

remediation”; and in (c), substituted “approved pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C,” for “by which the Department approves the cleanup” and “general” for “General”.

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

(a) General permit 5 authorizes activities in freshwater wetlands, transition areas and/or State open waters that are undertaken by the Department’s Division of Solid and Hazardous Waste, or authorized through a solid waste facility

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closure and post-closure plan or disruption approval issued by the Department under N.J.A.C. 7:26-2A.9.

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

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

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

(c) There is no acreage limit on activities under general permit 5. However, mitigation shall be performed to compensate for disturbance of freshwater wetlands and/or State open waters authorized under general permit 5, except that mitigation is not required for disturbance of wetlands located on top of the landfill, or on the intermediate or permanent cover of the landfill. The mitigation shall meet the procedural and substantive requirements at N.J.A.C. 7:7A-15.

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

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

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

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

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

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

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

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

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

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

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

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

2. The activities shall disturb no more than one-half acre of a freshwater wetland and/or State open water, which is a water of the United States, as defined at N.J.A.C. 7:7A-1.4. Mitigation shall be performed for all permanent loss and/or disturbance to wetlands and/or State open water that are waters of the United States in accordance with (d) below.

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

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

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

3. USEPA priority wetlands; or

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

(d) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters that are also waters of the United States. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters that are also waters of the United States unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval no later than 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

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

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

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

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

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

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

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

Public Notice: Request for public comments and public hearings.

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

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

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

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

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

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

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

Rewrote (a).

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

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

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

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

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

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

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

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

Amended by R.2009 d.330, effective November 2, 2009.

See: 40 N.J.R. 5478(a), 41 N.J.R. 4090(a).

In (b)2, inserted the last sentence; added new (d); and recodified former (d) as (e).

Case Notes

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

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

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

In the absence of clear evidence of a link between petitioner’s property and the inlet, or of scouring, erosion, or a concentrated flow of water from the property, the ALJ’s determination that the preponderance of the evidence favored a conclusion that the wetlands were isolated was sufficiently supported by the record; in light of the issues with the Department’s position, the ALJ reasonably found the conclusions of petitioner’s expert more persuasive, including the results of a dye-test **the expert** performed on the property, which showed rainwater flowing into the property at the very point where the Department’s witnesses had contended the water would exit the property (adopting 2005 N.J. AGEN LEXIS 710). *Ellis v. N.J. Dep’t of Env’tl. Prot., Land Use Regulation*,

OAL Dkt. No. ESA 8925-03, 2006 N.J. AGEN LEXIS 226, Final Decision (February 27, 2006).

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

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

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

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

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

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

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

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

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

New Rule, R.2008 d.291, effective October 6, 2008.

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

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

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

(b) For the purpose of this section, “headwater” means a water or wetland that is upstream of the point on a non-tidal stream where the average annual flow is less than five cubic feet per second. The Department may estimate this point from available data by using area annual precipitation, area drainage basin maps, and the average annual runoff coefficient, or by similar means. For a stream that is dry for long periods of