet of the following waterways, whichever is greater:

i. Pompton River;

ii. Pequannock River;

iii. Wanaque River;

iv. Ramapo River;

v. Whippany River;

vi. Rockaway River;

vii. Musconetcong River;

viii. Delaware River;

ix. Wallkill River;

x. North Branch of the Raritan River;

xi. South Branch of the Raritan River;

xii. Lamington River;

xiii. Lopatcong Creek;

xiv. Pohatcong Creek; or

xv. Raritan River;

3. A proposed regulated activity on a site that includes a permanent Highlands open water (for example, a wetland, pond, lake, river or perennial stream) or that is located wholly or partially within 500 feet of a permanent Highlands open water, except when the waterway is listed at (c)2 above, in which case (c)2 above governs;

4. A proposed regulated activity on a site for which available maps, photographs, or other information, or observations made during a site visit indicate the presence of buildings, structures, or ruins over 100 years old that could potentially be affected by the proposed regulated activity; or

5. A proposed regulated activity or site about which citizens, local units of government, historic preservation organizations, or others entities have indicated the possible presence of archaeological properties or sites within or adjacent to the regulated activity or its site.

(d) If an archaeological property or site is identified in the Phase I archaeological survey under (c) above, a Phase II (evaluation of resource eligibility) archaeological survey shall be submitted as part of the application for an HPAA.

(e) Phase I and II surveys and accompanying reports submitted for the purposes of this section shall conform with the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, 48 C.F.R. 44716, incorporated herein by reference.

(f) A proposed regulated activity shall be deemed to not have an impact to an historic property if the Department determines the regulated activity conforms with the Secretary of the Interior's Standards for the Treatment of Historic Properties, 36 CFR 68 et seq., incorporated herein by reference. The Standards are available at www.state.nj.us/dep/hpo or www.nps.gov.

(g) A proposed regulated activity shall be deemed to not have an impact to an archaeological area identified in a Phase II survey under (d) above if the Department determines: