

inserted the last sentence; in definition "Swale", recodified the former second sentence of paragraph 1 as subparagraph 1i and added subparagraph 1ii; in definition "Vernal habitat", rewrote the first sentence, inserted "or contains" in paragraph 1, inserted "or immediately adjacent to" in subparagraphs 2i and 2ii and inserted "reproducing" and "populations" in paragraph 4.  
Petition for Rulemaking.  
See: 41 N.J.R. 3319(b).

#### Case Notes

**INVALIDITY ANNOTATION:** Validity of definition of "residential development project" affected. In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478, (2004).

Township's land use ordinance reducing permissible development area and requiring documentation was not preempted by Freshwater Wetlands Protection Act. *Crow-New Jersey 32 Ltd. Partnership v. Township of Clinton*, D.N.J.1989, 718 F.Supp. 378.

Regulation was not invalid on the theory that it permitted regulation outside freshwater wetlands. *New Jersey Chapter of Nat. Ass'n of Indus. and Office Parks v. New Jersey Dept. of Environmental Protection*, 241 N.J.Super. 145, 574 A.2d 514 (A.D.1990) certification denied 122 N.J. 374, 585 A.2d 379, certification denied 122 N.J. 374, 585 A.2d 380.

Projects that received preliminary approval prior to July 1, 1989 were exempt from compliance with transition-area provisions of Freshwater Wetlands Protection Act. Appeal of Adoption of N.J.A.C. 7:7A-1.4 (Definition of "Documented Habitats for Threatened and Endangered Species" and "Swale"), 7:7A-2.5(b)(2), and 7:7A-2.7(f), 118 N.J. 552, 573 A.2d 143 (1990).

Where petitioner sought to use the subject property for a proposed used car sales operation in 2005, and petitioner's predecessor had only obtained in 1977 a preliminary and final subdivision approval for a division of the land, and, assuredly, petitioner sought to develop that land into a full-scale business operation, what the local authority approved in 1977 was nothing like what petitioner now proposed; thus, it was entirely correct for the Department of Environmental Protection to identify petitioner's "project" as not the "project" that the local authority approved in 1977, but instead a different "project," and as such, petitioner had no subdivision approval under the Municipal Land Use Law that would allow any exemption from the requirements of the Freshwater Wetlands Protection Act. *Haubrich v. N.J. Dep't of Env'tl. Prot./Land Use Regulation*, OAL Dkt. No. ESA 09194-06N, 2008 N.J. AGEN LEXIS 95, Initial Decision (January 16, 2008).

Property owner's argument that the wetlands on the property were tidally influenced, and therefore did not qualify as "freshwater wetlands" was rejected; Department of Environmental Protection regulations define freshwater wetlands as including "tidally influenced wetlands which have not been included on a promulgated map pursuant to the Wetlands Act of 1970," and the owner offered no evidence showing that the wetlands on the property were included on a promulgated map pursuant to the Wetlands Act of 1970 and offered no scientific evidence of tidal influence. *Cummings v. N.J. Dep't of Env'tl. Prot., Land Use Regulation Program*, OAL Dkt. No. ESA 4466-06, 2007 N.J. AGEN LEXIS 920, Final Decision (July 2, 2007).

Property owner's argument that a drainage easement existed on the property and that, accordingly, the corresponding wetlands were wetlands of "ordinary resource value" and thus not subject to transition area requirements, was rejected since a drainage easement does not equate to a manmade drainage ditch and the purported fact that drainage patterns corresponded with the mapped drainage easements did not establish the presence of a manmade drainage ditch. *Cummings v. N.J. Dep't of Env'tl. Prot., Land Use Regulation Program*, OAL Dkt. No. ESA 4466-06, 2007 N.J. AGEN LEXIS 920, Final Decision (July 2, 2007).

#### 7:7A-1.5 Severability

If any subchapter, section, subsection, provision, clause, or portion of this chapter, or the application thereof to any per-

son, is adjudged unconstitutional or invalid by a court of competent jurisdiction, such judgment shall be confined in its operation to the subchapter, section, subsection, provision, clause, portion, or application directly involved in the controversy in which the judgment was rendered and it shall not affect or impair the remainder of this chapter or the application thereof to other persons.

Amended by R.2001 d.312, effective September 4, 2001.  
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Substituted "the" for "such" following "the controversy in which", and "was" for "shall have been" preceding "rendered".

#### 7:7A-1.6 Other statutes and regulations

(a) The powers, duties and functions vested in the Department under this chapter shall not limit in any manner the powers, duties and functions vested therein under any other law except as specifically set forth in this chapter.

(b) The Freshwater Wetlands Protection Act, on and subsequent to July 1, 1988, shall supersede any law or ordinance enacted by any municipality, county, or political subdivision thereof, regulating freshwater wetlands or freshwater wetlands transition areas except that the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetland areas within its jurisdiction. No municipality, county, or political subdivision thereof shall enact any law, ordinance, or rule or regulation requiring a transition area adjacent to a freshwater wetland, except that the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetland areas within its jurisdiction.

(c) This section shall not, however, preclude municipal advice to the Department concerning letters of interpretation or other matters.

(d) This chapter shall not preempt State regulatory programs which affect regulated activities in freshwater wetlands, including but not limited to Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., and State approved municipal water quality management plans. These programs will continue to regulate based on the concerns covered by their respective enabling statutes and rules, and may, through such regulation, have some impact on projects in freshwater wetlands. However, those programs will not use freshwater wetlands concerns as a basis for regulation, and any regulation by these programs of projects in freshwater wetlands will be limited to that based on other (for example, flood danger) concerns.

(e) If a proposed project does not involve a freshwater wetland or State open water, does not constitute a regulated activity, or is exempt under this chapter, the final decision on the application shall be based solely on the requirements of other applicable permit programs.

Amended by R.1992 d.117, effective March 16, 1992.  
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).  
Internal cite corrected.

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

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

In (a), deleted "the provisions of the Act or" following "department", "be construed to" preceding "limit", and "provisions of" following "any other"; rewrote (b); in (c), substituted "or other matters" for "pursuant to N.J.A.C. 7:7A-8.5"; in (d), deleted "pre-existing" following "preempt", "except pursuant to (e) below," preceding "those programs" and "such" preceding "regulation by"; rewrote (e).

#### Case Notes

Regulation subjecting exempted projects to other permit programs is valid only if construed to mean that wetland regulations are not to be used when evaluating other permit program submissions. *New Jersey Chapter of Nat. Ass'n of Indus. and Office Parks v. New Jersey Dept. of Environmental Protection*, 241 N.J.Super. 145, 574 A.2d 514 (A.D. 1990) certification denied 122 N.J. 374, 585 A.2d 379, certification denied 122 N.J. 374, 585 A.2d 380.

Fill of wetlands authorized prior to effective date of Freshwater Wetlands Protection Act; permit modification granted. *Lawrencewood II, Inc., v. Department of Environmental Protection*. 92 N.J.A.R.2d (EPE) 36.

#### 7:7A-1.7 Hearings and appeals

(a) Subject to the limits on third party hearings at (k) below, a person may request an administrative hearing to contest a decision under this chapter on any of the following actions:

1. An exemption letter request;
2. An application for a letter of interpretation;
3. An application for authorization to act under a general permit;
4. An application for a transition area waiver;
5. An application for an individual freshwater wetlands permit;
6. An application for an individual open water fill permit; or
7. An application for a modification or extension of any Department issued document.

(b) A person seeking to contest an administrative order or a penalty assessment arising from an enforcement matter under this chapter shall do so under N.J.A.C. 7:7A-16.7.

(c) A request for an administrative hearing shall:

1. Be in writing;
2. Contain all information required by the administrative hearing request checklist, available from the Department at the address in N.J.A.C. 7:7A-1.3;
3. Explain in what way the person submitting the request believes the Department has acted improperly;
4. Explain what issues the person submitting the request will raise if a hearing is held; and
5. Be submitted to the Department at the following address, with a copy to the Division of Land Use Regulation at the address at N.J.A.C. 7:7A-1.3(b):

Office of Legal Affairs

Attention: Administrative Hearing Requests

Department of Environmental Protection

401 East State Street, 4th Floor

P.O. Box 402

Trenton, New Jersey 08625-0402

(d) To contest a decision listed at (a) above, a person shall submit a hearing request within 30 days after notice of the decision is published in the DEP Bulletin. If a person submits the hearing request after this time, the Department shall deny the request. The DEP bulletin is available through the Department's website at [www.state.nj.us/dep](http://www.state.nj.us/dep).

(e) As part of a request for an administrative hearing, a person may request that the Department determine whether the matter for which the administrative hearing is requested is suitable for mediation by the Department's Office of Dispute Resolution. The Department shall promptly notify the person who submitted the request of its determination. If the Department determines the matter is suitable for mediation, it shall also notify the person who submitted the request of the procedures and schedule for mediation.

(f) A request by a permittee for a hearing shall automatically stay operation of a permit, including a transition area waiver or general permit authorization, unless the permittee shows good cause why the permit should continue in effect while being contested. If a hearing is requested by a permittee, all permitted activities shall stop upon the date the hearing request is submitted, and shall not be started again until the matter is resolved, unless the Department grants an exception in writing. If a person other than the permittee requests a hearing, the requester may also request a stay of the permit. The Department shall grant the request for a stay of the permit if the requester shows good cause why the permit should be stayed.

(g) When the Department receives an administrative hearing request, the Commissioner may refer the matter to the Office of Administrative Law for an administrative hearing in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1, or may deny the request for a hearing. If the Commissioner refers the matter to the Office of Administrative Law, the Department shall so notify the person who submitted the request and the applicant.

(h) If the Department agrees to settle a matter for which a hearing request has been submitted under this section, and the settlement will result in Department approval of a regulated activity, public notice of the settlement shall be provided as follows:

1. The person who requested the hearing shall send by certified mail a notice of intent to settle the matter. A form for the notice may be obtained from the Department at the address in N.J.A.C. 7:7A-1.3. The notice shall be sent to:

scaffolds or ladders, the removal of human-made debris by non-mechanized means which does not destroy woody vegetation, the placement of temporary construction supports, and the placement of utility lines over or under a previously authorized, currently serviceable paved roadway surface. Fencing will not be regulated if it is installed on the boundary between the transition area and upland area; and

3. The erection of one or more temporary structures covering a combined total of 150 square feet or less of the transition area. For the purposes of this paragraph, a "temporary structure" means a shed or fence without a foundation, or a structure that remains in the transition area for no more than six months. Chain link fences are not considered temporary structures.

(c) Certain regulated activities are exempt from transition area requirements under N.J.A.C. 7:7A-2.8(f). In addition, an activity that is exempt from freshwater wetlands permit requirements under N.J.A.C. 7:7A-2.8(c) for farming activities, or N.J.A.C. 7:7A-2.8(d) for forestry activities, is also exempt from transition area requirements, subject to the limits on freshwater wetlands exemptions at N.J.A.C. 7:7A-2.8. A person may request an exemption letter confirming the exemption status of an activity by using the procedures at N.J.A.C. 7:7A-2.10.

Amended by R.1992 d.117, effective March 16, 1992.  
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

At (b)2i added reference to placement of utility lines; corrected cross references in (c) and (d).

Amended by R.2001 d.312, effective September 4, 2001.  
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Former N.J.A.C. 7:7A-2.6, Designation of State open waters, was repealed.

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)4, inserted "and" at the end; in (a)5, substituted a period for "; and" at the end; deleted (a)6; rewrote the introductory paragraph of (b) and (b)1i(1); added new (b)1i(2); recodified former (b)1i(2) through (b)1i(8) as (b)1i(3) through (b)1i(9); rewrote (b)1i(5) and (b)1i(8); in (b)1ii, inserted "and shall require a transition area waiver in accordance with this chapter" and ", alteration,"; in (b)2, substituted ". Fencing will not be regulated if it is installed on the boundary between the transition area and upland area; and" for a semicolon at the end; and in (b)3, inserted the last sentence.

#### Case Note

INVALIDITY ANNOTATION: Validity of N.J.A.C. 7:7A-2.6(a)6 affected. In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478, 852 A.2d 1083 (2004).

#### 7:7A-2.7 Transition areas due to freshwater wetlands on adjacent property

(a) The outside boundary of a transition area is determined solely by reference to the freshwater wetlands boundary and is not affected by property lines. Therefore, a property within 150 feet of a freshwater wetlands may contain a transition area that arises from a freshwater wetlands on another property. Every property containing a transition area is subject to this chapter, even if the freshwater wetland that causes the transition area is located on another property.

(b) To determine whether a site has transition areas on it caused by wetlands on another property:

1. Determine whether there are any wetlands on any property within 150 feet of the site's property line. If not, there are no transition areas on the site due to wetlands on nearby properties;

2. If there are freshwater wetlands on another property within 150 feet of the site's property line, determine the resource value classification of the wetlands on the nearby property. For a Department-issued resource value classification of the wetlands, obtain an LOI under N.J.A.C. 7:7A-3;

3. If all of the freshwater wetlands on nearby properties within 150 feet of the site's property line are ordinary resource value wetlands, there is no transition area on the site arising from wetlands on other properties;

4. If any of the freshwater wetlands on nearby properties within 150 feet of the site's property line cannot be classified as ordinary resource value wetlands, determine the transition area on the site as follows:

i. If any wetlands on nearby properties are intermediate resource value wetlands, and are within 50 feet of the site's property line, there is at least some transition area on the site arising from these wetlands. In order to determine the size and shape of the transition area, obtain a delineation of the wetlands on the nearby properties and determine the transition area for each under N.J.A.C. 7:7A-2.5(e); and

ii. If any wetlands on nearby properties are exceptional resource value wetlands, and are within 150 feet of the site's property line, there is at least some transition area on the site arising from these wetlands. In order to determine the size and shape of the transition area, obtain a delineation of the wetlands on the nearby properties and determine the transition area for each under N.J.A.C. 7:7A-2.5(d); and

5. To avoid obtaining an LOI and/or delineating wetlands under (b)3 and 4 above, a person can ensure compliance with transition area requirements arising from wetlands on other properties by assuming that there are exceptional resource value wetlands on all adjacent properties and refraining from any regulated activities within 150 feet of the site's property line.

(c) It may be necessary to obtain written permission from adjacent property owners to investigate their land within 150 feet of the site's boundary.

Amended by R.1992 d.117, effective March 16, 1992.  
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Repealed (b)5 and recodified existing 5-7 as 5 and 6; new language added at 6 regarding notification to owners of adjacent property.

Amended by R.2001 d.312, effective September 4, 2001.  
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

**Case Notes**

Court invalidated N.J.A.C. 7:7A-2.7(d)1, because the regulation improperly limited the statutory exemptions that had been extended to various municipal board approvals under N.J.S.A. 13:9B-4(d). In re Freshwater Wetlands Prot. Act Rules, 238 N.J. Super. 516, 570 A.2d 435, 1989 N.J. Super. LEXIS 497 (App.Div. 1989).

**Law Review and Journal Commentaries**

Insight to New Wetland Procedures of the Nineties. Alfred A. Porro, Jr., 168 N.J.L.J. 17 (1995).

**7:7A-2.8 Activities exempted from permit and/or waiver requirement**

(a) This section sets forth certain activities that are exempt from certain permit requirements in this chapter. However, even if an activity is exempt under this chapter, it may still require a permit from the Army Corps of Engineers under the Federal wetlands program, and/or a water quality certificate issued by the Department. Any activity conducted under an exemption that does not meet all standards, conditions, or limitations of the exemption shall constitute a violation of this chapter, and shall be subject to enforcement action in accordance with N.J.A.C. 7:7A-16.

(b) The farming, ranching, and silviculture exemptions in (c) and (d) below are subject to the following limits:

1. The exemptions shall not apply to any discharge of dredged or fill material into freshwater wetlands or State open water incidental to any activity which involves bringing an area of freshwater wetlands or State open waters into a use to which it was not previously subject, where the flow or circulation patterns of the freshwater wetlands or waters may be impaired, or the extent or values and functions of freshwater wetlands or State open waters is reduced;

2. The exemptions apply only as long as the area is used for the exempted activity. Therefore, if the area stops being used for farming, ranching, or silviculture, the exemption no longer applies;

3. The exemptions apply only to the portion of the property which meets all requirements for the exemption. For example, if half of a 20-acre property has been actively farmed since June 30, 1988 and half has not, the half that has been actively farmed would be considered to be part of an established, ongoing farming operation and would therefore be eligible for the farming exemption. The remainder would not be eligible for the farming exemption;

4. The normal harvesting of forest products, including the clear cutting of a non-cultivated, wooded wetland area, must be part of a forest management plan that addresses wetlands, and that is reviewed and approved by the State Forester before the activities are undertaken. A woodland management plan prepared for tax purposes but that does not address wetlands is insufficient to qualify for the exemption; and

5. If an area with hydric soils has been drained for farming purposes through the use of drainage structures such as tiles or ditches, the Department shall presume that the area has wetlands hydrology for the purpose of identifying a freshwater wetland under N.J.A.C. 7:7A-2.3. To rebut this presumption of wetlands hydrology, all drainage structures shall be removed or completely disabled and the area shall be left undisturbed for at least one normal rainfall year, after which the presence or absence of wetlands hydrology shall be determined through use of technical criteria, field indicators, and other information, in accordance with the 1989 Federal manual.

(c) Subject to the limitations of this section, the following activities, when part of an established, ongoing farming, ranching or silviculture operation, on properties which have received or are eligible for a farmland assessment under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq., are exempt from the requirement of a freshwater wetlands or open water fill permit, or transition area waiver:

1. Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food and fiber, or soil and water conservation practices. For the purposes of this paragraph, "minor drainage" means:

i. The discharge of material incidental to connecting upland drainage facilities to adjacent wetlands, adequate to effect the removal of excess soil moisture from upland croplands;

ii. The discharge of material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where the farming activities and the discharge occur in wetlands and waters which are in established use for such agricultural and silvicultural wetlands crop production, and the ditching or water control facilities do not alter the bottom elevations of any watercourse;

iii. The discharge of material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of the Federal Act and which are in established use for the production of rice, cranberries, or other wetland crop species;

iv. The discharge of material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not properly removed, would result in damage to or loss of existing crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the forma-

tion of the blockage. Removal must be accomplished within one year of formation of such blockages in order to be eligible for exemption under this paragraph; and

v. Minor drainage in wetlands is limited to drainage within areas that are part of an established farming or silvicultural operation. It includes maintenance of existing drainage tile or other drainage structures. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (for example, wetlands species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any new canal, ditch, dike or other waterway or structure. Any discharge of dredged or fill material into the wetlands or State open waters incidental to the construction of any such structure or waterway requires a freshwater wetlands or State open water permit, and will not be considered minor drainage;

2. Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches, provided that such facilities are for farming, ranching or silvicultural purposes and do not constitute a change in use. Any dredged material from pond construction or maintenance must be placed outside the freshwater wetlands unless it is needed for the structural or environmental integrity of the pond;

i. A pond constructed in an actively farmed area does not constitute a change in use. A field in which no crops or pasturing has occurred for five years or more is considered abandoned and is not considered an actively farmed area. Forest land is not considered an actively farmed area; however, an area that has been undergoing normal harvesting of forest products is considered an actively farmed area if it is part of a forest management plan in accordance with (d) below;

ii. To qualify for this exemption, a farm pond shall be:

(1) Part of a farm conservation plan developed in conjunction with the Natural Resources Conservation Service and approved by the Soil Conservation District, as appropriate;

(2) Located outside a watercourse;

(3) Created by excavation and not by creating an embankment within a watercourse;

(4) Not associated with development as that term is defined in the Municipal Land Use Law, N.J.S.A. 40:55D-4;

(5) Intended exclusively for agricultural purposes. The applicant shall submit a description of the purpose of the pond with any application for an exemption letter under N.J.A.C. 7:7A-2.10; and

(6) Sized appropriately for the intended use under (c)2ii(5) above.

3. Construction or maintenance of farm roads or forest roads constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of freshwater wetlands and State open waters are not impaired and that any adverse effect on the aquatic environment will be minimized. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. Roads constructed for forestry and silviculture purposes shall be constructed using temporary mats whenever practicable. Once the land use changes from forestry or farming to another use, that is, once the property no longer qualifies for a farmland assessment, all roads employing the placement of fill shall be removed within 30 days;

i. Construction of a farm road shall be undertaken only in accordance with the following:

(1) The road shall be part of a farm conservation plan developed in conjunction with the Natural Resources Conservation Service and approved by the Soil Conservation District, as appropriate;

(2) The location of the road shall be selected to minimize disturbance to wetlands, transition areas and watercourses. If there is an alternative location for a farm road that will have less impact to wetlands, transition areas, and watercourses, the alternative location shall be used;

(3) The road shall be necessary to support or provide access for a farming activity. A road that supports or provides access to proposed development is not a farm road and requires a permit in accordance with this chapter;

(4) The farm road shall not exceed 14 feet in width unless it must be wider to accommodate a large piece of equipment such as a combine. In the latter case, the road shall be no wider than 20 feet;

(5) The farm road shall be built at grade. If not built at grade, the applicant shall demonstrate to the Department why fill material is necessary for the farming operation with any application for an exemption letter under N.J.A.C. 7:7A-2.10; and

(6) In accordance with (c)3i(5) above, if fill material is necessary, it shall be no more than six inches deep and shall be limited to 0.25 acres of wetland disturbance. In addition, pipes shall be installed to maintain wetland hydrology;

ii. "Maintenance of a farm road" means:

(1) The existing road remains the same width before and after maintenance activities;

(2) The placement of all fill is entirely within the existing footprint of the existing road; and

(3) A culvert shall be used only to replace an existing culvert. If it is necessary to install a culvert for the first time, the Department will consider the project to be construction of a new road subject to the limitations in (c)3i above.

(d) Normal harvesting of forest products in accordance with a forest management plan approved by the State Forester before the conduct of the forest management activities is exempt from the requirement of a freshwater wetlands permit, transition area waiver, or open water fill permit, subject to the limitations of this section. A woodland management plan prepared for tax purposes but that does not address wetlands is insufficient to qualify for the exemption. However, the removal of stumps results in a discharge of dredged or fill material, and a change in use and an impairment of flow or circulation. Therefore, under (b)1 above, the removal of stumps is not exempt and shall require a permit under this chapter.

(e) Until March 2, 1994, when the Department assumed responsibility for the Federal 404 program, the Department issued certain exemptions based on prior local approvals. However, as of March 2, 1994, these exemptions are void as they apply to freshwater wetlands permit and open water fill requirements. The exemptions continue to apply to transition area requirements, and are described at (f) below.

(f) Subject to the limitations of this section including (g) below, the following projects, as defined at N.J.A.C. 7:7A-1.4, are exempt from transition area requirements, but are subject to freshwater wetlands and State open water requirements:

1. A project for which a preliminary site plan or subdivision application received formal preliminary approvals from local authorities pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., prior to July 1, 1989, provided those approvals remain valid under the Municipal Land Use Law. This excludes approvals which were given prior to the August 1, 1976 effective date of the Municipal Land Use Law; and

2. A project for which a preliminary site plan or subdivision application as defined in N.J.S.A. 40:55D-1 et seq., was submitted to the local authorities prior to June 8, 1987 and was subsequently approved. To qualify for an exemption under this paragraph, an application for preliminary approval must have been in proper form, must have been accompanied by all plans, data and information called for by the local land use ordinance and by statute, and thus must have been in fact complete prior to June 8, 1987.

(g) The following limits apply to the transition area exemptions at (f) above:

1. To be eligible for a transition area exemption under (f) above, a project must have preliminary site plan or subdivision approval. The exemptions do not apply to an application for, or grant of, any other approval under the Municipal Land Use Law, such as a sketch plat approval, general development plan, classification determination, building permit, variance, or conditional use approval;

2. A project listed in (f) above shall no longer be exempt from transition area requirements if significant changes are made to the approved site or subdivision plan. A significant change will be deemed to have been made if either of the following criteria is met:

i. The change would void the preliminary approval; or

ii. The change would require submittal to or approval of a new or amended application from the local authorities and either of the following criteria is met:

(1) The change would result in a change in land use on the project site, for example, from single family houses to multi-family units or a golf course; or

(2) The change would increase impacts to freshwater wetlands, State open waters, or transition areas;

3. A project listed in (f) above shall no longer be exempt if the municipal approval upon which the exemption was based becomes invalid for any reason; and

4. For all development determined to be exempt by the Department, once the development is constructed, the exempted "project" has been built. If, for example, the owner of a commercial building decides afterward that it is necessary to construct an addition, and goes back to the municipal authority for a new or amended site plan or subdivision approval, the exemption has been "used up" and the addition is subject to the permitting requirements of this chapter. Similarly, for residential approvals, once the houses and any accessory structures planned along with the house (for example, detached garages, barns, storage sheds, pools) are constructed, or the certificate of occupancy is issued, the exemption has been exhausted and any later additions or structural improvements are subject to the permitting requirements of this chapter. If there is an interruption of more than one year before construction of an accessory structure claimed to have been planned along with the house, there is a rebuttable presumption that the structure constitutes a later addition and will require a permit.

(h) If any discharge of dredged or fill material resulting from the activities exempted by this section contains any toxic pollutant listed under section 307 of the Federal Act, such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a freshwater wetlands or open water fill permit.

(i) A project covered by an individual permit issued by the U.S. Army Corps of Engineers prior to July 1, 1988 shall be governed only by the Federal Act, and shall not be subject to additional or inconsistent substantive requirements of this chapter. However, when the ACOE permit expires, any application for an extension shall be made to the Department under N.J.A.C. 7:7A-14.6. The Department shall not require a transition area as a condition of any extension of an ACOE permit issued prior to July 1, 1988.

INVALIDITY ANNOTATION: See: 21 N.J.R. 3482(a).

N.J.A.C. 7:7A-2.7(d)1 and 2 held invalid as providing permit exemption termination deadlines without statutory authority. *In the Matter of the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A-1.1 et seq.*, 238 N.J. Super. 516, 570 A.2d 435 (App.Div. 1989).

INVALIDITY ANNOTATION: See: 21 N.J.R. 3482(b).

N.J.A.C. 7:7A-2.7(f) held invalid as providing an exemption from transition area requirements without statutory authority. *In the Matter of Appeal of Adoption of N.J.A.C. 7:7A-1.4 (Definition of "Documented Habitats for Threatened and Endangered Species" and "Swale")*, 7:7A-2.5(b)(2), and 7:7A-2.7(f), 240 N.J. Super. 224, 573 A.2d 162 (App.Div. 1989).

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

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

Changes in exemptions reflect court decisions that have occurred since the rule adoptions of May 16, 1988 and July 3, 1989, as well as a formal opinion by the Attorney General.

Amended by R.1993 d.159, effective April 19, 1993.

See: 24 N.J.R. 912(b), 25 N.J.R. 1755(b).

Amendments based on Attorney General Formal Opinion No. 3(1990) and Formal Opinion No. 3: Reprise (1991) clarifying which projects qualify for an exemption from permit requirements.

Amended by R.1993 d.646, effective December 20, 1993.

See: 25 N.J.R. 1642(a), 25 N.J.R. 5954(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.2008 d.291, effective October 6, 2008.

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

In (a), inserted the last sentence; in (b)2, substituted "as" for "at"; in (b)3, substituted "20-acre" for "20 acre", inserted "since June 30, 1988", deleted "not" preceding "been" once and preceding "be" twice, and inserted ". The remainder would not be eligible for the farming exemption"; rewrote (b)4; in (c)1ii, substituted "the farming" for "these" and inserted "wetlands and" and " , and the ditching or water control facilities do not alter the bottom elevation of any watercourse"; in the introductory paragraph of (c)2, deleted "and" from the end; added (c)2i and (c)2ii; in (c)3, substituted "Once" for "All roads employing the placement of fill shall be removed once", inserted "or farming" and "that is, once the property no longer qualifies for a farmland assessment, all roads employing the placement of fill shall be removed within 30 days", and substituted a semicolon for a period at the end; added (c)3i and (c)3ii; in (d), inserted "before the conduct of the forest management activities" and "and shall require a permit under this chapter", and inserted the second sentence; and in (g)4, inserted "or the certificate of occupancy is issued".

#### Law Review and Journal Commentaries

Insight to New Wetland Procedures of the Nineties. Alfred A. Porro, Jr., 168 N.J.Law. 17 (Mag.) (April 1995).

Wetlands—Environmental Law—Municipal Land Use. Judith Nallin, 138 N.J.L.J. 76 (1994).

#### Case Notes

Wetlands regulation was invalid to extent that it conflicted with section of Freshwater Wetlands Protection Act. MCG Associates v. Department of Environmental Protection, 278 N.J. Super. 108, 650 A.2d 797 (A.D.1994).

Township planning board could require conditional use approval, rather than site plan approval only, of church's building despite church's First Amendment claim. Macedonian Orthodox Church v. Planning Bd. of Tp. of Randolph, 269 N.J. Super. 562, 636 A.2d 96 (A.D.1994).

Developer granted permit by Army Corps of Engineers was entitled to exemption from Fresh Water Wetlands Protection Act. A.R. Criscuolo and Associates, Inc. Defined Ben. Pension Plan and Trust v. New Jersey Dept. of Environmental Protection, 249 N.J. Super. 290, 592 A.2d 313 (A.D.1991).

Regulation exempting development activities authorized by Army Corps of Engineers was valid. A.R. Criscuolo and Associates, Inc. Defined Ben. Pension Plan and Trust v. New Jersey Dept. of Environmental Protection, 249 N.J. Super. 290, 592 A.2d 313 (A.D.1991).

For exemption of project from permit and transition area requirements based on a preliminary site plan submitted prior to 1987, application must have been under municipal land use law. In re Stemark Associates/Request to Vacate Exemption Letter Denial, 247 N.J. Super. 13, 588 A.2d 830 (A.D.1991).

Property was not entitled to exemption from permit and transition area requirements, despite evidence of subdivision prior to 1987. In re Stemark Associates/Request to Vacate Exemption Letter Denial, 247 N.J. Super. 13, 588 A.2d 830 (A.D.1991).

Regulation eliminating "transition areas" for projects that received preliminary approval prior to July 1, 1989 was not authorized. Appeal of Adoption of N.J.A.C. 7:7A-1.4 (Definition of "Documented Habitats for Threatened and Endangered Species" and "Swale"), 7:7A-2.5(b)(2), and 7:7A-2.7(f), 240 N.J. Super. 224, 573 A.2d 162 (A.D.1989) reversed 118 N.J. 552, 573 A.2d 143.

Regulation as adopted was not so substantially different from proposed version to require holding of new hearings. Appeal of Adoption of N.J.A.C. 7:7A-1.4 (Definition of "Documented Habitats for Threatened and Endangered Species" and "Swale"), 7:7A-2.5(b)(2), and 7:7A-2.7(f), 240 N.J. Super. 224, 573 A.2d 162 (A.D.1989) reversed 118 N.J. 552, 573 A.2d 143 (1990).

Projects that received preliminary approval prior to July 1, 1989 were exempt from compliance with transition-area provisions of Freshwater Wetlands Protection Act. Appeal of Adoption of N.J.A.C. 7:7A-1.4 (Definition of "Documented Habitats for Threatened and Endangered Species" and "Swale"), 7:7A-2.5(b)(2), and 7:7A-2.7(f), 118 N.J. 552, 573 A.2d 143 (1990).

Regulation limiting statutory exemption was not authorized. Matter of Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A-1.1 et seq., 238 N.J. Super. 516, 570 A.2d 435 (A.D.1989).

Where petitioner sought to use the subject property for a proposed used car sales operation in 2005, and petitioner's predecessor had only obtained in 1977 a preliminary and final subdivision approval for a division of the land, and, assuredly, petitioner sought to develop that land into a full-scale business operation, what the local authority approved in 1977 was nothing like what petitioner now proposed; thus, it was entirely correct for the Department of Environmental Protection to identify petitioner's "project" as not the "project" that the local authority approved in 1977, but instead a different "project," and as such, petitioner had no subdivision approval under the Municipal Land Use Law that would allow any exemption from the requirements of the Freshwater Wetlands Protection Act. *Haubrich v. N.J. Dep't of Env'tl. Prot./Land Use Regulation*, OAL Dkt. No. ESA 09194-06N, 2008 N.J. AGEN LEXIS 95, Initial Decision (January 16, 2008).

Construction of a swimming pool and accessory structure clearly falls within the category of "significant change" in N.J.A.C. 7:7A-2.8(g)2 that renders inapplicable an exemption from transition area requirements as a result of preliminary site plan or subdivision approval. *Cummings v. N.J. Dep't of Env'tl. Prot., Land Use Regulation Program*, OAL Dkt. No. ESA 4466-06, 2007 N.J. AGEN LEXIS 920, Final Decision (July 2, 2007).

Placement of fill material on wetlands without freshwater permit and transition waiver warranted civil penalty when not part of farming activity. Department of Environmental Protection v. Rapisardi, 95 N.J.A.R.2d (EPE) 248.

Engaging in regulated activities in freshwater wetlands and transition area without permit warranted imposition of civil penalty. Department of Environmental Protection v. Ludlam, 95 N.J.A.R.2d (EPE) 233.

Clay mining with soil removal permit could not be expanded to outside wetlands area. Department of Environmental Protection v. Mt. Bethel Humus, 95 N.J.A.R.2d (EPE) 202.

Permit to construct driveway on priority wetlands part of surface water tributary system connected to inland river was not issued. Edwards v. NJDEPE/LUR, 95 N.J.A.R.2d (EPE) 129.

Conversion of wetlands to a farm pond required permit when not in aid of silviculture use. Calella v. Department of Environmental Protection, 95 N.J.A.R.2d (EPE) 79.

Property owner seeking to build house on lots was not exempt under "grandfather" provisions. Brown v. Department of Environmental Protection, 93 N.J.A.R.2d (EPE) 195.

Applicant was not entitled to an exemption to the freshwater wetlands permit requirements; absence of preliminary site plan approval. N.J.S.A. 13:9B-4(d). Mt. Bethel Humus Co., Inc. v. New Jersey Dept. of Environmental Protection and Energy, Land Use Regulation Program, 93 N.A.J.R.2d (EPE) 136.

Developer was not entitled to exemption from Freshwater Wetlands Protection Act for tract of land partially situated in two municipalities. Masucci v. Land Use Regulation Program, 93 N.J.A.R.2d (EPE) 110.

The Freshwater Wetlands Protection Act did not provide exemption for projects on land subdivided prior to enactment of Municipal Land Use Law. Manroe Builders, Inc. v. New Jersey Department of Environmental Protection, 93 N.J.A.R.2d (EPE) 103.

Developer was not entitled to exemption from permitting requirements of Freshwater Wetlands Protection Act; local approval of subdivision plan. M. Alfieri Co., Inc. v. Department of Environmental Protection, 92 N.J.A.R.2d (EPE) 227.

Fill of wetlands authorized prior to effective date of Freshwater Wetlands Protection Act; permit modification granted. Lawrencewood II, Inc., v. Department of Environmental Protection, 92 N.J.A.R.2d (EPE) 36.

Projects exempt from Freshwater Wetlands Protection Act include those listed in the Act, those with prior applications filed under Municipal Land Use Law, those with Army Corps of Engineers permits, and those with nationwide permits. Atty.Gen.F.O.1990, No. 3.

### 7:7A-2.9 Geographic areas exempted from permit and/or waiver requirement

(a) Regulated activities in areas under the jurisdiction of the Hackensack Meadowlands Development Commission under N.J.S.A. 13:17-1 et seq. do not require a permit under this chapter, but may require other State and/or Federal wetlands approvals, such as a Federal 404 permit from the ACOE, and/or a Water Quality Certificate issued by the Department, and/or a Federal Consistency Determination issued under the Federal Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq.

(b) The discharge of dredged or fill material in a freshwater wetlands or State open water under the jurisdiction of

the Pinelands Commission is subject to freshwater wetlands and open water fill permit requirements under this chapter. However, regulated activities in areas under the jurisdiction of the Pinelands Commission, other than the discharge of dredged or fill material, are not subject to this chapter. Transition areas are not regulated under this chapter in areas under the jurisdiction of the Pinelands Commission. However, the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetland areas within its jurisdiction, which include transition area regulations. For information on freshwater wetlands and transition areas in the Pinelands under this chapter and under the Pinelands Comprehensive Management Plan (CMP), contact the Pinelands Commission at (609) 894-7300 or through its website at [www.state.nj.us/pinelands](http://www.state.nj.us/pinelands).

(c) An application for the discharge of dredged or fill material in areas under the jurisdiction of the Pinelands Commission shall be reviewed as follows:

1. If the discharge is subject to the Pinelands CMP and is eligible for a general permit under this chapter, the Pinelands Commission shall review the discharge under the CMP and shall also review the application for a freshwater wetlands general permit using the standards in this chapter;

2. If the discharge is subject to the Pinelands CMP and requires an individual permit under this chapter, the Pinelands Commission shall review the discharge under the CMP and the Department shall review the application for an individual freshwater wetlands permit using the standards in this chapter; and

3. If the discharge is not subject to the Pinelands CMP but requires an individual or general permit under this chapter, the Department shall review the application for an individual or general freshwater wetlands permit using the standards in this chapter.

(d) Regulated activities in tidally influenced wetlands which are defined as coastal wetlands pursuant to the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq. are not subject to this chapter, but may require other State and/or Federal approvals.

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

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

#### Case Notes

Memorandum of agreement (MOA) entered into by the New Jersey Department of Environmental Protection (DEP) and the Pinelands Commission delegating the Commission authority to administer regulated activities in accordance with the Statewide General Permit program was a permissible delegation of authority, as N.J.S.A. 13:1D-9(q) was an explicit authorization of the type of relationship established by the MOA, and the MOA expressly provided that the DEP retained ultimate authority and oversight; the Commission had to provide to the DEP a monthly report describing all permit activity and provide copies of

iv. Disturbance authorized under general permit 17 on a publicly owned site;

3. Disturbance exceeding 0.5 acre under general permit 6 cannot be combined with any other general permit authorization on the same site, except with an authorization under general permit 6A, in which case the total impact to wetlands, State open waters, and transition area shall not exceed one acre. For example, 0.75 acres of disturbance of wetlands or State open waters under general permit 6 can be combined with 0.25 acres of disturbance of transition area under general permit 6A;

4. The Department shall not authorize disturbance under both general permit 10A and general permit 10B for the same site; and

5. The Department shall not authorize multiple crossings of the same wetland or State open water unless:

i. There is no other location, design and/or configuration for the proposed crossing that would provide access to an otherwise developable lot that would reduce or eliminate the disturbance to a wetland or State open water; and

ii. Shared driveways are used to the maximum extent possible to access multiple lots.

(b) The Department may authorize activities under a general permit more than once on the same site, and/or at different times on the same site. However, the total disturbance authorized on a site under general permits since July 1, 1988 shall meet the criteria for use of multiple general permits set forth at (a)1 and 2 above.

(c) If a general permit is not listed at (a)2 above, any acreage disturbed under that general permit is not counted towards the one acre limit in (a)2 above, regardless of whether the general permit is used singly or in combination with other general permits, and regardless of whether the general permit is used once or repeatedly.

(d) In addition to the limits above in this section, the Department shall not authorize activities under general permit numbers 13, 15, or 18 more often than once every five years on a single site.

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.2008 d.291, effective October 6, 2008.

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

Rewrote the introductory paragraph of (a); in (a)1, substituted a period for “; and” at the end of the second sentence and inserted the third through sixth sentences; in the introductory paragraph of (a)2, inserted “6A,” and “17A,”; in (a)2iv, substituted a semicolon for a period at the end; and added (a)3 through (a)5.

#### **7:7A-4.5 Application for authorization to act under General Permits**

(a) An applicant for authorization to act under a general permit shall follow all application procedures and information

requirements at N.J.A.C. 7:7A-10, Application Contents and Procedures, unless the activity is one of the following, in which case the application requirements are found in the general permit itself:

1. Maintenance of an off-stream stormwater management facility under N.J.A.C. 7:7A-5.1(d);

2. Repair or modification of a malfunctioning individual subsurface sewage disposal system under N.J.A.C. 7:7A-5.25; or

3. Minor channel or stream cleaning under N.J.A.C. 7:7A-5.26.

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

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

#### **7:7A-4.6 (Reserved)**

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

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

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

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

Section was “Combined general permit authorization and flood hazard area permit”.

### **SUBCHAPTER 5. ADOPTED GENERAL PERMITS**

#### **7:7A-5.1 General permit 1—Maintenance and repair of existing features**

(a) General permit 1 authorizes activities in freshwater wetlands and State open waters, required to carry out the repair, rehabilitation, replacement, maintenance or reconstruction of a previously authorized, currently serviceable structure, fill, roadway, utility line, active irrigation or drainage ditch, or stormwater management facility lawfully existing prior to July 1, 1988 or permitted under this chapter. General permit 1 does not cover transition areas because these activities are not regulated in transition areas under N.J.A.C. 7:7A-2.6 and thus may be performed in a transition area without Department approval under this chapter.

(b) To be authorized under general permit 1, the previously authorized structure, fill, roadway, utility, ditch or facility shall not have been and will not be put to any use other than as specified in any permit authorizing its original construction. Activities under general permit 1 shall not expand, widen or deepen the previously authorized feature, and shall not deviate from any plans of the original activity, except that minor deviations due to changes in materials or construction techniques and which are necessary to make repairs, rehabilitation or replacements are allowed provided such changes do not result in disturbance of additional freshwater wetlands or State open waters upon completion of the activity.

(c) If the activity is the ongoing maintenance of an off-stream stormwater management facility created in uplands, including a wetland constructed in uplands for stormwater

management purposes after September 4, 2001, the following shall apply:

1. The application for authorization shall be subject to the public notice requirements at N.J.A.C. 7:7A-10.8 but shall not be subject to the other application requirements in N.J.A.C. 7:7A-10;
  2. The application for authorization shall include the information required by the application checklist, including information identifying and describing the site and the project, and a copy of the permit, if any, authorizing the original construction of the stormwater management facility;
  3. The Department shall process the application for authorization using the procedures at (d) below; and
  4. For the purposes of this subsection, maintenance includes removal of sediment and debris and mowing of vegetation, as necessary to ensure that the stormwater management facility will function as it was originally designed and/or permitted. Maintenance does not include enlargement of a stormwater management structure, excavation below the original bottom of a structure, or any other change in its design.
- (d) Upon receipt of an application for authorization under (c) above, the Department shall process the application as follows:
1. Within 20 days of the Department's receipt of the application, the Department shall notify the applicant if the application is not administratively complete (that is, if it does not include all of the information required under (c) above). If the Department so notifies the applicant, the time period in (d)2 below shall not begin to run. If the Department does not so notify the applicant, the application shall be deemed administratively complete 20 days after the Department receives it; and
  2. If the application is administratively complete, the Department shall have 30 days after receipt of the complete application to notify the applicant that the activities are not authorized under general permit 1, or that the activities may be authorized but require a full application review under N.J.A.C. 7:7A-10. If the Department does not so notify the applicant, the application is automatically approved, to the extent that the activity does not violate other laws then in effect.
- (e) Activities under general permit 1 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.2008 d.291, effective October 6, 2008.

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

In (c)1, updated the N.J.A.C. reference; and in (e), inserted “, and 13.2, Establishing permit conditions”.

#### Case Notes

Property owner not entitled to permit sought to build residences on subdivided island lots. *McCoy v. Department of Environmental Protection*, 93 N.J.A.R.2d (EPE) 1.

Developers not authorized to fill fresh water wetlands pursuant to terms and conditions of statewide general permit. *Zaloom v. Division of Coastal Resources*. 92 N.J.A.R.2d (EPE) 50.

#### 7:7A-5.2 General permit 2—Underground utility lines

- (a) General permit 2 authorizes activities in freshwater wetlands, transition areas, and/or State open waters, necessary for the construction and/or maintenance of an underground utility line.
- (b) If a utility line is jacked or directionally drilled underground, so that there is no surface disturbance of any freshwater wetlands, transition areas, or State open waters and there is no draining or dewatering of freshwater wetlands, no Department approval is required under this chapter. Jacking or directional drilling is regulated under this chapter if any disturbance occurs to the ground surface in the freshwater wetlands, transition area, or State open water; for example, if the drilling is conducted from a pit located in a freshwater wetland or transition area.
- (c) Activities under general permit 2 shall comply with the following limits:
1. Permanent above-ground disturbance of wetlands, transition area, and/or State open waters shall be no greater than 0.5 acre. Anything that changes the character of the existing wetland, even if only to a different wetland type, is permanent disturbance. For example, maintained clearing over a utility line is permanent disturbance. For the purposes of this subsection, installation of a utility line in scrub shrub or emergent wetlands shall not be considered permanent disturbance;
  2. Permanently maintained clearing over the utility line shall be no wider than 20 feet unless a wider area is required by law;

3. The trench into which the utility line is placed shall be no wider than necessary to comply with the United States Occupational Safety and Health Administration safety standards for excavations, set forth at 29 CFR Part 1926, Subpart P;

4. Temporary disturbance, as defined at N.J.A.C. 7:7A-1.4, such as temporary construction clearing or temporary storage of dirt or equipment, shall be the minimum size necessary for compliance with applicable laws;

5. The activities shall not cause any change in pre-construction elevation of a freshwater wetland, transition area, or State open water; and

6. Manholes and siphons for sewer lines shall be placed outside of wetlands, unless the Department's Municipal Finance and Construction Element determines under N.J.A.C. 7:22 and/or N.J.A.C. 7:14A:23 that there is no feasible alternative to placement in wetlands.

(d) In order to minimize environmental impact, a permittee shall:

1. Dispose of any excess soil or bedding material immediately upon completion of construction. This material shall be disposed of outside of freshwater wetlands, transition areas, State open waters, and areas regulated under the Department's Flood Hazard Area Control Act rules at N.J.A.C. 7:13;

2. Backfill the uppermost 18 inches of any excavation with the original topsoil material;

3. Replant the disturbed area with indigenous wetlands plants;

4. Stabilize the disturbed area in accordance with the requirements of the appropriate Soil Conservation District; and

5. Ensure that the activities do not interfere with the natural hydraulic characteristics of the wetland, such as the flow characteristics of groundwater on the site.

(e) Any pipes laid through wetlands, transition areas, or State open waters shall be:

1. Properly sealed so as to prevent leaking or infiltration;

2. Designed so as not to form or provide a conduit for groundwater to be discharged or drained from the wetland; and

3. Placed entirely beneath the pre-existing ground elevation in order to allow free passage of surface and ground water, unless the applicant shows that placing some or all of the pipe above ground would be more environmentally beneficial.

(f) Activities under general permit 2 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.2008 d.291, effective October 6, 2008.

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

In (c)1, substituted "0.5" for "one" and rewrote the last sentence; and in (f), inserted ", and 13.2, Establishing permit conditions".

#### 7:7A-5.2A (Reserved)

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

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

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

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

Section was "Combined general permit 2 and flood hazard area permit".

#### 7:7A-5.3 General permit 3—Discharge of return water

(a) General permit 3 authorizes the discharge of return water from an upland, contained, dredged material disposal area into State open waters, and placement of a pipe above ground for the discharge through freshwater wetlands and/or transition areas. The dredging itself may also require other State and Federal permits.

(b) Activities under general permit 3 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.2008 d.291, effective October 6, 2008.

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

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

#### 7:7A-5.4 General permit 4—Hazardous site investigation and cleanup

(a) General permit 4 authorizes activities in freshwater wetlands, transition areas, and State open waters, which are undertaken by the Department or expressly approved in writing by the Department’s Division of Remediation Management and Response, for the investigation, cleanup or removal of:

1. Hazardous substances as defined in the Department’s rules governing hazardous substances at N.J.A.C. 7:1E, Appendix A; or

2. Pollutants, as defined in the New Jersey Water Pollution Control Act implementing rules at N.J.A.C. 7:14A.

(b) There is no acreage limit on activities under general permit 4. However, disturbance shall be the minimum that is necessary for compliance with the Department’s technical requirements for site remediation, N.J.A.C. 7:26E, and mitigation shall be performed for all disturbances of freshwater wetlands or State open waters caused by a cleanup authorized under this general permit except that mitigation is not required to compensate for disturbance of wetlands or State open waters that have formed as a direct result of the remediation activities. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.

(c) The mitigation proposal required under (b) above may be incorporated into the document by which the Department approves the cleanup and/or it may be submitted as part of the General permit application. The Department shall not issue an authorization under general permit 4 until the mitigation proposal, or an equivalent document that ensures that the requirements of N.J.A.C. 7:7A-15 are met, is approved. Mitigation shall be performed prior to or concurrently with cleanup activities.

(d) Activities under general permit 4 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.2008 d.291, effective October 6, 2008.

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

In the introductory paragraph of (a), substituted “Division of Remediation Management and Response” for “Site Remediation Program”; and in (d), inserted “, and 13.2, Establishing permit conditions”.

#### 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 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.

(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) 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”.

### 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).

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 the year, the Department may establish the downstream boundary of the headwater as that point in the stream where water flow exceeds five cubic feet per second at least 50 percent of the time. In general, the Department considers a water body with a drainage area of less than 50 acres to be a headwater.

(c) Activities under general permit 7 shall not take place in the following:

1. A ditch or swale that is, or is located within, an exceptional resource value wetlands, as described at N.J.A.C. 7:7A-2.4; or
2. A ditch or swale that is, or is located within, a USEPA priority wetland, as defined at N.J.A.C. 7:7A-1.4.

(d) Activities under general permit 7 shall not result in either of the following:

1. The loss or substantial modification of more than one acre of freshwater wetlands; or
2. A disruption of a surface water connection, resulting in the isolation of wetlands or State open waters which were not isolated at the time of the general permit application.

(e) Activities under general permit 7 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.2008 d.291, effective October 6, 2008.

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

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

### Case Notes

Headwater wetlands not “swale”; no permit could be issued for filling wetlands. *Dykeman v. New Jersey Department of Environmental Protection*, 92 N.J.A.R.2d (EPE) 217.

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-5.8 General permit 8—House additions

(a) General permit 8 authorizes activities in freshwater wetlands and/or transition areas, necessary for the construction of additions or appurtenant improvements to residential dwellings lawfully existing prior to July 1, 1988, provided that the improvements or additions require less than a cumulative surface area of 750 square feet of fill and/or disturbance and will not result in new alterations to a freshwater wetlands outside of the 750 square foot area. General permit 8 does not authorize activities in State open waters.

1. If requested within five years of the destruction of a dwelling, this permit authorizes the replacement of a residential dwelling that was lawfully existing prior to July 1, 1988, within the same footprint of the previous dwelling with an increase of up to 750 square feet of fill and/or disturbance provided that:

- i. The applicant provides documentation that the dwelling was habitable at the time of destruction. “Habitable” means that persons could legally occupy the dwelling and that the dwelling had utilities including a functioning septic system or legal connection to a sewer; and
- ii. There is a foundation remaining or other evidence, such as a deed or plot plan, of the size and location of the overall building footprint.

(b) To be authorized under general permit 8, an addition or improvement shall be located within 100 feet of the residential dwelling.

(c) Activities under general permit 8 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that

(b) A request for an adjudicatory hearing under this subchapter shall be submitted as follows:

1. Submit the original request to:

Office of Legal Affairs  
ATTENTION: Adjudicatory Hearing Requests  
Department of Environmental Protection  
401 East State Street, 4th Floor  
P.O. Box 402  
Trenton, New Jersey 08625-0402

2. Submit a copy of the request to:

Bureau of Coastal and Land Use Compliance and Enforcement  
Department of Environmental Protection  
401 East State Street, 4th Floor  
P.O. Box 422  
Trenton, New Jersey 08625-0422

(c) If the Department does not receive the hearing request within 35 days after the violator receives the notice of civil administrative penalty assessment and/or the administrative order which is being contested, the Department shall deny the hearing request.

(d) If the violator fails to include all the information required by (a) above, the Department may deny the hearing request.

(e) Any adjudicatory hearing shall be conducted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

Administrative change to (a).

See: 23 N.J.R. 3325(b).

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

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

Former N.J.A.C. 7:7A-16.7, Fees for the review and processing of requests for permit modifications, was repealed.

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

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

In (b), substituted "08625-0402" for "08625-402" in the address.

Amended by R.2009 d.264, effective August 17, 2009.

See: 40 N.J.R. 4657(a), 41 N.J.R. 3066(a).

In the introductory paragraph of (a), substituted "addresses" for "address"; rewrote (b); and in (c), substituted "35" for "20".

#### **7:7A-16.8 Civil administrative penalty amount for failure to obtain a permit prior to conducting regulated activities**

(a) When the Department assesses a civil administrative penalty for the failure to obtain a permit prior to conducting regulated activities, the Department shall use the procedures in this section to determine the amount of the penalty if the violation pertains to freshwater wetlands and/or freshwater wetland transition areas, except if the violation type is listed at N.J.A.C. 7:7A-16.9, 16.10, 16.11, or 16.12, in which case the penalty amount shall be determined under whichever of those sections applies. For the purposes of this section, permit shall have the meaning set forth at N.J.A.C. 7:7A-1.4.

(b) If a violation of this chapter pertains to State open waters, the Department shall not determine the amount of the civil administrative penalty under this subchapter, but shall determine the penalty under the Department's rules implementing the enforcement provisions of the Water Pollution Control Act at N.J.A.C. 7:14-8.

(c) The Department shall use the two factors described at (c)1 and 2 below, conduct and seriousness, to determine the amount of the base daily civil administrative penalty under this section. Using the standards below, the Department assigns each violation a point value for each factor. The total number of points is used in Table D at (d) below to determine the base penalty amount per day for each violation. The factors, and the point values assigned to them, are as follows:

1. The conduct factor of the violation shall be classified as major, moderate or minor and assigned points as follows:

- i. Major conduct shall include an intentional, deliberate, purposeful, knowing or willful act or omission by the violator and is assigned five points;

- ii. Moderate conduct shall include any unintentional but foreseeable act or omission by the violator and is assigned two points; and

- iii. Minor conduct shall include any conduct not identified in (c)1i or ii above and is assigned one point.

2. The seriousness factor of the violation is assigned points as provided in (c)2i and ii below based on the acreage of wetlands and/or transition areas impacted and the resource value of the freshwater wetlands.

- i. The acreage of wetlands and/or transition areas impacted shall be assigned points in accordance with (c)2i(1) through (7) below:

- (1) A violation impacting greater than seven acres of wetlands and/or transition areas is assigned seven points;

- (2) A violation impacting greater than four acres up to and including seven acres of wetlands and/or transition areas is assigned six points;

- (3) A violation impacting greater than two acres up to and including four acres of wetlands and/or transition areas is assigned five points;

- (4) A violation impacting greater than one acre up to and including two acres of wetlands and/or transition areas is assigned four points;

- (5) A violation impacting greater than 0.5 acre up to and including one acre of wetlands and/or transition areas is assigned three points;

- (6) A violation impacting greater than 0.25 acre up to and including 0.5 acre of wetlands and/or transition areas is assigned two points; and

(7) A violation impacting up to and including 0.25 acre of wetlands and/or transition areas is assigned one point; and

ii. The resource value classification shall be assigned points in accordance with (c)2ii(1) through (5) below. If the site of a violation contains regulated areas of more than one resource value classification, the points assigned to a violation for the highest resource classification on the site shall apply for the entire site:

(1) A violation impacting exceptional resource classification wetlands is assigned five points;

(2) A violation impacting intermediate resource classification wetlands is assigned four points;

(3) A violation impacting ordinary resource classification wetlands is assigned three points;

(4) A violation impacting only exceptional resource classification transition areas is assigned two points; and

(5) A violation impacting only intermediate resource classification transition areas is assigned one point.

(d) The Department shall sum the total points assigned according to the two factors in (c) above, and shall determine the base penalty amount per day using the following table:

Table D  
Base penalty points table

Total Points	Base Penalty Amount	
	Per Day	
17	\$25,000	
16	23,000	
15	21,000	
14	19,000	
13	17,000	
12	15,000	
11	13,000	
10	11,000	
9	10,000	
8	9,000	
7	8,000	
6	6,000	
5	5,000	
4	4,000	
3	3,000	

(e) The Department shall subtract from the daily base penalty determined pursuant to (d) above a penalty mitigation amount calculated by multiplying the daily base penalty times the penalty mitigating factor multiplier pursuant to (e)1 or 2 below, if applicable.

1. Where the nature, timing and effectiveness of any measures taken by the violator to correct the violation and restore the site to its pre-disturbance condition results in compliance within 30 days of receipt of the notice of violation from the Department, the mitigating factor multiplier is 0.50; or

2. Where a complete application for a general permit or an individual permit is submitted within 60 days of receipt of the notice of violation from the Department and an authorization under a general permit or an individual permit is subsequently obtained for the unauthorized regulated activity cited in the notice of violation without the need for any changes to the regulated activity for which the notice of violation was issued, the mitigating factor multiplier is 0.25.

(f) The total civil administrative penalty shall be the daily civil administrative penalty determined as provided under (c) through (e) above, multiplied by the number of days during which each violation continued.

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

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

Repealed use of "major" and "minor" seriousness and added factors to be used in determining penalties.

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

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

Former N.J.A.C. 7:7A-16.8, Fee refunds, was repealed.

Amended by R.2009 d.264, effective August 17, 2009.

See: 40 N.J.R. 4657(a), 41 N.J.R. 3066(a).

Section was "Civil administrative penalty amount". Rewrote (a) and (c); in the introductory paragraph of (d), substituted "two" for "three" and inserted "base"; rewrote Table D; and added (e) and (f).

**Case Notes**

Initial Decision (2006 N.J. AGEN LEXIS 176) adopted, which concluded that where respondent knowingly engaged in the unauthorized ditching and disruption of wetlands, a penalty of \$6,000 was warranted since the wetlands were of intermediate resource value (two points), the total disturbance was under an acre (one point), and the violation was intentional (three points). N.J. Dep't of Env'tl. Prot. v. Wagner, OAL Dkt. No. ESA 04815-04, 2006 N.J. AGEN LEXIS 579, Final Decision (April 21, 2006).

Placement of fill material on wetlands without freshwater permit and transition waiver warranted civil penalty when not part of farming activity. Department of Environmental Protection v. Rapisardi, 95 N.J.A.R.2d (EPE) 248.

Engaging in regulated activity in a freshwater wetland without a permit warranted civil penalty and restoration order. Department of Environmental Protection and Energy v. Toufayan, 95 N.J.A.R.2d (EPE) 71.

Assessment of \$9,000 penalty against homeowner for improperly placing fill within 100-year floodplain and for placing asphalt paving in wetlands transition zone was proper. Department of Environmental Protection v. Ruelan, 93 N.J.A.R.2d (EPE) 239.

Evidence established that diverting stream and filling stream bed violated statutes; penalty assessed. Department of Environmental Protection v. DiFlorio, 93 N.J.A.R.2d (EPE) 187.