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Freshwater Wetlands Protection Act Rules
Proposed Readoption with Amendments

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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT AND COMPLIANCE
LAND USE REGULATION PROGRAM
Freshwater Wetlands Protection Act Rules

Proposed Readoption with Amendments

Authorized By:	Robert C. Shinn, Jr., Commissioner, Department of Environmental Protection
Authority:	N.J.S.A. 13:9B-1 et seq., N.J.S.A. 58:10A-1 et seq.
DEP Docket Number:	
Proposal Number:	PRN 1996-

The Land Use Regulation Program will hold two public workshops to explain the proposed readoption.

Note: *the workshops are for informational purposes only. Comments made at workshops will not be part of the formal rule record and the Department will not provide written responses.*

The workshops will be held as follows:

August 16, 2000
9:00 a.m.
Somerset County Environmental Education Center
190 Lord Stirling Road
Basking Ridge, New Jersey

August 23, 2000
9:00 a.m.
DEP Public Hearing Room
401 East State Street
Trenton, New Jersey

The Land Use Regulation Program will hold two public hearings to solicit public comments on the proposed readoption. Comments made at the public hearings will be part of the formal rule record and the Department will provide written responses as part of the adoption notice when published in the New Jersey Register.

The public hearings will be held as follows:

September 11, 2000
1:00 p.m.
DEP Public Hearing Room
401 East State Street
Trenton, New Jersey

September 13, 2000
9:00 a.m.
Somerset County Environmental Ed. Center
190 Lord Stirling Road
Basking Ridge, New Jersey

Submit written comments by the close of business on October 6, 2000 to:

Janis Hoagland, Esq.
Attn: DEP Docket Number _____
Office of Legal Affairs
New Jersey Department of Environmental Protection
P.O. Box 402

Trenton, New Jersey 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on 3½ inch diskettes as well as on paper. The Department will be able to upload the comments onto its office automation equipment and will avoid having to retype the comments. The Department will use the paper version of the comments to ensure that the uploading was accomplished successfully. Submittal of comments on diskette is not a requirement. The Department prefers Microsoft Word 6.0 or above; however, other word processing software that can also be read or used by Microsoft Word 6.0 is acceptable. MacIntosh formats should not be used.

The proposal can be viewed or downloaded on the Land Use Regulation Program website at http://www.state.nj.us/dep/landuse. A copy of the proposal is also available on paper or on disk by e-mailing the Department at lurweb@dep.state.nj.us, or by calling the Department at (609) 984-3444.

This proposal has been filed with the Office of Administrative Law, which will edit it before publishing it in the New Jersey Register. Please refer to the August 7, 2000, New Jersey Register for the official final text of the proposal.

The agency proposal follows:

Summary

History and Background

The Freshwater Wetlands Protection Act rules, N.J.A.C. 7:7A, were first adopted in June 1988, in response to the 1987 enactment of the New Jersey Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 et seq. Additional provisions governing transition areas were adopted in July of 1989. On March 2, 1994, the Department assumed responsibility in most of New Jersey for the Federal wetlands permitting program, also known as the "Federal 404 program" because it stems from section 404(g) of the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq. The Federal 404 program had previously been administered in New Jersey by the U.S. Army Corps of Engineers (ACOE). The United States Environmental Protection Agency (EPA) oversees the Department's wetlands program in accordance with the Federal Clean Water Act and a Memorandum of Agreement between the Department and EPA.

While New Jersey's freshwater wetlands program operates in place of the Federal 404 program throughout most of the State, the ACOE has retained responsibility for the Federal 404 program in certain waters in New Jersey. These are all interstate and navigable waters (including adjacent wetlands), and areas under the jurisdiction of the Hackensack Meadowlands Development Commission. Projects in these "non-delegable" waters remain subject to ACOE jurisdiction as well as to the State wetlands program. Thus, activities in these waters may require both a Federal 404 permit from the ACOE and a State permit under this chapter. This is the first readoption of these rules since New Jersey assumed the Federal 404 program. Therefore, the proposal reflects changes in the program necessitated by assumption of the Federal 404 program.

The Department proposed to readopt these rules once before. The proposed readoption with amendments was published in the New Jersey Register at 28 NJR 4981(a) on December 2, 1996. Additional notice of the proposal, the public hearings, and the public comment period, was given through publication in six newspapers of regional circulation throughout the State. Three public hearings were held, on December 18 and 19, 1996 and on January 7, 1997, in Basking Ridge, Pomona, and Trenton, respectively. The required 30 day public comment period for submittal of written comments was extended, upon request, resulting in a 60 day comment period which expired on January 31, 1997.

As a result of the comments on the 1996 proposal (see below for a brief summary of the main points raised by commenters), and unresolved issues raised by EPA, the Department determined to consider the issues further and to obtain more public input on possible rule changes. Accordingly, in March of 1997 the Governor extended the existing rules through March 14, 1998. The Department held two public meetings in September of 1997 to obtain public input and suggestions for changes to the rules. In order to respond to all of the public input on the rules, and to make the rules "user-friendly", the Department determined that all of N.J.A.C. 7:7A should be reviewed, reorganized and edited for clarity. In order to accomplish this, and to develop a proposal that addressed the commenters' and EPA concerns, the Department received two more extensions of the existing rules, through March 2000. The Department held

five public meetings in early 1999 to present ideas and draft rule text to the public. The meetings provided the Department with a great deal of valuable public input, as well as a healthy exchange of ideas among different segments of the regulated public.

Reorganization:

This proposal substantially reorganizes the rules for easier reading. The existing chapter was developed before the Department had begun to administer the freshwater wetlands program. Over time, amendments to the rules have made the rules repetitive and unnecessarily long. One goal of these proposed amendments is to make the chapter shorter, simpler, and easier to understand. The amendments will do this through consolidating similar provisions, removing unnecessary detail, and substituting plain language for legalese. This entails many changes, the great majority of which make no change in the meaning of the rule, but merely make that meaning more easily accessible to the reader. An extensive section-by-section description is provided, below in this Summary, to guide the reader through these proposed changes.

The proposal reorganizes the chapter to more closely reflect the actual operation of the program. For example, since the vast majority of the applications the Department receives are for letters of interpretation and general permits, these subchapters are moved closer to the beginning in the chapter, with the less commonly used individual permit standards appearing later in the chapter. In general, the proposed reorganization of the chapter also reflects the chronological order in which a person would move through the permitting process. Accordingly, basic jurisdictional provisions and exemptions come before letters of interpretation, after which come the types of available permits, application requirements, application review procedures, permit contents, mitigation, and enforcement.

The reorganization also consolidates multiple application sections into one subchapter, N.J.A.C. 7:7A-10, that applies to most applications. Since many of the basic application requirements for these different approvals are identical, this allows the Department to reduce redundancy and shorten the rules, making them more user-friendly. In addition, much of the detail regarding application requirements is removed from the rules and placed in application forms and checklists. Drafts of these new application checklists are available for review by contacting the Department by e-mail at lurweb@dep.state.nj.us, or by telephone at (609) 984-3444. The rules retain broad categories describing the basic types of application information the Department will require, but no longer will such details as the size of paper, or the fact that a plan must be folded, appear in the rules. Details of this type are only relevant to a small subset of the regulated community. Putting them in the rules forces others to read through lengthy provisions that do not apply to their situation. These detailed application requirements will now be explained in application forms and checklists that are tailored specifically to the type of approval sought.

Hearings and appeals provisions, which appear in the existing rules in several places, are consolidated at proposed N.J.A.C. 7:7A-1.7. The two subchapters dealing with enforcement (N.J.A.C. 7:7A-15) and penalties (N.J.A.C. 7:7A-17) are consolidated at proposed N.J.A.C. 7:7A-16, with virtually no substantive change in their meaning. These changes will make the rules easier to read and to comply with.

This proposal has been filed with the Office of Administrative Law, which will edit it before publishing it in the New Jersey Register.
Please refer to the August 7, 2000, New Jersey Register for the official final text of the proposal.

This proposal also simplifies the rule language wherever possible. Excess verbiage and multisyllabic legalisms are proposed for deletion wherever possible, and simpler, more common wording proposed instead. Citations are changed to refer to the most commonly used legal reporters, rather than to public law numbers, bulleted lists are substituted for long narrative paragraphs, in order to help organize information for easier understanding. It is the Department's hope that this more "user-friendly" approach will not only clarify the rules for existing users, but will also encourage more people to use the rules as a source of primary information regarding the freshwater wetlands program.

The following table indicates the location in the proposed readoption of each section of the existing rules:

TABLE OF CITATIONS AND RECODIFICATIONS

Subject matter	Current citation	Proposed citation	Proposed change(s)
General information	1.1 through 1.6	Unchanged	Clarified
Operative date	7:7A-1.7	Deleted	Deleted
Jurisdiction	7:7A-2.1	Unchanged	Clarified, expanded, some provisions moved to other sections
Subchapters that apply	7:7A-2.2	Deleted	Deleted
Regulated activities, designation, resource value	7:7A-2.3 through 2.5	Recodified at 7:7A-2.2 through 7:7A-2.4	Clarified
Designation of State open waters	7:7A-2.6	Deleted	Deleted
Exempted activities	7:7A-2.7	Recodified at 7:7A-2.8	Clarified, expanded, some provisions deleted
Exempted areas	7:7A-2.8	Recodified at 7:7A-2.9	Clarified
Exemption letters	7:7A-2.9	Recodified at 7:7A-2.10	Clarified, some provisions moved to other sections
Individual permit standards	7:7A-3.1 through 3.5	Recodified at 7:7A-7.1 through 7:7A-7.4	Clarified, reorganized
Emergency permits	7:7A-5.1 and 5.2	Recodified at 7:7A-8.1 and 7:7A-8.2	Clarified, expanded
Transition areas	7:7A-6.1 through 6.3	Recodified at 7:7A-2.5 through 7:7A-2.7	Clarified, some provisions moved or deleted
Transition area waivers	7:7A-7.1 through 7.5	Replaced with 7:7A-6.1 through 7:7A-6.6	Reorganized, expanded, reworded
Transition area waiver applications	7:7A-7.6	Moved to 7:7A-6.6	Reworded, some provisions moved to other sections
Waiver application review	7:7A-7.7	Deleted	Substance moved to 7:7A-12.1 through 7:7A-12.5
Waiver appeals	7:7A-7.8	Deleted	Substance moved to 7:7A-1.7

Duration of waivers	7:7A-7.9	Deleted	Substance moved to 7:7A-13.3, 7:7A-13.4, and 7:7A-14.2
Cancellation of waivers	7:7A-7.10	Deleted	Substance moved to 7:7A-12.6
Letters of interpretation	7:7A-8.1 and 8.2	Moved to 7:7A-3.1 through 7:7A-3.4	Reworded and reorganized, some new provisions
LOI applications	7:7A-8.3	Recodified at 7:7A-3.5	Reworded, some provisions moved to other sections
Onsite inspections	7:7A-8.4	Deleted	Substance moved to 7:7A-3.1
Local review, effect, reissuance of LOIs	7:7A-8.5 through 8.7	Recodified at 7:7A-3.5(c), 7:7A-3.6(a), (b), and (c)	Reworded, no change in meaning
Non-issuance of LOI	7:7A-8.8	Deleted	Substance moved to 7:7A-12.1(f)
Cancellation of LOI application	7:7A-8.9	Deleted	Substance moved to 7:7A-12.6
Appeal of an LOI	7:7A-8.10	Deleted	Substance moved to 7:7A-1.7
Issuance of general permits	7:7A-9.1	Recodified at 7:7A-4.1	Clarified
General permits	7:7A-9.2	Recodified at 7:7A-5 and 7:7A-4.2(d) and (e)	Clarified, reworded, expanded and amended
Standard general permit conditions	7:7A-9.3	Recodified at 7:7A-4.3	Clarified, expanded
Multiple general permits	7:7A-9.4	Recodified at 7:7A-4.4	Clarified
Application under a general permit	7:7A-9.5	Recodified at 7:7A-4.5	Reworded, some provisions moved to other sections
Appeal of a general permit authorization	7:7A-9.6	Deleted	Substance moved to 7:7A-1.7
Duration of a general permit authorization	7:7A-9.7	Deleted	Substance moved to 7:7A-13.3
Cancellation of a general permit application	7:7A-9.8	Deleted	Substance moved to 7:7A-12.6
Pre-application conferences	7:7A-10.1 through 10.4	Recodified at 7:7A-9.1 and 7:7A-9.2	Clarified, some provisions deleted
Application procedures	7:7A-11.1 through 11.4	Moved to 7:7A-10	Reworded and reorganized

Review of applications	7:7A-12.1 through 12.6	Citation unchanged	Clarified, reorganized, expanded
Hearings and appeals	7:7A-12.7	Deleted	Substance moved to 7:7A-1.7
Permit contents	7:7A-13.1 through 13.4	Citation unchanged	Clarified, some provisions moved to other sections
Transfer of permits	7:7A-13.5	Moved to 7:7A-14.2	Reworded
Permit modifications	7:7A-13.6 through 13.9	Deleted	Substance moved to 7:7A-14.1, and 7:7A-14.3 through 7:7A-14.5
Mitigation	7:7A-14.1 through 14.6	Deleted	Replaced with new subchapter at 7:7A-15
Enforcement	7:7A-15.1 through 15.5	Recodified at 7:7A-16.1 through 7:7A-16.5	Clarified, expanded, some provisions moved to other sections
Enforcement	7:7A-15.6 and 15.7	Recodified at 7:7A-16.13 and 7:7A-16.14	Clarified
Enforcement	7:7A-15.8 and 15.9	Recodified at 7:7A-16.16 and 7:7A-16.17	Clarified, reworded
Termination of permits	7:7A-15.10	Recodified at 7:7A-14.5	Clarified, some provisions moved to other sections
Public participation	7:7A-15.11	Recodified at 7:7A-16.18	Clarified
Payment of fees	7:7A-16.1	Recodified at 7:7A-11.1	Clarified, reworded
Application fees	7:7A-16.2 through 16.7	Deleted	Replaced with fee tables at 7:7A-11.1
Fee refunds	7:7A-16.8	Deleted	Substance moved to 7:7A-11.1(g)
General penalty provisions	7:7A-17.1	Deleted	Substance moved to 7:7A-16.1
Civil administrative penalty	7:7A-17.2	Recodified at 7:7A-16.8	Clarified, reworded
Civil administrative penalty for regulated activity without approval	7:7A-17.3	Deleted	Substance moved to 7:7A-16.5

Civil administrative penalty for submitting false information	7:7A-17.4	Recodified at 7:7A-16.9	Reworded, expanded
Civil administrative penalty for refusing entry	7:7A-17.5	Recodified at 7:7A-16.10	Clarified, expanded
Civil administrative penalty for failure to pay a penalty	7:7A-17.6	Recodified at 7:7A-16.11	Clarified
Economic benefit factor	7:7A-17.7	Recodified at 7:7A-16.12	Clarified
Procedures for assessing civil administrative penalties	7:7A-17.8	Recodified at 7:7A-16.6	Clarified, expanded
Hearing request procedures for enforcement actions	7:7A-17.9	Recodified at 7:7A-16.7	Clarified

Mitigation

The proposal replaces the existing mitigation subchapter, N.J.A.C. 7:7A-14, with a new, more detailed and clear mitigation subchapter at N.J.A.C. 7:7A-15. The proposed new mitigation subchapter divides mitigation projects into those for smaller and larger disturbances, and provides a hierarchy of mitigation alternatives for each. In general, the Department encourages mitigation banking over other alternatives for smaller disturbances. Smaller mitigation projects do not tend to be as successful as large ones, and tend to provide fewer environmental benefits for the same amount of Department effort in review and monitoring. Using mitigation banking for these disturbances not only reduces administrative burden, but also ensures that mitigation happens closer in time to the disturbance, and often before the disturbance, resulting in greater environmental benefit.

The proposed new mitigation subchapter also clearly sets forth a hierarchy of locations for mitigation in relation to the disturbance for which the mitigation is performed. In general, it is better for mitigation to be as close to the disturbance as possible, and within the same watershed (identified by a USGS HUC 11 code) when possible. When the mitigation cannot be in the same watershed, the rule provides for mitigation in the same watershed management area, in keeping with the Department's watershed planning initiatives. The proposed provisions balance these environmental goals with the logistical realities of where mitigation sites and mitigation banks can be located.

The proposed new mitigation subchapter also spells out requirements for all mitigation alternatives in a comprehensive and organized manner, and includes provisions for review by the Wetlands Mitigation Council of monetary contributions, land donations, and mitigation banks. For more information, see the section-by-section description of the proposal, in this Summary below.

General permits

The proposal reformats the list of adopted general permits in their own subchapter, N.J.A.C. 7:7A-5, in order to reduce the confusing multiple layers of rule sections, subsections, paragraphs, subparagraphs, etc. However, all existing general permits will retain their current general permit number. For example, general permit 1, currently codified at N.J.A.C. 7:7A-9.2(a)1, is located in the proposed readoption at N.J.A.C. 7:7A-5.1; while general permit 2, currently codified at N.J.A.C. 7:7A-9.2(a)2, is located at N.J.A.C. 7:7A-5.2, and so on.

The proposal also adds transition area waiver authorization to general permits that, under the existing rules, would be eligible for a special activity transition area waiver for a general permit activity. Under these general permits, a project with disturbances in freshwater wetlands, transition areas, and/or State open waters can be approved with a single general permit authorization. Although this will consolidate approvals, it will not affect the total acreage allowed under a combined general permit and special activity waiver. The existing rule at N.J.A.C. 7:7A-7.4(e)3 limits the total impact under a general permit and a special activity transition area waiver based on that general permit, such that the total impacts cannot exceed the limits in the general permit. The proposal reflects this, and will make it easier to ensure compliance with this provision, by putting all impacts under one approval. This is explained further in the section-by-section description of N.J.A.C. 7:7A-5, Adopted general permits.

The proposal deletes three general permits, covering the removal of shipwrecks, construction of bulkheads on human-made lagoons, and construction of roads permitted by the ACOE prior to the enactment of the FWPA. The proposed readoption adds six new general permits, which authorize landfill closures, airport sight line clearing, animal waste management activities in farmed wetlands, spring developments in farmed wetlands, stream cleaning, and certain types of redevelopment. Drafts of these general permits were presented for discussion at public meetings in early 1999, along with other possible general permits that are not proposed herein, covering fences and mitigation projects. The new general permits are described in detail in the section-by-section description of the proposed rules, below in this Summary. The environmental analyses required under the FWPA (see N.J.S.A. 13:9B-23c) for the new general permits, and for the amendments to existing general permits, can be obtained by contacting the Department by e-mail at lurweb@dep.state.nj.us, or by telephone at (609) 984-3444.

Redevelopment

The Department supports redevelopment of existing disturbed sites, especially when the alternative would be development of an undisturbed site. Therefore, the proposed readoption encourages such redevelopment in two ways. First, proposed new general permit 27, found at N.J.A.C. 7:7A-5.27, authorizes redevelopment of certain previously disturbed sites. Unlike other general permits, this new proposed general permit allows an extra acre of disturbance, over and above disturbances under other general permits. Second, the proposed readoption retains and clarifies an existing transition area waiver specifically tailored to redevelopment, found at proposed N.J.A.C. 7:7A-6.3(f).

Public comments on the December 1996 proposal

The Department received approximately 450 comments on the 1996 proposal, both written and oral, from 46 commenters. Comments were received from consultants and attorneys, utilities and businesses, developers, environmental non-profit groups, trade associations, mitigation bankers, private citizens, and State and local government agencies. The following is a brief summary of the major points made by the commenters.

Several commenters on the 1996 proposal focussed on how the rules address issues already addressed by other agencies or other Department units. For example, a commenter suggested that the rules should not regulate the spraying of herbicides in wetlands for utility line maintenance, since the Department's Pesticide Control Program also reviews this. Other commenters suggested that the Department remove limits on rip-rap and refer to the standards for soil erosion and sediment control, which address the proper amount of rip-rap for erosion control. Both of these suggestions are addressed in the proposed readoption. The proposal includes an expedited permit process for spraying of herbicides in wetlands for utility line maintenance if a DEP pesticide permit has already been issued, and replaces most limits on rip-rap with requirements that the amount of rip-rap be the minimum necessary for compliance with the standards for soil erosion and sediment control.

Several commenters on the 1996 proposal urged the Department to include provisions in the rules that would restrict the development of infrastructure in undeveloped areas, and that would implement the concepts in the State Development and Redevelopment Plan. The FWPA rules, to the extent possible under the statute, facilitate development in already developed areas in order to remove development pressure on undeveloped high value wetlands, for example, through the proposed redevelopment general permit.

Several commenters on the 1996 proposal suggested that the Department seek feedback from regulated stakeholders. The Department has held seven public meetings since the 1996 proposal, and has obtained valuable feedback which the Department has used in developing this proposed readoption.

A commenter on the 1996 proposal suggested that the rule should encourage use of wetlands for short-term detention of stormwater during storms that occur at a frequency of less than or equal to every two years. The commenter stated that this makes sense because a primary function of wetlands is to store stormwater during the less frequent storms, thus alleviating downstream flooding. The Department has not included such provisions in this proposed readoption. Although it is true that a beneficial function of wetlands is the storage of stormwater, the use the commenter suggests would cause the buildup of sediments and pollutants in the wetland. Thus, stormwater must be pretreated before being released into wetlands, as is required under general permit 11 for stormwater outfalls.

Many commenters on the 1996 proposal addressed the definition of "State open waters", which the 1996 proposal amended to include all "waters of the State", in addition to "waters of the United States." Some commenters felt the proposed definition would be too broad, while others felt it would make the State program more stringent than the Federal 404 program. The Department has retained the proposed amendment

to the definition of "State open waters" in this proposed readoption, but has added a proposed list of exclusions which narrow the definition. (See the section-by-section description of N.J.A.C. 7:7A-1.4 for a detailed explanation of the proposed definition.) The proposed definition reflects the fact that the Water Pollution Control Act (WPCA) is the source of the Department's authority to regulate the discharge of dredged or fill material into open waters, and the definition removes the extraneous issue of interstate commerce from jurisdictional determinations. The proposed change, especially with the exclusions in this proposal, does not make the State program more stringent than the Federal 404 program, but simply recognizes that, with respect to the Department's authority over waters of the State, the interstate commerce issue is not germane.

Commenters on the 1996 proposal suggested several activities they believed should be exempt from freshwater wetlands and/or transition area requirements, such as fences that do not obstruct water flow; removal of fill, debris, or structures; and paving of gravel areas. The Department considered these suggestions and has proposed at N.J.A.C. 7:7A-6.3(f) to allow limited redevelopment on transition areas that are significantly degraded but may not be covered with impervious surfaces. The possibility of a general permit for fences in wetlands was also discussed at one of the 1999 public meetings but was dropped because of the difficulty ensuring that such a general permit would not create an incentive to enclose and disturb large areas. The proposed readoption does not include exemptions for removal of fill, debris, or structures, because these are all activities that fit the definition of a regulated or prohibited activity and must be regulated.

A commenter on the 1996 proposal applauded the proposal to add on-going maintenance of stormwater detention basins created in uplands as an activity which does not rise to the level of a regulated activity, because it will support water quality and flood control. The Department has not retained this provision, but has instead proposed an expedited version of general permit 1 that would allow such maintenance upon thirty days notice to the Department, unless the Department raised objections within that thirty days. See proposed N.J.A.C. 7:7A-5.1.

Some commenters objected to provisions in the 1996 proposal to allow above ground swimming pools of up to 500 square feet in transition areas, contending that such pools are too large and are not temporary. Other commenters applauded the proposed provision, but suggested that it should be expanded to allow larger pools. The Department has determined that the proposed rule change is inconsistent with the FWPA and therefore has not included such a provision in this proposed readoption.

Several commenters on the 1996 proposal requested more detailed provisions governing whether two wetland areas are part of the same wetland or are separate wetlands. Commenters suggested several factors that should be considered in making this determination, including the existence of a hydrologic connection, the existence of a surface water connection, or a determination whether impacts to one wetland would be likely to affect the other. The Department has addressed this issue at proposed N.J.A.C. 7:7A-6.1(f), and has included both physical proximity and hydrological connection as factors to be considered.

A commenter on the 1996 proposal objected to a proposed provision prohibiting any transition area averaging that would result in a building within 20 feet of a transition area. The commenter felt that the Department was arbitrarily adding 20 feet to a

transition area, and requested a justification for it. The proposed provision was intended to address a perennial problem. The Department's experience has been that it is virtually impossible to build and use a residence immediately adjacent to a transition area without conducting prohibited activities in the transition area. There are hundreds of cases in New Jersey where a developer has built multiple homes immediately adjacent to a transition area and then sold the homes, sometimes without informing the buyers that their backyard is a regulated transition area. Inevitably, use of the home results in prohibited activities in the transition area, resulting in degradation of the transition area and the adjacent wetlands, numerous enforcement cases, and substantial use of Department resources. Possible solutions to this problem were discussed at a public meeting at Department headquarters on February 16, 1999. This proposal includes a definition of "residential development project" that applies to construction of a single family or multi unit residence, which includes the 20 foot wide area surrounding the house. The Department hopes this will solve the problem for future home buyers. See the description of proposed N.J.A.C. 7:7A-2.6 for a more detailed explanation of this concept.

A commenter on the 1996 proposal recommended that no transition area waivers be granted in the Passaic River Watershed above the Dundee Dam, in order to provide flood management and to protect water quality, especially for drinking water sources. The Department has not included such a prohibition in the proposed readoption because the Department's stream encroachment permit program is the appropriate forum in which to address flooding concerns. Further, the FWPA requires that the Department consider the impacts of activities in transition areas on a site-by-site basis.

Many comments were received on the amendments in the 1996 proposal to the redevelopment transition area waiver. The existing rule allows redevelopment only where there is an impervious surface in a transition area, while the 1996 proposal allowed redevelopment also on a lawn covered transition area. Some commenters felt the provisions were not sufficiently protective of the transition area, while others felt that the rule should allow redevelopment of gravel areas and bare ground as well as lawn areas. The proposed readoption includes an amendment to the redevelopment waiver at proposed N.J.A.C. 7:7A-6.3(f), which allows redevelopment on a transition area that is significantly disturbed so that it is not functioning as a transition area. Thus, an area that is not covered with impervious surfaces might be eligible for a redevelopment waiver if this threshold is met. (See the section-by-section description of proposed changes for a detailed explanation of this proposed change.)

Many commenters on the 1996 proposal addressed the amendment allowing construction of pump stations as an authorized activity under general permit 2, which covers underground utility lines. Some commenters were supportive of the change and requested it be expanded, while others were opposed and requested that it be deleted. In the proposed readoption, the Department has included pump stations as an authorized activity under general permit 2 only for sewage lines, because the gravity feed operation of sewage lines severely limit where sewage pump stations may be placed. (See the section-by-section description of proposed changes for a detailed explanation of this proposed amendment.)

Comments were received both in support of and in opposition to the 1996 proposed amendment to general permit 8 for house additions, which removed the requirement that a house be in existence prior to July 1, 1988 in order to be eligible for the general

permit. This 1996 proposed amendment was not included in this proposed readoption because the Department determined that the amendment was not consistent with the FWPA.

Many commenters on the 1996 proposal addressed proposed changes to general permit 10 for minor road crossings. Commenters fell into two categories: those who opposed the proposed changes as not sufficiently environmentally protective, and those who felt the general permit should provide more flexibility for permittees. The proposed readoption includes a revamped, two part general permit 10 at proposed N.J.A.C. 7:7A-5.10A and 10B, which the Department believes balances both interests. (See the section-by-section description of proposed changes for a detailed explanation of the proposed new general permit 10.)

A commenter on the 1996 proposal questioned the necessity of regulating dredging of State open waters under general permit 13, since such dredging activities need a stream encroachment permit which already addresses all of the listed concerns. The Department agrees that, if no wetlands are being disturbed, either in the water or on the bank of the water, then no freshwater wetlands permit is needed. An open water fill permit is not needed either, because dredging does not constitute a discharge of dredged or fill material and so is not a regulated activity in a State open water. The proposed readoption clarifies this point.

A few commenters on the 1996 proposal objected to the removal of a prohibition on using general permits 2 and 15 in exceptional resource value freshwater wetlands, on the grounds that this weakens protection of exceptional resource value wetlands. However, this change has been retained in the proposed readoption. The Department believes that the standard condition on all general permits at proposed N.J.A.C. 7:7A-4.3(b)3, which protects threatened or endangered species habitat, will be sufficiently protective. (See the section-by-section description of proposed changes for a detailed explanation of this proposed change.)

Many commenters on the 1996 proposal commended the extension of general permit 17 to include nature trails on private land, and some suggested that the general permit be expanded to allow larger paths and trails, to allow all activities on both public and private land, or to allow activities such as unenclosed structures. Other commenters suggested that the rule allow the use of recycled plastic decking and pilings. The proposed readoption incorporates some of these suggestions, including removing restrictions on the ownership of land upon which a trail or boardwalk may be built, and allowing use of a broader range of materials, including recycled plastic materials. The proposed readoption does not authorize unenclosed structures or large paths or trails. The Department believes that these activities are more appropriately located outside of wetlands.

Three commenters on the 1996 proposal suggested that additional limitations should be placed on the removal of dams under general permit 18, including a requirement for a thorough assessment of the wetlands to be eliminated by the dam removal and a mitigation requirement. This proposed readoption does not include such provisions. Because many dam owners do not own the land under the bottom of the lake created by the dam, they often do not have the legal authority to deed restrict or assess the area. Therefore, this readoption requires a deed restriction only when the dam owner also owns the lake bottom property.

Several commenters on the 1996 proposal addressed the proposed amendments to general permit 20 for bank stabilization, which expanded the length of stream bank that could be stabilized. Objectors stated that the expansion would counter efforts at the local level to protect stream and lake sides by non-structural source controls rather than end of pipe solutions. Supporters of the amendments stressed the importance of expanding the general permit to remedy erosion problems. The proposed readoption does include an extension of the allowable length of a bank stabilization project, but only in two cases: where a project uses environmentally beneficial bioengineering stabilization techniques, or where a project is listed as a priority by the Department's watershed management program.

Many comments were received on a provision in the 1996 proposal allowing disturbances resulting from regional infrastructure development to be considered separately from other wetlands disturbance, for purposes of calculating the one acre cumulative impact limit on general permit disturbances. Some commenters supported the proposed provisions in order not to penalize a property owner who accommodated regional infrastructure, while others strongly objected, stating that the provision was confusing, too broad, and would encourage poor planning at the local level. After consideration of the many comments on the provisions proposed in 1996, the Department has not included this special provision for regional infrastructure in the proposed readoption.

Many commenters on the 1996 proposal addressed issues involving notice of applications, and whether there should be more notice or less. Some commenters wanted more events to trigger notice requirements, such as notice of a minor modification application, and wanted notice to go to more different entities or to be posted on the site. Other commenters requested relief from notice requirements for linear developments, or for developments adjacent to multi-family housing where a condominium association might be notified rather than every family. This issue was discussed at one of the five public meetings held in early 1999. Because the FWPA includes detailed notice requirements, the Department's discretion to modify the rules as requested is limited. This proposed readoption includes a new requirement at N.J.A.C. 7:7A-13.1(d), requiring a copy of the permit to be kept on site for public inspection; and an option for an applicant to notify landowners within 200 feet of the proposed activity rather than within 200 feet of the property line. No other changes to the notice provisions are proposed in this readoption.

A commenter on the 1996 proposal supported the inclusion of provisions for minor modification of a general permit authorization, but urged the Department to include a requirement for notice to the affected municipality of the minor modification, because many developments are approved by municipalities with conditions tied to Department permits. This proposed readoption includes provisions for minor modifications but does not include such notice. The Department does not believe that the very minor types of changes authorized as minor modifications are likely to materially affect municipal approvals issued for these projects.

A commenter on the 1996 proposal urged the Department to streamline the regulatory process by providing for default issuance of permits if the Department failed to meet the deadline for a permit decision. This readoption includes three new general permit authorizations which can be obtained through this type of expedited process,

after notice to the Department. However, the Department chose these three activities carefully, and believes the default issuance process is appropriate only in very limited situations.

Several commenters on the 1996 proposal stated that the proposed mitigation subchapter should remain as guidance and should not be incorporated into the rule, because this would inhibit the flexibility necessary for varied sites and situations. The mitigation provisions were also extensively discussed at a public meeting in early 1999, and input from that meeting is reflected in the proposed readoption. The provisions also were discussed at a meeting of the Wetlands Mitigation Council on January 14, 2000. This proposal reflects that Council input. The Department has included more detailed mitigation provisions in the proposed readoption, but has tried to ensure an appropriate level of flexibility.

One commenter on the 1996 proposal opposed a provision allowing public projects to be mitigated for on public property, on the ground that this is not authorized under the FWPA. Another commenter on the 1996 proposal suggested that the rules be amended to allow use of public property for mitigation even if the property was not originally purchased for mitigation. The existing rules at N.J.A.C. 7:7A-14.1(f) allow a public entity to perform mitigation for public projects on public property if the property was obtained for mitigation purposes. This proposed readoption at N.J.A.C. 7:7A-15.4(a) retains this provision, and also allows use of public land in cases where the public agency did not obtain the land for any specific purpose, such as through a tax lien. The Department believes that this comports with the FWPA.

A commenter on the 1996 proposal requested an amendment providing that mitigation for all disturbances in the Passaic River Basin must take place in the watershed. However, due to the small number of potential mitigation sites in this basin, the suggested change could not realistically be implemented. The proposed readoption does, however, strive to ensure that mitigation is performed in the same watershed to the extent reasonably possible. (See the section-by-section description of N.J.A.C. 7:7A-15 for a detailed explanation of these provisions.)

A commenter on the 1996 proposal objected to provisions limiting the use of mitigation banks, and allowing the contribution of monies into the Wetlands Mitigation Fund without first requiring an applicant to use a mitigation bank in the service area of the permitted disturbance. Although the proposed readoption encourages the appropriate use of mitigation banks in many cases, the Department believes that in some cases a monetary contribution must be an option, in order to provide flexibility for mitigators and to achieve environmental goals.

Two commenters on the 1996 proposal objected to the requirement for a No Further Action (NFA) letter from the Department's Site Remediation Program as a component of a proposal for mitigation through upland preservation. Objections were based on whether the workload and delay required to obtain the NFA letter was justified. The commenters instead suggested submittal of a signed affidavit. While the Department recognizes that a No Further Action letter requires more effort to obtain, this requirement has been retained in the proposed readoption. It is doubtful that a contaminated mitigation site could provide the equal ecological value required by the FWPA. Also, accepting potentially contaminated sites could raise substantial liability questions and complicate subsequent site monitoring or remediation. Therefore, the

This proposal has been filed with the Office of Administrative Law, which will edit it before publishing it in the New Jersey Register.
Please refer to the August 7, 2000, New Jersey Register for the official final text of the proposal.

Department believes that submittal of a signed affidavit would provide insufficient assurance that a site proposed for preservation as mitigation is not contaminated, and that a No Further Action letter is necessary.

Some commenters on the 1996 proposal objected to the proposed new factors the Department will consider in determining a penalty amount or settlement amount, on the ground that the factors add more Department discretion. These factors are included in the proposed readoption at N.J.A.C. 7:7A-16.6(c) and N.J.A.C. 7:7A-16.9(f) and N.J.A.C. 7:7A-16.10(d). The proposed changes will codify the factors the Department currently employs in practice, and these factors are consistent with those used in the Department's other regulatory programs. The proposed changes will provide specific guidelines for the Department to apply in exercising its existing discretion to determine the amount of a penalty and to settle an assessed penalty. This will help ensure consistency so that similar violations will have comparable penalties and/or settlements.

The following is a section-by-section description of the rules proposed for readoption and the amendments to them:

SUBCHAPTER 1 GENERAL INFORMATION

7:7A-1.1 Scope and authority

N.J.A.C. 7:7A-1.1 addresses the statutory authority for these rules. A sentence describing some regulated activities is proposed for deletion from this section, since it is redundant with provisions proposed at N.J.A.C. 7:7A-2.1(a). In addition, the fill titles and citations of the statutory authority for the rules are proposed to be included.

7:7A-1.2 Construction of this chapter

N.J.A.C. 7:7A-1.2 provides that the chapter should be liberally construed. The proposal changes the name of the section to clarify that it relates to construction of the rules, includes the full title of the wetlands statute, and makes a grammatical correction.

7:7A-1.3 Forms and information, internet web site

The Department is proposing minor clarifying changes to N.J.A.C. 7:7A-1.3, which provides information for contacting the Department to obtain or submit forms and information. The proposal also provides the internet web address for the Land Use Regulation Program's new web site (www.state.nj.us/dep/landuse).

7:7A-1.4 Definitions

A new definition of the term "ACOE" is proposed. This is a common abbreviation for the United States Army Corps of Engineers, and the abbreviation is used in the rules.

Changes are proposed to the definition of "acid producing deposits" in order to clarify the definition without changing its meaning.

The definition of "Act" is proposed for deletion and the term is replaced throughout the rule with "Freshwater Wetlands Protection Act" to reduce confusion.

The definitions of "Administrator" and "advanced stages of construction" are proposed for deletion because neither is used in the rules proposed for readoption. The Land Use Regulation Program is no longer headed by an Administrator. The term "advanced stages of construction" was used only in relation to an exemption for prior ACOE approvals. Since the exemption is proposed for deletion, there is no longer a need for the definition.

The definition of "application for development" is proposed for deletion, because the term is not used in the proposed readoption of this chapter. It is used in the exemptions found in the existing rule at N.J.A.C. 7:7A-2.7, but the exemptions are proposed to be reorganized and reworded for clarity and no longer use the term.

The definition of "Bank" has been deleted, since the proposed mitigation section, N.J.A.C. 7:7A-15, has its own separate definitions section, which addresses this term.

Minor clarifying changes that do not affect meaning are proposed to the definition of "best management practices." It should be noted that the definition is not intended to provide an exhaustive list of guidelines or manuals regarding these practices, but merely examples.

The definition of "Clean Water Act," which also includes the definitions of "Federal Act" and "CWA" is proposed for deletion because the term "Clean Water Act" is not used in the proposed readoption. Instead, the proposal defines "Federal act" and replaces all instances of the terms "Clean Water Act" and "CWA" with the term "Federal act". A definition of the term "Federal act" is proposed to replace the deleted term. The definition of "Federal act" is the same as the existing definition of the terms "Clean Water Act," "Federal act" and "CWA," with minor clarifying changes that do not affect meaning.

The definition of "climax habitat" is proposed for deletion because it is not used in the proposed rules. It is used in an existing provision discouraging use of valuable habitat as a mitigation site, which is proposed to be reworded for clarity without changing its meaning.

An unnecessary citation is proposed to be deleted from the definition of "compelling public need."

A definition of "conservation restriction" is proposed, for the portions of the rules, such as the transition area waiver and mitigation subchapters, that require a legal document restricting future development on a property or portion thereof. The proposed definition is based on the definition of this term in the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-2. A conservation restriction could include an easement granting rights to a third party to enforce restrictions on future development. This is an effective preservation method when a responsible third party can be found, which has the resources to monitor the area and ensure compliance with the restrictions. However, in some cases it is difficult to find such a third party.

Additions are proposed to clarify the definition of "contiguous". This is a key term in the freshwater wetlands rules. It is used in the definition of "site," and most of the acreage limits in the rules apply to a "site." These proposed additions to the definition of "contiguous" codify the Department's current practice in interpreting this term, and are also consistent with the use of the term in the Department's Coastal Permit Program Rules.

The definition of "Council" is proposed for deletion and relocation in the definitions section of the subchapter on mitigation, N.J.A.C. 7:7A-15.1.

Minor clarifying changes that do not affect meaning are proposed to the definition of "cultivating."

The proposal replaces the definition of "degraded wetland" with a new proposed definition of "degraded" which refers to the FWPA. The definition is repeated in the

mitigation section because it also includes a provision stating that for mitigation purposes only, an active agriculture field devoid of wetland vegetation which would otherwise meet the definition of a wetland may be considered a degraded wetland. If a wetland is degraded, it can be used for mitigation through enhancement. This will facilitate ongoing programs at the federal and state level to encourage the return of farmed wetlands to their natural state, by allowing enhancement on certain farmed wetlands.

Minor clarifying changes that do not affect meaning are proposed to the definition of "delegable waters."

The proposal deletes the definition of "destruction of plant life which would alter the character of a freshwater wetland including the cutting of trees" because the term is used only in one place. Instead of defining the term, the proposal incorporates the substance of the definition in the provision where the term is used at proposed N.J.A.C. 7:7A-2.2(a).

The proposal clarifies the definition of "detention basin" to indicate that it must be a human-made feature.

A definition of "developable upland" is proposed to aid in implementation of general permit 10, which in some cases requires an applicant to demonstrate that there is no alternative way to access a developable upland. The term is also used in the provisions for hardship transition area waivers at proposed N.J.A.C. 7:7A-6.5. A developable upland is an upland area that could be developed under the laws that apply to the site.

The proposal deletes extraneous material from the definition of "discharge of dredged material" and rewords the definition slightly for clarity.

Minor clarifying changes that do not affect meaning are proposed to the definition of "discharge of fill material." The term "subaqueous," which means "below the surface of the ground, a wetland, or a water surface," is replaced with the simpler, less confusing term "underground."

The proposal deletes the definition of "disturbance of the water level or water table" because the term is only used in one place. Instead of defining the term, the proposal incorporates the information from the definition in the provision where the term is used at proposed N.J.A.C. 7:7A-2.2(a).

Minor clarifying changes are proposed to the definition of "ditch."

The proposal deletes the definition of "element" because the term is not used in the proposed rule.

Minor clarifying changes that do not affect meaning are proposed to the definition of "environmental commission" and "EPA priority wetlands."

The proposal deletes the definition of "equal ecological value," and replaces it with a detailed rule provision at N.J.A.C. 7:7A-15.2(c), that more fully explains how the Department applies the concept of equal ecological value in implementing the mitigation provisions of the rules.

Minor clarifying changes that do not affect meaning are proposed to the definition of "Established, ongoing farming, ranching or silviculture operation." In addition, a substantive change is proposed to make the definition consistent with the policy of the USDA's Natural Resources Conservation Service. The existing definition provides that an operation ceases to be an established operation if the area has lain idle for so long that modifications to the hydrological regime are necessary to resume operations. However, the Department's experience has been that this standard is vague and hard to implement. Therefore, the Department is proposing an additional criterion, such that, even if it is not clear whether hydrologic modifications are necessary to resume operations, an operation ceases to be established if the area has lain idle for more than five years. This is the standard used by the USDA's Natural Resources Conservation Service, and will provide an easily measurable and predictable standard.

A definition of "farmed wetland" is proposed, for use in the two new general permits that allow spring developments and animal waste management activities in such wetlands and transition areas. A wetland that has been in active agricultural use since the passage in 1985 of the Federal Food Security Act, 16 U.S.C. §§ 3801 et seq., would be considered a farmed wetland. A wetland actively used for pasture or hay would also be considered a "farmed wetland." The definition is taken from a portion of the federal definition of the term, found in ACOE Regulatory Guidance Letter 90-07, and is consistent with the use of the term by the Natural Resources Conservation Service (NRCS) in the U.S. Department of Agriculture.

A definition of "Federal act" is proposed. This definition replaces a single existing definition of three terms: "Clean Water Act", "Federal Act" and "CWA". The proposed definition is the same as the previous definition, with minor clarifying changes that do not affect meaning. The proposed rule uses the term "Federal act" throughout, and does not use "Clean Water Act" or "CWA."

Minor clarifying changes that do not affect meaning are proposed to the definition of "fill."

Minor clarifying changes that do not affect meaning are proposed to the definitions of "FW," "FW1," "FW2," "freshwater wetland," and "freshwater wetlands permit."

A new definition of "gabion" is added to clarify general permit 20 (stream bank stabilization). The definition is consistent with the definition of this term in the Department's proposed Coastal Zone Management rules.

A new definition of "general permit" is proposed to help clarify the difference between a general permit and an individual permit.

A new definition of "government agency" is proposed for use in implementing mitigation provisions such as those at N.J.A.C. 7:7A-15.2 that allow a government

agency to mitigate on public land, and those at N.J.A.C. 7:7A-15.4 that require that a completed mitigation site be transferred to a government agency or conservation organization.

The proposal relocates the definition of "headwaters" into general permit 7, since that is the only place this term is used.

Minor clarifying changes that do not affect meaning are proposed to the definition of "hydric soil," "hydrophyte," "individual permit" and "intermittent stream."

A new definition is proposed for "impervious surface," in order to clarify provisions throughout the rule that use the term. For example, the determination of whether a freshwater wetlands is an ordinary resource value wetlands rests partly on the presence of impervious surfaces.

A new definition is proposed for "individual transition area waiver" to distinguish a transition area waiver issued independently of a general permit from a transition area waiver issued as part of a general permit authorization.

Changes are proposed to the definition of "isolated wetlands." These changes are related to the proposed new definition of "part of a surface water tributary system." The proposal clarifies that isolated wetlands are those that are not part of a surface water tributary system.

A minor clarifying change that does not affect meaning is proposed to the definition of "lake, pond, or reservoir."

Minor clarifying changes that do not affect meaning are proposed to the definition of "letter of interpretation."

Changes are proposed to the definition of "major discharge," to make the definition consistent with the Department's 1993 memorandum of agreement with EPA. This memorandum of agreement lists major discharges, which the Department must submit to EPA for review prior to final decision-making.

A citation correction is proposed in the definition of "mitigation."

A new definition of "Natural Resources Conservation Service" is added to reduce confusion. The Natural Resources Conservation Service, or NRCS, is a branch of the United States Department of Agriculture that provides technical assistance to farmers concerning USDA conservation programs associated with soil, water, and other related natural resources. The NRCS was formerly named the "Soil Conservation Service." In addition, there is a branch of the New Jersey Department of Agriculture called the Soil Conservation District. The definition is intended to assist the reader in distinguishing these different agencies.

A new definition of "non-delegable waters" is proposed, to clarify the Department's jurisdiction under the Federal 404 program. The definition refers to the definition of "delegable waters."

The proposal amends the definition of "onsite" so that it simply means the area located within a site. The proposal then defines "site" separately. This allows the use of each term separately, which will minimize awkward and confusing grammatical constructions. See the discussion of the proposed definition of "site" below.

A new definition of "palustrine emergent" is proposed, for use in applying general permit 13. General permit 13 allows dredging in a freshwater wetlands only if the vegetation in the wetlands is palustrine emergent vegetation.

A new definition is proposed for "part of a surface water tributary system." This term is used as a basis for authorizing activities under general permit 6.

Clarifying changes are proposed to the definition of "permit." The proposed definition includes general permit authorizations and transition area waivers as types of permits. This will allow for a short, simple term that applies to almost all approvals under the chapter, thus making the rules easier to understand.

A new definition of "permittee" is proposed in order to simplify the rule text through use of a short and simple term.

The proposal deletes the definition of "placing of obstructions " because the term is used in only one place. Instead of defining the term, the proposal incorporates the information from the definition into the provision where the term is used at proposed N.J.A.C. 7:7A-2.2(a).

Minor clarifying changes that do not affect meaning are proposed to the definition of "plowing" and "preliminary approval."

Minor clarifying changes that do not affect meaning are proposed to the definition of "project." In addition, language relating to the duration of exemptions is deleted from the definition and relocated in the exemptions section at proposed N.J.A.C. 7:7A-2.8(g)4.

The definition of "property" is proposed for deletion because clarifications in the new definition of "site" make it unnecessary.

The proposal amends the definition of "redevelopment" by removing a list of impervious surfaces from the definition and replacing it with a reference to the definition of "impervious surface." The proposal also clarifies that redevelopment may take place where an area is significantly disturbed but not necessarily covered with impervious surfaces, and deletes the requirement that the disturbance occurred prior to July 1, 1988. These changes reflect the fact that the term "redevelopment" is now used in several provisions in the rules. The term is used to limit general permit 5 and not allow wetlands disturbance whose purpose is to facilitate redevelopment rather than proper closure of a landfill. The term is also used in proposed new general permit 27, which allows limited wetlands disturbance as part of redevelopment of industrial or commercial sites. Finally, the term is used in the special activity transition area waiver for redevelopment. In all of these contexts, limited regulated activities are allowed where

an area is significantly disturbed, as well as where it is covered with an impervious surface. The requirement that impervious surfaces be legally existing prior to July 1, 1988 does not make sense in the context of the use of the term "redevelopment" in all of these provisions. Therefore, this limitation is proposed to be deleted from the definition and is inserted in proposed N.J.A.C. 7:7A-2.4(d)1ii, where it should apply.

Minor clarifying changes that do not affect meaning are proposed to the definition of "regulated activity."

A new definition of "residential development project" is proposed for purposes of the construction of a single family or multi unit residential dwelling. The new definition includes a 20 foot area surrounding the residential structure as part of the residential development project. See the description of proposed N.J.A.C. 7:7A-2.6 for a more detailed explanation of this concept.

A new definition of "sewage pump station" is proposed for use in implementing general permit 2, which allows construction of pump stations as part of the construction of an underground utility line.

The definition of "significant adverse impact" is proposed for deletion because it is not used in the proposed rule.

The definition of "silviculture" is proposed to be replaced with a more accurate definition.

A new definition of "site" is proposed to clarify the area within which regulated activities are proposed or conducted. The term is used extensively throughout the rule, and in many cases disturbance is limited to a maximum amount per site. The substance of the proposed definition is found in the existing definition of "onsite."

A new definition of "Soil Conservation District" is proposed, for use in implementing provisions that require compliance with requirements of the New Jersey Department of Agriculture's Soil Conservation Districts (for example, in general permit 2). In addition, the definition will help alleviate confusion caused by the similarities between the USDA's Natural Resources Conservation Service and the NJDA's Soil Conservation Districts.

The proposal adds explanatory material to the definition of "special aquatic site." This material is taken from the Federal 404(b)1 guidelines, and explains in more detail the Federal concept of a special aquatic site. The proposal also adds the current Federal list of special aquatic sites, and notes that, although freshwater wetlands are excluded from the definition of a special aquatic site, other wetlands are not.

The proposal includes an amended definition of "State open waters", to reflect the fact that the New Jersey Water Pollution Control Act (WPCA) is the source of the Department's authority to regulate the discharge of dredged or fill material into open waters, and to remove the extraneous references to interstate commerce from the definition of "State open waters". When the Legislature enacted the Freshwater Wetlands Protection Act, it amended the Water Pollution Control Act, at N.J.S.A. 58:10A-6(c), to provide the Department with authority to regulate the discharge of

dredged and fill material into the waters of the State, as required by section 404 of the Federal Clean Water Act. The definition of "waters of the United States" includes, among other things, all waters which are or can be used in interstate commerce. But the WPCA gives the Department jurisdiction over discharges of dredged or fill materials into "waters of the State," without an express requirement that the "waters of the State" be used or be susceptible for use in interstate commerce. In addition, the interstate commerce requirement has always been very broadly interpreted, in accordance with existing case law stating that a very broad range of activities can be regulated under the commerce clause of the Federal constitution. Therefore, this change does not make the State program more stringent than the Federal 404 program, but simply recognizes that with respect to the Department's authority over waters of the State, the interstate commerce issue is not germane.

To ensure that the definition of "State open waters" is not inappropriately broad, the definition also provides a list of general exclusions based on Federal exclusions from the class of "waters of the United States." Item 5 on the proposed list has one addition not included in the Federal list: a water-filled depression created in dry land incidental to remediation activity would also be excluded. The Federal list only references such depressions if they are created through construction activity. The proposal also includes items 7 and 8, which are not in the Federal list. These would probably not fit the Federal definition of "waters of the United States," but are not specifically excluded in the Federal definition.

A new definition is proposed for "stormwater management facility." This term is defined in the existing rules in the transition area waiver provisions at N.J.A.C. 7:7A-7.4(b)1. The proposal moves the definition into N.J.A.C. 7:7A-1.4 and simplifies it.

Clarifying changes that do not affect meaning are proposed to the definition of "swale."

A new definition is proposed for "temporary disturbance." The existing rule defines "minor and temporary disturbance" at N.J.A.C. 7:7A-6.2(b)2i, but this definition is specific to the transition area provisions in which it is found. The proposed definition of "temporary disturbance" is broader, and will be useful in implementing transition area and mitigation requirements. The definition uses the same six-month time limit for a temporary disturbance as is used in the existing transition area provision, but restricts a temporary disturbance to one which is permitted. If a non-permitted regulated or prohibited activity is performed, merely stopping the activity within six months of starting it does not address the ongoing environmental damage wrought by the activity. However, if a disturbance is permitted and lasts less than six months, the permit will contain conditions, such as mitigation, to ensure that the damage does not continue past the cessation of regulated or prohibited activities.

Minor clarifying changes that do not affect meaning are proposed to the definitions of "threatened or endangered species" and "transition area."

Changes are proposed to the definition of "transition area waiver" in order to remove redundant material that is found at proposed N.J.A.C. 7:7A-6.

Minor clarifying changes that do not affect meaning are proposed to the definitions of "trout production waters," "USEPA" and "USGS."

A new definition of "USGS quad map" is proposed, in order to clarify the type of map required in various provisions in the rules, including application requirements.

A new definition is proposed for "utility line." This term is defined in the existing rules at N.J.A.C. 7:7A-9.2(a)2 in the general permit for construction of utility lines. The proposal relocates the definition in N.J.A.C. 7:7A-1.4, and clarifies that the term includes poles and towers only if they carry or support a utility line. Thus, a microwave tower or cell phone tower would not be a utility line. (See the section-by-section description of proposed general permit 2 for more information.) The definition also clarifies that the term "utility line" does not include a stormwater pipe, or any pipe that drains a wetland or State open water.

A new definition is proposed for "vernal habitat." This term is used in a proposed amendment to general permit 6. General permit 6 allows disturbance of a non-tributary wetland. The proposed amendment would prohibit use of general permit 6 in vernal habitats. A vernal habitat is a type of small, seasonal pond that acts as valuable breeding habitat for certain amphibian species. Vernal habitats are especially important to these small amphibians because the pools are large enough to support amphibian breeding but too small to support the fish that feed on these amphibians and their eggs. Accordingly, the definition of vernal habitat hinges largely on evidence of the presence of these amphibian species. Such evidence creates a rebuttable presumption that other key factors needed for a vernal habitat are present. See the section-by-section description of N.J.A.C. 7:7A-5.6 for a discussion of this proposed amendment to general permit 6.

Minor clarifying changes that do not affect meaning are proposed to the definition of "water-dependent use." In addition, the term is changed from "water-dependent use" to "water-dependent activity," to reflect the way the term is actually used in the rule.

A new definition of "Water Pollution Control Act" is proposed so that this statute can be referred to in the rule without including a lengthy citation.

The definition of "watershed" is proposed to be deleted. Instead, the proposal uses the USGS system of hydrologic unit codes (HUC) to more clearly define the area that drains to a particular water body. The proposal includes a definition of the term "HUC 11" to clearly specify the area within which mitigation must be performed in certain cases.

A new definition of "waters of the State" is proposed, for use in the definition of "State open waters." The definition is taken from the rules implementing the NJPDES program at N.J.A.C. 7:14A.

Minor clarifying changes that do not affect meaning are proposed to the definitions of "waters of the United States" and "water quality certificate." As noted above with regard to the definition of "State open waters," the list of excluded waters in the existing

definition of "waters of the United States" is proposed to be incorporated into the definition of "State open waters."

A new definition of "working day" is proposed, to clarify provisions that set deadlines and time periods consisting of a certain number of working days.

7:7A-1.5 Severability

The Department is proposing minor clarifying changes to this section, which addresses the severability of each portion of the rule in the event another portion is invalidated. The proposed changes are intended solely to make the rules easier to understand and make no change in the meaning of this provision.

7:7A-1.6 Other statutes and regulations

The Department is proposing minor clarifying changes to N.J.A.C. 7:7A-1.6(a) to remove redundant phrases. The proposed change is intended solely to make the rule easier to understand and makes no change in the meaning of this provision.

The Department is proposing minor changes to N.J.A.C. 7:7A-1.6(b) to delete obsolete date limitations and to clarify the provision.

The Department is proposing minor clarifying changes to N.J.A.C. 7:7A-1.6(c), that do not affect meaning.

The Department is proposing a minor change to N.J.A.C. 7:7A-1.6(d) to remove a cross reference to N.J.A.C. 7:7A-1.6(e). The cross reference erroneously implies that, under some circumstances, other State regulatory programs may regulate freshwater wetlands based on freshwater wetlands protection concerns. This is prohibited by the FWPA.

Amendments are proposed at N.J.A.C. 7:7A-1.6(e) to remove redundant phrases, and to delete a redundant sentence.

7:7A-1.7 Hearings and appeals

The proposal deletes existing N.J.A.C. 7:7A-1.7, which addresses the initial operative date of the freshwater wetlands rules, because that date is ten years past and thus the provision is no longer necessary.

Existing N.J.A.C. 7:7A-1.7 is replaced with proposed provisions governing hearings and appeals. This new proposed section consolidates multiple existing provisions that govern appeals of Department permit and other decisions made under this chapter. The provisions in the existing rule that are replaced by this proposed section are N.J.A.C. 7:7A-2.10, 7:7A-7.8, 7:7A-8.10, 7:7A-9.6, and 7:7A-12.7.

This consolidation is intended to make the rule shorter, simpler and easier to understand. In addition, the proposal makes some substantive changes, described below.

The proposal deletes a provision in the existing rule at N.J.A.C. 7:7A-8.10(b), which requires that an applicant make a good faith effort to resolve disputes with the Department prior to filing a request for a hearing. The proposal deletes this requirement. The Department encourages applicants in all cases to work with review staff to resolve concerns prior to a Department decision in order to prevent, if possible, a decision that an applicant will feel compelled to appeal. In addition, the proposal adds an option for alternative dispute resolution at N.J.A.C. 7:7A-1.7(e).

Proposed N.J.A.C. 7:7A-1.7(a) lists the type of Department actions on which a hearing may be requested. Item 7, which allows a person to request a hearing on a modification or extension of a Department document, is not included in the existing rule.

Proposed N.J.A.C. 7:7A-1.7(b) is a new provision not included in the existing rule. It clarifies that appeals of Department enforcement actions are addressed not at N.J.A.C. 7:7A-1.7 but at N.J.A.C. 7:7A-16.18.

Proposed N.J.A.C. 7:7A-1.7(c) and (d) include requirements for the content and timing of a submittal requesting an administrative hearing. The substance of these provisions is found in the existing rules at N.J.A.C. 7:7A-8.10 and 12.7. The proposal adds more detail to the requirements, in order to assist the Department in evaluating hearing requests.

Proposed N.J.A.C. 7:7A-1.7(e) is a new provision not included in the existing rule. It adds the option of requesting alternative dispute resolution as part of a hearing request. The Department's Office of Dispute Resolution mediates disputes between the Department and other parties in an effort to resolve these disputes with less cost and acrimony than is usually attendant on formal appeal proceedings. The Department determines which matters are appropriate for mediation by the Office of Dispute Resolution.

Proposed N.J.A.C. 7:7A-1.7(f) is a new provision not included in the existing rule. It provides that a hearing request will automatically stay a permit, and all permitted activities must stop, unless the Department issues an exception to the stay. This is based on a provision found in existing N.J.A.C. 7:7A-12.7(a), which gives the Commissioner discretion to stay any permit upon the submittal of a hearing request. However, the proposal makes the stay automatic upon the submittal of the hearing request, but gives the Commissioner discretion to grant an exception to the stay for good cause. The automatic stay will prevent a permittee from undertaking activities while contesting permit conditions that are integral to the Department's finding that the permit application met the freshwater wetlands rule standards for approval.

Proposed N.J.A.C. 7:7A-1.7(g) sets forth the standards and procedure by which the Department will determine whether to grant a hearing. Again, this is based on existing provisions at N.J.A.C. 7:7A-8.10 and 12.7, but more detail and specificity is added.

Proposed N.J.A.C. 7:7A-1.7(h) provides for public notice of a Department decision to settle a matter for which a hearing has been requested. This is a new provision, reflecting the Department's current practice.

Proposed N.J.A.C. 7:7A-1.7(i) and (j) are new provisions not found in the existing rules, which set forth the procedure that will be followed after an administrative hearing.

Proposed N.J.A.C. 7:7A-1.7(k) provides that the section does not provide a right to a hearing in contravention of the New Jersey Administrative Procedure Act.

SUBCHAPTER 2 APPLICABILITY

7:7A-2.1 Jurisdiction; permit or waiver requirement

The proposal changes the name of this section to clarify that it includes the basic requirement for a permit or waiver.

The proposal deletes existing N.J.A.C. 7:7A-2.1(a), which states that the chapter applies to regulated activities, because it essentially repeats information stated more clearly in N.J.A.C. 7:7A-2.1(b) in the existing rule, which is recodified at proposed N.J.A.C. 7:7A-2.1(a).

Existing N.J.A.C. 7:7A-2.1(b), which requires a permit for regulated activities, is recodified at proposed N.J.A.C. 7:7A-2.1(a), with clarifying changes that do not affect its meaning. The proposal deletes a redundant reference to the discharge of dredged or fill material into State open waters, since this is already included in the term "regulated activity" and thus is already covered in the first sentence of this subsection. A provision requiring a transition area waiver for prohibited activities is added. Text stating that regulated activities may also require a water quality certificate in addition to a permit is proposed for deletion, since a permit issued under this chapter itself constitutes a water quality certificate. These proposed changes are intended solely to make the rule easier to understand and do not change the meaning of this provision.

The proposal recodifies existing N.J.A.C. 7:7A-2.1(c), which exempts State agencies from application fees, at proposed N.J.A.C. 7:7A-2.1(b). The proposal also clarifies the wording, and deletes a redundant sentence regarding the discharge of dredged or fill material into State open waters. The proposed changes are intended solely to make the rule easier to understand and do not change the meaning of this provision.

The proposal relocates existing N.J.A.C. 7:7A-2.1(d) and (e), which address the submittal of applications, to the subchapter on application requirements at N.J.A.C. 7:7A-10.1(m).

At proposed new N.J.A.C. 7:7A-2.1(c), the proposal adds a provision addressing the Department's assumption of the Federal 404 wetlands program, clarifying that projects in non-delegable waters may require a permit from the ACOE as well as a permit from the Department.

At proposed new N.J.A.C. 7:7A-2.1(d), the proposal adds a provision explaining that a permit issued by the Department under this chapter constitutes the water quality certificate for the activity, which is required by the Federal Clean Water Act. The provision also provides for the Department to issue a water quality certificate in a case where no permit is needed under this chapter. In most cases, the standards and procedures in this chapter will be used, except in the Coastal zone, where the standards and procedures in the coastal permit program rules and coastal zone management rules will be used. This is consistent with existing provisions in the coastal zone management rules at N.J.A.C. 7:7E-1.2(d).

At proposed new N.J.A.C. 7:7A-2.1(e), the proposal clarifies the permittee's responsibility for ensuring compliance with this chapter.

At proposed new N.J.A.C. 7:7A-2.1(f), the proposal clarifies that an activity must be specified in a permit or waiver to be authorized by that permit or waiver.

7:7A-2.2 Regulated activities in freshwater wetlands and State open waters

The section currently codified at N.J.A.C. 7:7A-2.2 (Subchapters which apply to freshwater wetlands permits or open water fill permits) is proposed for deletion since it was intended to assist the reader in understanding the structure of the existing rule, but the reorganization of the rule has rendered it unnecessary. Existing N.J.A.C. 7:7A-2.3 is proposed to be recodified at N.J.A.C. 7:7A-2.2, with amendments described below.

The Department is proposing minor clarifications to proposed N.J.A.C. 7:7A-2.2(a), found in the existing rule at N.J.A.C. 7:7A-2.3(a), which describes regulated activities in freshwater wetlands and State open waters. The proposal clarifies that the listed activities are not regulated if excluded under proposed N.J.A.C. 7:7A-2.2(c), and the proposal moves the substance of the definitions of the terms "drainage or disturbance of the water level or water table" and "destruction of plant life which would alter the character of a freshwater wetlands" into the list of regulated activities. The proposal also deletes a provision at existing N.J.A.C. 7:7A-2.3(a)6, which excludes approved forestry activities from the list of regulated activities. This is redundant with proposed N.J.A.C. 7:7A-2.8(d), which exempts approved forestry activities. Finally, the proposal adds N.J.A.C. 7:7A-2.2(a)7, which clarifies that placement of a residential development project in a freshwater wetlands is a regulated activity.

The Department is proposing a change to N.J.A.C. 7:7A-2.2(b), found in the existing rule at N.J.A.C. 7:7A-2.3(b), which provides that a discharge of dredged or fill material into a State open water is a regulated activity under these rules. The proposed change clarifies that, if the dredged or fill material is discharged into a non-delegable State open water that is subject to the Waterfront Development Law, the discharge would not be a regulated activity. The authority for the Department to regulate discharges of dredged or fill material into State open waters is found at N.J.S.A. 58:10A-6(c). That provision allows the Commissioner to exempt by regulation certain categories of discharges. This provision does that, since the activity is reviewed by the Land Use Regulation Program under the Waterfront Development Law.

The proposal clarifies the language of proposed N.J.A.C. 7:7A-2.2(c), recodified from the existing N.J.A.C. 7:7A-2.3(c). Currently, the provision lists items that are "not considered to result in the alteration of the character of a freshwater wetlands." This is intended to be a list of activities that the Department does not believe meet the statutory definition of a "regulated activity", and thus the activities are not regulated. To clarify this and reduce confusion, the proposal changes the wording of the introductory language of the provision to merely state that the following are not regulated activities. It also adds a cross reference to N.J.A.C. 7:7A-2.2(a) for clarification. These proposed changes are intended solely to make the rule easier to understand and do not change the meaning of this subsection.

Proposed N.J.A.C. 7:7A-2.2(c)1, which lists certain minor surveying activities as not regulated, is found in the existing rules at N.J.A.C. 7:7A-2.3(c)1. No changes are proposed.

At N.J.A.C. 7:7A-2.2(c)2, which lists certain temporary structures that are not regulated, the proposal adds examples of the types of temporary structures that are not regulated, and reformats the rule language into a numbered list for easier reading. The proposed changes are intended solely to make the rule easier to understand and do not change the meaning of this provision.

At N.J.A.C. 7:7A-2.2(c)3, the proposal clarifies that the placement of small guy anchors is an unregulated activity. Guy anchors are small metal spirals that screw into the ground, with a small metal hook on the top. A wire support for a utility pole is attached to the hook. Because guy anchors are so small and only a small portion of the guy anchor protrudes above the ground, the Department does not believe that they rise to the level of a regulated activity, as defined by the FWPA.

At N.J.A.C. 7:7A-2.2(c)4, the proposal clarifies that hand trimming of trees and vegetation is not a regulated activity if it does not alter the character of the wetland. An example would be the trimming of branches of trees through which power lines pass.

At N.J.A.C. 7:7A-2.2(c)5, the proposal adds the driving of pilings in a State open water to the list of unregulated activities, unless the pilings are so large or numerous as to have the characteristics of fill. This activity is not regulated as a discharge of dredged or fill material by ACOE under the Federal 404 program, and the proposed language is based on that of the Federal 404 program.

7:7A-2.3 Identifying freshwater wetlands

Proposed N.J.A.C. 7:7A-2.3 contains provisions found at N.J.A.C. 7:7A-2.4 in the existing rules.

Minor clarifications are proposed at N.J.A.C. 7:7A-2.3(a). The proposal removes the description of the Federal manual for delineating wetlands, instead referring to the new proposed definition of "Federal manual". The proposed changes are intended solely to make the rule easier to understand and do not change the meaning of this provision.

Provisions in the existing rule at N.J.A.C. 7:7A-2.4(b) are proposed for deletion because they contain unnecessary and confusing technical detail.

Provisions in the existing rule at N.J.A.C. 7:7A-2.4(c) are recodified at proposed N.J.A.C. 7:7A-2.3(b) with minor clarifying changes that do not affect their meaning.

Provisions in the existing rule at N.J.A.C. 7:7A-2.4(d) are recodified at proposed N.J.A.C. 7:7A-2.3(c) with no changes.

Proposed new N.J.A.C. 7:7A-2.3(d) directs the reader to the provisions regarding LOIs for an official determination of whether and/or where freshwater wetlands are on a property.

Proposed N.J.A.C. 7:7A-2.3(e) is a consolidation and clarification of existing N.J.A.C. 7:7A-2.4(e) and (f). The proposed changes are intended solely to make the rule easier to understand and do not change its meaning.

Proposed new N.J.A.C. 7:7A-2.3(f) explains where the New Jersey wetlands maps are available for public inspection. Some of this information is found in existing N.J.A.C. 7:7A-2.4(e).

7:7A-2.4 Classification of freshwater wetlands by resource value

Proposed N.J.A.C. 7:7A-2.4 contains provisions found at N.J.A.C. 7:7A-2.5 in the existing rule.

Minor clarifications are proposed at N.J.A.C. 7:7A-2.4(a), found in the existing rule at N.J.A.C. 7:7A-2.5(a), which provides for classifying wetlands by resource value. The proposed changes are intended solely to make the rule easier to understand and do not change the meaning of this provision.

Minor clarifications are proposed at N.J.A.C. 7:7A-2.4(b) (existing N.J.A.C. 7:7A-2.5(b)), which describes exceptional resource value wetlands. The proposed changes are intended solely to make the rule easier to understand and do not change the meaning of this provision.

Minor clarifications are proposed to existing N.J.A.C. 7:7A-2.5(b)2i, which is recodified in the proposal at N.J.A.C. 7:7A-2.4(c). This provision allows an applicant to request Department reconsideration of a potential exceptional resource value classification. The proposed changes are intended solely to make the rule easier to understand and do not change the meaning of this provision.

Provisions found in the existing rule at N.J.A.C. 7:7A-2.5(c), describing ordinary resource value wetlands, are proposed to be recodified at N.J.A.C. 7:7A-2.4(d), reorganized and clarified. At proposed N.J.A.C. 7:7A-2.4(d)4, the Department is proposing a change which will clarify that only detention basins which were originally constructed in uplands are classified as ordinary resource value wetlands. If a detention basin is created in a wetland, the wetland does not thus automatically become an ordinary resource value wetland. This would ignore the values and functions that can be provided by a natural wetland.

Minor clarifications are proposed to N.J.A.C. 7:7A-2.4(e) and (f), found in the existing rule at N.J.A.C. 7:7A-2.5(d) and (e). These provisions describe intermediate resource value wetlands, and explain that the classification system does not limit the Department's mitigation program, respectively. The proposed changes are intended solely to make the rule easier to understand and do not change the meaning of these provisions.

Proposed new N.J.A.C. 7:7A-2.4(g) is added to inform the reader that a statement from the Department of the resource value classification for a particular wetland can be obtained through a letter of interpretation issued under N.J.A.C. 7:7A-3.

N.J.A.C. 7:7A-2.6, Designation of State open waters, is proposed for deletion, since its sole purpose is to define a term already defined at N.J.A.C. 7:7A-1.4.

7:7A-2.5 General transition area provisions

The provisions proposed at N.J.A.C. 7:7A-2.5(a) through (g) are recodified, with minor clarifications, from N.J.A.C. 7:7A-6.1(a) through (g), which describe transition areas and their functions. (Provisions at existing N.J.A.C. 7:7A-6.1(h), which address a transition area arising from wetlands on an adjacent property, are recodified and consolidated with proposed N.J.A.C. 7:7A-2.7(a).) The proposal shows the recodified provisions as existing provisions, so that changes can be indicated with brackets and underlining. The proposed clarifying changes are intended solely to make the rules easier to understand and do not change the meaning of these provisions.

Proposed Figure 1 is recodified from existing Figure 1, Appendix A, with no changes.

7:7A-2.6 Prohibited activities in transition areas

The provisions proposed at N.J.A.C. 7:7A-2.6 are recodified, with minor changes, from existing N.J.A.C. 7:7A-6.2.

Minor clarifications are proposed to N.J.A.C. 7:7A-2.6(a), found in the existing rules at N.J.A.C. 7:7A-6.2(a), which describes activities prohibited in transition areas. The proposed changes at N.J.A.C. 7:7A-2.6(a)1 through 5 are intended solely to make the rule easier to understand and do not change its meaning. In addition, a provision is added at N.J.A.C. 7:7A-2.6(a)6 addressing the placement of a residential development project. Over the years of implementing the freshwater wetlands program, the Department has determined that construction and use of buildings and other impervious surfaces invariably involves disturbances in the surrounding area. Regardless of good faith intentions and efforts to the contrary, it is virtually impossible to build and use a structure, especially a residence, immediately adjacent to a transition area or freshwater wetland without conducting prohibited activities in the transition area or wetlands.

There are many cases in New Jersey where a developer has built multiple homes immediately adjacent to a transition area or wetland and then sold the homes, sometimes without ever informing the buyers that their backyard is a strictly regulated area. Inevitably, use of the home results in prohibited activities in the transition area, resulting in degradation of the transition area and the adjacent wetlands and numerous enforcement actions. These enforcement actions tend not to be cost-effective due to the small area affected in relation to the effort required to prosecute them to completion, and because the Department is reluctant to prosecute individual homeowners for problems created by the original developer of a property. Even when efforts are made not to disturb the transition area, the Department has found that buildings and

impervious surfaces placed immediately adjacent to transition areas result in a substantial adverse impact on the transition area and wetlands because the human activity spills out into the transition area. In order to account for this reality when reviewing an application, the Department will consider the area within 20 feet of a residence, as well as the residence itself, to be the "residential development project" and thus the regulated (in a wetland) or prohibited (in a transition area) activity, as set forth at proposed N.J.A.C. 7:7A-2.6(a)6.

Clarifications are proposed to N.J.A.C. 7:7A-2.6(b) (existing N.J.A.C. 7:7A-6.2(b)), which lists activities that are not prohibited in transition areas. The proposed changes are intended solely to make the rule easier to understand and do not change the meaning of this provision.

Provisions at proposed N.J.A.C. 7:7A-2.6(c), which provide that activities which are exempt from freshwater wetlands requirements are also exempt from transition area requirements, are recodified from existing N.J.A.C. 7:7A-6.2(c), and reorganized and clarified. Information on how to request an exemption letter is added. References to freshwater wetlands exemptions that no longer exist (see existing rule at N.J.A.C. 7:7A-2.7(d)) are deleted. All other proposed changes are intended solely to make the rule easier to understand and do not change the meaning of this provision.

Provisions in the existing rule at N.J.A.C. 7:7A-6.2(d), which provide information on how to request an exemption letter, are proposed for deletion, since this information is proposed to be added at N.J.A.C. 7:7A-2.6(c).

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

Proposed N.J.A.C. 7:7A-2.7(a) contains provisions found in the existing rules at N.J.A.C. 7:7A-6.1(h), consolidated with provisions found in the existing rules at N.J.A.C. 7:7A-6.3(a), and rewritten for clarity. A sentence stating that engaging in prohibited activities without Department approval is a violation is proposed for deletion, since this is covered in other provisions proposed at N.J.A.C. 7:7A-2.5(f). The consolidation and proposed changes are intended solely to make the rule easier to understand and do not change its meaning.

Proposed N.J.A.C. 7:7A-2.7(b) and (c) contain provisions found in the existing rule at N.J.A.C. 7:7A-6.3(b) and (c), reorganized and clarified. These provisions address how to determine if your property may have transition areas on it that stem from a freshwater wetlands on another property. The reorganization and proposed changes are intended solely to make the rule easier to understand and do not change the meaning of these provisions.

Existing Appendix A, which includes a diagram of a transition area labeled Figure 1, is proposed to be recodified as Figure 1 at N.J.A.C. 7:7A-2.5, with no changes.

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

The exemption provisions proposed at N.J.A.C. 7:7A-2.8 are recodified, with minor changes, from N.J.A.C. 7:7A-2.7.

A new provision is proposed at N.J.A.C. 7:7A-2.8(a) to introduce the section, and to alert the reader that some projects, although exempt from freshwater wetlands requirements, may still require other approvals.

Proposed new N.J.A.C. 7:7A-2.8(b), which limits the farming and forestry exemptions provided at proposed N.J.A.C. 7:7A-2.8(c), is recodified from existing N.J.A.C. 7:7A-2.7(a). The existing language is derived from Federal wetlands regulations. Several additions and clarifications are proposed, as described below.

Proposed N.J.A.C. 7:7A-2.8(b)1 is found in the existing rules at N.J.A.C. 7:7A-2.7(a). A minor clarification is proposed, which does not change the meaning of the provision.

Proposed new N.J.A.C. 7:7A-2.8(b)2 clarifies that any activities in wetlands that would be regulated but are not because of the exemption will again become regulated as soon as the farming, ranching or silviculture stops. For example, maintenance of drainage structures for minor drainage is exempt for farming purposes but must stop when the area is no longer used for farming.

Proposed new N.J.A.C. 7:7A-2.8(b)3 clarifies that these exemptions apply only to the portion of a site that meets all requirements for the exemption, and does not apply to a whole site just because a portion of the site meets the exemption requirements. The proposal includes the example of a farm where half of the 20 acre property has been actively farmed and half has not. In this case, the half that has not been actively farmed would not be considered to be part of an established, ongoing farming operation and would therefore not be eligible for the farming exemption.

Third, proposed new N.J.A.C. 7:7A-2.8(b)4 clarifies that clear cutting of a wooded area is not covered by the exemptions unless it is part of the normal harvesting of forest products performed in accordance with a forest management plan approved by the State Forester. Cutting trees in order to enlarge or create a cleared area is not silviculture, because the trees are not being cut to manage the forest but to remove it. It has been the Department's experience that this aspect of the exemption is not well understood in the farming community.

Proposed new N.J.A.C. 7:7A-2.8(b)5 addresses a problem the Department often encounters, wherein a person attempts to continue minor drainage activity that is exempt under the farming exemption, even after the farming has stopped and the property has been put to another use. The farming, ranching and silviculture exemption allows minor drainage of wetlands for farming purposes, if the drainage does not reduce the size or function of the wetlands. Typically, a farmer has a field with drainage tiles, resulting in minor drainage that is exempt under the farming exemption. At some point, the farmer stops farming and sells the land to a developer, without removing or blocking the drainage tiles. The developer then applies for a letter of interpretation and, based on the absence of wetlands hydrology, which is caused by the farmer's drainage tiles, the developer claims that the field is not a wetland and therefore is not regulated.

To identify a wetland, the FWPA requires three parameters: wetland soils, vegetation, and hydrology. Unlike other farming activities, drainage tiles and other drainage structures usually remain in place and continue to function even after farming stops. This drainage makes the difficult task of assessing wetlands hydrology even more difficult than usual. Wetlands identification is also complicated by the fact that the planting of crops has also destroyed much of the wetland vegetation in the area, and it takes time for wetland vegetation to return. Thus, even when farming has stopped, the after effects of the farming continue, making a wetland determination on the site very difficult until the hydrology and vegetation can recover.

Therefore, rather than requiring all farmers to disable or remove drainage structures upon cessation of farming activities, the Department has created the presumption of wetlands hydrology when those drainage structures are present in an area with hydric soils. The presumption, which is consistent with the Federal Manual, would be used in determining the boundaries of wetlands wherever there are drainage structures. The presumption can be rebutted by disabling the structures and then waiting one year to allow the hydrology to return to normal. After that year, the extent of wetlands can be accurately determined. This presumption makes sense, in that the very presence of drainage structures is an indication that the field was wet enough to justify the investment in installing drainage. If the field had not been wet, the farmer would not have made that investment.

The intent of this exemption is to allow existing, ongoing farming, ranching and silviculture in wetlands without permanent damage to the wetlands. As is clear in the existing rules at N.J.A.C. 7:7A-2.7(b)1i(5), the exemption was never intended to allow a wetland to be converted to an upland, even for farming purposes. It was certainly not intended to allow minor drainage to convert a wetland to an upland so that the land could be used for non-farming purposes.

Proposed N.J.A.C. 7:7A-2.8(c), which lists activities included in the exemptions for farming, ranching, and silviculture, is recodified from the existing rules at N.J.A.C. 7:7A-2.7(b). A minor change is proposed at N.J.A.C. 7:7A-2.8(c)1v, which clarifies that construction of new ditches or other structures that drain wetlands is not exempt. This is distinguished from a ditch for the purpose of water control for growing a wetland crop such as rice or cranberries, which are exempted under proposed N.J.A.C. 7:7A-2.8(c)1ii (found at existing N.J.A.C. 7:7A-2.7(b)1i(2)). Such ditches are not intended to drain an area, but to allow the farmer to control the wetland hydrology, flooding and draining a field as necessary to sustain wetland crops.

Proposed N.J.A.C. 7:7A-2.8(d), which requires an approved forest management plan for an exemption for harvesting of forest products, is recodified from the existing rules at N.J.A.C. 7:7A-2.7(c). Normal harvesting of forest products is part of some silviculture operations. An addition is proposed to clarify that the removal of stumps is not an exempt silvicultural activity because it fits within an exception to exemptions, found at proposed N.J.A.C. 7:7A-2.8(b).

Proposed N.J.A.C. 7:7A-2.8(e) clarifies that certain wetlands exemptions based on local approvals became void as of the date the Department assumed responsibility for

the Federal 404 program. The exemptions remain only as they apply to transition areas.

Proposed N.J.A.C. 7:7A-2.8(f), which provides for exemptions based on local approvals, is recodified from the existing rules at N.J.A.C. 7:7A-2.7(d). Deletions are proposed because some exemptions in the existing rules are no longer available, as described below.

At proposed N.J.A.C. 7:7A-2.8(f)1 and 2 (recodified from existing N.J.A.C. 7:7A-2.7(d)1 and 2), the proposal deletes wetlands exemptions, but not transition area exemptions, for projects with local approvals obtained before the FWPA took effect. The wetlands exemptions were discontinued upon the Department's assumption of the Federal 404 program, because the Department's wetlands program must be as stringent as the Federal program and the Federal program does not include these exemptions. However, since the Federal 404 program does not regulate transition areas, the exemptions were discontinued only for projects in freshwater wetlands, and may still apply to projects in transition areas.

Existing N.J.A.C. 7:7A-2.7(d)3 is proposed for deletion, to be replaced by proposed N.J.A.C. 7:7A-2.8(i). The provision provides an exemption for a project with an individual permit issued by the ACOE prior to enactment of the FWPA.

Proposed N.J.A.C. 7:7A-2.8(g) is recodified, with additions, from existing N.J.A.C. 7:7A-2.7(e). In the existing rule, these provisions limit the exemptions that are based on prior municipal approvals. Some changes are proposed to reflect the fact that some of these exemptions were discontinued upon assumption of the Federal wetlands program, as discussed above regarding proposed N.J.A.C. 7:7A-2.8(f). A new provision is proposed at N.J.A.C. 7:7A-2.8(g)1, clarifying that only site plan and subdivision approvals, and no other local approvals, can qualify a project for the exemption. Clarifying changes that do not affect meaning are added at proposed N.J.A.C. 7:7A-2.8(g)2, which sets forth the types of changes in a project that would void its exemption. In addition, a provision allowing a change if there was no more than a de minimis increase in impacts has been deleted, since it proved to be too vague a standard to apply in practice. A provision is proposed at N.J.A.C. 7:7A-2.8(g)3, emphasizing that the exemption is valid only while the approval upon which it is based is also valid. In addition, minor wording changes are proposed to make the rule easier to understand.

Existing N.J.A.C. 7:7A-2.7(f) is proposed for deletion because it provides for a transition area exemption that is discussed with more clarity and detail at proposed N.J.A.C. 7:7A-2.8(f).

Existing N.J.A.C. 7:7A-2.7(g) is proposed for deletion because it provides for exemptions based on ACOE Nationwide permits that were in effect on July 1, 1988, and those Nationwide permits have all expired. Therefore, any exemption that was based on such a Nationwide permit would also have expired.

Proposed N.J.A.C. 7:7A-2.8(h) is recodified from existing N.J.A.C. 7:7A-2.7(h), which limits exemptions where toxic pollutants are present. Two clarifying changes are proposed, which have no effect on the meaning of the provision.

Provisions found in the existing rule at N.J.A.C. 7:7A-2.7(i) are proposed for deletion, to be replaced by proposed N.J.A.C. 7:7A-2.8(i). Provisions at existing N.J.A.C. 7:7A-2.7(i)1 provide an exemption for projects with ACOE approvals prior to assumption, that are in "advanced stages of construction" as of the date of assumption. Since any such projects should have been completed by now, this provision is no longer necessary. Proposed N.J.A.C. 7:7A-2.8(i) addresses any remaining projects that are exempt from the FWPA because of an individual permit issued by the ACOE prior to enactment of the FWPA. Although it is not clear if there are any remaining individual ACOE permits issued prior to the FWPA that have not already expired, any that may remain are exempt under the FWPA.

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

Proposed N.J.A.C. 7:7A-2.9 is recodified from existing N.J.A.C. 7:7A-2.8.

Proposed N.J.A.C. 7:7A-2.9(a), found in the existing rule at N.J.A.C. 7:7A-2.8(a), is amended to explain the current regulatory situation in the Hackensack Meadowlands and the Pinelands, caused by the Department's assumption of the Federal wetlands program on March 2, 1994. The existing rule reflects the regulatory scheme before assumption. It states that the Meadowlands and the Pinelands are not regulated under this chapter, but may be after assumption.

The proposal breaks existing N.J.A.C. 7:7A-2.8(a) into two parts, proposed N.J.A.C. 7:7A-2.9(a) and 7:7A-2.9(b), to make them easier to understand. Proposed N.J.A.C. 7:7A-2.9(a) addresses jurisdiction in the Meadowlands. Projects in the Meadowlands do not require State approvals under the FWPA, but are subject to ACOE jurisdiction under the Federal 404 program and may require a water quality certificate issued by the Department. In addition, some clarifying changes are proposed that do not affect the meaning of the provision.

Proposed N.J.A.C. 7:7A-2.9(b) is recodified from existing N.J.A.C. 7:7A-2.8(a)2, and addresses jurisdiction in the Pinelands. The FWPA requires the Department to take jurisdiction over wetlands and waters in the Pinelands only to the extent necessary to assume the Federal 404 program. The Federal 404 program only regulates the discharge of dredged or fill material, and does not regulate the full panoply of activities regulated under the FWPA. In addition, the 404 program does not regulate transition areas. Thus, proposed N.J.A.C. 7:7A-2.9(b) sets forth these limits on FWPA jurisdiction in the Pinelands.

Proposed new N.J.A.C. 7:7A-2.9(c) provides for the administration of some FWPA permit review functions by the Pinelands Commission, and reflects the Department's current practice. In the Pinelands, the general permit portion of the FWPA program is administered by the Pinelands Commission. However, if a project requires an individual

permit, or if a project in the Pinelands is not regulated under the CMP but is subject to the FWPA, the Department handles the permit review.

Proposed N.J.A.C. 7:7A-2.9(d) is found in the existing rule at N.J.A.C. 7:7A-2.8(b). A proposed addition clarifies that, although projects in wetlands defined as coastal wetlands under the Wetlands Act of 1970, N.J.S.A. 13:9A, do not require a permit or waiver under this chapter, other State or Federal approvals may still be needed.

7:7A-2.10 Exemption letters

The provisions proposed at N.J.A.C. 7:7A-2.10, which provide for the Department to issue exemption letters, are recodified from existing N.J.A.C. 7:7A-2.9, with reorganizations and clarifications.

A proposed change at N.J.A.C. 7:7A-2.10(a) deletes a reference to the State's future assumption of the 404 program, since that event has happened. The proposal adds other minor clarifying changes that do not affect the meaning of the provision.

Existing N.J.A.C. 7:7A-2.9(b), which describes how to apply for exemption letters, is broken into three parts for ease of understanding, and recodified at proposed N.J.A.C. 7:7A-2.10(b), (c), and (d).

Proposed N.J.A.C. 7:7A-2.10(b) sets forth application requirements for an exemption letter based on farming, ranching or silviculture. A change is proposed at N.J.A.C. 7:7A-2.10(b)4, adding a requirement that the applicant submit additional information reasonably necessary for the Department to evaluate the exemption letter request. All other proposed changes are clarifications that do not change the meaning of the existing provision.

Proposed N.J.A.C. 7:7A-2.10(c) sets forth application requirements for an exemption letter based on an approved forest management plan. A change is proposed at N.J.A.C. 7:7A-2.10(c)3, adding a requirement that the applicant submit additional information reasonably necessary for the Department to evaluate the exemption letter request. All other proposed changes are clarifications that do not change the meaning of the existing provision.

Proposed N.J.A.C. 7:7A-2.10(d) sets forth application requirements for a transition area exemption letter based on prior local approval. A requirement is added at proposed N.J.A.C. 7:7A-2.10(d)2 that an applicant for an exemption letter submit a letter from municipal officials providing certain statements regarding the status of the local approval that forms the basis of the exemption. This will ensure that an exemption letter will be issued only for a project with a currently valid approval. In addition, a change is proposed at N.J.A.C. 7:7A-2.10(d)4, adding a requirement that the applicant submit additional information reasonably necessary for the Department to evaluate the exemption letter request. This brief provision replaces existing N.J.A.C. 7:7A-2.9(b)4. All other proposed changes are clarifications that do not change the meaning of the existing provision.

Provisions at existing N.J.A.C. 7:7A-2.9(b)5 and 6 are proposed for deletion because they address exemptions that are being deleted in this proposal.

Hearing and appeal provisions at existing N.J.A.C. 7:7A-2.10 are proposed for deletion, to be consolidated at N.J.A.C. 7:7A-1.7.

SUBCHAPTER 3 LETTERS OF INTERPRETATION

This proposed new subchapter replaces existing Subchapter 8. The proposed new subchapter reorganizes and rewords the LOI provisions to reduce confusion and to clarify the Department's existing practice.

Provisions found in the existing rule at N.J.A.C. 7:7A-3, addressing individual permits, are proposed to be recodified at N.J.A.C. 7:7A-7.

7:7A-3.1 Basic LOI information

Proposed new N.J.A.C. 7:7A-3.1(a) sets forth the types of information contained in an LOI, and provides that the LOI is the official Department determination on these issues. This information is found in the existing rule at N.J.A.C. 7:7A-8.1(a) and (b), and is rephrased here for clarity, with no change in meaning.

Proposed new N.J.A.C. 7:7A-3.1(b) clarifies that an LOI imparts information only, and does not grant authority to act. This is found in the existing rule at N.J.A.C. 7:7A-8.1(c), and is rephrased here for clarity, with no change in meaning.

Proposed new N.J.A.C. 7:7A-3.1(c) lists the types of LOIs, and refers to sections explaining each in detail. This information is found in the existing rule at N.J.A.C. 7:7A-8.2, and is reorganized and rephrased here for clarity, with no change in meaning.

Proposed N.J.A.C. 7:7A-3.1(d) is a new provision not found in the existing rules. It provides for the same rebuttable presumption found in proposed new N.J.A.C. 7:7A-2.8(b)5, presuming that a farmed area that has been drained through use of drainage structures has wetlands hydrology. If such an area exhibits other wetlands characteristics (such as soils or vegetation) so that, but for the absence of hydrology it would be classified as a wetland, the area would be considered a wetland. However, the presumption of wetlands hydrology can be rebutted if the drainage structures are all disabled or removed and the area left undisturbed for one year. If after that year, wetlands hydrology is not reestablished in the area, the presumption is rebutted. For a more detailed explanation of the presumption, see the description of proposed N.J.A.C. 7:7A-2.8(b)5, above in this Summary.

Proposed new N.J.A.C. 7:7A-3.1(e) explains that resource value classification is also provided as part of every LOI. This is found in the existing rule at N.J.A.C. 7:7A-8.1(b), and is rephrased here for clarity, with no change in meaning. A new provision is added, however, to provide for the situation in which an applicant wishes to obtain an LOI quickly, but seasonal conditions make it difficult or impossible to establish the resource value classification of the wetland. This typically happens when there is reason to believe an area contains habitat for an endangered or threatened species, but the LOI application is submitted when a survey cannot be done because the species is dormant, absent, or difficult to find due to seasonal habits of the species. In such a case, the proposal provides for the Department to give the applicant the choice of whether the Department should quickly issue an LOI that includes an exceptional resource value

classification, or wait until seasonal conditions allow for a definitive determination of the resource value classification.

Proposed new N.J.A.C. 7:7A-3.1(f) sets forth the time periods within which the Department will issue an LOI. This is found in the existing rule at N.J.A.C. 7:7A-8.8(b) and (c), and includes statutory requirements found at N.J.S.A. 13:9B-8. A new provision is added to extend the LOI deadlines in the case of an applicant who wishes to wait for seasonal conditions to improve so that the Department can definitively determine the resource value classification of a wetland.

Proposed new N.J.A.C. 7:7A-3.1(g) provides that an LOI may be issued for a portion of a site rather than the whole site, but special application requirements will apply in order to clearly mark the portion. This is found in the existing rule at N.J.A.C. 7:7A-8.2(a)2, and is rephrased here for clarity, with no change in meaning.

Proposed new N.J.A.C. 7:7A-3.1(h) is not found in the existing rule. It clarifies how the Department will handle situations when the Department determines that a delineation submitted by an applicant is inaccurate. In most cases, Department staff can resolve such problems through requests for corrections or additional information. However, in some cases an applicant will refuse to correct inaccuracies in submitted delineations or other information. In such a case, the Department will not issue the letter of interpretation. If the applicant wishes to pursue regulated activities on the site, the applicant can apply for a permit and questions regarding the resource value classification and wetlands boundary location will be resolved through the permit review process.

Proposed new N.J.A.C. 7:7A-3.1(i) requires a person who has received an LOI involving a wetlands boundary delineation to provide the Department with a survey of the approved freshwater wetlands boundary. The Department then will incorporate this surveyed line into the LOI upon issuing the LOI. This is a change from the existing rules, which only require a survey of a delineated line for properties of five acres or more. The Department has found that, without a survey, it is very difficult to identify a delineated wetlands boundary once any appreciable amount of time has passed after the LOI is issued. This results in confusion, difficulties enforcing wetlands requirements, and unfairness to later buyers of the property who cannot easily determine the boundaries of the regulated areas on their property. This provision will help prevent these problems by incorporating a precise survey with a metes and bounds description.

Proposed new N.J.A.C. 7:7A-3.1(j) requires that, if an LOI covers only a portion of a site, the applicant must provide a survey of the portion of the site covered by the LOI, in addition to a survey of the wetlands boundary, if any was delineated as part of the LOI.

7:7A-3.2 Presence/absence LOI

Proposed new N.J.A.C. 7:7A-3.2(a) provides for the Department to issue a presence/absence LOI. A presence/absence LOI states whether there are any freshwater wetlands or transition areas on a site or portion of a site. However, if these features are present, the presence/absence LOI does not indicate where the features are. A presence/absence LOI that covers only a portion of a site is also called a

"footprint of disturbance" LOI. This is found in the existing rule at N.J.A.C. 7:7A-8.2(a)1 and 2, and is rephrased here for clarity, with no change in meaning.

Proposed new N.J.A.C. 7:7A-3.2(b) clarifies that, if there are freshwater wetlands or transition areas on a site, a presence/absence LOI will not identify where they are located. This is found in the existing rule at N.J.A.C. 7:7A-8.2(a)1, and is rephrased here for clarity, with no change in meaning.

Proposed new N.J.A.C. 7:7A-3.2(c) provides that a presence/absence LOI will be issued for any size site, or for a portion of a site. This is found in the existing rule at N.J.A.C. 7:7A-8.2(a)1 and 2, and is rephrased here for clarity, with no change in meaning. A presence/absence LOI for a portion of a site is also called a "footprint of disturbance" LOI.

Proposed N.J.A.C. 7:7A-3.2(d) is a new provision not found in the existing rules, which clarifies that an applicant may obtain presence/absence LOIs for more than one portion of a single site, but a separate application and fee must be submitted for each, and no more than three will be issued for a single site. This will allow flexibility for both the Department and the regulated community.

7:7A-3.3 Line delineation LOI

Proposed new N.J.A.C. 7:7A-3.3(a) provides for a line delineation LOI, and clarifies that the Department performs the delineation for the applicant. This is found in the existing rule at N.J.A.C. 7:7A-8.3(a)3, and is rephrased here for clarity, with no change in meaning.

Proposed new N.J.A.C. 7:7A-3.3(b) provides that a line delineation LOI is only available for a site that is one acre or smaller. Further, the LOI will only be issued for an entire site, not for a portion of a site. This is found in the existing rule at N.J.A.C. 7:7A-8.3(a)3, and is rephrased here for clarity, with no change in meaning.

7:7A-3.4 Line verification LOI

Proposed new N.J.A.C. 7:7A-3.4(a) provides for a line verification LOI, and clarifies that the applicant must submit a proposed delineation, which the Department will confirm or modify. This is found in the existing rule at N.J.A.C. 7:7A-8.2(a)4, and is rephrased here for clarity, with no change in meaning.

Proposed new N.J.A.C. 7:7A-3.4(b)1 provides that a line verification LOI is available for a site of any size. This is found in the existing rule at N.J.A.C. 7:7A-8.2(a)4, and is rephrased here for clarity, with no change in meaning. The proposal adds a new provision at N.J.A.C. 7:7A-3.4(b)2 that is not found in the existing rule, providing for the issuance of a line verification LOI for a portion of a site, if the site is publicly owned and larger than 10 acres. This option is intended to ease the burden on public agencies that wish to improve only a small portion of a large park or publicly owned property. Without

this option, the agency must delineate all wetlands on the entire property, even if no disturbance is planned on most of the property.

7:7A-3.5 Application for a letter of interpretation

Proposed new N.J.A.C. 7:7A-3.5(a) refers the reader to N.J.A.C. 7:7A-10 for LOI application contents and procedures. This is consistent with changes proposed throughout the freshwater wetlands rules, which consolidate application requirements for many approvals in one application section that applies to them all. This will reduce redundancy and shorten the rules, making them easier for the regulated public to understand.

Proposed new N.J.A.C. 7:7A-3.5(b) refers the reader to N.J.A.C. 7:7A-12 for the Department's LOI application review procedures. Again, this is consistent with changes proposed throughout the rules, which consolidate application review procedures in order to reduce redundancy and shorten the rules.

Proposed new N.J.A.C. 7:7A-3.5(c) provides for the Department to consider public and local government comments in its review of an LOI application, and sets time limits for submittal of such comments. This is found in the existing rule at N.J.A.C. 7:7A-8.5, and is rephrased here for clarity, with no change in meaning.

7:7A-3.6 Effect, duration, and extension of a letter of interpretation

Proposed N.J.A.C. 7:7A-3.6 is recodified, with minor changes that do not affect meaning, from existing N.J.A.C. 7:7A-8.6 and 8.7.

Proposed N.J.A.C. 7:7A-3.6(a) addresses reliance on an LOI and sets the term of an LOI at five years, except for an LOI that is based on inaccurate information, which shall be void.

Proposed N.J.A.C. 7:7A-3.6(b), found in the existing rule at N.J.A.C. 7:7A-8.7, allows for a five year extension of the LOI under certain conditions. Minor clarifying changes are proposed, with no change in meaning.

Proposed new N.J.A.C. 7:7A-3.6(c) sets forth application requirements for an LOI extension. This is found in the existing rule at N.J.A.C. 7:7A-8.7, and is rephrased here for clarity. The specific application requirements are deleted and replaced with a cross reference to N.J.A.C. 7:7A-10, which includes application requirements for most approvals.

SUBCHAPTER 4 GENERAL PROVISIONS FOR GENERAL PERMITS

The existing freshwater wetlands rules include one subchapter addressing all aspects of general permits, including their adoption and use, conditions that apply to all general permits, use of multiple general permits, application requirements, appeals, duration of authorizations, and cancellation of applications. This proposal breaks the existing general permit subchapter into two subchapters, and relocates and/or consolidates some provisions with other subchapters. The two proposed subchapters that address general permits contain general conditions for all general permit authorizations (proposed N.J.A.C. 7:7A-4), and the general permits themselves (proposed N.J.A.C. 7:7A-5).

The proposed subchapter on general conditions for all general permit authorizations consolidates provisions recodified from existing N.J.A.C. 7:7A-9.1, General standards for issuing Statewide general permits; existing N.J.A.C. 7:7A-9.2(b) and (c), Statewide General Permit Authorizations; existing N.J.A.C. 7:7A-9.3, Standards and Conditions for all Statewide General Permit Authorizations; and existing N.J.A.C. 7:7A-9.4, Use of multiple Statewide General Permits. The proposed subchapter containing the general permits themselves is recodified, with many changes, from existing N.J.A.C. 7:7A-9.2(a).

Existing provisions at N.J.A.C. 7:7A-9.5, 9.6, 9.7, and 9.8, which address application requirements, appeals, duration of authorizations, and cancellation of applications, are all proposed to be deleted or consolidated with other subchapters which cover those subjects for all approvals.

Throughout this proposed readoption, the term "Statewide general permit" is changed to the simpler "general permit", for brevity and simplicity.

7:7A-4.1 Department issuance of general permits

Proposed N.J.A.C. 7:7A-4.1(a), which provides for the Department to issue general permits, is recodified from existing N.J.A.C. 7:7A-9.1(a), with clarifying changes. The proposed changes are intended solely to make the rule easier to understand and do not change the meaning of these provisions.

Throughout proposed N.J.A.C. 7:7A-4.1 and this rule, the language concerning Department adoption of general permits is clarified to reflect the fact that general permits are adopted as rules, and are not issued in the same manner as individual permits or waivers. Once a general permit is adopted as a rule, the Department can issue site-specific authorizations under the adopted general permit. The process of issuing a site-specific authorization conforms more closely with the traditional process of issuing a permit. Therefore, the proposal uses the language of permit issuance when addressing general permit authorizations, while the language of rule adoption is used for the creation and adoption of each general permit itself. These clarifications do not change the meaning of the rule, and merely reflect the Department's longstanding practice.

Proposed N.J.A.C. 7:7A-4.1(b), which sets forth the conditions under which the Department may adopt a general permit, is recodified from existing N.J.A.C. 7:7A-9.1(b), with minor clarifying changes. Existing N.J.A.C. 7:7A-9.1(b)1 is proposed for deletion, because it refers to existing N.J.A.C. 7:7A-9.1(c)1, which is itself proposed for deletion.

Existing N.J.A.C. 7:7A-9.1(c), which contains a list of the types of conditions the Department must include in every general permit, is proposed to be simplified by deleting detailed provisions and substituting a reference to the Federal wetlands rules, from which the detailed provisions were originally drawn.

Proposed N.J.A.C. 7:7A-4.1(d), (e), (f) and (g) are recodified from existing N.J.A.C. 7:7A-9.1(d), (e), (f), and (g), with minor clarifying changes that do not affect meaning. These provisions set forth the process by which the Department can adopt, modify and rescind general permits, and provide for the Department to require an individual permit rather than a general permit in some circumstances. The proposed changes are intended solely to make the rule easier to understand and do not change the meaning of these provisions.

7:7A-4.2 Using a general permit to authorize specific activities

Proposed new N.J.A.C. 7:7A-4.2(a) requires an application in order for an activity to be authorized under a general permit. This is found in the existing rule at N.J.A.C. 7:7A-9.5(a). This differs from the Federal nationwide general permit program, where many activities do not require application to the ACOE to be authorized under a nationwide general permit.

Proposed new N.J.A.C. 7:7A-4.2(b) provides for general permits to cover activities not only in freshwater wetlands, but also in transition areas and/or State open waters. Although this is a different procedure than used in the existing rules, it does not change the scope of activities which are authorized in transition areas through a general permit. Under the existing rule, a project would receive a general permit under existing N.J.A.C. 7:7A-9.2 to authorize the activities in freshwater wetlands, and a special activity transition area waiver under N.J.A.C. 7:7A-7.4(e) to authorize the same types of activities in transition areas. This proposed consolidation of both approvals under a single general permit will streamline the general permit authorization process.

Under the existing rules, several general permits cover activities in both freshwater wetlands and State open waters, but not in transition areas. Thus, a project may require both a general permit and a special activity transition area waiver based on the general permit. The proposed rules would combine both authorizations into one, so that the general permit authorization would satisfy the requirements for a freshwater wetlands permit, transition area waiver, and/or open water fill permit, as applicable. Of course, in cases where the activity would not have been eligible for a transition area waiver, the general permit will not cover activities in transition areas. Each general permit in proposed N.J.A.C. 7:7A-5 will now specify what combination of freshwater wetlands, transition areas, and/or State open waters that it covers.

Proposed new N.J.A.C. 7:7A-4.2(c) emphasizes that an activity in a non-delegable water may need a Federal 404 permit from the ACOE as well as a general permit.

Proposed new N.J.A.C. 7:7A-4.2(d) includes provisions found in the existing rules at N.J.A.C. 7:7A-9.2(b), that allow the Department to deny an application for a general permit authorization under certain conditions. These provisions are required in order to satisfy the requirements for assumption of the Federal 404 program. The proposed provisions are reworded from the existing provisions for clarity, but their meaning is unchanged. The last sentence of existing N.J.A.C. 7:7A-9.2(b) is proposed to be reworded and relocated at proposed at N.J.A.C. 7:7A-4.2(g), described below.

Proposed new N.J.A.C. 7:7A-4.2(e) specifies that the limits in a general permit apply to the entire site, and prohibits segmentation of a project into pieces for permitting purposes. This is found in the existing rules at N.J.A.C. 7:7A-9.2(c). Under proposed N.J.A.C. 7:7A-4.2(e), the Department does not allow one project to be covered by both a general permit and an individual permit. In its review of an individual permit application, the Department, together with the applicant, must be able to consider all alternatives to the activity for which a permit is sought. If the Department authorized another activity onsite under a general permit prior to consideration of the individual permit application, it might preclude certain alternatives. Therefore, if an individual permit is required, all activities onsite must be included as part of the individual permit application.

Proposed new N.J.A.C. 7:7A-4.2(f) clarifies that the limits on disturbance under a general permit apply to temporary and permanent disturbance combined, unless the general permit specifies a limit for temporary disturbance that is separate from the limit on permanent disturbance. For example, in calculating the disturbance caused by a road crossing, an applicant must include temporary construction disturbance caused by the movement of heavy equipment around the site, as well as permanent disturbance caused by the road, embankments or side slopes, and any grading.

Proposed new N.J.A.C. 7:7A-4.2(g) contains the substance of a portion of existing N.J.A.C. 7:7A-9.2(b), which clarifies that, if an activity cannot be authorized under one or more general permits, an individual freshwater wetlands or open water fill permit or a transition area waiver is required in order to authorize the activity. The provision is reworded for clarity with no change in meaning.

7:7A-4.3 Conditions that apply to all general permit authorizations

Provisions proposed at N.J.A.C. 7:7A-4.3, which provide standard conditions that apply to all general permits, are recodified with clarifying changes from existing N.J.A.C. 7:7A-9.3.

Proposed N.J.A.C. 7:7A-4.3(a), which lists the requirements that apply to all general permits, is recodified from existing N.J.A.C. 7:7A-9.3(a), with clarifying changes. The proposed changes are intended solely to make the rules easier to understand and do not change the meaning of these provisions.

Proposed N.J.A.C. 7:7A-4.3(b), which sets forth in detail conditions that apply to all general permits, is recodified and consolidated from existing N.J.A.C. 7:7A-9.3(b) and (c), with minor clarifying changes that do not affect meaning, and substantive changes as described in the following paragraphs. Throughout proposed N.J.A.C. 7:7A-4.3(b), clarifying changes are proposed to make the rules easier to understand. Unless specifically discussed in the paragraphs below, these changes are for clarification only and do not change the meaning of the rules.

Proposed N.J.A.C. 7:7A-4.3(b)3, which addresses threatened or endangered species habitat, is found in the existing rules at N.J.A.C. 7:7A-9.3(b)3, and is rephrased in the proposal to match the federal regulatory language on this issue.

The proposal would make a substantive change at N.J.A.C. 7:7A-4.3(b)4 (existing N.J.A.C. 7:7A-9.3(b)4). Under the existing rules this provision prohibits general permit activities in a river that is designated a Wild and Scenic River by the National Park Service. The proposal would change this to allow general permit activities in a Wild and Scenic River if the National Park Service approves the activities.

An addition is proposed at N.J.A.C. 7:7A-4.3(b)6 (existing N.J.A.C. 7:7A-9.3(c)1), specifying that any fill discharged under a general permit must meet all Department requirements for use of dredged material. This will prevent the use of fill that has been removed from a cleanup site being used in a wetland, unless it complies with Department standards for use of such material.

A listing of streams that are subject to timing restrictions to protect fishery resources at existing N.J.A.C. 7:7A-9.3(c)3 is proposed for deletion. This provision is proposed to be replaced by a reference at proposed N.J.A.C. 7:7A-4.3(b)14 to proposed N.J.A.C. 7:7A-4.3(c), which includes a table containing updated timing restrictions.

A new provision is proposed at N.J.A.C. 7:7A-4.3(b)10, requiring that, if a general permit activity will result in a ¼ acre or greater increase in impervious surfaces in the area on a site that is generating stormwater, then stormwater resulting from the general permit activity must be treated in accordance with the water quality requirements in the Department's Flood Hazard Area Control Act rules. This will remove pollutants and sediment from any runoff entering wetlands.

Provisions requiring appropriate disposal of dredged materials, and allowing the Department to require soil testing, are proposed to be added at N.J.A.C. 7:7A-4.3(b)11. Currently, only some general permits include these requirements. Relocating them here will make them apply consistently to all general permits, and will reduce redundant provisions in specific general permits.

A new provision is proposed at N.J.A.C. 7:7A-4.3(b)12, specifying that the amount of rip-rap or energy dissipating material used under a general permit shall be the minimum necessary to comply with the erosion prevention standards in the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90. This is intended to remedy a situation that arises under some general permits, where an applicant is required by the Standards for Soil Erosion and Sediment Control to put in a larger amount of rip-rap than the freshwater wetlands general permit allows. For some

general permits, this will replace an existing, more specific limit on the amount of rip-rap allowed. For others, it will provide a limit where none exists in the existing rule.

Proposed N.J.A.C. 7:7A-4.3(b)14 requires that activities that are subject to the Department's water quality planning rules must comply with the applicable Water Quality Management Plan (also known as a 208 Plan). This will ensure consistency among Department permitting and planning programs.

Proposed N.J.A.C. 7:7A-4.3(b)15 requires compliance with timing restrictions to protect fishery resources, found in the proposal at N.J.A.C. 7:7A-4.3(c). Timing restrictions are found in the existing rules at N.J.A.C. 7:7A-9.3(c)3.

Proposed N.J.A.C. 7:7A-4.3(c) includes timing restrictions to protect fishery resources, arranged in table form (Table A) for easier comprehension. Table A clarifies that an area within one mile upstream of a trout-stocked or trout maintenance water is also included.

Proposed N.J.A.C. 7:7A-4.3(d) provides for the Department to modify the timing restrictions in proposed N.J.A.C. 7:7A-4.3(c) when they result in restricting activities to less than six months per year, result in adverse effects on the fishery resource, or cause risk or delay to school buses. These provisions are consistent with those in the Department's stream encroachment rules at N.J.A.C. 7:13-3.5 and 3.6.

Proposed new N.J.A.C. 7:7A-4.3(e) requires that, prior to beginning activities in non-delegable waters under a general permit, a 404 permit must be obtained from the ACOE. This will alert the regulated community that both approvals are necessary, and will assist the Department and the ACOE in enforcing the requirements of both programs.

Proposed new N.J.A.C. 7:7A-4.3(f) clarifies that an activity is not authorized under a general permit until the Department issues a written approval, except for four activities which are listed. This provision is relocated from existing N.J.A.C. 7:7A-9.4(a). This an important point to stress in the rules, since under the Federal 404 program most nationwide permit activities require neither an application to, nor a response from, the ACOE.

7:7A-4.4 Use of multiple General Permits

Provisions at proposed N.J.A.C. 7:7A-4.4 are recodified, with clarifying changes, from existing N.J.A.C. 7:7A-9.4. This section sets limits on the use of more than one general permit on a single site, the use of one general permit in more than one location on a site, and the use of multiple general permits on a site over time.

Proposed N.J.A.C. 7:7A-4.4(a) combines provisions found in existing N.J.A.C. 7:7A-9.4(a) through (c), and rewords them for clarity. These provisions provide limits on use of multiple general permits on a single site. Except for the addition of an overall limit on transition area disturbance, which is taken from existing N.J.A.C. 7:7A-7.4(e), there is no change in the meaning of the provision.

Proposed N.J.A.C. 7:7A-4.4(a)1 allows use of multiple general permits on a single site only if the acreage limits in each general permit are complied with. Proposed N.J.A.C. 7:7A-4.4(a)2 allows use of multiple general permits on a single site only if combined disturbance under general permits 2, 6, 7, 8, 10A, 10B, 11, 12, 13, 14, 17, 18, 19, 21, 22, 24, 25, and 26 is one acre or less. In general, these are general permits that set a limit of one acre or less of disturbance. Proposed N.J.A.C. 7:7A-4.4(a)2i is a new provision that clarifies existing Department practice. Because dredging of State open waters does not involve the discharge of dredged or fill material, it is not a regulated activity. Thus, the dredging in State open waters is not included when calculating total disturbance, while disturbances of freshwater wetlands and transition areas would be included. Proposed N.J.A.C. 7:7A-4.4(a)2ii is a new provision that parallels proposed N.J.A.C. 7:7A-4.4(a)2i, but which applies to the new general permit for stream cleaning. Since stream cleaning is essentially dredging of a stream, the same rules would apply as those that apply to the dredging of a lake.

Proposed new N.J.A.C. 7:7A-4.4(b) addresses the use of multiple general permits on a site at more than one point in time. The proposed provision applies the same limits to the use of many general permits over time as apply to the use of many general permits at one time. This is found in the existing rules at N.J.A.C. 7:7A-9.4(d).

Proposed new N.J.A.C. 7:7A-4.4(c) further clarifies that disturbance under the general permits that do not contain a limit on acreage of disturbance will not be counted in measuring the total impacts of activities authorized under general permits on the site.

Proposed N.J.A.C. 7:7A-4.4(d) includes a provision found in the existing rules at N.J.A.C. 7:7A-9.4(f), which limits authorizations under certain general permits to once every five years. The provision is reworded for clarity without changing its meaning.

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

Proposed N.J.A.C. 7:7A-4.5(a) replaces existing N.J.A.C. 7:7A-9.5, which addresses application requirements for general permits. Existing N.J.A.C. 7:7A-9.5 contains detailed application requirements, many of which repeat nearly identical provisions for other applications found in existing N.J.A.C. 7:7A-7.6, 8.3, and 11. The proposal consolidates most application requirements at N.J.A.C. 7:7A-10. Therefore, proposed N.J.A.C. 7:7A-4.5 refers the reader to N.J.A.C. 7:7A-10 for the proposed new consolidated application requirements for all general permits, except for applications for the four types of general permit activities that are eligible for a default issuance. For these activities, the proposal refers applicants to the specific general permits, which include their own application requirements.

Provisions in the existing rules at N.J.A.C. 7:7A-9.6 and 9.7, address hearings and appeals and the duration of general permit authorizations respectively. These provisions are proposed to be consolidated with other appeal provisions at N.J.A.C. 7:7A-1.7, and provisions governing the duration of all Department approvals under this chapter, found at proposed N.J.A.C. 7:7A-13.3.

7:7A-4.6 Combined general permit authorization and flood hazard area permit

The proposal introduces a new option for several general permits, whereby an applicant can obtain a combined freshwater wetlands general permit authorization and flood hazard area permit. The Department has provided this option for five activities that often occur in wetlands located in flood hazard areas, described below.

Proposed new N.J.A.C. 7:7A-4.6(a) lists the general permits and activities for which a combined freshwater wetlands general permit authorization and flood hazard area permit is available. There are five such activities – underground utility lines, minor road crossings, intake and outfall structures, bank stabilization activities, and stream cleaning. It should be noted that the provisions in the Flood Hazard Area Control Act rules that apply to stream cleaning, found at N.J.A.C. 7:13-2.5, also apply to other water bodies such as ponds and lakes. However, under the freshwater wetlands rules, these activities in a pond or lake would be authorized under general permit 13 for lake dredging. Therefore, unlike its counterpart in the Flood Hazard Area Control Act rules at N.J.A.C. 7:13-3.3, general permit 26 is limited to streams.

Proposed new N.J.A.C. 7:7A-4.6(b) clarifies that the combined permit meets the requirements of both the freshwater wetlands rules and the Flood Hazard Area Control Act rules at N.J.A.C. 7:13. However, the provision stresses that, in cases where a project includes other activities not covered by the combined permit, a separate approval may be needed for those other activities.

Proposed new N.J.A.C. 7:7A-4.6(c) refers the reader to the subchapter on application requirements for information on how to apply for these combined permits.

SUBCHAPTER 5 ADOPTED GENERAL PERMITS

Provisions currently found at N.J.A.C. 7:7A-9.2(a), which list adopted general permits, are proposed to be recodified, with substantial changes, at N.J.A.C. 7:7A-5.

This subchapter includes all of the general permits that the Department has adopted. In order to make the rules easier to read, the general permits have been recodified so that each is listed in its own separate section, with a section number that matches the existing general permit number. For example, general permit 1, found in the existing rules at N.J.A.C. 7:7A-9.2(a)1, is found in the proposal at N.J.A.C. 7:7A-5.1, so that it can still be called general permit 1. In addition, the proposal uses the term "general permit" rather than "statewide general permit." This reflects the fact that not all the general permits apply State wide (e.g., general permit 23 for cranberry operations), and to make the rules more readable.

It should be noted that many of the proposed general permits now include authorization for transition area disturbances. In the existing rules, certain transition area disturbances, which would be authorized under a general permit if pursued in a freshwater wetland, are authorized under special activity transition area waivers at N.J.A.C. 7:7A-7.4(e). Often, an activity in a transition area will have less adverse environmental impact than the same activity in a wetland. Therefore, in order to encourage applicants to use transition areas rather than wetlands for a construction project, the existing rules include a special activity waiver authorizing activities that would be authorized in a wetland under certain general permits. However, the existing system of authorizing the same activity on the same site under a different approval, depending on whether some or all of it occurs in wetlands or transition areas, has proved confusing.

In order to reduce redundancy and confusion, this proposal adds transition area waiver authorization to general permits that, under the existing rules, would be eligible for a special activity transition area waiver for a general permit activity. Under these general permits, a project with disturbances in freshwater wetlands, transition areas, and/or State open waters can be approved with a single general permit authorization. Although this will consolidate approvals, it will not affect the total acreage allowed under a combined general permit and special activity waiver. The existing rule at N.J.A.C. 7:7A-7.4(e)3 limits the total impact under a general permit and a special activity transition area waiver based on that general permit, such that the total impacts cannot exceed the limits in the general permit. The proposal reflects this, and will make it easier to ensure compliance with this provision, by putting all impacts under one approval.

Because this consolidation is being made across the board, it is not noted in the description of each general permit. Thus, when a general permit description states that the meaning of a general permit has not changed, this does not include the change wrought by consolidating the existing special activity waiver's authorization for transition area disturbances into the general permit.

The proposal adds a standard provision to all general permits, requiring that all activities under each general permit comply with any applicable requirements in the standard conditions for general permits at N.J.A.C. 7:7A-4.3, as well as with the specific requirements in the general permit itself. This will serve as a reminder to the reader that the general permit itself does not contain the complete universe of requirements that bind the permittee.

7:7A-5.1 General Permit 1 – Maintenance and repair of existing features

Existing N.J.A.C. 7:7A-9.2(a)1 (general permit 1), which authorizes maintenance and repair of existing features, is proposed to be recodified at N.J.A.C. 7:7A-5.1, with proposed procedural changes.

Proposed N.J.A.C. 7:7A-5.1(a) and (b), which set forth the scope of the general permit, include provisions found at existing N.J.A.C. 7:7A-9.2(a)1, with minor clarifications that do not change meaning.

Proposed new N.J.A.C. 7:7A-5.1(c) is a new provision not found in the existing rule. It governs the spraying of herbicides to manage vegetation in a utility line right-of-way. This activity is currently covered under general permit 1. However, the proposed new provision creates an expedited authorization process for this activity, if the activity has been authorized under a permit issued by the Department's Pesticide Program. The provision allows the applicant to proceed with the spraying if the Department does not respond to the application within 30 days of its submittal to the Department. If the Department objects to the proposed spraying during the 30 days, a full review is necessary and the applicant must wait for a standard general permit authorization letter before proceeding. This expedited process is appropriate for right-of-way herbicide spraying because the Department has already reviewed the project under the special standards for use of pesticides in aquatic areas, found in the Department's Pesticide Control Code at N.J.A.C. 7:30. These standards ensure that the environmental impact of the spraying will be minimal.

Proposed new N.J.A.C. 7:7A-5.1(d) is a new provision not found in the existing rule, which provides the same expedited authorization process as in N.J.A.C. 7:7A-5.1(c), for ongoing maintenance of an off-stream stormwater management facility created in uplands. Such maintenance is already covered under general permit 1, but the new provision provides for a quicker Department review. One of the primary functions of stormwater management facilities is to trap sediment so as to protect water quality. However, this inevitably results in a buildup of sediment over time, making the basin gradually shallower and less able to function properly. This expedited process will encourage regular maintenance to ensure that basins are cleaned of sediment so that they can continue functioning and protecting water quality.

Proposed new N.J.A.C. 7:7A-5.1(e) is a new provision not found in the existing rule, which sets forth the expedited authorization process for the activities in N.J.A.C. 7:7A-5.1(c) and (d). Under this process, the applicant submits a standard general permit application. The Department has 20 days after it receives the application to notify the applicant if the application is not complete. If the application is complete, the

Department has 30 days after receipt in which to notify the applicant that the project requires a full general permit review. If the Department does not so notify the applicant, the project is automatically approved upon the 30th day after the Department received the application. This expedited authorization process is also used for the repair of malfunctioning septic systems under existing general permit 25, and for minor stream cleaning under proposed general permit 26.

7:7A-5.2 General Permit 2 – Underground utility lines

Existing N.J.A.C. 7:7A-9.2(a)2 (general permit 2), which authorizes construction and maintenance of underground utility lines, is proposed to be recodified at N.J.A.C. 7:7A-5.2. The text of the existing general permit is proposed to be deleted and replaced with new text. The proposal also relocates the definition of "utility line" from general permit 2 to the definitions section at N.J.A.C. 7:7A-1.4, since the term is used in several places in the rules.

Proposed new N.J.A.C. 7:7A-5.2(a) describes the activities authorized under general permit 2. Most of the activities are found in the existing general permit, but the proposal adds two new activities – construction of a small sewage pump station, and construction of an access road directly above the utility line. Mitigation is required for any disturbance resulting from construction of an access road. The proposal does not increase the total acreage of disturbance allowed under the general permit, but merely expands the universe of activities allowed as part of that disturbance.

The proposal adds construction of a sewage pump station as an authorized activity because it has been the Department's experience that such pump stations can be small and cause minimal impact, and that there are few alternative locations for them. The disturbance caused by a pump station is minimal. Most pump stations are placed underground, with the only permanent disturbance being a manhole cover for access in order to service the pumping equipment. The general permit limits the size of those that are placed above ground. There are few practicable alternative locations for sewage pump stations because most sewage lines are gravity fed. Because of the physics of liquid flow, pump stations must be located at a low point in the sewer line. These same laws of liquid flow dictate that low areas are also where wetlands naturally occur. Therefore, the lowest point on a sewage line is often in wetlands.

Proposed N.J.A.C. 7:7A-5.2(b) provides that, if a utility line is jacked or directionally drilled underground so that there is no ground surface disturbance of a regulated area, no approval is needed under the rules.

Proposed N.J.A.C. 7:7A-5.2(c) sets forth limits on activities authorized under the general permit. Some of these limits are the same as those in the existing rule, while others are proposed to be amended, as described below.

Proposed N.J.A.C. 7:7A-5.2(c)1 limits overall disturbance under general permit 2 to one acre. This is the same as in the existing rule at N.J.A.C. 7:7A-9.2(a)2i.

Proposed N.J.A.C. 7:7A-5.2(c)2 limits the width of permanently maintained clearing over the utility line to 20 feet unless a wider area is required by law. For example, large underground utility lines are subject to the regulations of the Federal Energy Regulatory Commission (FERC). If an access road were constructed on the top of the utility line, it would have to fall within this 20 foot wide area.

Proposed N.J.A.C. 7:7A-5.2(c)3 requires that an access road meet detailed requirements at proposed N.J.A.C. 7:7A-5.2(d).

Proposed N.J.A.C. 7:7A-5.2(c)4 sets forth limits on the width of the trench into which the utility line is placed. Under the existing rule at N.J.A.C. 7:7A-9.2(a)2ii, the width of the trench is limited to 20 feet. However, it has been the Department's experience that, depending on the depth of the trench and the type of soil, 20 feet is often too narrow to ensure safety for the workers who install the utility line. Therefore, the proposed general permit 2 allows a trench that is the minimum width necessary to meet safety standards set by the U.S. Office of Safety and Health Administration (OSHA).

The proposed general permit at N.J.A.C. 7:7A-5.2(c)5 sets forth a limit on temporary disturbance. The existing general permit 2 does not specifically address temporary disturbance. However, the Department requires that the permittee backfill the uppermost 18 inches of an excavation with the original soil material (the Federal Energy Regulatory Commission (FERC) also requires this). Thus, topsoil excavated during placement of the utility line must be stored in a separate pile from the other soil excavated during the construction, until the utility line is placed and all of the soil can be returned to the trench. A large area is required for storage of these two piles of soil, along with storage and movement of other construction equipment and materials. However, because the soil and other equipment and materials are removed from the site as soon as the utility line is placed and buried, this area is only temporarily disturbed. Therefore, the proposed general permit at N.J.A.C. 7:7A-5.2(c)5 allows the permittee to temporarily disturb an area that is the minimum necessary for compliance with applicable laws.

Proposed N.J.A.C. 7:7A-5.2(c)6 limits the above ground portion of a pump station to 400 square feet. This will ensure that a pump station will cause almost no disturbance.

Proposed N.J.A.C. 7:7A-5.2(c)7 retains the requirement, found in the existing general permit at N.J.A.C. 7:7A-9.2(a)2, that there shall be no change in preconstruction elevation. An exception is proposed in the case of a pump station, although as mentioned above, many pump stations are placed under ground.

Proposed N.J.A.C. 7:7A-5.2(d) sets forth limits and requirements for an access road over a utility line. Such a road must be built by a municipal utilities authority, must be placed directly over a trunk main, must be necessary for maintenance of the line, must minimize disturbance, and may not impede ground or surface water, may not be located where the water table is at or above ground level, and mitigation must be provided for the area covered by the road and its attendant features. Mitigation is required even if the access road is unpaved, because without the access road, the area over the utility line would be more fully revegetated and thus would provide some wetlands values.

Proposed N.J.A.C. 7:7A-5.2(e) includes requirements found in the existing rule that apply to soil disposal (existing N.J.A.C. 7:7A-9.2(a)2), backfilling (existing N.J.A.C. 7:7A-9.2(a)2iv), replanting (existing N.J.A.C. 7:7A-9.2(a)2v), stabilizing the area (new provision), and retaining hydraulic site characteristics (existing N.J.A.C. 7:7A-9.2(a)2vi). The proposal removes the qualifier "if feasible" on the requirement to backfill with topsoil, because now that the proposal allows a wider temporary disturbance, separation and storage of topsoil should always be feasible. In addition, the proposal includes clarifying changes that do not affect the meaning of the provisions.

Proposed N.J.A.C. 7:7A-5.2(f) includes new provisions requiring that pipes be placed, sealed and configured so as to prevent draining of wetlands, transition areas, and State open waters. These conditions are found in existing general permit 11. They are proposed to be added here because they are sound practices which should be performed any time pipes are placed underground in wet areas.

Existing N.J.A.C. 7:7A-9.2(a)2iii, barring the use of general permit 2 in exceptional resource value wetlands, is proposed for deletion. Thus, the limits that apply to general permit 2 in exceptional resource value wetlands would be the standard conditions for general permits at N.J.A.C. 7:7A-4.3, which apply to all general permits. The most significant of these is the requirement that no general permit activity may be pursued if it would jeopardize threatened or endangered species habitat.

The Department has found over the years that the bar to underground utility lines in exceptional resource value wetlands has produced project delays without benefiting the environment. Under existing general permit 2, an applicant must obtain an individual permit for work in an exceptional resource value wetland, even if all other requirements of the general permit are met. The individual permit process in these cases often does not result in greater environmental protection. When an individual permit is required for an underground utility line, it is often difficult to find a practicable alternative. In many cases a utility line location is chosen so as to share a right-of-way with other existing utility lines. Even if the existing line is in an exceptional resource value wetland, it is often better environmentally to place the utility line where there is already some existing human disturbance, rather than to construct a new line in a new location that has not been disturbed.

In addition, a utility line's location is to a large extent determined by where the utility service is needed, and by other factors not under the control of the applicant. In these cases, it is very difficult to find a practicable alternative that will provide the utility service to the necessary location. Therefore, requiring an individual permit often does not significantly change the utility line project or reduce its environmental impact, but does delay it. In fact, in many cases the individual permit issued for the project looks very much like the general permit 2 authorization that would have been issued for the project, including similar limits and conditions as those in the adopted general permit itself. Thus, a lengthy individual permit process is imposed with little or no environmental gain. The deletion of the bar to use of the general permit in exceptional resource value wetlands will alleviate this problem, while retaining the standard general permit requirement that threatened or endangered species be protected.

7:7A-5.2A Combined general permit 2 and flood hazard area permit

Proposed N.J.A.C. 7:7A-5.2A provides for a combined freshwater wetlands general permit and stream encroachment permit. In the Department's experience, many utility lines require both freshwater wetlands and stream encroachment approvals. In order to reduce the administrative burden on the applicant and the Department, the proposal includes a combined permit for certain utility line projects.

This is one of five general permits for which the proposal provides the option of a combined freshwater wetlands and stream encroachment permit. The five are: general permit 2 for underground utility lines (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.2A), general permit 10A for minor road crossings (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.10C), general permit 11 for outfalls and intakes (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.11A), general permit 20 for bank stabilization activities (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.20A), and general permit 26 for minor stream cleaning (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.26A). If these combined permits prove useful, the Department will consider expanding the number of combined permits through future rulemakings.

Proposed N.J.A.C. 7:7A-5.2A(b) sets forth the eligibility requirements for a combined permit. To be eligible, a utility line must meet all of the requirements for authorization under general permit 2, as well as all of the Flood Hazard Area Control Act rule requirements for an underground utility line. General permit 2A places both freshwater wetlands and Flood Hazard Area Control Act rule requirements in one place, and provides for a combined application. This will make it easy to apply for the combined permit, and will provide for quicker Department review of the application.

Those familiar with the Flood Hazard Area Control Act rule requirements for underground utility lines, set forth at N.J.A.C. 7:13-2.10, will note that the requirements proposed at N.J.A.C. 7:7A-5.2A(b) are very similar but not identical to those requirements. This is because the Department is currently developing a proposal regarding the Flood Hazard Area Control Act rules, and some amendments will be proposed to the standards for utility lines. General permit 2A thus includes the provisions for utility lines that the Department intends to propose for the Flood Hazard Area Control Act rule, rather than the existing provisions. However, the substance of both requirements is essentially the same, except that a minimization requirement is added at proposed N.J.A.C. 7:7A-5.2A(b)1.

Proposed N.J.A.C. 7:7A-5.2A(c) provides that, if a utility line is jacked or directionally drilled underground so that there is no ground surface disturbance of a regulated area under the freshwater wetlands rules or the Flood Hazard Area Control Act rules, no approval is needed under either set of rules.

Proposed N.J.A.C. 7:7A-5.2A(d) provides that the combined permit is subject to the conditions for combined permits at N.J.A.C. 7:7A-4.6, and directs the reader to N.J.A.C. 7:7A-10.7 for application procedures for the combined permit.

7:7A-5.3 General Permit 3 – Discharge of return water

Existing N.J.A.C. 7:7A-9.2(a)3, which authorizes the discharge of return water from a permitted dredged material disposal site, is proposed to be recodified at N.J.A.C. 7:7A-5.3, with clarifying changes. First, the general permit specifically authorizes placement of a pipe through freshwater wetlands and transition areas in order to transport the return water to the State open water. In some cases, freshwater wetlands and/or transition areas lie between the upland disposal site and the State open water into which the return water is to be discharged. The provision allowing piping will prevent the erosion and sedimentation that would result from discharging the return water directly into the freshwater wetlands or transition area. Second, the requirement that the discharge be covered by a Department-issued water quality certificate is proposed for deletion. Since the general permit authorization itself constitutes the water quality certificate for the activity, as noted at proposed N.J.A.C. 7:7A-2.1(d), this provision is redundant.

7:7A-5.4 General Permit 4 – Hazardous site investigation and cleanup

Existing N.J.A.C. 7:7A-9.2(a)4, which authorizes the cleanup of hazardous sites, is proposed to be recodified at N.J.A.C. 7:7A-5.4.

Proposed N.J.A.C. 7:7A-5.4(a), found in the existing rule at N.J.A.C. 7:7A-9.2(a)4, includes clarifications and recodifications to make the provision easier to understand, but does not change its meaning.

Existing N.J.A.C. 7:7A-9.2(a)4i, which requires an alternatives analysis before a cleanup is authorized in exceptional resource value wetlands, is proposed for deletion. The Department has interpreted this requirement to require an examination of alternative remediation methods, since alternative sites cannot be considered if the basic project purpose is to clean up a particular contaminated area. However, there are practical and legislative limits on the number of different types of remediation methods available. In addition, the current practice of the Site Remediation Program is to coordinate with the Land Use Regulation Program when approving a cleanup that involves wetlands. Thus, it has been the Department's experience that the alternatives analysis required under the existing rule has not resulted in significant environmental benefits.

Proposed N.J.A.C. 7:7A-5.4(b), recodified from the first half of N.J.A.C. 7:7A-9.2(a)4ii, is amended so as not to require mitigation for a disturbance under the general permit if the wetland disturbed has formed as a direct result of the remediation activity itself, for example, where a remediation project requires the soil to be stripped and then replaced, but wetlands form on the site after the soil is stripped off and before the replacement soil is brought in. Such wetlands could be filled under the proposed language, because they formed as a direct result of the remediation project. The proposal also clarifies that mitigation under general permit 4 must meet the standards for all mitigation, set forth at proposed N.J.A.C. 7:7A-15.

Proposed N.J.A.C. 7:7A-5.4(c), recodified from the second half of N.J.A.C. 7:7A-9.2(a)4ii, is amended to allow the required mitigation to be approved through a document equivalent to a mitigation proposal. For example, the Land Use Regulation Program and the Department's site remediation unit might together draft a document that requires mitigation as part of a cleanup plan. If this document is equivalent to a mitigation proposal and ensures that the requirements at N.J.A.C. 7:7A-15 are met, this could take the place of the mitigation proposal required under N.J.A.C. 7:7A-15. The proposal also clarifies that mitigation for general permit 4, like all mitigation, must be performed prior to or concurrently with the cleanup activities.

7:7A-5.5 General Permit 5 – Landfill closures

Existing general permit 5, which covers the removal of abandoned vessels and other navigation obstructions, is proposed for deletion because it has never been used in the 12 years of the freshwater wetlands program.

Proposed new general permit 5 provides for disturbance of wetlands, transition areas, and/or State open waters in order to carry out a landfill closure plan or landfill disruption plan issued by the Department's Division of Solid and Hazardous Waste. Out of over 500 landfills in New Jersey, only 124 have approved closure plans. There are over 300 landfills that need to be properly closed. Most are old landfills, and many are located in or adjacent to wetlands. This general permit will facilitate this important and environmentally beneficial work.

Proposed new N.J.A.C. 7:7A-5.5(a) sets forth the activities authorized under the general permit. This includes activities undertaken by the Department or authorized through a solid waste facility closure and post-closure plan or disruption approval issued by the Department.

Proposed new N.J.A.C. 7:7A-5.5(b) sets forth two limits on the activities pursued under the general permit, described below.

Proposed new N.J.A.C. 7:7A-5.5(b)1 requires that the activities pursued under the general permit be necessary for closure of the landfill. In some cases, a landfill is being closed and/or capped in order to allow for redevelopment of the area. A landfill closure plan may take this into account by authorizing both activities necessary for landfill closure, and additional activities necessary only for redevelopment. Proposed new N.J.A.C. 7:7A-5.5(b)1 would only authorize those activities in the plan that are necessary for the closure. Although the Department supports redevelopment, there are other general permits that address redevelopment in more comprehensive terms (see general permit 27). Therefore, this general permit is limited to activities necessary for closure of the landfill.

Proposed new N.J.A.C. 7:7A-5.5(b)2 requires that the disturbance caused by permitted activities, in addition to being necessary for landfill closure, be limited to the *minimum amount* necessary for landfill closure. For example, if an applicant demonstrates under N.J.A.C. 7:7A-5.5(b)1 that an access road is an activity that is necessary to carry out the landfill closure, proposed N.J.A.C. 7:7A-5.5(b)2 requires that

the access road must be located as much as possible on uplands, and must be as small as possible so as to disturb the minimum amount of freshwater wetlands, transition area, and State open water.

Proposed N.J.A.C. 7:7A-5.5(c) requires mitigation for wetlands disturbed by landfill closure or disruption activities, except if the wetland is located on the top of the landfill, on a landfill's cap. This is similar to the mitigation requirement found in the general permit for hazardous site cleanups (general permit 4). Both of these general permits allow activities necessary to remedy an environmental problem, so the general permits do not have acreage limits. Because they have no acreage limits, the Department believes it is important to require mitigation to offset the environmental impact of removing wetlands from the ecosystem. However, some wetlands on a landfill site are not valuable and in fact can be dangerous to wildlife. Often, water collects in small low areas on landfilled solid waste. If this ponded water is undisturbed for long periods, small pockets of wetlands are created. Because these wetlands are underlain by solid waste and are usually small and scattered, mitigation for disturbing them is not required.

Proposed N.J.A.C. 7:7A-5.5(d) sets forth the process and timing for approval and implementation of the mitigation. This is consistent with the mitigation provisions in general permit 4.

7:7A-5.6 General Permit 6 – Non-tributary wetlands

Existing N.J.A.C. 7:7A-9.2(a)6, which authorizes the disturbance of certain non-tributary wetlands that are not part of a larger surface water system, is recodified at N.J.A.C. 7:7A-5.6, with clarifying changes that do not affect its meaning, and two substantive changes, described below.

Proposed N.J.A.C. 7:7A-5.6(a) is recodified from existing N.J.A.C. 7:7A9.2(a)6, with minor clarifying changes that do not affect meaning.

Proposed N.J.A.C. 7:7A-5.6(b) is recodified from existing N.J.A.C. 7:7A9.2(a)6i, with minor clarifying changes that do not affect meaning.

Proposed N.J.A.C. 7:7A-5.6(c) is recodified from existing N.J.A.C. 7:7A9.2(a)6ii. Proposed N.J.A.C. 7:7A-5.6(c)4 adds a new limit not found in the existing rule, which prohibits the use of general permit 6 in a State open water larger than one acre. This change is necessary to avoid a contradiction in the general permit. The general permit only allows disturbance of wetlands that are not tributary to a surface water system. However, a State open water larger than an acre would itself be large enough to be considered a surface water system. It does not make sense for the Department to allow use of the general permit in a surface water system itself, but not in a tributary to a surface water system. Therefore, this new provision will ensure a consistent and logical application of the general permit.

Proposed N.J.A.C. 7:7A-5.6(c)5 adds another new limit, not found in the existing rule, which prohibits use of general permit 6 in a vernal habitat. A vernal habitat is a small (usually less than an acre), temporarily ponded or otherwise fish-free depression

not connected to a flowing stream system. Water is supplied by surface runoff and/or ground water. Various studies have identified vernal habitat as ecologically important because it performs the following functions:

- supports a unique ecological community with high species diversity;
- supports species that act as indicators of environmental changes due to their rapid life cycle;
- supports certain amphibians, some of which are endangered or rapidly declining;
- eliminates fish and other predators through drying up each year, so that when the pond fills, tadpoles can survive free of predators;
- stimulates rapid growth and high population densities in amphibians after seasonal flooding;
- scatters pockets of water widely across the landscape to supply drinking water for many types of wildlife;
- provides foraging and nesting habitat for a variety of birds; and
- allows some species, such as crayfish and some salamanders, to survive dry periods by burrowing into the bottom and waiting until rain again fills the pond.

In New Jersey, an estimated 27 reptiles and amphibians use vernal habitat. Of these species, five are endangered, one threatened, and five are listed as declining (Declining species are those which are likely to become endangered unless conditions change.) For the five endangered salamander species, the major reason they are endangered is loss of habitat.

In order to implement the prohibition against using general permit 6 in vernal habitat, the Department will develop a comprehensive list of vernal habitat locations, similar to the list of threatened or endangered species sightings. The Department has already compiled approximately 4200 records for the 27 vernal habitat species in New Jersey. The Department will make the list available to the public (perhaps via the LUR Website at www.state.nj.us/DEP/landuse). If a site is listed as having vernal habitat or if evidence of onsite vernal habitat is obtained during application review, general permit 6 would be unavailable for activities on that site, unless the applicant could demonstrate that one or more of the characteristics of a vernal habitat (found in the definition of vernal habitat at N.J.A.C. 7:7A-1.4) is absent.

Without this proposed limit on use of general permit 6 in vernal habitats, general permit 6 will result in more than minimal individual and cumulative impacts. The Department believes that the proposal appropriately balances protection of this important environmental resource with the desire to minimize the regulatory burden on the applicant, and will enable an applicant to gauge the likelihood of approval for a particular application.

7:7A-5.7 General Permit 7 – Human-made ditches or swales in headwaters

Existing N.J.A.C. 7:7A-9.2(a)7, which authorizes the disturbance of certain ditches and swales, is recodified at N.J.A.C. 7:7A-5.7, with clarifying changes that do not affect its meaning. In addition, the definition of "headwaters" is proposed to be relocated here since this is the only provision to which the definition applies. Clarifying changes that do not affect meaning are proposed to the definition of "headwaters." The proposal

clarifies that, because wetlands are waters, they are a type of headwater. In addition, the proposal adds a sentence codifying current Department practice, which is to generally consider a water body which drains less than 50 acres to be a headwater. This is consistent with the definition of "swale" which includes features which drain less than 50 acres, and with the Department's Flood Hazard Area Control Act rules.

7:7A-5.8 General Permit 8 – House additions

Existing N.J.A.C. 7:7A-9.2(a)8, which authorizes construction of certain additions to existing homes, is recodified at N.J.A.C. 7:7A-5.8, with clarifying changes that do not affect its meaning.

7:7A-5.9 General Permit 9 – Airport sight line clearing

Existing N.J.A.C. 7:7A-9.2(a)9, which authorizes construction of certain State or Federally funded roads that were approved prior to the passage of the FWPA, is proposed for deletion since the Department believes that any roads in this category have been completed by now. The Department invites comment identifying any such roads that may exist that are not yet complete.

In place of existing general permit 9, the Department is proposing a new general permit at N.J.A.C. 7:7A-5.9, which authorizes the clearing of vision-obstructing vegetation near airports. This activity is not regulated at all under the Federal 404 program because it does not involve the discharge of dredged or fill material. However, the FWPA requires the Department to regulate the destruction of vegetation in freshwater wetlands and transition areas. It has been the Department's experience that the cutting of vegetation at airports in order to comply with airport safety regulations has minimal environmental impacts. In addition, because of the safety reasons for such vegetation removal, there is no practicable alternative to this removal.

Proposed new N.J.A.C. 7:7A-5.9(a) sets forth the activities authorized by the general permit (selective cutting of vegetation), and limits use of the general permit to public use aeronautical facilities.

Proposed new N.J.A.C. 7:7A-5.9(b) limits vegetation removal to that necessary to comply with Federal Aviation Administration safety requirements. In New Jersey, these requirements are implemented by the New Jersey Department of Transportation (NJDOT) through its administrative regulations.

Proposed new N.J.A.C. 7:7A-5.9(c) limits activities to those necessary for existing airport operations only. General permit 9 is not available for expansion of airport buildings or runways into wetlands or transition areas.

Proposed new N.J.A.C. 7:7A-5.9(d) sets forth additional application requirements for general permit 9. The applicant must submit a certification from the New Jersey Department of Transportation, stating that the airport is a public use aeronautical facility, describing the clearing required by NJDOT rules, and stating that the clearing is

necessary to comply with those rules. These requirements will ensure that Department staff can, prior to authorizing the activity, verify that the vegetation removal is the minimum required for safety.

Proposed new N.J.A.C. 7:7A-5.9(e) sets forth ways in which the permittee must minimize adverse environmental impacts, such as timing activities to minimize disruption of wildlife, leaving stumps and roots in place, using equipment that minimizes soil disturbance, and responsible disposal of vegetative debris. The provision notes that fire protection laws also apply to how cut vegetation is handled in an area which could be subject to forest fires. For example, fire regulations may require that stumps be cut off at ground level, and/or that tree trunks or other large obstacles be removed, in order to allow for the passage of fire trucks.

7:7A-5.10 General Permit 10 – Minor Road Crossings

Existing N.J.A.C. 7:7A-9.2(a)10, which authorizes construction of minor road crossings and attendant features, is recodified at N.J.A.C. 7:7A-5.10A and 7:7A-5.10B, with major changes and reorganization. The proposal divides the activities currently authorized under existing general permit 10 into two groups. The more minor of the activities authorized under existing general permit 10 are authorized under proposed general permit 10A, found at N.J.A.C. 7:7A-5.10A. The rest of the activities authorized under existing general permit 10 are authorized under proposed general permit 10B, found at N.J.A.C. 7:7A-5.10B. In addition, some activities not currently authorized under existing general permit 10 are proposed to be added to N.J.A.C. 7:7A-5.10B.

The Department is separating minor road crossing activities into these two groups in order to make approvals simpler and quicker for the most minor of the activities, which will be authorized under general permit 10A. Larger or more environmentally sensitive minor road crossings will be reviewed under general permit 10B. This proposed two-tier system grows out of the Department's experience in administering the existing general permit 10. Under the existing general permit 10, the Department may authorize a wide range of road crossing projects, which can vary substantially in size, complexity, and degree of impact. This new system splits road crossing projects into those that are very simple and have very minor environmental implications, and those that, while still minimal in impact, are more complex to review or may need closer scrutiny to ensure that impacts are minimized. By separating road crossings into two groups, the Department hopes to simplify and speed review for the smallest projects, while focussing more scrutiny on those that are more complex or have a greater potential for environmental impact.

N.J.A.C. 7:7A-5.10A General permit 10A – Very minor road crossings

Proposed N.J.A.C. 7:7A-5.10A is intended to be a simple, quick general permit for the most minor of road crossings.

Proposed N.J.A.C. 7:7A-5.10A(a) sets forth the types of activities authorized under general permit 10A. These are the same basic types of activities authorized under the

existing general permit 10 and under proposed general permit 10B, such as new road crossings and road widenings. As in the existing general permit 10, attendant features such as shoulders, sidewalks and embankments are included in the general permit. Proposed N.J.A.C. 7:7A-5.10A(a) also clarifies that the reduction of horizontal curves in an existing paved roadway for safety reasons would be covered by the general permit.

Proposed N.J.A.C. 7:7A-5.10A(b) sets forth limits on the length and acreage of disturbance allowed under general permit 10A. These limits are designed to ensure that general permit 10A will cover only very minor road crossings. There are two road crossing scenarios available under general permit 10A: a crossing that is up to 100 feet long and disturbs up to a quarter of an acre, and a crossing that is over 100 feet long and disturbs up to one eighth acre.

The 100 foot length limit is found in the existing rule at N.J.A.C. 7:7A-9.2(a)10ii. The limit is intended to ensure that, in choosing a location for a road crossing, an applicant will choose to cross at the narrowest portion of a wetland, since that will require the shortest crossing. In the existing rule, the 100 foot length limit does not apply to a widening or straightening. However, general permit 10A would apply the 100 foot length limit to a widening or straightening as well as to a new crossing, because a longer crossing can still be authorized under general permit 10B, after an onsite alternatives analysis. It should be noted that the 100 foot length limit applies only to disturbance of freshwater wetlands and State open waters, while the acreage limit includes not only disturbance of freshwater wetlands and State open waters, but also disturbance of transition areas.

The quarter acre limit on total disturbance is found in the existing rules at N.J.A.C. 7:7A-9.2(a)10iii. A lower acreage limit is imposed for a longer crossing because a longer crossing has the potential to segment the wetlands more than a shorter crossing would. Such segmenting of wetlands can have a detrimental effect, even if the total disturbance is not as great. A crossing that is both longer than 100 feet and has more than one eighth acre of impact would not be eligible for general permit 10A, but might still be authorized under general permit 10B.

Proposed N.J.A.C. 7:7A-5.10A(c) requires that, if a proposed road crossing skirts along the edge of a wetland or transition area or touches the wetland or transition area, without actually crossing through the wetland, the applicant must show that there is no onsite alternative location or configuration for the crossing that would have less environmental impact. This reflects the Department's experience that some applicants place a proposed road crossing in wetlands or transition area, not because they must cross them to reach developable upland, but because this makes more upland available for placing buildings and other development. However, the intent of general permit 10A is to permit access across wetlands where necessary to reach developable portions of the site. Usually, where a proposed road nips at the edge of a wetland or transition area, the intrusion into wetlands or transition area can be avoided by shifting the road. This provision will ensure that, when possible, this will be done and the wetlands and transition area will be protected.

Proposed N.J.A.C. 7:7A-5.10A(d) sets forth requirements to ensure minimization of environmental impacts under general permit 10A. Proposed N.J.A.C. 7:7A-5.10A(d)1,

which requires that fish passage not be impeded during low flows, is recodified from existing N.J.A.C. 7:7A-9.2(a)10v(4). The provision is clarified to indicate that the requirement does not apply to a water body in which fish cannot survive. Some specific methods for ensuring fish passage are proposed for deletion, since there is a wide range of such methods that are appropriate, depending on the water depth, water flow, soils, and other factors, and the choice of method must be made on a case by case basis in consultation between the applicant and the Department.

Proposed N.J.A.C. 7:7A-5.10A(d)2 replaces existing N.J.A.C. 7:7A-9.2(a)10i, which requires a crossing to be designed to withstand and prevent the restriction of high flows. The portion of this provision regarding withstanding high flows was not retained in the proposed new general permit 10 because this is a flood protection measure that is more appropriately addressed in the stream encroachment rules. However, the portion of the provision requiring that high flows not be restricted is reflected in the requirement at proposed N.J.A.C. 7:7A-5.10A(d)2 that the applicant install cross drains or other devices to ensure that the crossing does not alter the existing hydrology of the area, for example by blocking the flow of water from one side of the crossing to the other.

Proposed N.J.A.C. 7:7A-5.10A(d)3 limits rip-rap or other energy dissipating material to the minimum necessary to prevent erosion, and may be no more than 200 cubic yards unless a greater amount is required to comply with the New Jersey Standards for Soil Erosion and Sediment Control. This is a new requirement that replaces similar requirements in the existing rules at N.J.A.C. 7:7A-9.2(a)10iv and 7:7A-9.2(a)10v(2). The existing rules set a limit of no more than 200 cubic yards of fill, and require stabilization of disturbed areas in accordance with the Standards for Soil Erosion and Sediment Control. However, in the Department's experience, it is sometimes impossible to stabilize an area in accordance with the Standards for Soil Erosion and Sediment Control without using more than 200 cubic yards of fill, while it is sometimes possible to stabilize an area adequately with far less fill. The proposed new provision will alleviate this problem by requiring the minimum amount of fill necessary in all cases, and by allowing more fill if necessary to comply with the Standards.

Proposed N.J.A.C. 7:7A-5.10A(e) sets forth in detail the method of calculating the length of a disturbance for purposes of determining compliance with the 100 foot length limit at N.J.A.C. 7:7A-5.10A(b)1. These provisions address the main areas of confusion that the Department has encountered during its use of existing general permit 10.

The proposal includes a diagram (Figure 2) illustrating how to measure the length of a disturbance when a crossing goes over fingers of the same wetland.

N.J.A.C. 7:7A-5.10B General permit 10B – Minor road crossings

Proposed N.J.A.C. 7:7A-5.10B(a) sets forth the types of activities authorized under general permit 10B. These are the same types of activities authorized under the existing general permit 10 and under proposed general permit 10A. As in the existing general permit 10, attendant features such as shoulders, sidewalks and embankments are included in the general permit.

Proposed N.J.A.C. 7:7A-5.10B(b) sets forth the criteria for eligibility for general permit 10B. Proposed N.J.A.C. 7:7A-5.10B(b)1 requires an onsite alternatives analysis, showing that there is no onsite alternative location or configuration for the road crossing that would have less environmental impact. Thus, a road crossing under general permit 10B may be longer than 100 feet, if the applicant demonstrates that this is the least environmentally damaging configuration and location on the site, and if all other requirements (such as the one quarter acre limit on total disturbance) are met. For example, an applicant who places a road crossing in wetlands when there are uplands available onsite has not met the alternatives analysis requirement. Proposed N.J.A.C. 7:7A-5.10B(b)2 sets forth the requirement, found in the existing rules at N.J.A.C. 7:7A-9.2(a)10iii, that total disturbance onsite under general permit 10B may not exceed one quarter acre.

Proposed N.J.A.C. 7:7A-5.10B(c) sets forth requirements to ensure minimization of environmental impacts under general permit 10B. With the exception of proposed N.J.A.C. 7:7A-5.10B(c)4, these are the same as those for general permit 10A, which are discussed in detail in the summary of that general permit, above.

Proposed N.J.A.C. 7:7A-5.10B(c)4 requires that the cartway, shoulder, and side slopes of the roadway are the minimum necessary to comply with the Department of Community Affairs' Residential Site Improvement Standards or, if the project is not a residential development, the minimum necessary for safety. The existing rule at N.J.A.C. 7:7A-9.2(a)10v requires that the cartway, shoulder, and side slopes of a roadway must be minimized, but provides no standard by which to judge whether minimization has in fact occurred. The Residential Site Improvement Standards set minimum dimensions and specifications for roadways. For a non-residential development, the proposal allows the minimum size roadway necessary for safety. These standards will make general permit 10B easier to apply for both the regulated community and the Department, while ensuring that the road and its impacts are no larger than necessary and thus that the disturbance to the wetlands is minimized.

Proposed N.J.A.C. 7:7A-5.10B(d) sets forth in detail the requirements for the onsite alternatives analysis required in proposed N.J.A.C. 7:7A-5.10B(b)1. The provision creates several rebuttable presumptions. Proposed N.J.A.C. 7:7A-5.10B(d)1 creates the presumption that disturbance of non-transition area uplands would have less environmental impact than disturbance of a transition area, State open water or freshwater wetland. Proposed N.J.A.C. 7:7A-5.10B(d)2 creates the presumption that disturbance of a transition area would have less environmental impact than disturbance of wetlands or State open waters. Proposed N.J.A.C. 7:7A-5.10B(d)3 creates the presumption that disturbance of a wetland would have less environmental impact than disturbance of a State open water. This hierarchy reflects the overall scheme of the FWPA, and reflects the fact that wetlands are valuable because they protect the quality of State open waters. Proposed N.J.A.C. 7:7A-5.10B(d)4 creates a presumption that expansion or upgrading of an existing road crossing will have less environmental impact than constructing a new road crossing. Proposed N.J.A.C. 7:7A-5.10B(d)5 creates a presumption that placing a new crossing in an area that is already disturbed, or designated as road right-of-way, will have less environmental impact than placing it in an undisturbed area. These proposed presumptions will provide guidance in applying the onsite alternatives test required under general permit 10B.

N.J.A.C. 7:7A-5.10C Combined general permit 10A and flood hazard area permit

Proposed new N.J.A.C. 7:7A-5.10C sets forth a combined general permit 10A and flood hazard area permit. The Department has found that many minor road crossings are located in flood hazard areas and thus require a permit under the Department's stream encroachment rules at N.J.A.C. 7:13. In addition, there are often overlapping aspects in the review for the two permits. In order to reduce paperwork and processing time, the Department is proposing a combined permit for very minor road crossings that are eligible for general permit 10A and meet certain limits.

This is one of five general permits for which the proposal provides the option of a combined freshwater wetlands and stream encroachment permit. The five are: general permit 2 for underground utility lines (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.2A), general permit 10A for minor road crossings (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.10C), general permit 11 for outfalls and intakes (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.11A), general permit 20 for bank stabilization activities (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.20A), and general permit 26 for minor stream cleaning (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.26A). If these combined permits prove useful, the Department will consider expanding the number of combined permits through future rulemakings.

Proposed N.J.A.C. 7:7A-5.10C(a) sets forth the type of activities for which the combined permit is available.

Proposed N.J.A.C. 7:7A-5.10C(b)sets forth requirements for the combined permit. Proposed N.J.A.C. 7:7A-5.10C(b)1 requires that the crossing must meet all of the requirements for authorization under general permit 10A. The goal of the combined permit is to reduce processing time and effort for certain small projects that require both freshwater wetlands and flood hazard area permits. The Department plans to achieve this by creating a simple set of standards that can be applied by one Land Use Regulation staff member, with little, if any, need for consultation with other staff or for a site visit. Thus, the proposal only includes projects eligible under general permit 10A and not under general permit 10B because the review process for general permit 10B does not meet this criterion.

Proposed N.J.A.C. 7:7A-5.10C(b)2 requires that the crossing must meet all requirements for approval under the Department's Flood Hazard Area Control Act rules.

Proposed N.J.A.C. 7:7A-5.10C(b)3 requires that the crossing must either be located on a site with a Department-issued letter of interpretation showing all wetlands boundaries; or must only impact State open waters and not freshwater wetlands or transition areas. Again, these requirements are designed to select projects that can be reviewed quickly and easily by one person without a site inspection. Any project that cannot meet these requirements would have to undergo the standard procedure for obtaining both permits.

Proposed N.J.A.C. 7:7A-5.10C(c) provides that the combined general permit 10A and flood hazard area permit are subject to the conditions for combined permits (at proposed N.J.A.C. 7:7A-4.6), and the application requirements for combined permits at N.J.A.C. 7:7A-10.7.

7:7A-5.11 General Permit 11 – Outfalls and intake structures

Existing N.J.A.C. 7:7A-9.2(a)11, which authorizes construction of stormwater outfalls and related structures, is recodified at N.J.A.C. 7:7A-5.11, with some clarifying changes that do not affect its meaning, and some substantive changes, discussed in detail below.

Proposed N.J.A.C. 7:7A-5.11(a), which lists the activities authorized under the general permit, is recodified from existing N.J.A.C. 7:7A-9.2(a)11. The existing general permit allows construction of only stormwater outfall structures and associated conveyance structures (such as pipes). However, the proposal would add two types of structures not currently authorized under existing general permit 11: Department-permitted water intake structures (at proposed N.J.A.C. 7:7A-5.11(a)3), potable water wells that are part of a small private water system (at proposed N.J.A.C. 7:7A-5.11(a)4), and NJPDES-permitted outfalls (at proposed N.J.A.C. 7:7A-5.11(a)2). The Department's experience has been that these types of structures have minimal impacts on wetlands, which are similar to the impacts of a stormwater outfall structure.

Proposed N.J.A.C. 7:7A-5.11(a)5 and 6, allowing construction of conveyance and energy dissipation structures, are recodified from existing N.J.A.C. 7:7A-9.2(a)11, with clarifications that do not change their meaning. However, the proposal would change the amount of rip-rap allowed for energy dissipation. The existing rule, at N.J.A.C. 7:7A-9.2(a)11vi, allows 10 cubic yards of rip-rap. The proposal deletes this limit. Instead, the amount of rip-rap would be determined under proposed N.J.A.C. 7:7A-5.11(e), which requires that all activities under the general permit comply with the Standards for Soil Erosion and Sediment Control in New Jersey. In the Department's experience, the existing limits on rip-rap do not allow the permittee to effectively prevent erosion damage to the wetlands in most cases. The proposed standard will allow the Department to apply a more meaningful, rip-rap limit, which can be tailored to the specific situation through the application of the Standards for Soil Erosion and Sediment Control.

Proposed N.J.A.C. 7:7A-5.11(b) is recodified from a provision found in existing N.J.A.C. 7:7A-9.2(a)11v, prohibiting construction of detention facilities. The proposed provision includes minor clarifications that do not change its meaning, and also clarifies that retention basins, like detention basins, are not authorized under general permit 11.

Proposed new N.J.A.C. 7:7A-5.11(c) limits total disturbance under general permit 11 to one quarter acre, and limits the width of disturbance and the amount of rip-rap. The proposed one quarter acre limit is recodified from existing N.J.A.C. 7:7A-9.2(a)11iii, with minor clarifications that do not change its meaning. The proposed limit on the width of disturbance is different from that in the existing rule. The existing rule at N.J.A.C. 7:7A-9.2(a)11i limits the width of disturbance to 20 feet. However, it is the Department's

experience that some projects need a wider disturbance, and some a narrower disturbance. Generally, the width of the disturbance caused by a conveyance structure is determined by safety rules promulgated by the U.S. Occupational Safety and Health Administration (OSHA), designed to ensure that the trench into which the structure is placed does not cave in on the workers. Thus, the width will vary based on the size of the conveyance structure (larger pipes require a wider trench), and on the soil (sand caves in more easily than clay). Therefore, the proposal allows the minimum width necessary to meet OSHA standards. Proposed N.J.A.C. 7:7A-5.11(c)3 sets a limit on the amount of rip-rap or other energy dissipating material. This replaces existing N.J.A.C. 7:7A-9.2(a)11vi, which sets a limit of 10 cubic yards of rip-rap per outfall. The proposal limits rip-rap or other energy dissipating material to the minimum necessary to prevent erosion, and to no more than 10 cubic yards unless a greater amount is required to comply with the New Jersey Standards for Soil Erosion and Sediment Control. However, in the Department's experience, it is sometimes impossible to adequately prevent erosion in accordance with the Standards for Soil Erosion and Sediment Control without using more than 10 cubic yards of fill, while it is sometimes possible to prevent erosion with far less fill. The proposed new provision will alleviate this problem by requiring the minimum amount of fill necessary in all cases, and by allowing more fill if necessary to comply with the Standards.

Proposed new N.J.A.C. 7:7A-5.11(d) sets forth various requirements that apply to intake structures. These requirements are designed to ensure that the wetlands are not drained, and to protect the flora and fauna in the area of the intake structure.

Proposed new N.J.A.C. 7:7A-5.11(e), which requires compliance with the Standards for Soil Erosion and Sediment Control, is recodified from existing N.J.A.C. 7:7A-9.2(a)11iv, with clarifications that do not change its meaning.

Proposed new N.J.A.C. 7:7A-5.11(f), which requires pre-discharge treatment of stormwater, is recodified from existing N.J.A.C. 7:7A-9.2(a)11v. The proposal changes the provision by referring to the stormwater treatment requirements from the Department's Flood Hazard Area Control Act rules, instead of the stormwater requirements in the existing general permit. This will make the two programs consistent. No specific pre-discharge treatment requirements are necessary here for non-stormwater discharges, since those discharges must be permitted under the NJPDES program, which will require appropriate pre-discharge treatment.

Proposed new N.J.A.C. 7:7A-5.11(g), which requires certain types of restoration of excavated areas, is recodified from existing N.J.A.C. 7:7A-9.2(a)11vii, with clarifications that do not change its meaning.

Proposed new N.J.A.C. 7:7A-5.11(h), which requires pipes to be buried and fitted with special devices, is recodified from existing N.J.A.C. 7:7A-9.2(a)11viii, with clarifications that do not change its meaning. The devices required by this provision are important because they prevent wetlands from being drained by water moving along the outside of a pipe. The proposal adds a provision allowing a pipe to be placed above ground if an applicant can show that such placement would be more environmentally beneficial.

Proposed new N.J.A.C. 7:7A-5.11(i), which sets forth the limited conditions under which a swale may be used to convey stormwater through wetlands, is recodified from existing N.J.A.C. 7:7A-9.2(a)11x, with clarifications that do not change its meaning.

7:7A-5.11A Combined general permit 11 and flood hazard area permit

Proposed N.J.A.C. 7:7A-5.11A provides for a combined freshwater wetlands general permit and stream encroachment permit. This is one of five general permits for which the proposal provides the option of a combined freshwater wetlands and stream encroachment permit. The five are: general permit 2 for underground utility lines (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.2A), general permit 10A for minor road crossings (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.10C), general permit 11 for outfalls and intakes (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.11A), general permit 20 for bank stabilization activities (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.20A), and general permit 26 for minor stream cleaning (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.26A). If these combined permits prove useful, the Department will consider expanding the number of combined permits through future rulemakings.

Proposed N.J.A.C. 7:7A-5.11A(a) sets forth the eligibility requirements for a combined permit. To be eligible, an outfall or intake structure must meet all of the requirements for general permit 11, as well as all of the stream encroachment requirements for such a structure, set forth in the Flood Hazard Area Control Act rules at N.J.A.C. 7:13. Unlike general permit 2A for utility lines, general permit 11A does not incorporate the Flood Hazard Area Control Act rule requirements for outfalls and intakes. Instead, the Department intends to proposed amendments to the Flood Hazard Area Control Act rules, providing for this combined general permit. The limits in freshwater wetlands general permit 11 will be incorporated into those provisions when proposed. This will make it easy for an applicant to obtain the combined permit, and will provide for quicker Department review of the application.

Proposed N.J.A.C. 7:7A-5.11A(b) provides that the combined general permit 11 and flood hazard area permit are subject to the conditions for combined permits (at proposed N.J.A.C. 7:7A-4.6), and the application requirements for combined permits at N.J.A.C. 7:7A-10.7.

7:7A-5.12 General Permit 12 – Surveying and investigating

Existing N.J.A.C. 7:7A-9.2(a)12, authorizing surveying activities, is recodified at proposed N.J.A.C. 7:7A-5.12, with clarifying changes that do not alter its meaning, and with substantive changes described below.

Proposed new N.J.A.C. 7:7A-5.12(a)1, 2 and 4 are recodified, with clarifying changes that do not affect meaning, from existing N.J.A.C. 7:7A-9.2(a)12.

Proposed new N.J.A.C. 7:7A-5.12(a)3 is recodified from existing N.J.A.C. 7:7A-9.2(a)12, with one substantive change. Existing general permit 12 limits the width of clearing for a survey line to five feet. However, proposed general permit 12 removes the five foot width limit and instead requires, under proposed N.J.A.C. 7:7A-5.12(b), that the disturbance be the minimum necessary to obtain the desired information. This change is intended to allow the Department to determine the appropriate width of a survey line clearing, as well as a soil boring or other disturbance under general permit 12, on a case-by-case basis.

Proposed new N.J.A.C. 7:7A-5.12(a)5 adds an authorized activity to the general permit -- the digging of exploratory pits or other temporary activities necessary for a geotechnical or archaeological investigation.

Proposed new N.J.A.C. 7:7A-5.12(b) requires that disturbance under general permit 12 be the minimum necessary to obtain the desired information.

Proposed new N.J.A.C. 7:7A-5.12(c) adds a new requirement that any soil disturbance under the general permit be restored to its original elevation. This does not require replanting, but merely the replacement of the soil to its original elevation.

7:7A-5.13 General Permit 13 – Lake dredging

The proposal deletes general permit 13, found in the existing rule at N.J.A.C. 7:7A-9.2(a)13, and replaces it with a reworded version at proposed N.J.A.C. 7:7A-5.13. The proposed general permit 13 has the same meaning as the existing one, except that dredging in wetlands is limited to palustrine emergent wetlands only. A definition of palustrine emergent wetlands is proposed at N.J.A.C. 7:7A-1.4.

Proposed new N.J.A.C. 7:7A-5.13(a) lists the activities authorized under the general permit, limits the acreage of wetlands disturbed to one acre, and limits the types of wetlands which may be disturbed to palustrine emergent freshwater wetlands. The existing general permit allows disturbance of any kind of freshwater wetlands. Palustrine emergent wetlands are often found where State open waters are in the process of gradually developing wetlands characteristics, as sediment collects and vegetation takes root. Thus, palustrine emergent wetlands are characterized by herbaceous, grass-like plants, rather than shrubs or trees. However, the Department believes that, if open waters are to be maintained, dredging should be performed regularly, before wetlands have fully developed. If a wetland has developed beyond the palustrine emergent stage, such that it is characterized by shrubs or trees, it is providing substantial wetlands functions and should no longer be subject to dredging under the general permit. Proposed N.J.A.C. 7:7A-5.13(a) also clarifies that general permit 13 does not apply in transition areas, except to the extent needed to gain access to open waters for dredging.

Proposed new N.J.A.C. 7:7A-5.13(b) clarifies that an approval under this chapter is not required if no wetlands or transition areas are to be disturbed by the dredging. There is often confusion over whether authorization under this general permit is needed if the dredging will affect only State open waters and will not affect any wetlands or

transition areas. In open waters, the Department does not regulate any activities except the discharge of dredged or fill material. Because dredging in open waters has been determined under the Federal 404 program not to involve the discharge of dredged or fill material, such dredging is not regulated under the wetlands program and no authorization under this chapter would be needed. However, if there will be disturbance of any wetlands in the open water, such as vegetated shallows or sandbars, authorization under the general permit is required. In addition, if any wetlands or transition area on the bank are disturbed in order to gain access to the open water dredging, this too would require authorization under the general permit.

Proposed N.J.A.C. 7:7A-5.13(c), addressing the need for a Department lake lowering permit and only allowing work while the water is lowered, is recodified from existing N.J.A.C. 7:7A-9.2(a)13i and ii. The existing general permit states that a lake lowering permit is required for the general permit. However, in some cases lake dredging can be accomplished without lowering the lake. The proposed provision recognizes this and allows such dredging under the general permit. In addition, other clarifications are proposed that do not change the meaning.

Proposed N.J.A.C. 7:7A-5.13(d)1, which concerns fish spawning, is found in the existing rules at N.J.A.C. 7:7A-9.2(a)13vi. If the Department's Division of Fish & Wildlife has issued a lake lowering permit for the project, this issue will be addressed as part of the review of that permit and will not be reviewed by the Land Use Regulation Program. Proposed N.J.A.C. 7:7A-5.13(d)2 is a new provision not found in the existing rules. It requires that the permittee ensure a continuous flow of sediment-free water during dredging, in order to maintain downstream species and their habitat.

Proposed N.J.A.C. 7:7A-5.13(e), allowing temporary disturbance for access to the dredging, is recodified from existing N.J.A.C. 7:7A-9.2(a)13iv, with clarifications that do not change its meaning, and with one substantive change. The proposed substantive change lowers the amount of wetlands and transition area that may be disturbed to one eighth of an acre. The existing general permit allows one quarter acre for access, but the Department's experience has been that access can be obtained in most cases with a substantially smaller disturbance, and the Department has therefore lowered the limit.

Proposed N.J.A.C. 7:7A-5.13(f)1, requiring documentation that the dredging will not increase the depth or size of the open water beyond the lake's original configuration, is recodified from existing N.J.A.C. 7:7A-9.2(a)13iii, with clarifications that do not change its meaning. Proposed N.J.A.C. 7:7A-5.13(f)2 is a new requirement, designed to help applicants who wish to trace the source of sediment that causes the need for dredging. This is the first step in preventing sedimentation of the lake, pond or reservoir, so that dredging will not be necessary as often in the future.

Proposed N.J.A.C. 7:7A-5.13(g), which only allows dredging under the general permit once every five years, is recodified from existing N.J.A.C. 7:7A-9.2(a)13ix, with clarifications that do not change its meaning. Like proposed N.J.A.C. 7:7A-5.13(f)2, this is designed to discourage frequent dredging and instead encourage preventive measures to minimize sedimentation.

Proposed N.J.A.C. 7:7A-5.13(h), which addresses disposal of dredged material, is recodified from existing N.J.A.C. 7:7A-9.2(a)13viii, with clarifications that do not change its meaning. The proposal replaces specific dredged material disposal requirements with a cross reference to the general provisions that apply to all general permits at N.J.A.C. 7:7A-4.3, which contain the specific dredged material disposal requirements.

7:7A-5.14 General Permit 14 – Water monitoring devices

Existing N.J.A.C. 7:7A-9.2(a)14 is recodified at proposed N.J.A.C. 7:7A-5.14, with clarifying changes that do not change its meaning, and minor substantive changes, described below.

Proposed new N.J.A.C. 7:7A-5.14(a) lists the types of devices which may be placed in freshwater wetlands, transition areas, and State open waters under the general permit. The proposal adds small weirs or flumes for water measurement. Since this is an example of a "similar scientific device" – a category already included in the existing general permit, this is not a substantive change, but an illustration of an already authorized activity. These devices are used by other units in the Department in collecting data needed to assess compliance, environmental trends, and progress towards environmental goals.

Proposed N.J.A.C. 7:7A-5.14(b) prohibits activities that significantly disrupt the movement of aquatic species. This is a new limit, not included in the existing general permit, that the Department believes will ensure minimal environmental impact.

Proposed N.J.A.C. 7:7A-5.14(c) provides for a "blanket" authorization for drilling of multiple monitoring wells, in a case where it is not clear prior to drilling how many wells will be needed. It is quite common in a groundwater cleanup project for it to be unclear at the outset how many monitoring wells will be needed, and their locations. It is only after drilling some wells that the direction of the flow of the groundwater contamination can be determined. The direction of the groundwater flow then indicates where to drill the next well, and so on. This provision will enable such cleanup projects to proceed as necessary, provided the number and location of all wells is reported to the Department at the end of drilling.

7:7A-5.15 General Permit 15 – Mosquito control activities

Existing N.J.A.C. 7:7A-9.2(a)15 is recodified at proposed N.J.A.C. 7:7A-5.15, with clarifying changes that do not affect its meaning, and with three substantive changes, described below.

Proposed N.J.A.C. 7:7A-5.15(a), listing the activities authorized by the general permit, is recodified from existing N.J.A.C. 7:7A-9.2(a)15, with minor clarifications that do not change its meaning.

Proposed new N.J.A.C. 7:7A-5.15(b), which requires a determination from the State Office of Mosquito Control Coordination, is recodified from existing N.J.A.C. 7:7A-9.2(a)15vii, with minor clarifications that do not change its meaning.

Existing N.J.A.C. 7:7A-9.2(a)15i, ii, and iii, requiring certain practices to minimize environmental impact, are recodified at proposed N.J.A.C. 7:7A-5.15(c), with minor clarifications that do not change meaning.

Existing N.J.A.C. 7:7A-9.2(a)15iv, governing dredged material disposal, is recodified at proposed N.J.A.C. 7:7A-5.15(d), with minor clarifications that do not change its meaning. In addition, the proposal makes a minor substantive change, by requiring a demonstration that dredged materials spread in the wetlands will not alter the character of the wetlands.

Existing N.J.A.C. 7:7A-9.2(a)15v, prohibiting excessive drainage, is recodified at proposed N.J.A.C. 7:7A-5.15(e), with minor clarifications that do not change its meaning.

Proposed new N.J.A.C. 7:7A-5.15(f) sets forth new public notice requirements, required by amendments to the FWPA, for county agencies submitting applications under general permit 15. Under the existing rule, general permit 15 applicants are subject to the same public notice requirements as most other general permit applicants. These public notice requirements, found in the existing rule at N.J.A.C. 7:7A-9.5(b), require submittal of a notice to several local government bodies, and to neighboring property owners. However, amendments in 1995 to the FWPA at N.J.S.A. 13:9B-23c(4) provided that, for county applicants, only a display advertisement can be required. The FWPA amendments also cover municipal applicants, but because the general permit does not at present cover municipal agencies, proposed N.J.A.C. 7:7A-5.15(f) includes the statutory requirement only for county applicants.

Proposed new N.J.A.C. 7:7A-5.15(g) sets forth a limit found in the existing rules at N.J.A.C. 7:7A-9.4(f), prohibiting use of the general permit on a site more often than once every five years.

Existing N.J.A.C. 7:7A-9.2(a)15vi, barring the use of general permit 15 in exceptional resource value wetlands, is proposed for deletion. Thus, the limits that apply to general permit 15 in exceptional resource value wetlands would be the standard conditions for general permits at N.J.A.C. 7:7A-4.3, which apply to all general permits. The most significant of these is the requirement that no general permit activity may be pursued if it would jeopardize threatened or endangered species habitat.

The Department has found over the years that the bar to mosquito projects in exceptional resource value wetlands has produced project delays without benefiting the environment. Under existing general permit 15, an applicant must obtain an individual permit for work in an exceptional resource value wetland, even if all other requirements of the general permit are met. However, the individual permit process in these cases often does not result in greater environmental protection. When an individual permit is required for a mosquito control project, it is very difficult to find a practicable alternative for dealing with a "documented mosquito problem affecting existing residents"

(requirements quoted from the general permit). Alternative locations are not available, because the mosquito problem cannot be moved to another location before being eradicated. Alternative methods can be examined, but mosquito control techniques are fairly standardized, so requiring an individual permit does not usually result in major changes in the proposed project activities.

In fact, in most cases the individual permit issued for the project looks very much like the general permit 15 that would have been issued for the project, but for the bar in exceptional resource value wetlands, including similar limits and conditions as those in the adopted general permit itself. Thus, a lengthy individual permit process is imposed with little or no environmental gain. The deletion of the bar to use of the general permit in exceptional resource value wetlands will alleviate this problem, while retaining the standard general permit requirement that threatened or endangered species be protected.

7:7A-5.16 General Permit 16 – Habitat creation and enhancement activities

Existing N.J.A.C. 7:7A-9.2(a)16, which authorizes habitat creation and enhancement activities, is recodified at N.J.A.C. 7:7A-5.16, with major changes, described below.

Proposed N.J.A.C. 7:7A-5.16(a) sets forth the scope of the general permit. Where the existing general permit lists authorized activities, limits and conditions, the proposed general permit instead authorizes the implementation of habitat creation and enhancement plans funded or sponsored by State or Federal agencies or other resource protection agencies. Many Federal and State agencies have existing programs under which habitat creation and enhancement activities may be pursued. For example, there are agricultural programs to restore farmed wetlands, and programs for habitat enhancement as compensation for dams or road work. Rather than creating another such program, the proposed general permit will support and facilitate these ongoing efforts. The provision also clarifies the meaning of the term "sponsor."

Proposed N.J.A.C. 7:7A-5.16(b) lists the types of plans that are covered by the general permit.

Proposed N.J.A.C. 7:7A-5.16(c) sets forth the basic demonstrations an applicant must make to be eligible for the general permit.

Proposed N.J.A.C. 7:7A-5.16(d) prohibits use of the general permit for activities unless the sole purpose of the activity is habitat creation and enhancement. It has been the Department's experience that some development or flood control projects may have incidental habitat enhancement effects. It is not the Department's intent that such projects would be covered by general permit 16.

Proposed N.J.A.C. 7:7A-5.16(e) lists examples of the types of activities covered by the general permit. Many of these are found in existing general permit 16 at N.J.A.C. 7:7A-9.2(a)16i through iii.

Proposed N.J.A.C. 7:7A-5.16(f) sets forth limits on disturbance under general permit 16. Disturbance must be the minimum necessary, and shall not decrease the total area of freshwater wetlands, State open waters and/or transition areas, except upon a Department determination that this would be environmentally beneficial.

Proposed N.J.A.C. 7:7A-5.16(g) provides that there will be no application fee for general permit 16. This is appropriate because the activities authorized under the general permit have a net environmental benefit and are often pursued by agencies funded by taxes.

Proposed N.J.A.C. 7:7A-5.16(h) allows an activity that complies with general permit 16, but that also includes activities covered under other general permits, to be authorized under general permit 16 only. This is intended to prevent an applicant with a project that is legitimately covered by general permit 16 from having to also obtain multiple other general permits to authorize the project.

Proposed N.J.A.C. 7:7A-5.16(i) clarifies that an exempt activity does not require general permit 16 authorization solely because it is conducted through a program which is covered by general permit 16.

7:7A-5.17 General Permit 17 – Trails and boardwalks

Existing N.J.A.C. 7:7A-9.2(a)17, which authorizes construction of certain trails and boardwalks, is recodified at proposed N.J.A.C. 7:7A-5.17, with minor changes that do not affect its meaning, and some substantive changes.

Proposed N.J.A.C. 7:7A-5.17(a), which lists the activities authorized under the general permit, is recodified from existing N.J.A.C. 7:7A-9.2(a)17. The proposal makes a substantive change in this provision, in that it removes a limit on the types of land upon which trails and boardwalks are authorized, and clarifies that the general permit does not authorize construction of trails intended for use by automobiles or other motor vehicles. A provision clarifying that the general permit does not authorize covered or enclosed structures is relocated here from existing N.J.A.C. 7:7A-9.2(a)17i.

Proposed N.J.A.C. 7:7A-5.17(b) adds a one quarter acre limit on total disturbance under the general permit. This is necessary to ensure that the general permit has minimal impacts, especially in light of the fact that the general permit is no longer limited to use on public land.

Proposed N.J.A.C. 7:7A-5.17(c) is recodified from existing N.J.A.C. 7:7A-9.2(a)17i, with minor clarifications that do not change its meaning. The Department did not propose to increase the width of the trail or boardwalk allowed, despite the fact that in some cases this will bar bike paths and multi-use trails from authorization under the general permit. Although the Department supports construction of bike paths and other outdoor recreation facilities, this general permit is intended to increase environmental education and understanding of wetlands, not to facilitate the use of wetlands as outdoor recreation facilities. A provision clarifying that the general permit does not

authorize covered or enclosed structures is deleted here and relocated at proposed N.J.A.C. 7:7A-5.17(a).

The proposal deletes existing N.J.A.C. 7:7A-9.2(a)17ii. The existing provision requires the use of natural materials for construction of trails and boardwalks. The Department believes that the use of non-natural materials is often appropriate. For example, plastic lumber can be an appropriate material for a boardwalk, and paving may be necessary for a trail that must be accessible to wheelchair users.

Proposed N.J.A.C. 7:7A-5.17(d) is a new provision not found in the existing rules. It requires that the location and configuration of the trail or boardwalk minimize environmental impact, and requires educational features. This reflects the intent of the general permit to facilitate environmental education rather than to merely use wetlands for outdoor recreation.

Proposed N.J.A.C. 7:7A-5.17(e) is recodified from existing N.J.A.C. 7:7A-9.2(a)17iii, with minor clarifying changes that do not change its meaning, and with one substantive change. The proposal adds a requirement that a permittee minimize impacts on vegetation.

Proposed N.J.A.C. 7:7A-5.17(f) provides that there will be no application fee for general permit 17 for activities on public land. The exemption of public land from fees reflects the fact that trails and boardwalks on public land serve a valuable function by promoting public understanding and enjoyment of the environment, and is intended to help encourage the preservation and use of public open space.

Existing N.J.A.C. 7:7A-9.2(a)17iv is proposed for deletion, since it repeats a condition already found in the standard conditions for general permits at N.J.A.C. 7:7A-4.3

7:7A-5.18 General Permit 18 – Dam repair

Proposed N.J.A.C. 7:7A-5.18 is recodified from existing N.J.A.C. 7:7A-9.2(a)18, with clarifying changes, and minor substantive changes, described below.

Proposed N.J.A.C. 7:7A-5.18(a) sets forth the scope of the general permit. The proposed general permit covers the same activities as existing general permit 18, with the addition of removal of a dam.

Proposed N.J.A.C. 7:7A-5.18(b) clarifies that the general permit allows repair, rehabilitation, replacement, maintenance or reconstruction of a dam only if the dam is "currently serviceable." If a dam is not currently serviceable, the only activity authorized by general permit 18 is removal of the dam. The provision adds a definition of "currently serviceable."

Proposed N.J.A.C. 7:7A-5.18(c) sets forth limits on activities under general permit 18. The limits at proposed N.J.A.C. 7:7A-5.18(c)1, 2, 4, 5, and 6 are found in existing general permit 18. Minor clarifications are proposed and more detail is added but the

proposal does not change the basic meaning of these provisions. Proposed N.J.A.C. 7:7A-5.18(c)3 is a new provision that requires temporary disturbance to be minimized. Existing N.J.A.C. 7:7A-9.2(a)18iii and (a)18iv(2) are proposed for deletion because they repeat standard general permit conditions found at proposed N.J.A.C. 7:7A-4.3.

Proposed N.J.A.C. 7:7A-5.18(d) contains a new provision not found in the existing rules. It allows the Department to require the dam owner to place a conservation restriction on any portions of the lake bottom owned by the dam owner. The restriction would last five years, so as to allow any natural wetlands in the lake bottom area to reestablish themselves.

7:7A-5.19 General Permit 19 – Docks and piers

Proposed new N.J.A.C. 7:7A-5.19, which authorizes construction of docks, piers, and public boat ramps, replaces existing N.J.A.C. 7:7A-9.2(a)19. The proposed new general permit is reorganized, but its substance differs only slightly from the existing general permit.

Proposed N.J.A.C. 7:7A-5.19(a), which lists the activities authorized under the general permit, is relocated from existing N.J.A.C. 7:7A-9.2(a)19, with minor clarifications and changes. The proposed general permit authorizes the same activities as existing N.J.A.C. 7:7A-9.2(a)19. In addition, the proposal clarifies at N.J.A.C. 7:7A-5.19(a)1 that docks or piers built in State open waters on pilings are not regulated under the freshwater wetlands program. This has always been true, because the Department regulates only the discharge of dredged or fill material into open waters, and dock pilings are not considered fill. Thus, the portion of a dock that crosses wetlands and/or transition areas to get to the open water is regulated, but the portion of the dock located on pilings in the open water is not.

Proposed N.J.A.C. 7:7A-5.19(a)2 authorizes construction of a public boat ramp. Again, this is the same as the existing general permit, with clarifications. The proposal clarifies that, because a boat ramp requires fill, construction of a boat ramp is regulated not only in freshwater wetlands and transition areas, but also in State open waters.

Proposed N.J.A.C. 7:7A-5.19(b) sets forth limits on the activities authorized under the general permit. Proposed N.J.A.C. 7:7A-5.19(b)1 is recodified from existing N.J.A.C. 7:7A-9.2(a)19i(3), which limits disturbance for a dock or pier to one tenth acre. However, since a properly built dock or pier (i.e., one placed on pilings) will not be regulated in State open waters, proposed N.J.A.C. 7:7A-5.19(b)1 clarifies that the one tenth acre of disturbance does not include State open waters disturbance, but only freshwater wetlands and transition areas disturbances.

Proposed N.J.A.C. 7:7A-5.19(b)2 is recodified, with minor clarifications that do not affect its meaning, from existing N.J.A.C. 7:7A-9.2(a)19ii(3), which limits disturbance for a boat ramp to one tenth acre.

Proposed new N.J.A.C. 7:7A-5.19(b)3 clarifies that, if an applicant wishes to build both a dock and a boat ramp, combined disturbance shall not exceed one tenth acre.

Proposed N.J.A.C. 7:7A-5.19(c) includes provisions found in the existing rule at N.J.A.C. 7:7A-9.2(a)19i(6), with clarifications and changes. The existing rule requires that all docks and piers be elevated four feet above the ground. However, the proposed general permit divides wetlands into two categories – tidal and non-tidal, and applies a different elevation requirement to each. Some tidal wetlands are not governed by the rules for coastal wetlands but by the freshwater wetlands rules. These are wetlands that may not be included in the mapping that determines the jurisdiction of the coastal wetlands rules. For these tidal wetlands, the general permit continues to require a four foot elevation for docks and piers, in order to be consistent with the treatment of other tidal wetlands under the coastal rules. However, for docks or piers in non-tidal wetlands, or in transition areas, the proposed general permit does not set a numerical limit, but requires only that the dock or pier be elevated to a height that will ensure no effect on the hydrology of the wetlands.

Proposed N.J.A.C. 7:7A-5.19(d), which requires that a dock, pier or boat ramp be perpendicular to the shoreline, is recodified from existing N.J.A.C. 7:7A-9.2(a)19i(4). The existing general permit allows divergence from the perpendicular if a perpendicular configuration is not feasible. However, the proposed general permit only allows a divergence from the perpendicular only if a different configuration would cause less impact to wetlands and aquatic resources.

Proposed new N.J.A.C. 7:7A-5.19(e) clarifies the meaning of a "public dock or pier," because the proposed general permit, unlike the existing one, has different requirements based on whether a dock or pier is public or private.

Proposed new N.J.A.C. 7:7A-5.19(f) includes additional requirements that apply only to private docks and piers. Proposed N.J.A.C. 7:7A-5.19(f)1 allows only one dock per lot. This requirement is found in the existing rule at N.J.A.C. 7:7A-9.2(a)19i(1). In the existing rule, it applies to all docks and piers, whether public or private, whereas the proposal would no longer impose this limit on public docks or piers. This reflects the fact that many public properties are large and need more than one location at which the public can gain access to the water.

Proposed new N.J.A.C. 7:7A-5.19(f)2 limits the width of a private dock or pier to six feet. This is found in the existing rule at N.J.A.C. 7:7A-9.2(a)19i(4). In the existing rule, it applies to all docks and piers, whether public or private. Under the proposed general permit, this limit would apply to both public and private docks or piers, but a public pier could be wider in certain limited circumstances (see description of N.J.A.C. 7:7A-5.19(g) below).

Proposed new N.J.A.C. 7:7A-5.19(g) includes an additional requirement that a public dock or pier be no wider than six feet unless it must be wider to comply with construction codes for access by disabled people, or if it is used for group instruction. This will encourage the use of public outdoor facilities for people with disabilities, and for wetlands education.

Proposed new N.J.A.C. 7:7A-5.19(h) includes an additional requirement that an applicant who wishes to build a boat ramp show that there is no onsite alternative with

less impact to wetlands, transition areas, and/or State open waters. This is found in the existing rule at N.J.A.C. 7:7A-9.2(a)19ii(1).

The proposal deletes nearly identical provisions at N.J.A.C. 7:7A-9.2(a)19i(2) and ii(4) prohibiting a negative impact on threatened or endangered habitat, since this is covered in the standard conditions for general permits at N.J.A.C. 7:7A-4.3.

The proposal deletes requirements at existing N.J.A.C. 7:7A-9.2(a)19i(4) that a dock or pier be no longer than necessary to reach deep water, 50 feet outside of navigation channels, and no more than 50 feet long in most cases. Because the Department does not regulate the dock or pier once it has crossed over into the State open waters, this provision is not necessary.

The proposal deletes requirements at existing N.J.A.C. 7:7A-9.2(a)19i(5), which specify width and spacing of planking. This was designed to reduce shading of wetlands. However, because the general permit contains a limit on disturbance, and shading is specifically included as a type of disturbance at proposed N.J.A.C. 7:7A-5.19(b)1, this provision is not necessary.

The proposal deletes a requirement at existing N.J.A.C. 7:7A-9.2(a)19ii(2) that requires boat ramps to be made out of concrete or natural materials such as crushed stone or shells for boat ramps, and requires that the ramp be placed so as to minimize excavation and filling. The Department believes that this provision is overly detailed without providing a major environmental benefit. Shell and crushed stone are not practical materials for boat ramps in most parts of the state. Further, the types of materials that must be used to build a stable boat ramp are generally similar to each other in their environmental impact and thus it is not appropriate to require one rather than another. The proposed general permit adequately ensures minimization of impact by specifying at N.J.A.C. 7:7A-5.19(d) that the boat ramp must be perpendicular to the shoreline unless another configuration would cause less impact.

7:7A-5.20 General Permit 20 – Bank Stabilization

Proposed N.J.A.C. 7:7A-5.20 is recodified from existing N.J.A.C. 7:7A-9.2(a)20, with major substantive changes, described below.

Proposed N.J.A.C. 7:7A-5.20(a), which sets forth the scope of the general permit, includes provisions found at existing N.J.A.C. 7:7A-9.2(a)20, with additional detail and minor clarifications that do not affect meaning.

Proposed N.J.A.C. 7:7A-5.20(b) is a new provision not found in the existing rule. It requires the use of vegetative or bioengineering stabilization methods unless a demonstration shows that the Standards for Soil Erosion and Sediment Control in New Jersey require other methods. This provision will increase the use of these more environmentally friendly methods of bank stabilization and will reduce the unnecessary use of rip-rap and other higher impact methods.

Proposed new N.J.A.C. 7:7A-5.20(c) replaces existing N.J.A.C. 7:7A-9.2(a)20i, which limits bank stabilization projects to 150 feet in length. The proposal retains the 150 foot length limit for some bank stabilization methods, but provides longer limits for other bank stabilization methods which are more environmentally beneficial. The intent of the proposed general permit is to encourage the use of vegetative and soil bioengineering bank stabilization methods rather than rip-rap, because these methods are more environmentally beneficial. Therefore, the proposed general permit limits activities using only rip-rap to 150 feet of stream bank. Soil bioengineering methods of bank stabilization (which sometimes involve small amounts of rip-rap combined with vegetation) may disturb up to 300 feet of bank. A bank stabilization project listed as an "action now" priority by the Department's Division of Watershed Management may disturb up to 500 feet of bank, while no disturbance limit is imposed on bank stabilization using only vegetative methods.

Proposed new N.J.A.C. 7:7A-5.20(c) also clarifies that the length limits apply to the length of the stream bank affected, not the length of the stream affected. The Department's experience under the existing general permit has shown that many people mistakenly assume that they may stabilize both sides of the stream for 150 feet, or one side for 300 feet. The proposal clarifies that the general permit's length limits are intended to limit the total length of stream bank disturbed. A bank stabilization project causes a great deal of stream disturbance, whether performed on one or both banks of a stream. Restricting the stabilization activities to one bank of the stream does not reduce impacts sufficiently to justify increasing the total length of stream disturbance. For example, a bank stabilization using only rip-rap could disturb one bank of a stream for a distance of 150 feet, or both banks for 75 feet.

Proposed N.J.A.C. 7:7A-5.20(d) clarifies that the length limits in proposed N.J.A.C. 7:7A-5.20(c) apply to each bank stabilization method, and that these methods may be combined in one project. Thus, a project may involve two different bank stabilization methods, as long as the total length of stream affected by each method is within the limit that applies to that method.

Proposed N.J.A.C. 7:7A-5.20(e), which requires that environmental impact be minimized in various ways, includes provisions found in the existing rules at N.J.A.C. 7:7A-9.2(a)20ii, iv, v, and vii, with minor clarifications that do not affect meaning. In addition, proposed new N.J.A.C. 7:7A-5.20(e)2 requires that any freshwater wetlands and/or transition area disturbance in order to gain access to the area where the bank stabilization will occur shall be the minimum necessary, and no wider than 20 feet. Proposed new N.J.A.C. 7:7A-5.20(e)3 allows replacement of previously eroded material only upon a demonstration that it will be environmentally beneficial. This provision is intended to allow an applicant to replace a portion of stream bank that has washed away, if the applicant can show that the bank did exist and that replacement of the bank would be environmentally beneficial.

The substance of existing N.J.A.C. 7:7A-9.2(a)20iii, which limits the volume of rip-rap to one cubic yard per linear foot of stream, is found at proposed N.J.A.C. 7:7A-5.20(e)6. The proposed provision limits rip-rap or other energy dissipating material to the minimum necessary to prevent erosion, and to no more than 150 cubic yards unless a greater amount is required to comply with the New Jersey Standards for Soil Erosion

and Sediment Control. The Standards for Soil Erosion and Sediment Control are promulgated by the New Jersey Department of Agriculture, which is the State agency assigned to be the lead agency on soil erosion matters. Any project causing more than 5000 square feet of disturbance must comply with these Standards.

The 150 cubic yard limit is derived by multiplying the one cubic yard per linear foot limit in existing general permit 20 by the 150 foot length limit in existing general permit 20. In the Department's experience, it is sometimes impossible to stabilize an area in accordance with the Standards for Soil Erosion and Sediment Control without using more than 150 cubic yards of fill, while it is sometimes possible to stabilize an area adequately with far less fill. Thus, the existing general permit sometimes places applicants in the untenable position of having to violate one State law (the Standards for Soil Erosion and Sediment Control) in order to comply with another (general permit 20). The proposed new provision will alleviate these problems by requiring the minimum amount of fill in all cases, so as to provide maximum environmental protection; and by allowing more fill if necessary to comply with the Standards, so as to remove the conflict between the two State laws.

Existing N.J.A.C. 7:7A-9.2(a)20vi is proposed for deletion, since it repeats a condition requiring clean fill which is found in the general conditions for all general permits at proposed N.J.A.C. 7:7A-4.3.

Existing N.J.A.C. 7:7A-9.2(a)20viii is proposed for deletion, since it repeats a condition requiring compliance with the Flood Hazard Area Control Act which is found in the general conditions for all general permits at proposed N.J.A.C. 7:7A-4.3.

7:7A-5.20A Combined general permit 20 and flood hazard area permit

Proposed N.J.A.C. 7:7A-5.20A provides for a combined freshwater wetlands general permit and stream encroachment permit. This is one of five general permits for which the proposal provides the option of a combined freshwater wetlands and stream encroachment permit. The five are: general permit 2 for underground utility lines (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.2A), general permit 10A for minor road crossings (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.10C), general permit 11 for outfalls and intakes (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.11A), general permit 20 for bank stabilization activities (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.20A), and general permit 26 for minor stream cleaning (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.26A). If these combined permits prove useful, the Department will consider expanding the number of combined permits through future rulemakings.

Proposed N.J.A.C. 7:7A-5.20A(a) provides for a combined general permit 20 and flood hazard area permit, for a project that meets the requirements for general permit 20 and the requirements for bank stabilization under the flood hazard area rules.

Proposed N.J.A.C. 7:7A-5.20A(b) provides that the combined general permit 20 and flood hazard area permit are subject to the conditions for combined permits (at

proposed N.J.A.C. 7:7A-4.6), and the application requirements for combined permits at N.J.A.C. 7:7A-10.7.

7:7A-5.21 General permit 21— Above ground utility lines

Proposed N.J.A.C. 7:7A-5.21, which authorizes construction and maintenance of above ground utility lines, is recodified, with major reorganization and one very minor substantive change, from existing N.J.A.C. 7:7A-9.2(a)21.

Proposed N.J.A.C. 7:7A-5.21(a) lists the types of activities authorized under the general permit. The list of activities is the same as in the existing general permit, except for some clarifications. First, the proposal clarifies that a pole or tower is not authorized under the general permit if it does not support a pipe, wire, or cable. The intent of general permit 21 is to allow poles or towers for a utility line that supports several points on a wire or line. Such linear utilities cannot easily be moved out of the wetlands and still transmit utilities where they need to go. However, a free standing tower that does not carry a line or wire need not be located within a certain proximity to the next tower, and therefore can more easily be placed outside of the wetlands. Thus, the proposed provision clarifies that such a free standing pole or tower would not be authorized under general permit 2. Proposed N.J.A.C. 7:7A-5.21(a)4 clarifies that the general permit covers limited maintenance of cleared vegetation under a utility line constructed under the general permit.

Proposed new N.J.A.C. 7:7A-5.21(b) sets forth limits on disturbance under the general permit. Proposed N.J.A.C. 7:7A-5.21(b)1 limits the width of temporary disturbance to sixty feet. This is found in the existing general permit at N.J.A.C. 7:7A-9.2(a)21ii.

Proposed new N.J.A.C. 7:7A-5.21(b)2 limits permanent disturbance to one acre of freshwater wetlands, transition areas, and State open waters combined. This limit is found in the existing rule at N.J.A.C. 7:7A-9.2(a)21i. In addition, the proposal limits the width of disturbance to twenty feet, unless the disturbance must be wider to comply with the law. This is found in the existing rule at N.J.A.C. 7:7A-9.2(a)21iii, but the exception is new. This exception is intended to allow a wider clearing for utility lines, such as high capacity power lines, which may be required by Federal law to have wider clearings for safety reasons.

Proposed new N.J.A.C. 7:7A-5.21(c) prohibits interference with the hydrology of the aquatic resource. This is found in the existing rule at N.J.A.C. 7:7A-9.2(a)21vii.

Proposed new N.J.A.C. 7:7A-5.21(d) requires that areas not within the area which may be permanently maintained must be allowed to revert to their natural condition. This differs slightly from the existing rule, which requires that areas disturbed for access must be replanted with wetlands plants. Because the disturbance is temporary and excavation is typically minimal for above ground utility lines, the proposal requires merely that these areas be allowed to revert to their natural condition.

7:7A-5.22 General permit 22 – Animal waste management activities

Proposed N.J.A.C. 7:7A-5.22 creates a new general permit, which authorizes construction of animal waste management structures on wetlands already used for pasture or crops. A substantial amount of the pollution found in wetlands and waters in New Jersey comes from improper storage and disposal of manure and other animal waste. The Department has had major successes in restoring the quality of waters such as the Navesink River by aggressively working to improve the management of animal waste on farms along water bodies. Thus, the Department believes that any disturbance of wetlands caused by the installation of animal waste management structures will be offset by the resulting improvement of the water quality in those wetlands and the surrounding waters.

Proposed N.J.A.C. 7:7A-5.22(a) lists the types of activities authorized by the general permit. All activities must be approved by the local Soil Conservation District.

Proposed N.J.A.C. 7:7A-5.22(b) limits disturbance under general permit 22 to one acre or less.

Proposed N.J.A.C. 7:7A-5.22(c) sets forth the requirements for eligibility for the general permit. These requirements are intended to ensure that only existing, active farms may use the general permit, and that farm practices are consistent with the requirements of the Natural Resources Conservation Service and the local Soil Conservation District. It should be noted that the general permit does not necessarily apply to all wetlands on a farm. It applies only if the specific wetland that will be disturbed meets the definition of a farmed wetland and the other general permit requirements.

Proposed N.J.A.C. 7:7A-5.22(c)1 requires that the animal waste management activities be necessary to implement an animal waste management plan developed by the Natural Resources Conservation Service and approved by the local Soil Conservation District. These plans address environmental issues throughout a farm and help farmers develop environmentally responsible farming practices.

Proposed N.J.A.C. 7:7A-5.22(c)2 requires that activities pursued under general permit 22 be part of an established, ongoing farming, ranching or silviculture operation. This means the farm must have been in operation since before the enactment of the FWPA.

Proposed N.J.A.C. 7:7A-5.22(c)3 requires that the animal waste management activities must be placed in a farmed wetland.

Proposed N.J.A.C. 7:7A-5.22(d) requires that, if the animal waste management activities require a NJPDES permit under the New Jersey Water Pollution Control Act, the NJPDES permit must be obtained prior to the start of activities under general permit 22. A NJPDES permit would be required in accordance with N.J.A.C. 7:14A if the farm containing the animal waste management system is determined to be a concentrated animal feeding operation (CAFO) or is a significant contributor of pollutants to waters of the state.

7:7A-5.23 General permit 23 – Expansion of cranberry growing operations in the Pinelands

This general permit was adopted effective October 4, 1999. See 31 N.J.R. 1562(a) and 31 N.J.R. 2964(a). No changes are proposed to this general permit.

7:7A-5.24 General permit 24 – Spring developments

Existing N.J.A.C. 7:7A-9.2(a)24 (general permit 24), which authorizes the placement of bulkheads adjacent to human-made lagoons, is proposed for deletion because the Department now regulates these bulkheads under the coastal rules rather than the freshwater wetlands rules.

Proposed N.J.A.C. 7:7A-5.24 includes a new general permit for construction of a spring development in farmed wetlands. Proposed general permit 24 authorizes construction of a spring development for watering livestock on land already used for pasture or crops. Wetlands located on a farm near a pond or stream often sustain a substantial amount of damage from trampling by livestock as they drink from the water body. A spring development pumps or diverts water from a water body to a tub or trough from which livestock can drink. The general permit will allow placement of pipes through the wetlands that are adjacent to the water, in order to transport the water out of the wetlands for the livestock. The small disturbance caused by the pipes will be more than offset by the prevention of wetlands trampling by the livestock.

Proposed N.J.A.C. 7:7A-5.24(a) lists the types of activities authorized by the general permit, and specifically prohibits use of the general permit for irrigation or for any purpose other than livestock watering.

Proposed N.J.A.C. 7:7A-5.24(b) limits disturbance under general permit 24 to one quarter acre or less, and clarifies that the activities may not drain any additional area.

Proposed N.J.A.C. 7:7A-5.24(c) sets forth the requirements for eligibility for the general permit. These requirements are intended to ensure that only existing, active farms may use the general permit, and that farm practices are consistent with the requirements of the Natural Resources Conservation Service and the local Soil Conservation District. It should be noted that the general permit does not necessarily apply to all wetlands on a farm. It applies only if the specific wetland that will be disturbed meets the definition of a farmed wetland, and the other general permit requirements.

Proposed N.J.A.C. 7:7A-5.24(c)1 requires that the spring development activities be necessary to implement a farm management plan developed by the Natural Resources Conservation Service and approved by the local Soil Conservation District. These plans address environmental issues throughout a farm and help farmers develop environmentally responsible farming practices.

Proposed N.J.A.C. 7:7A-5.24(c)2 requires that activities pursued under general permit 24 be part of an established, ongoing farming, ranching or silviculture operation. This means the farm must have been in operation since before the enactment of the FWPA.

Proposed N.J.A.C. 7:7A-5.24(c)3 requires that the spring development activities must be placed in a farmed wetland which is eligible for farmland assessment.

Proposed N.J.A.C. 7:7A-5.24(d) requires that the portion of the spring development from which the livestock drink must be outside of freshwater wetlands and State open waters. This will ensure that wetlands and State open waters are not trampled.

7:7A-5.25 General permit 25 – Malfunctioning individual subsurface sewage disposal (septic) systems

Proposed N.J.A.C. 7:7A-5.25 is recodified from existing N.J.A.C. 7:7A-9.2(a)25, which authorizes repair of malfunctioning septic systems.

Proposed N.J.A.C. 7:7A-5.25(a), which lists the types of activities authorized by the general permit, is recodified, with minor clarifications that do not affect meaning, from existing N.J.A.C. 7:7A-9.2(a)25. The proposed provision also clarifies that the general permit does not apply in State open waters.

Proposed N.J.A.C. 7:7A-5.25(b), which limits total disturbance under the general permit to one quarter acre, is recodified from existing N.J.A.C. 7:7A-9.2(a)25iv, with minor clarifications that do not affect its meaning.

Proposed N.J.A.C. 7:7A-5.25(c), which prohibits use of general permit 25 for expansion or change in use of the facility, is recodified from existing N.J.A.C. 7:7A-9.2(a)25i, with minor clarifications that do not affect its meaning.

Proposed N.J.A.C. 7:7A-5.25(d), which provides a special expedited permit process for general permit 25, is recodified from existing N.J.A.C. 7:7A-7.6(c)4ii (transition area waiver applications) and existing N.J.A.C. 7:7A-9.5(f) (general permit applications). The proposal reorganizes the existing provisions for clarity without changing their meaning, and adds more detail regarding the Department's review procedure. In addition, the proposal adds more specific requirements regarding the findings that a board of health must make. Currently, the applicant must merely submit an approval from the local board of health. The proposal changes this by requiring that the board of health make two specific findings: that the proposed activities comply with the Department's septic rules, and that there is no alternative onsite location that would be appropriate for the septic system.

Proposed N.J.A.C. 7:7A-5.25(e), which sets forth the Department's review procedure under the expedited permit process, is recodified from existing N.J.A.C. 7:7A-7.6(c)4ii and N.J.A.C. 7:7A-9.5(f), with clarifications that do not change its meaning.

7:7A-5.26 General permit 26 – minor stream cleaning for local government agencies

The proposal creates two new general permits covering stream cleaning. The more minor stream cleaning projects are authorized under proposed general permit 26, found at N.J.A.C. 7:7A-5.26. The Department is separating stream cleaning activities into these two groups in order to make approvals simpler and quicker for the most minor of the activities, and to allow greater focus on larger or more environmentally sensitive projects. This system separates stream cleaning projects into those that are very simple and have very minor environmental implications, and those that, while still minimal in impact, are more complex to review or may need closer scrutiny to ensure that impacts are minimized. By separating stream cleaning projects into two groups, the Department hopes to simplify and speed review for the smallest projects, while focussing more scrutiny on those that are more complex or have a greater potential for environmental impact.

Proposed new general permit 26 authorizes minor stream cleaning. The general permit is designed to be consistent with the Department's existing stream encroachment requirements for stream cleaning with 1997 amendments to the New Jersey Flood Hazard Area Control Act at N.J.S.A. 58:16A-67. The Department is also preparing amendments to the Flood Hazard Area Control Act rules to implement these amendments. Because of the constant sedimentation of streams and water bodies, and their tendency to become clogged with branches, garbage, and other debris, stream cleaning is an ongoing activity in New Jersey.

Proposed N.J.A.C. 7:7A-5.26(a) lists the types of activities authorized under the general permit, and provides that the activities must be conducted by a county or municipality.

Proposed N.J.A.C. 7:7A-5.26(b) sets limits and conditions on the activities which may be pursued under the general permit. Proposed N.J.A.C. 7:7A-5.26(b)1 requires that the sole purpose of the activities be stream cleaning. Proposed N.J.A.C. 7:7A-5.26(b)2 requires that the activities must be necessary and in the public interest. Proposed N.J.A.C. 7:7A-5.26(b)3 and 4 prohibit the disturbance or enlargement of the stream bed or banks. Proposed N.J.A.C. 7:7A-5.26(b)5 limits the activities to removal of accumulated sediment, debris, and/or garbage from a natural stream; or the removal of any material from a concrete lined stream. Proposed N.J.A.C. 7:7A-5.26(b)6 requires that the permittee work only from one stream bank if possible. This will minimize the area disturbed by heavy equipment. Proposed N.J.A.C. 7:7A-5.26(b)7 requires that use of heavy equipment in the stream must be minimized. Proposed N.J.A.C. 7:7A-5.26(b)8 requires preservation of vegetation and trees on the more southerly or westerly bank of the stream in order to preserve shading. Shading is important because it keeps the water cool, which allows the water to hold more dissolved oxygen. Greater amounts of dissolved oxygen in the water improve habitat value and water quality in general.

Proposed N.J.A.C. 7:7A-5.26(c) sets forth additional limits that apply if the stream cleaning project involves sediment removal. The provision limits the size of the stream that may be affected, requires a showing of necessity based on flooding concerns, and limits eligible streams based on threatened or endangered species and water quality classification. It also imposes timing restrictions to protect fish resources. These are

the same timing restrictions that apply to all general permits under proposed N.J.A.C. 7:7A-4.3.

Proposed N.J.A.C. 7:7A-5.26(d) requires that material removed from a stream must be disposed of outside of wetlands, transition areas, and State open waters, unless the applicant demonstrates that this would cause more environmental harm than disposal in these areas.

Proposed N.J.A.C. 7:7A-5.26(e) sets forth the application requirements for the expedited authorization for activities covered by general permit 26. Proposed N.J.A.C. 7:7A-5.26(f) and (g) set forth the expedited authorization process, under which the Department has 15 or 60 days (depending on whether the project involves sediment removal) after receiving the application in which to notify the applicant that the project is not authorized under the general permit. If the Department does not request more information or notify the applicant of a problem with the proposed project, the project is automatically authorized upon the 15th or 60th day after the Department received the application. This expedited authorization process is also used for certain activities under general permit 1, and for the repair of malfunctioning septic systems under general permit 25.

Proposed N.J.A.C. 7:7A-5.26(h) provides for the Department to identify the technical reasons for any Department decision not to authorize the activity, and requires that, if the problem is an inability to determine the natural stream bed, the Department must assist the applicant in making this determination.

Proposed N.J.A.C. 7:7A-5.26(i) requires a permittee who is removing sediment from a stream to submit a completion report to the Department, including a certification that all conditions of the general permit have been complied with.

7:7A-5.26A Combined general permit 26 and flood hazard area permit

This is one of five general permits for which the proposal provides the option of a combined freshwater wetlands and stream encroachment permit. The five are: general permit 2 for underground utility lines (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.2A), general permit 10A for minor road crossings (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.10C), general permit 11 for outfalls and intakes (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.11A), general permit 20 for bank stabilization activities (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.20A), and general permit 26 for minor stream cleaning (provisions for the combined permit found at proposed N.J.A.C. 7:7A-5.26A).

The Department intends in the future to make the minor stream cleaning provisions in the Department's stream encroachment rules identical in substance to general permit 26. Thus, an applicant will be able to obtain either a stream encroachment permit or a general permit 26 authorization, and either one will constitute a combined general permit authorization and stream encroachment permit for the stream cleaning project.

7:7A-5.27 General permit 27 – Redevelopment of previously disturbed sites

Proposed new general permit 27 authorizes redevelopment of an area degraded by previous human disturbance. By encouraging redevelopment of areas already degraded by previous use, the general permit will relieve some of the development pressure on the remaining open space in New Jersey. Even in an upland area, redevelopment brings with it many obstacles and difficulties, including the possibility of contamination on the site. Consequently, developers often prefer to develop undisturbed land, especially if the usual difficulties of redevelopment are accompanied by the additional regulatory burdens of complying with wetlands permit requirements. The proposed general permit will reduce the burden of one obstacle (freshwater wetlands permit requirements) and thus create a greater incentive for a developer to use previously disturbed land rather than undisturbed land.

Proposed N.J.A.C. 7:7A-5.27(a) sets forth the scope of the general permit. The general permit applies in freshwater wetlands, transition areas, and State open waters.

Proposed N.J.A.C. 7:7A-5.27(b) sets forth limits on the activities under the general permit.

Proposed N.J.A.C. 7:7A-5.27(b)1 requires that the activities must be located in an area that has already been disturbed by commercial or industrial activities. The general permit would not apply to an area previously used for residential activities. Since residential use generally causes less environmental impact, such an area is more likely to retain wetlands values and functions than one used for commercial or industrial activities.

Proposed N.J.A.C. 7:7A-5.27(b)2 requires that the area be abandoned or underutilized. The Department's intent in proposing this general permit is to channel new development into unused areas that are already disturbed, in order to help prevent development of undisturbed areas. It is not intended merely to facilitate a change in land use from one commercial or industrial activity to another.

Proposed N.J.A.C. 7:7A-5.27(b)3 limits applicability of the general permit to areas that have been identified pursuant to various redevelopment programs. This will ensure that the area is suitable for redevelopment.

Proposed N.J.A.C. 7:7A-5.27(b)4 requires that the wetlands, transition areas, and State open waters that will be disturbed are significantly degraded by previous human disturbance and are not significantly ecologically valuable. In some cases, an area may provide significant habitat or other values despite previous disturbance or even contamination. In such a case, disturbance of the area would not have minimal environmental impact, so the general permit would not apply.

Proposed N.J.A.C. 7:7A-5.27(c) limits disturbance under the general permit to one acre. However, unlike most other general permits, this one acre may be added to the disturbance caused by activities under other general permits on the same site, when calculating the total disturbance allowed under multiple general permits. Again, this is

intended to create an incentive to locate development in previously disturbed areas instead of on pristine land.

Proposed N.J.A.C. 7:7A-5.27(d) requires mitigation for all disturbance under general permit 27, if the activities authorized under the general permit disturb more than one half acre. As mentioned above, even significantly disturbed areas can provide some ecological values and functions, especially if the disturbance is of a significant size. The mitigation requirement will ensure that values or functions provided by the wetland being disturbed will be replaced.

SUBCHAPTER 6 TRANSITION AREA WAIVERS

Transition area waiver provisions currently codified at N.J.A.C. 7:7A-7 are proposed to be recodified, with changes as noted below, at N.J.A.C. 7:7A-6. Provisions describing transition areas, found in the existing rules at N.J.A.C. 7:7A-6, are proposed for recodification, with minor clarifying changes, at N.J.A.C. 7:7A-2.6 through 2.8, where they are incorporated into N.J.A.C. 7:7A-2, Applicability.

Provisions for averaging plan waivers, addressed in the existing rules at N.J.A.C. 7:7A-7.5, are found in proposed N.J.A.C. 7:7A-6.2. Special activity waivers for stormwater management, linear development, and redevelopment, found in the existing rules at N.J.A.C. 7:7A-7.4, are addressed at proposed N.J.A.C. 7:7A-6.3. Special activity waivers for activities covered by a general permit, found in the existing rules at N.J.A.C. 7:7A-7.4(e), are replaced by provisions for general permits that authorize both freshwater wetlands and transition area impacts, at N.J.A.C. 7:7A-4 and 5. Matrix type width reduction waivers, found in the existing rules at N.J.A.C. 7:7A-7.2 and 7.3, are addressed at proposed N.J.A.C. 7:7A-6.4. Hardship waivers, addressed in the existing rules at N.J.A.C. 7:7A-7.2(f) and 7.3(e), are found at proposed N.J.A.C. 7:7A-6.5. Provisions for a transition area waiver for access to a permitted activity, found in the existing rules at N.J.A.C. 7:7A-7.1(f), are found at proposed N.J.A.C. 7:7A-6.1(a)6.

7:7A-6.1 General transition area waiver provisions

Provisions proposed at N.J.A.C. 7:7A-6.1 are recodified, with clarifying changes, from N.J.A.C. 7:7A-7.1.

The proposal deletes existing N.J.A.C. 7:7A-7.1(a). A portion of the provision, stating that the Department shall add additional transition area waiver conditions as necessary to ensure that the purposes and functions of the transition area are not impaired, is relocated to proposed N.J.A.C. 7:7A-6.1(e). The remainder of the provision is deleted because it unnecessarily reiterates portions of the statutory standard for granting a transition area waiver. Since the entire transition area waiver section explains and implements this standard, there is no need to repeat the general standard here.

Existing N.J.A.C. 7:7A-7.1(b) is proposed for deletion because it merely repeats information more clearly set forth in proposed N.J.A.C. 7:7A-2.5, detailing standard transition area widths, and proposed N.J.A.C. 7:7A-2.1, requiring a waiver for a prohibited activity in a transition area.

Existing N.J.A.C. 7:7A-7.1(c), which lists the types of transition area waivers available, is proposed for deletion, to be replaced by proposed N.J.A.C. 7:7A-6.1(a). Proposed new N.J.A.C. 7:7A-6.1(a) contains the same basic listing of the types of transition area waivers as is contained in existing N.J.A.C. 7:7A-7.1(c), but the listing is reworded for easier understanding, and expanded to include three types of waivers. Although these waivers have always been provided for under the existing rules, the existing rule does not list all types of waivers in one place. Except for the addition of these three types of waivers to the listing, the meaning of proposed N.J.A.C. 7:7A-6.1(a)

remains the same as existing N.J.A.C. 7:7A-7.1(c). The three waivers added to the list are:

1. The waiver for access to a permitted activity that the Department grants automatically (as required by N.J.S.A. 13:9B-12) to any person issued a permit to conduct activities in the wetland, provided for under proposed N.J.A.C. 7:7A-6.1(a)6 and found in existing N.J.A.C. 7:7A-7.1(f);
2. The authorization to disturb transition areas based on the fact that an activity is authorized under a general permit, provided for under proposed N.J.A.C. 7:7A-6.1(a)5 and found in the existing rule at N.J.A.C. 7:7A-7.4(e), special activity waiver for general permit activities; and
3. The transition area waiver based on the fact that an activity would be eligible for a freshwater wetlands individual permit if performed in the wetlands. This is provided for under proposed N.J.A.C. 7:7A-6.1(a)2 and found in the existing rule at N.J.A.C. 7:7A-7.4(a). The proposal includes this as a type of special activity waiver, found at proposed N.J.A.C. 7:7A-6.3.

Proposed new N.J.A.C. 7:7A-6.1(a)5 clarifies the proposal's inclusion of transition area disturbances under certain general permits. This proposed change is discussed in detail in the description of the general permit subchapter (proposed N.J.A.C. 7:7A-5) in this Summary, above.

Proposed new N.J.A.C. 7:7A-6.1(b) distinguishes between transition area waivers that change the shape or size of a transition area, and transition area waivers that do not change the transition area but allow prohibited activities to occur within the transition area.

Proposed new N.J.A.C. 7:7A-6.1(c) provides that, in order to prevent prohibited activities in the transition area resulting from construction and use of structures, such structures must be separated from the transition area or wetland. Over the years of implementing the freshwater wetlands program, the Department has determined that construction and use of buildings and other impervious surfaces invariably involves disturbances in the surrounding area. Regardless of good faith intentions and efforts to the contrary, it is virtually impossible to build and use a structure, especially a residence, immediately adjacent to a transition area without conducting prohibited activities in the transition area.

There are many cases in New Jersey where a developer has built multiple homes immediately adjacent to a transition area and then sold the homes, sometimes without ever informing the buyers that their backyard is a regulated transition area. Inevitably, use of the home results in prohibited activities in the transition area, resulting in degradation of the transition area and the adjacent wetlands, numerous enforcement cases, and substantial use of Department resources. Even when efforts are made not to disturb the transition area, the Department has found that buildings and impervious surfaces placed immediately adjacent to transition areas result in a substantial adverse impact on the transition area and wetlands because the human activity spills out into the transition area. Therefore, when reviewing an application, the Department will consider the area immediately surrounding the structure, as well as the structure itself, to be the regulated project. This is reflected in the proposed new definition of "residential

development project," discussed above in the summary of the definitions section, N.J.A.C. 7:7A-1.4.

Various possible solutions to this problem were discussed at a public meeting at Department headquarters on February 16, 1999. Based on this public input, the Department developed proposed N.J.A.C. 7:7A-6.1(c), which limits the issuance of a matrix type or averaging plan waiver if a non-residential structure would be placed within 20 feet of a transition area or wetland, or if a residential development project would be placed within a transition area or a wetland, unless certain measures are taken to prevent any prohibited activities or regulated activities. These measures are set forth at proposed N.J.A.C. 7:7A-6.1(d), described below.

Proposed new N.J.A.C. 7:7A-6.1(d) provides for an applicant to perform certain activities to ensure that no disturbance will take place in a transition area or wetland, in order to be allowed to construct and use a structure closer than allowed under proposed N.J.A.C. 7:7A-6.1(c). The measures required are: designing, constructing, and using the structure in such as way as to cause no disturbance of the transition area and/or wetland; fencing of the transition area and/or wetland; and placing a conservation restriction upon the transition area and/or wetland. Although it has been the Department's experience that it is virtually impossible to construct and use a structure adjacent to a transition area or wetland without intruding upon the transition area or wetland, these measures are provided as an option for an applicant who is willing to ensure that they completely avoid such intrusion.

Proposed new N.J.A.C. 7:7A-6.1(e) states that the Department shall add additional transition area waiver conditions as necessary to ensure that the purposes and functions of the transition area are not impaired. This provision is relocated from existing N.J.A.C. 7:7A-7.1(a), with clarified wording that does not change its meaning.

Existing N.J.A.C. 7:7A-7.1(e) is proposed for deletion. It merely lists some of the sources from which the Department may obtain information when making a decision on a transition area waiver application. The provision is proposed for deletion because it is unnecessary and states the obvious.

Existing N.J.A.C. 7:7A-7.1(f) is proposed for deletion because it provides for the automatic waiver for access, which is relocated in N.J.A.C. 7:7A-6.1(a)6.

Proposed N.J.A.C. 7:7A-6.1(f), which requires each freshwater wetland and its associated transition area to be considered separately for transition area waiver purposes, is recodified from existing N.J.A.C. 7:7A-7.1(d). The proposal includes changes intended to make the rule easier to understand, and lists factors the Department will consider in determining whether a wetland is all one, or is actually multiple separate wetlands. These factors are not detailed in the existing rule, but have long been used by the Department in interpreting existing N.J.A.C. 7:7A-7.1(d), which requires each transition area to be treated separately.

Proposed new N.J.A.C. 7:7A-6.1(g) is recodified from the existing N.J.A.C. 7:7A-7.2(g), with minor clarifications that do not change its meaning. This subsection allows a person who is ineligible for any other transition area waiver to perform a scientific

analysis to show that the proposed activity will have no substantial impact on the wetlands, and thus to obtain a waiver.

Proposed N.J.A.C. 7:7A-6.1(h) is recodified, with changes, from N.J.A.C. 7:7A-7.1(g) in the existing rule, which requires a conservation restriction for certain transition area waivers. The proposal deletes some specific requirements for conservation restrictions, replacing them with a reference to proposed N.J.A.C. 7:7A-15.14, which includes basic requirements for conservation restrictions. However, the proposal retains limits on future use of restricted transition areas found in the existing rules at N.J.A.C. 7:7A-7.1(g)1.

Proposed new N.J.A.C. 7:7A-6.1(i) requires that, if a transition area is reduced below 100 feet, the transition area shall be increased in another area so that the average transition area is at least 100 feet. This is found in the FWPA at N.J.S.A. 13:9B-18(c).

Proposed new N.J.A.C. 7:7A-6.1(j) prohibits issuance of a transition area waiver and general permit authorization on the same site, if the combined effect would be to expand the activity authorized under the general permit beyond the limits in the general permit.

7:7A-6.2 Transition area averaging plan waiver

Provisions proposed at N.J.A.C. 7:7A-6.2 are recodified from the existing rule at N.J.A.C. 7:7A-7.5, with major reorganization and clarifications.

Proposed N.J.A.C. 7:7A-6.2(a) and (b) contain provisions recodified, with clarifying changes that do not affect meaning, from existing N.J.A.C. 7:7A-7.5(a). The provisions include introductory information explaining what an averaging plan waiver is, and explaining that an averaging plan waiver may be granted for a transition area next to either an exceptional resource value or intermediate resource value wetlands.

The introductory language in existing N.J.A.C. 7:7A-7.5(b) is proposed for deletion. The deleted language reiterates the basic concept of an averaging plan, requires the averaging to be done on the applicant's land, and requires that the transition area continue to serve the rule's listed purposes of a transition area. The proposal separates this information into several subsections, described below.

Proposed new N.J.A.C. 7:7A-6.2(b) includes basic minimum limits that apply to all transition area averaging, whether for an exceptional or intermediate resource value wetlands. Additional limits that apply to transition area averaging adjacent to an exceptional resource value wetland are found at proposed N.J.A.C. 7:7A-6.2(c).

Proposed N.J.A.C. 7:7A-6.2(b)1 consolidates repetitive provisions found at existing N.J.A.C. 7:7A-7.5(b)1i and (b)4i.

Proposed N.J.A.C. 7:7A-6.2(b)2 consolidates repetitive provisions found at existing N.J.A.C. 7:7A-7.5(b)1iii(2) and (b)4ii(5).

Proposed N.J.A.C. 7:7A-6.2(b)3 consolidates repetitive provisions found at existing N.J.A.C. 7:7A-7.5(b)1iii(3) and (b)4ii(6).

Proposed N.J.A.C. 7:7A-6.2(b)4 is found at existing N.J.A.C. 7:7A-7.5(b)4ii(7).

Proposed N.J.A.C. 7:7A-6.2(b)5 is a new provision, limiting the placement of a residential development project, as discussed in the description of proposed N.J.A.C. 7:7A-6.1(c), above in this Summary.

Proposed N.J.A.C. 7:7A-6.2(b)6i through v includes provisions found at existing N.J.A.C. 7:7A-7.5(b)4ii(1), (2), (3), (8), and (4), respectively. A change is proposed at N.J.A.C. 7:7A-6.2(b)6iv, which provides a special limit on transition area averaging near National Wildlife Refuges. The existing rule applies this limit anywhere within the drainage basin of such a Refuge. However, a drainage basin can be a very large area encompassing many square miles, especially for a larger river like the Passaic. Therefore, the proposal applies this special limit only within the area encompassed by the same hydrologic unit code (HUC 11) as a National Wildlife Refuge.

Proposed new N.J.A.C. 7:7A-6.2(c) contains additional limits that apply only to transition area averaging adjacent to exceptional resource value wetlands. These limits are found in the existing rule at N.J.A.C. 7:7A-7.5(b). Proposed new N.J.A.C. 7:7A-6.2(c)1 includes provisions found in existing N.J.A.C. 7:7A-7.5(b)1ii.

Proposed new N.J.A.C. 7:7A-6.2(c)2 includes new limits that further restrict transition area averaging adjacent to some trout production waters. The Department's experience indicates that some additional limits are needed to adequately protect these more sensitive exceptional resource value wetlands.

Proposed new N.J.A.C. 7:7A-6.2(c)3i includes provisions found in existing N.J.A.C. 7:7A-7.5(b)3. Proposed new N.J.A.C. 7:7A-6.2(c)3ii includes provisions found in existing N.J.A.C. 7:7A-7.5(b)1iii(1).

Proposed N.J.A.C. 7:7A-6.2(d) contains provisions found in the existing rule at N.J.A.C. 7:7A-7.5(c), requiring that the expansion of a transition area as a result of averaging must take place on the same transition area that is reduced as part of the averaging. In addition, the proposal adds a new requirement that the expanded portion of the transition area must be physically similar to the reduced portion. This is intended to comply with the FWPA requirement that transition area averaging have no substantial impact on the adjacent freshwater wetland.

7:7A-6.3 Special activity transition area waiver

Provisions proposed at N.J.A.C. 7:7A-6.3 are found in the existing rule at N.J.A.C. 7:7A-7.4.

Provisions proposed at N.J.A.C. 7:7A-6.3(a), which introduce the concept of a special activity transition area waiver, are found in the existing rule at N.J.A.C. 7:7A-7.4(a). The proposal shortens and clarifies the provision, with no change in meaning.

Proposed new N.J.A.C. 7:7A-6.3(b) lists the types of special activity transition area waivers. Three of these (for stormwater management, linear development, and redevelopment) are the same types of special activity waivers as are available under the existing rule. The fourth, an individual permit transition area waiver, is available under the existing rule at N.J.A.C. 7:7A-7.4(a), but provisions for this waiver are relocated here in the section on special activity waivers. The proposed list does not include transition area waivers based on general permits, which are included as special activity waivers under the existing rule, because these waivers will now be issued as part of the general permit authorization itself. The proposed new N.J.A.C. 7:7A-6.3(b) does not change the existing meaning of the special activity waiver provisions.

Proposed new N.J.A.C. 7:7A-6.3(c) sets forth basic standards the Department will consider in evaluating alternative locations under the special activity transition area waiver section. These standards are recodified from existing N.J.A.C. 7:7A-7.4(b)3, (c)2, and (d), with no change in meaning. These provisions are necessary because both the stormwater transition area waiver and the linear development transition area waiver require an evaluation of alternative locations.

Provisions at proposed N.J.A.C. 7:7A-6.3(d), providing for a stormwater management special activity transition area waiver, are recodified from existing N.J.A.C. 7:7A-7.4(b), with clarifications that do not affect their meaning. The definition of "stormwater management facility" is proposed to be amended and relocated in the definitions section at N.J.A.C. 7:7A-1.4.

Provisions at proposed N.J.A.C. 7:7A-6.3(e), providing for a linear development special activity transition area waiver, are recodified from existing N.J.A.C. 7:7A-7.4(c), with rewording and clarifications that do not affect their meaning.

Proposed new N.J.A.C. 7:7A-6.3(f), which provides for a redevelopment special activity transition area waiver, is proposed for recodification from existing N.J.A.C. 7:7A-7.4(f), with rewording and clarifications. In addition, the proposal very slightly expands the type of transition area which is eligible for the redevelopment transition area waiver. Under the existing rule, the area must be covered with impervious surfaces. Under the proposal, an area that is not covered with impervious surfaces could be eligible for the redevelopment transition area waiver, provided it is so significantly disturbed that it is not functioning as a transition area at the time of application. For example, an unvegetated railroad embankment covered by gravel would likely be eligible for the redevelopment transition area waiver. However, a lawn would not be considered to be so significantly disturbed as to be eligible.

Proposed new N.J.A.C. 7:7A-6.3(g) provides for a special activity transition area waiver based on the fact that an activity would be eligible for an individual permit if performed in the wetlands. This is found in the existing rule at N.J.A.C. 7:7A-7.2(a). By listing this as a type of special activity transition area waiver, the proposal clarifies the rule without changing its meaning.

Existing N.J.A.C. 7:7A-7.4(g) is proposed for deletion. It relates solely to the special activity transition area waiver in existing N.J.A.C. 7:7A-7.4(e) for activities covered by

certain general permits. Since the proposal deletes N.J.A.C. 7:7A-7.4(e), (g) is no longer needed.

7:7A-6.4 Matrix type width reduction transition area waiver

This proposed new section includes requirements for a matrix type width reduction transition area waiver, or "transition area matrix waiver" in either an exceptional resource value wetland or an intermediate resource value wetland. It consolidates, reorganizes, and rewords provisions found in the existing rules at N.J.A.C. 7:7A-7.2 and 7.3, without changing their meaning. As discussed below, the proposal also relocates hardship transition area waiver provisions from existing N.J.A.C. 7:7A-7.2(f) and 7.3(e) into a new section at proposed N.J.A.C. 7:7A-6.5.

The proposal deletes existing N.J.A.C. 7:7A-7.2(a) and replaces it with proposed new N.J.A.C. 7:7A-6.4(a), which contains the same information in a shorter, clearer form.

The proposal deletes existing N.J.A.C. 7:7A-7.2(b), because it is redundant and contains information already stated elsewhere in the proposal.

Proposed new N.J.A.C. 7:7A-6.4(b) includes limitations on transition area matrix waivers found in the existing rule at N.J.A.C. 7:7A-7.2(c). The proposal makes two substantive changes. First, at proposed N.J.A.C. 7:7A-6.4(b)1, a transition area matrix waiver would be available in a wild and scenic river area if the National Park Service approved the project. This is consistent with recent changes in the Federal rules governing projects in wild and scenic river areas. Second, N.J.A.C. 7:7A-6.4(b)4iv is proposed to replace existing N.J.A.C. 7:7A-7.2(c)6i. The existing provision prohibits a transition area matrix waiver if any of several industries, listed by their SIC codes, would be involved. The proposed provision instead prohibits a transition area matrix waiver for a facility for the storage, processing, or disposal of hazardous substances. The proposed provision more accurately expresses the intent of this provision, which is to prevent use or storage of hazardous materials near the wetlands, where the materials might leak or be flooded, and thus make their way into the wetlands and aquatic ecosystem.

Proposed new N.J.A.C. 7:7A-6.4(c) limits transition area matrix waivers according to the types of exceptional resource value wetlands adjacent to the transition area which is the subject of the waiver. These provisions are found in the existing rule at N.J.A.C. 7:7A-7.2(c)1 and 2. The provisions are reworded and clarified with no change in meaning.

Proposed new N.J.A.C. 7:7A-6.4(d) prohibits issuance of a transition area matrix waiver where an intermediate resource value wetland is a critical habitat for fauna or flora. This is found in the existing rules at N.J.A.C. 7:7A-7.3(c)1. The proposal shortens the provision by replacing a definition of "critical habitat for fauna or flora" with a cross reference to the definition of the term at N.J.A.C. 7:7A-1.4.

Proposed new N.J.A.C. 7:7A-6.4(e) lists the parameters used to determine the amount of transition area reduction allowed under a transition area matrix waiver. These parameters are slope, development intensity and dominant vegetational community. This is found in the existing rule at N.J.A.C. 7:7A-7.2(d) and is reworded here for clarity, with no change in meaning.

Proposed new N.J.A.C. 7:7A-6.4(e) also contains Tables B and C, which are the transition area matrix waiver tables which show how much transition area reduction is possible depending on the three parameters. Table B, which is identical to the transition area matrix found in the existing rule at N.J.A.C. 7:7A-7.2(e), contains the width reduction options for a transition area adjacent to an exceptional resource value wetlands. Table C contains the width reduction options for a transition area on an intermediate resource value wetlands, which are found in narrative form in the existing rules at N.J.A.C. 7:7A-7.3(d)1 through 3. The proposal reformats this information into table form for easier understanding, without changing the meaning.

Proposed new N.J.A.C. 7:7A-6.4(f) clarifies that the transition area matrix waiver options in Table C for intermediate resource value wetlands are the only options available, and if a transition area on an intermediate resource value wetland does not fit into one of those options, no transition area matrix waiver will be issued. This is found in the existing rule at N.J.A.C. 7:7A-7.3(d)4.

Proposed new N.J.A.C. 7:7A-6.4(g) provides the method for determining the slope of a transition area for use in the matrices. This information is located at N.J.A.C. 7:7A-7.2(e)2 in the existing rules, and is reworded for clarity. In addition, the proposal changes the intervals at which slope measurements are taken. In the existing rules, slope measurements must be taken every 200 feet along the transition area boundary, regardless of whether and how many times the slope of the transition area varies. The proposal instead requires that measurements be repeated at representative intervals along the transition area boundary. This will allow the Department the flexibility to require more measurements on a transition area where the slope fluctuates a great deal, and to require fewer where the slope is uniform across the transition area.

Proposed new N.J.A.C. 7:7A-6.4(h) provides the method for determining the dominant vegetational community in a transition area for use in the matrices. This information is located in the existing rule at N.J.A.C. 7:7A-7.2(e)1, and is reworded for clarity, with no change in meaning.

Proposed new N.J.A.C. 7:7A-6.4(i) provides the method for determining the development intensity of a transition area for use in the matrices. This information is located in the existing rule at N.J.A.C. 7:7A-7.2(e)3, and is reworded for clarity, with no change in meaning.

Existing N.J.A.C. 7:7A-7.2(g), which provides the option for an applicant to obtain a waiver through a scientific demonstration of no substantial impact, is proposed to be relocated at N.J.A.C. 7:7A-6.1(g). The proposed new location for this provision will help clarify that it applies to any type of transition area and is not limited to transition areas adjacent to exceptional resource value wetlands.

7:7A-6.5 Hardship transition area waiver

Proposed new N.J.A.C. 7:7A-6.5 includes hardship transition area waiver provisions, found in the existing rule at N.J.A.C. 7:7A-7.2(f) and 7.3(e). The provisions are reworded for clarification, with no change in the meaning of the provisions.

7:7A-6.6 Application for a transition area waiver

Proposed new N.J.A.C. 7:7A-6.6 replaces existing N.J.A.C. 7:7A-7.6, which includes detailed application requirements, with a cross reference to the consolidated application requirements at proposed N.J.A.C. 7:7A-10. This is in keeping with the consolidation and streamlining of application requirements detailed above in the discussion of reorganization, above in this Summary.

Existing N.J.A.C. 7:7A-7.7, Procedure for review of transition area waiver applications, is proposed for deletion because the proposal consolidates application review procedures for all permits and waivers at proposed N.J.A.C. 7:7A-12.1.

Existing N.J.A.C. 7:7A-7.8, Hearings and appeal, is proposed for deletion since all hearings and appeal requirements are proposed to be consolidated at N.J.A.C. 7:7A-1.7.

Existing N.J.A.C. 7:7A-7.9, Duration, effect, modification and transfer of transition area waivers, is proposed for deletion because it repeats requirements found in the proposed consolidated provisions governing duration of permits and waivers at N.J.A.C. 7:7A-13.3, governing modification of permits and waivers at N.J.A.C. 7:7A-14, and governing transfer of permits and waivers at N.J.A.C. 7:7A-14.2.

Existing N.J.A.C. 7:7A-7.10, Cancellation, withdrawal, resubmission and amendment of applications, is proposed for deletion because the provisions are proposed for consolidation with other similar provisions at N.J.A.C. 7:7A-12.6.

Existing N.J.A.C. 7:7A-7, Appendix A is proposed to be recodified at N.J.A.C. 7:7A-6, with no change.

SUBCHAPTER 7 INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

Transition area waiver provisions currently codified at N.J.A.C. 7:7A-7 have been recodified, with changes as noted in this Summary above, at N.J.A.C. 7:7A-6. The individual permit provisions proposed at N.J.A.C. 7:7A-7 are recodified, with minor clarifying changes, from existing N.J.A.C. 7:7A-3.

7:7A-7.1 General provisions for individual permits

Existing N.J.A.C. 7:7A-3.1, which contains a requirement for an alternatives analysis, is proposed to be deleted because this requirement is proposed at N.J.A.C. 7:7A-7.2(b).

Proposed new N.J.A.C. 7:7A-7.1(a) provides a "road map," referring to the individual permit standards that apply to each type of activity.

Proposed N.J.A.C. 7:7A-7.1(b) prohibits the Department from considering a mitigation proposal in determining whether a permit will be issued for a project. This is found in the existing rule at N.J.A.C. 7:7A-14.1(d), and is also found in the FWPA at N.J.S.A. 13:9B-13b.

Proposed new N.J.A.C. 7:7A-7.1(c) clarifies that an individual permit applies to cumulative disturbance, and prohibits segmentation of a project into general permit and individual permit activities. This is found in the existing rule at N.J.A.C. 7:7A-9.2(c).

7:7A-7.2 Standard requirements for all individual permits

This section includes provisions found in the existing rules at N.J.A.C. 7:7A-3.1, 3.2, and 3.5, specifying the basic standards that apply to all applications for an individual permit.

Proposed new N.J.A.C. 7:7A-7.2(a) sets forth the scope of the section and clarifies that additional requirements apply to an application for a non water-dependent activity located in a wetland or special aquatic site (proposed N.J.A.C. 7:7A-7.3); and to a non water-dependent activity located in an exceptional resource value wetland or trout production water (proposed N.J.A.C. 7:7A-7.4). Since the basic requirements are the same for water dependent and non water dependent activities, this section consolidates the basic requirements for all activities, with later sections detailing the additional requirements for non water dependent activities.

Proposed N.J.A.C. 7:7A-7.2(b) lists the standards for issuance of an individual permit.

Proposed N.J.A.C. 7:7A-7.2(b)1, which includes the basic requirement that there be no practicable alternative to an activity, is found in the existing rules at N.J.A.C. 7:7A-3.1(a), 3.2(a), and 3.3(a).

Proposed N.J.A.C. 7:7A-7.2(b)2 through 12, which list standard requirements for all individual permits, are recodified from existing N.J.A.C. 7:7A-3.5(a)1 through 11 with clarifications.

An addition is proposed to N.J.A.C. 7:7A-7.2(b)2i, which requires that an activity be in the public interest. The new provision states that, in determining whether an activity is in the public interest, the Department will consider the State Development and Redevelopment Plan (State Plan) as one source of guidance. The Department believes that the State Plan embodies the type of balance that was intended by the Legislature in creating the public interest test. The State Plan serves the public interest by providing a comprehensive environmental design for protecting the State from inappropriate development, discouraging sprawl, and protecting sensitive areas in an equitable manner. The State Plan was developed with extensive participation by the public as well as State agencies and county and municipal governments. The State Plan is based on planning decisions at the State, county, and municipal levels and reflects well-established growth management principles. Thus, the Department believes that it is appropriate to use the State Plan as a source of guidance.

Proposed new N.J.A.C. 7:7A-7.2(b)13 requires that any fill be clean and suitable material. This is a standard condition on all general permits and the proposal also applies it to individual permits. In addition, the provision requires that dredged and fill material meet all Department standards for use of dredged or fill material. This is intended to prevent use of contaminated material resulting from dredging or soil cleanups from being used inappropriately in freshwater wetlands. Proposed new N.J.A.C. 7:7A-7.2(b)14 requires that activities that are subject to the Department's water quality planning rules must comply with the applicable Water Quality Management Plan (also known as a 208 Plan). This will ensure consistency among Department permitting and planning programs.

Proposed N.J.A.C. 7:7A-7.2(c) sets forth the parameters within which the Department will evaluate alternatives to a proposed activity. Proposed N.J.A.C. 7:7A-7.2(c)1 and 2 are found in the existing rules at N.J.A.C. 7:7A-3.1(a) and 3.3(c). Proposed N.J.A.C. 7:7A-7.2(c)3 is a new provision not found in the existing rules. It creates a presumption that applies to the construction of a single family home that is not part of a larger development, by an applicant who has owned the property since July 1, 1988 or earlier and has not improved any part of the property since then. The presumption is that offsite alternatives to such construction are not practicable. This reflects ACOE policy, as stated in ACOE Regulatory Guidance Letter 95-01, entitled "Guidance on Individual Permit Flexibility for Small Landowners." Although the provision reflects ACOE policy which applies nationally, the Department has limited the acreage allowed, and has added requirements that the applicant offer the property for sale, and that the area be served by sewers or alternative waste water facilities, in order to prevent the installation of a septic system in a filled wetland. These additional limits are necessary in light of New Jersey's unique attributes, including its dense population and intense development pressure.

7:7A-7.3 Additional requirements for a non-water dependent activity in a wetland or special aquatic site

This proposed new section includes provisions found in the existing rules at N.J.A.C. 7:7A-3.3, governing individual permit requirements for non water-dependent activities in a freshwater wetland or special aquatic site.

Proposed new N.J.A.C. 7:7A-7.3(a) clarifies that the requirements in this section are in addition to those for all individual permits in N.J.A.C. 7:7A-7.2, and that the section applies only to non water-dependent activities that are proposed in a freshwater wetland or a special aquatic site. Thus, activities in a State open water would not be covered by this section unless the State open water meets the definition of a special aquatic site at N.J.A.C. 7:7A-1.4.

Proposed new N.J.A.C. 7:7A-7.3(b) includes provisions found in the existing rule at N.J.A.C. 7:7A-3.3(b), creating a rebuttable presumption that there is a practicable alternative to a non water-dependent activity in a freshwater wetland or special aquatic site. The provision is reworded for clarity, but the meaning is unchanged.

Proposed new N.J.A.C. 7:7A-7.3(c) includes provisions found in the existing rule at N.J.A.C. 7:7A-3.3(c) and (d), detailing how to rebut the presumption in proposed N.J.A.C. 7:7A-7.3(b). The proposal makes minor clarifying changes that do not affect the meaning of the provisions. In addition, the proposal adds a cross reference to the requirements at proposed N.J.A.C. 7:7A-7.4. These provisions, found in the existing rules at N.J.A.C. 7:7A-3.4, detail how to rebut the presumption in proposed N.J.A.C. 7:7A-7.3(b) if a project is in an exceptional resource value wetlands.

7:7A-7.4 Additional requirements for a non water-dependent activity in exceptional resource value wetlands or trout production waters

Proposed new N.J.A.C. 7:7A-7.4(a) includes provisions found in the existing rule at N.J.A.C. 7:7A-3.4, which contain additional requirements for a non water-dependent activity in an exceptional resource value wetland or in a trout production State open water. The further requirement is for a demonstration of compelling public need or extraordinary hardship. The proposal rewords the introductory language of the provision for clarity, but the meaning of the provision remains unchanged.

SUBCHAPTER 8 EMERGENCY PERMITS

Letter of interpretation provisions currently codified at N.J.A.C. 7:7A-8 are proposed for recodification, with major organizational and clarifying changes, at proposed N.J.A.C. 7:7A-3. The emergency permit provisions proposed at N.J.A.C. 7:7A-8 are recodified, with minor clarifications, from N.J.A.C. 7:7A-5.

7:7A-8.1 Emergency permits

Proposed N.J.A.C. 7:7A-8.1(a), providing for the Department to issue an emergency permit, is recodified from existing N.J.A.C. 7:7A-5.1(a), with minor clarifying changes that do not change its meaning.

Proposed N.J.A.C. 7:7A-8.1(b), which provides that an emergency permit may be approved orally and followed up by a written emergency permit, is recodified from existing N.J.A.C. 7:7A-5.1(c), with minor clarifying changes that do not change its meaning.

Proposed N.J.A.C. 7:7A-8.1(c), explaining the term and other requirements of an emergency permit, is recodified from existing N.J.A.C. 7:7A-5.1(b), with minor clarifying changes that do not change its meaning. In addition, the proposal adds a requirement that the emergency permit describe the work authorized, and that it specify procedures for obtaining a permanent permit.

Proposed N.J.A.C. 7:7A-8.1(d), providing for public notice of an emergency permit, is recodified from existing N.J.A.C. 7:7A-5.1(d), with no changes.

Proposed N.J.A.C. 7:7A-8.1(e), providing for termination of an emergency permit, is recodified from existing N.J.A.C. 7:7A-5.1(e), with no changes.

7:7A-8.2 Obtaining an emergency permit

Proposed N.J.A.C. 7:7A-8.2(a), explaining how to request an emergency permit, is recodified from existing N.J.A.C. 7:7A-5.2(a), with clarifying changes. In addition, the proposal deletes a requirement that the applicant inform the Department by telephone of the request for an emergency permit, and adds a requirement that the application include a written description of the work, and plans and photographs. These changes reflect the fact that there are now many different ways to contact the Department (including telephone, fax, e-mail, etc.), and reflects the Department's experience that some written narrative and visual plan of the work is necessary for a clear understanding of what is being approved in the emergency permit.

Proposed N.J.A.C. 7:7A-8.2(b), providing for Department notice to EPA prior to issuance of an emergency permit, is recodified from existing N.J.A.C. 7:7A-5.2(b), with clarifying changes that do not change its meaning.

Proposed N.J.A.C. 7:7A-8.2(c), providing for reporting to the Department during the term of an emergency permit, is recodified from existing N.J.A.C. 7:7A-5.2(c), with minor clarifying changes that do not change its meaning.

Proposed N.J.A.C. 7:7A-8.2(d), providing for a written, as opposed to oral, emergency permit, is recodified from existing N.J.A.C. 7:7A-5.2(d), with minor clarifying changes that do not change its meaning.

Proposed N.J.A.C. 7:7A-8.2(e), requiring submittal of a written permit application within 15 days after the Department issues an emergency permit, is recodified from the first part of existing N.J.A.C. 7:7A-5.2(e). The proposed provision specifies submittal requirements and replaces a requirement for a complete permit application. A complete permit application often includes information that is not necessary when work has already been performed under the authority of an emergency permit. This change will limit the information required so that only information appropriate to the emergency permit situation will be submitted.

Proposed N.J.A.C. 7:7A-8.2(f), providing for the Department to issue a standard permit after issuance of the emergency permit, is recodified from the second part of existing N.J.A.C. 7:7A-5.2(e), with clarifications that do not change its meaning.

Proposed new N.J.A.C. 7:7A-8.2(g) clarifies that work performed under the emergency permit must be consistent with the representations made to the Department in the request for the emergency permit.

SUBCHAPTER 9 PRE-APPLICATION CONFERENCES

7:7A-9.1 Purpose

Proposed N.J.A.C. 7:7A-9.1 is recodified, with clarifying changes that do not affect meaning, from the existing rule at N.J.A.C. 7:7A-10.1. The provision stresses that the Department will only issue a binding decision on a project or portion thereof through a permit. It has been the Department's experience that many applicants request informal or "off the record" determinations regarding whether a project is eligible for a permit. This provision clarifies that the Department will provide guidance at a pre-application conference but will not provide any binding determinations.

7:7A-9.2 Request for a pre-application conference

Proposed N.J.A.C. 7:7A-9.2(a), governing requests for a pre-application conference, is recodified from the existing rule at N.J.A.C. 7:7A-10.2(a), with reformatting and minor clarifying changes that do not change its meaning. In addition, the proposal adds a requirement that the requestor submit a plan view of the project, and an LOI for the site if one has been issued. These materials will allow Department staff to better prepare for the pre-application conference.

Proposed N.J.A.C. 7:7A-9.2(b), governing the timing of a pre-application conference, is recodified from the last sentence of existing N.J.A.C. 7:7A-10.2(a), with no change.

Proposed N.J.A.C. 7:7A-9.2(c), which provides for scheduling of a pre-application conference, is recodified from existing N.J.A.C. 7:7A-10.2(b), with minor clarifying changes that do not change its meaning. In addition, a sentence is added clarifying that, if the Department does not schedule a pre-application conference within 15 days of a request, an applicant may proceed an apply for a permit.

Provisions at existing N.J.A.C. 7:7A-10.3, regarding the non-binding nature of discussion at a pre-application conference, are proposed for deletion since they repeat information already found at proposed N.J.A.C. 7:7A-9.1.

Existing N.J.A.C. 7:7A-10.4, which requires the Department to prepare a memorandum of record regarding every pre-application conference, is proposed for deletion. The Department has found that such a memorandum is often unnecessary, and the Department does not need a rule provision in order to issue one when necessary.

SUBCHAPTER 10 APPLICATION CONTENTS AND PROCEDURE

The application provisions proposed at N.J.A.C. 7:7A-10 are recodified from existing N.J.A.C. 7:7A-11, with organizational and clarifying changes. Pre-application provisions found in the existing rules at N.J.A.C. 7:7A-10 are proposed for recodification at N.J.A.C. 7:7A-9. In addition, application requirements found in the existing rule at N.J.A.C. 7:7A-7.6 (transition area waiver applications), N.J.A.C. 7:7A-8.3 (LOI applications), N.J.A.C. 7:7A-9.5 (general permit applications), and N.J.A.C. 7:7A-11.1 (individual permit applications) are all consolidated in proposed N.J.A.C. 7:7A-10.

The general thrust of proposed new N.J.A.C. 7:7A-10 is to consolidate application requirements for different approvals so as to avoid repetition, and to reduce the level of unnecessary detail in the rule by moving that detail to application forms and checklists.

The reduction of detail will allow readers to focus on basic regulatory requirements, without having to wade through details that may only apply to a small minority. This detail will instead be placed in the various application checklists, which will be specific to each type of approval. The proposal retains only broad provisions describing the types of information the Department will require on each application checklist. Thus, the rule will continue to provide notice of the types of information required, but will not be burdened with lengthy provisions detailing specifications that may be relevant only to a few applicants. The existing application checklists will continue to be used until final adoption of these proposed rule changes. Drafts of the new application checklists are available from the Department for review by contacting the Land Use Regulation Program by e-mail at lurweb@dep.state.nj.us, or by telephone at (609) 984-3444.

Once a person has decided to apply for a permit, they can obtain from the Department an application form and checklist that specifies in detail all of the application requirements for the type of approval sought. The rule requires that a complete application include all the application checklist items, so as to ensure that the Department can enforce its application requirements.

The proposal deletes existing N.J.A.C. 7:7A-11.1, Application contents for Individual Freshwater Wetlands and Open Water Fill Permits, and relocates the information in that section to other provisions, including proposed N.J.A.C. 7:7A-10.1(m), 7:7A-10.1, 7:7A-10.2, and 7:7A-10.6. Recordkeeping provisions at existing N.J.A.C. 7:7A-11.2 are proposed for recodification, with minor clarifications that do not affect their meaning, at proposed N.J.A.C. 7:7A-10.1(n).

7:7A-10.1 Basic application information

Proposed new N.J.A.C. 7:7A-10.1(a), (b), and (c) set forth the scope of these consolidated application provisions, clarifying that they apply to all approvals under this chapter except exemption letters and mitigation proposals. Exemption letters and mitigation proposals are excluded from coverage under this subchapter because these applications are quite different from those for other approvals. Application requirements

for exemption letters are found at proposed N.J.A.C. 7:7A-2.10, while application requirements for mitigation proposals are found at proposed N.J.A.C. 7:7A-15.12.

Proposed new N.J.A.C. 7:7A-10.1(d) requires that the applicant be the owner of the site, or a person under contract to buy the site. This codifies existing Department practice, and will enable the Department and the public to accurately identify applicants.

Proposed new N.J.A.C. 7:7A-10.1(e), requiring that an application include all planned activities, is recodified from existing N.J.A.C. 7:7A-11.1(b)1, with clarifying changes that do not affect its meaning.

Proposed new N.J.A.C. 7:7A-10.1(f) provides that failure to provide all required information may result in denial or termination of the permit, and may result in penalties.

Proposed new N.J.A.C. 7:7A-10.1(g) introduces the concept of the application checklist. The existing rules list in detail all application requirements. As discussed above, the proposal removes much of this detail from the rule and transfers it to a series of application checklists. For each type of approval, the Department will supply an application checklist setting forth in detail the information required for a complete application. The proposed rule will retain a listing of types of information that will be required by the checklist for a particular application. The checklist for each approval will then specify in detail what must be submitted. This proposed change will shorten the rule, and allow the Department to update application requirements more easily, while still providing notice to the regulated public of the types of information that will be required on an application.

Proposed new N.J.A.C. 7:7A-10.1(h) provides information on where to obtain application forms and checklists. The Department provides up-to-date forms and checklists by mail, and they can also be downloaded or printed from the Department's website at www.state.nj.us/dep/landuse/.

Proposed new N.J.A.C. 7:7A-10.1(i) includes provisions found in a note in the existing rule at N.J.A.C. 7:7A-11.1(b)16, providing for Department guidance on the appropriate level of detail for an application.

Proposed new N.J.A.C. 7:7A-10.1(j) requires that an applicant comply with application checklist requirements concerning the number of copies and other specifications for documents to be submitted as part of an application. While some of these requirements may seem unimportant to an applicant, the large number of applications handled by the Department make these requirements crucial for smooth operation of the program. For example, one requirement is to fold large plans before submitting them. Because of the large number of plans per application and the large number of applications received, a substantial amount of staff time was being spent merely folding plans so they could be filed. This staff time can now be spent reviewing applications and decreasing the length of time it takes for applications to be reviewed.

Proposed new N.J.A.C. 7:7A-10.1(k) emphasizes the importance of submitting a complete application, and provides average processing times for applications. The Department's experience over ten years of administering this program is that applicants

can save themselves and the Department a great deal of time and money by ensuring that applications are complete before submittal. Incomplete applications trigger deficiency letters, telephone calls, and delays in processing time that cause needless frustration and expense to all concerned.

Proposed new N.J.A.C. 7:7A-10.1(l) allows the submittal of one application for multiple approvals under this chapter.

Proposed N.J.A.C. 7:7A-10.1(m) includes provisions found in the existing rule at N.J.A.C. 7:7A-11.1(a), encouraging consolidation of applications for a project requiring multiple approvals from the Land Use Regulation Program. The provisions are reworded for clarity and a provision is added requiring an environmental plan showing all regulated activities on one plan.

Proposed N.J.A.C. 7:7A-10.1(n) includes record keeping provisions found in the existing rule at N.J.A.C. 7:7A-11.2, with minor clarifying changes. The proposal also replaces a provision requiring that records be retained for three years with a provision requiring that they be retained for three years or the duration of the permit, whichever is longer.

Proposed N.J.A.C. 7:7A-10.1(o) includes alternative time frames for submittal of mitigation proposals. A mitigation proposal must either be submitted concurrently with an application for a permit, or be submitted after a permit is approved. The provision also stresses that regulated activities may not begin until the mitigation proposal is approved.

7:7A-10.2 Basic content requirements for all applications

Proposed new N.J.A.C. 7:7A-10.2(a) sets forth the basic structure of the sections that specify the information that will be required for an application.

Proposed new N.J.A.C. 7:7A-10.2(b) sets forth the types of information that will be required for all applications, regardless of the type of document or approval applied for. This list was created by consolidating repetitive application requirements in the existing rule for individual permits, LOIs, general permits, and transition area waivers, and eliminating unnecessary detail.

Proposed new N.J.A.C. 7:7A-10.2(c) provides for the Department to require additional information when necessary to clarify other information, to ensure compliance with the law, or to evaluate an application's compliance with the law.

Proposed new N.J.A.C. 7:7A-10.2(d) provides for the Department to require certain key information to be placed directly on construction plans. The Department's experience has been that permittees often contract out permitted construction work to a third party who likely does not read the permit, but merely works from the construction plan. Therefore, in order to ensure that key information about permitted activities is transmitted to the people actually performing the construction, the Department must at times require information to be placed directly on construction plans or drawings.

7:7A-10.3 Additional requirements for an individual permit application

Proposed new N.J.A.C. 7:7A-10.3 sets forth additional application materials and information that will be required by the Department's application checklist for a letter of interpretation (or LOI). Since there are several varieties of LOIs, the section specifies different types of information for each variety of LOI. These provisions are based on those in the existing rule at N.J.A.C. 7:7A-8.3.

7:7A-10.4 Application requirements for a general permit authorization

Proposed N.J.A.C. 7:7A-10.4(a) sets forth the additional information that will be required on an application checklist for a general permit authorization. These requirements are found in the existing rule at N.J.A.C. 7:7A-9.5.

7:7A-10.5 Additional application requirements for an individual transition area waiver

Proposed N.J.A.C. 7:7A-10.5(a) sets forth the additional information required by an application checklist for an individual transition area waiver. Since many transition area disturbances will now be authorized under general permits, the rule terms a transition area waiver that is not issued as part of a general permit authorization an "individual transition area waiver." This section specifies the additional application information that will be required for an individual transition area waiver. It is based on existing N.J.A.C. 7:7A-7.6.

7:7A-10.6 Additional application requirements for an individual freshwater wetlands or open water fill permit

Proposed N.J.A.C. 7:7A-10.6(a) sets forth the additional information required by an application checklist for an individual freshwater wetlands or open water fill permit. This is based on provisions in the existing rule at N.J.A.C. 7:7A-11.1. However, the proposal has reduced the level of detail in the rule, and has increased the level of detail in the application checklist.

7:7A-10.7 Application requirements for a combined flood hazard area permit and general permit authorization

Proposed new N.J.A.C. 7:7A-10.7 sets forth the additional application requirements for the five combined flood hazard area permit and general permit authorizations. For all of the combined general permits, as with all applications, the application requirements will be set forth on application checklists available from the Department.

In developing the application process for the combined permits, the Department has attempted to minimize the burden on the applicant and the Department. For some of

the combined permits, the freshwater wetlands requirements are fairly simple while the Flood Hazard Area Control Act rule requirements are not. For other combined permits, the Flood Hazard Area Control Act rule requirements are fairly simple but the freshwater wetlands requirements are not. Therefore, the Department has tried to consolidate the application requirements for each combined permit in the rule chapter that contains the more complicated set of requirements. For example, since the Flood Hazard Area Control Act rule application requirements for an underground utility line are fairly straightforward, these have been incorporated into the freshwater wetlands rules. Since the freshwater wetlands rule application requirements for a minor road crossing are simpler than the application requirements for a road crossing in the Flood Hazard Area Control Act rules, the freshwater wetlands application requirements will be incorporated into upcoming amendments to the Flood Hazard Area Control Act rules.

For general permit 2, all of the elements that will be addressed on the application checklist are set forth in the freshwater wetlands rules, including freshwater wetlands requirements and requirements taken from the Flood Hazard Area Control Act rules.

For general permits 10A, 11, and 20, elements taken from both the freshwater wetlands rule and the flood hazard area rules will be included on the application checklists. It should be noted that for these combined permits, all of the application requirements of the freshwater wetlands rules apply, including the notice requirements. Additional requirements from the Flood Hazard Area Control Act rules will also apply, but are not listed in the freshwater wetlands rules.

For general permit 26, an application may be submitted under either the freshwater wetlands rules or the Flood Hazard Area Control Act rules, because an authorization under either rule satisfies both the freshwater wetlands and the flood hazard area permit requirements.

7:7A-10.8 Additional application requirements for a modification or extension

Proposed new N.J.A.C. 7:7A-10.8 sets forth application materials and information that the Department may require through an application checklist for a modification to a permit, including a general permit authorization or a waiver. This new provision corrects an omission in the existing rules, which allow modifications but do not specify how to apply for one.

Proposed new N.J.A.C. 7:7A-10.8(a) provides that the information required by the section is in addition to the basic application materials required at N.J.A.C. 7:7A-10.2.

Proposed new N.J.A.C. 7:7A-10.8(b) sets forth application materials and information required for a minor modification, and refers to the application checklist.

Proposed new N.J.A.C. 7:7A-10.8(c) provides that there will be no application fee for a minor modification. This is found in the existing rule at N.J.A.C. 7:7A-16.7.

Proposed new N.J.A.C. 7:7A-10.8(d) sets forth application materials and information required for a major modification, and clarifies that portions of the permit that are not

being modified will not be subject to the procedures that apply to a new permit. This is found in the existing rule at N.J.A.C. 7:7A-13.6(e).

Proposed new N.J.A.C. 7:7A-10.8(e) sets forth application materials and information required for an extension of a permit. This is a new provision, not found in the existing rules. The Department has created a process for extending a permit under certain conditions. The process is consistent with that used by the ACOE.

Proposed new N.J.A.C. 7:7A-10.8(f) sets forth application materials and information required for an extension of an LOI. In the existing rule, this is called a "reissuance" of an LOI. However, the proposal renames this an extension of an LOI. The same information is required for an application, and is set forth in the existing rule at N.J.A.C. 7:7A-8.7.

7:7A-10.9 Public notice requirements for applications

This proposed section consolidates and reorganizes public notice requirements for applications found in the existing rule at N.J.A.C. 7:7A-7.6, 8.3, 9.5, and 11.1. In addition, the proposed notice requirements are less detailed than those in the existing rule. As with the other application requirements, the Department proposes to move some of the detail into application checklists. Drafts of these checklists are available from the Department at the address in proposed N.J.A.C. 7:7A-1.3.

Proposed new N.J.A.C. 7:7A-10.9(a) sets forth the scope of the section, and explains that more detail will be supplied through each application checklist.

Proposed new N.J.A.C. 7:7A-10.9(b) lists the approvals to which the notice requirements apply. Two types of applications are exempted from these notice requirements – certain government mosquito control projects, and applications for a minor modification of a permit or waiver. The exemption of mosquito control general permits is required by the FWPA at N.J.S.A. 13:9B-23c(4). The exemption of minor modification applications from notice requirements is found in the existing rule at N.J.A.C. 7:7A-13.6(d), and is consistent with Federal requirements.

Proposed new N.J.A.C. 7:7A-10.9(c) provides that notices or applications must be sent by certified mail, return receipt requested. This will ensure that a record of each mailing will be available to document compliance with these notice requirements. This is required in the existing rules at N.J.A.C. 7:7A-7.6(a)6 and 7, 8.3(a)8 and 9, 9.5(b), and 11.1(b)9 and 10.

Proposed new N.J.A.C. 7:7A-10.9(d) requires a copy of the application to be submitted to the municipal clerk. This is found in the existing rule at N.J.A.C. 7:7A-7.6(a)6, 8.3(a)8 and 9, 9.5(b), and 11.1(b)9.

Proposed new N.J.A.C. 7:7A-10.9(e) requires submittal of a notice of the application to various people, including municipal officials, neighboring land owners, and persons on a list provided by the Department, if such a list is available. This is the same set of recipients that must receive notice under the existing rules, except that the proposed

rules provide the option of notifying landowners within 200 feet of the disturbance rather than within 200 feet of the site. This change will somewhat relieve the burden of notice for an applicant with a large site but a small disturbance, while still ensuring notice to neighboring landowners who are close enough to be affected by the disturbance.

Currently, the text of the required notice is included in the existing rule wherever application requirements are discussed. In the interests of brevity, the proposed amendments move these lengthy notices into the application checklist packet, to be provided to the applicant with the application form. This way, the Department can provide a form notice tailored to each particular approval.

Proposed new N.J.A.C. 7:7A-10.9(f) provides for a special method of providing notice to neighboring land owners, if a project is a linear development longer than one half mile, and the application is not for an individual permit. In such a case, the applicant may use display advertisements to satisfy a portion of the land owner notice requirement. This provision is found in the existing rule at N.J.A.C. 7:7A-7.6(a)7vi, 8.3(a)9v, and 9.5(c).

Proposed new N.J.A.C. 7:7A-10.9(g) allows the use of one notice for multiple applications, and sets out the basic types of information that will be required in the notice. This broad description is developed from the notices found in the existing rule at N.J.A.C. 7:7A-7.6, 8.3, 9.5, and 11.1. Thus, though the proposal does not include the text of the notice, it specifies minimum requirements for the notice to ensure its effectiveness.

Proposed new N.J.A.C. 7:7A-10.9(h) sets forth additional notice requirements for an application for an individual permit or open water fill permit. The additional requirements are for display advertisements, and are found in the existing rule at N.J.A.C. 7:7A-11.1(b)10.

Proposed new N.J.A.C. 7:7A-10.9(i) provides that an applicant who amends an application after submittal must follow the notice requirements for amending an application, found at proposed N.J.A.C. 7:7A-12.6(f). Under this section, the applicant must provide notice of the amendment to anyone who received a complete copy of the original application, but need not notify those who received only a notice of the original application, unless the amendment will increase the environmental impact of the project.

Proposed new N.J.A.C. 7:7A-10.9(j) requires the Department to provide an applicant with copies of any public comments on the application upon request.

7:7A-10.10 Signatories to permit applications and reports

Provisions proposed at N.J.A.C. 7:7A-10.10(a), specifying who must sign permit applications, are recodified from the existing rule at N.J.A.C. 7:7A-11.3(a), with minor clarifying changes that have no effect on meaning.

Provisions proposed at N.J.A.C. 7:7A-10.10(b), allowing a report or other information to be signed by an authorized representative, are recodified from the existing rule at N.J.A.C. 7:7A-11.3(b), with clarifications that do not change meaning.

Provisions proposed at N.J.A.C. 7:7A-10.10(c), providing for a change in an authorized representative, are recodified from the existing rule at N.J.A.C. 7:7A-11.3(c), with clarifications that do not change meaning.

Proposed new N.J.A.C. 7:7A-10.10(d) requires that, if an applicant retains a professional to assist in preparing an application, the professional must certify the truth and accuracy of the portions of the application they prepare.

Provisions proposed at N.J.A.C. 7:7A-10.10(e), setting forth the certification that must accompany documents submitted under this section, are recodified from the existing rule at N.J.A.C. 7:7A-11.3(d), with minor clarifying changes which do not affect meaning.

Proposed new N.J.A.C. 7:7A-10.10(f) requires that all surveys submitted under the chapter must be performed by a surveyor licensed in New Jersey, and further that the Department may require other documents to be prepared, signed or otherwise certified by an appropriate professional.

7:7A-10.11 Confidentiality

Provisions proposed at N.J.A.C. 7:7A-10.11(a), providing that any information submitted to the Department may be claimed confidential, are recodified, with a minor clarifying change that does not affect meaning, from existing N.J.A.C. 7:7A-11.4(a).

Provisions proposed at N.J.A.C. 7:7A-10.11(b) and (c), addressing denials of certain confidentiality claims, are recodified without change from existing N.J.A.C. 7:7A-11.4(b) and (c).

SUBCHAPTER 11 FEES

7:7A-11.1 General fee provisions

Provisions proposed at N.J.A.C. 7:7A-11.1(a) and (b), which require an application fee and provide that an application is incomplete without a fee, are recodified from existing N.J.A.C. 7:7A-16.1(a) and simplified, with no change in meaning, except that additions are made to the list of applications that do not require a fee. These additions include minor modifications, which are exempt from fees under the existing rules at N.J.A.C. 7:7A-13.6(h); and three activities covered by general permits, which the Department believes benefit the environment or the public welfare. These are habitat creation and enhancement under general permit 16, repair of malfunctioning septic systems under general permit 25, and construction of a trail or boardwalk on public land under general permit 17.

Proposed N.J.A.C. 7:7A-11.1(c), which addresses the form of fee payment, is recodified from existing N.J.A.C. 7:7A-16.1(b), with minor clarifying changes that do not affect its meaning.

Proposed N.J.A.C. 7:7A-11.1(d), which requires that a check or money order include certain basic information, is recodified, without change, from existing N.J.A.C. 7:7A-16.1(c).

Proposed new N.J.A.C. 7:7A-11.1(e) provides for a combined application fee when a project requires more than one Land Use Regulation Program approval. This is found in the existing rule at N.J.A.C. 7:7A-16.1(d). The proposal rewords the provision for clarity, without changing its meaning.

Proposed N.J.A.C. 7:7A-11.1(f), addressing installment payment of fees, is recodified, with minor clarifying changes that do not affect meaning, from existing N.J.A.C. 7:7A-16.1(e).

Proposed new N.J.A.C. 7:7A-11.1(g), addressing fee refunds, is recodified from existing N.J.A.C. 7:7A-16.8. In addition, the proposed new language consolidates similar provisions from existing N.J.A.C. 7:7A-7.10, 7:7A-9.8, and 7:7A-12.6. The consolidation and rewording do not change the meaning of the existing provisions, except that a provision at existing N.J.A.C. 7:7A-9.8(c), which provides that the Department shall not refund a fee if a significant portion of the review has been completed, is deleted. This standard has proven hard to apply, and this change will make the standards consistent for all types of applications under the chapter.

Proposed new N.J.A.C. 7:7A-11.1(h) consolidates provisions found in the existing rule at N.J.A.C. 7:7A-16.2(d), 16.3(c), and 16.5(a)5, with no change in meaning. These provisions require an extra fee of up to one thousand dollars if an applicant's act or omission necessitates an extra Department site visit.

The proposal deletes existing provisions at N.J.A.C. 7:7A-16.2 through 16.7, which specify the application fees for letters of interpretation, individual freshwater wetlands and open water fill permits, general permit authorizations, transition area waivers,

requests for exemption letters, and permit modifications. The proposal replaces these provisions with tables showing the fee for each type of approval. The Department believes that the table format will aid the reader in more quickly and easily determining the appropriate fee for each approval sought. The information in the fee tables is the same as that in the provisions being deleted, except that two new fees are added, one for an extension of a general permit authorization and one for an extension of a transition area waiver.

The proposal deletes existing N.J.A.C. 7:7A-16.8, addressing fee refunds, since that information is included at proposed N.J.A.C. 7:7A-11.1(g).

The proposed new fee tables set forth the application fees for all types of approvals issued under this chapter. The information in the fee tables is the same as that in the provisions being deleted at N.J.A.C. 7:7A-16.2 through 16.7, except for the following minor changes.

First, three new fees are proposed, which will apply to applications for three new extension options provided by the proposal. The three fees apply to applications for extensions of general permit authorizations, extensions of transition area waivers, and extensions of individual permits.

Second, the proposed fee tables provide a new fee for an application for a general permit authorization modification, which is also a new option provided by the proposal.

Third, the fee for a major modification is changed slightly. In the existing rules, the application fee for a major modification is always 25% of the original permit application fee. However, now that the proposal will allow modification of a general permit authorization, the Department is concerned that the 25% formula will result in small fees of under $100.00 that will not reflect the Department resources expended to process the modification, and that will cause difficulties in accounting. Therefore, the proposal sets a minimum of $100.00 for any application for a major modification. This is similar to the fee requirements for LOI extensions, which have a minimum of $100.00, and it will more adequately reflect the Department's costs for processing submittals. In addition, provisions for application fees for special activity transition area waivers based on general permits are deleted, since the proposal would authorize transition area disturbances as part of the general permit authorization and a separate application (and fee) is not needed.

Finally, fees are proposed for combined general permit authorizations and flood hazard area permits. These fees reflect the existing fee system for applications for two different Land Use Regulation Program approvals for the same project. In these cases, the fee is the sum of the highest of the fees and seventy-five percent of the fee for each additional approval. This is included in the existing rule at N.J.A.C. 7:7A-16.1(d) and in the proposal at N.J.A.C. 7:7A-11.1(e).

It should also be noted that the proposed fee table lists an LOI extension, since this is the proposed new name for an LOI reissuance. Also, the fee table lists application fees for line delineation LOIs separately from those for line verifications. However,

these proposed provisions do not change the fees that apply to each type of LOI application.

SUBCHAPTER 12 DEPARTMENT REVIEW OF APPLICATIONS

7:7A-12.1 Completeness review

The proposal deletes the existing provisions in this section, which applied only to review of applications for individual permits, and replaces them with new proposed consolidated provisions covering review of all applications. The new provisions include the information found in the deleted N.J.A.C. 7:7A-12.1, consolidated with other application review provisions found in the existing rule at N.J.A.C. 7:7A-7.7, 8.8, and 9.5, and reorganized for clarity. The consolidation and reorganization does not change the meaning of the provisions, except as specifically noted in this summary below.

Proposed new N.J.A.C. 7:7A-12.1(a) provides that the Department will perform a completeness review on an application within 20 working days of receiving it. This shortens the time within which the Department must review some applications for completeness. Under the existing rule, the Department must review an application for a general permit or a letter of interpretation for completeness within 20 days, whereas the Department has 30 days for completeness review of other types of applications. In consolidating all application review requirements, the proposal provides for a 20 day completeness review for all applications. The Department believes that this is feasible, and is less confusing than having different completeness review deadlines for different applications.

Proposed new N.J.A.C. 7:7A-12.1(a) also separates the completeness review into two parts: a review for administrative completeness, and a review for technical completeness. The term "administratively complete" is used in the existing rule but is not clearly explained. An administratively complete application has all items required by the application checklist. However, an item that is clearly deficient will be considered to not have been included in the application. For example, if an application checklist requires "a detailed site plan" and the applicant submits a rough, semi-legible sketch, the item (site plan) is included, but because it is clearly deficient on its face, the Department would declare the application administratively incomplete. Similarly, if an application checklist requires a $1,000 fee and the applicant includes a check for only $100, the item (fee) is included but is clearly deficient on its face, so the Department would declare the application administratively incomplete.

A technically complete application is one which contains all of the information needed, in sufficient detail for Department staff to make a final permit decision without further supplementation. Usually, an administratively complete application will contain at least one item (usually more) that requires supplementation or further explanation before the Department can make a decision on the application. For instance, a detailed site plan may be included, but the applicant may have omitted a feature from the site plan that the Department must see in order to evaluate the application. In such a case, the Department would send a letter requesting the further information. When all information necessary for a permit decision is included in sufficient detail to make the decision, the application is technically complete.

Proposed new N.J.A.C. 7:7A-12.1(b) provides for the Department to return an application that is not administratively complete, with a list of missing items. This is provided for in the existing rules at N.J.A.C. 7:7A-7.7(b), 8.8(a), and 12.1(b).

Proposed new N.J.A.C. 7:7A-12.1(c) provides that, when the Department declares an application administratively complete, the Department shall notify the applicant, send copies to other agencies, publish notice in the DEP Bulletin, and request any more information needed to declare technical completeness. Although this is the Department's standard practice, the existing rule only explicitly requires publication in the DEP Bulletin for transition area waivers (see N.J.A.C. 7:7A-7.7(g)) and for individual permits (see N.J.A.C. 7:7A-12.1(a)). Therefore, the proposed consolidated provisions will make the rules consistent across the different approvals, and will more accurately reflect Department practice.

The proposal makes a change from the existing rule in its handling of a Department request for further information after an application is declared administratively complete. In the existing rule at N.J.A.C. 7:7A-12.1(c), if the Department requests further information, it has 15 days after receipt of such information to request further clarification. This deadline has not proven helpful for applicants, and does not comport with the realities of permit review, where several different aspects of a project may be adjusted during permit review in order to better comply with Department requirements. Therefore, the Department has omitted this deadline from the proposed application review provisions.

Proposed new N.J.A.C. 7:7A-12.1(d) provides for the Department to require an applicant to provide copies if requested additional information to persons who received copies of the initial application. This requirement does not apply to persons who merely received notice of the application, but only to those who received a full copy of the initial application. This is found in the existing rule at N.J.A.C. 7:7A-12.1(c)1.

Proposed new N.J.A.C. 7:7A-12.1(e) provides that an applicant whose application is returned may resubmit within 60 days without repeating the notice requirements for applications, assuming the project is sufficiently similar to the project originally applied for. This is addressed in the existing rule at N.J.A.C. 7:7A-12.1(b)2. The proposal adds a requirement that the project be sufficiently similar to the original submittal that the original public notice would provide reasonable notice of the characteristics of the new submittal.

Proposed new N.J.A.C. 7:7A-12.1(f) emphasizes that an applicant who does not receive a response from the Department is not authorized to proceed with the project applied for, except in four listed cases. In those four cases, an application is automatically approved if the Department does not respond to a properly submitted application. This automatic approval applies in the existing rule to general permit 25 (see existing N.J.A.C. 7:7A-9.5(f), and proposed N.J.A.C. 7:7A-5.25). The proposal adds this expedited approval process as an option for certain activities under general permit 1 (see N.J.A.C. 7:7A-5.1), and for minor stream cleaning under general permit 26 (see N.J.A.C. 7:7A-26).

Provisions found in the existing rule at N.J.A.C. 7:7A-8.8(e), which provides that a person who has applied for an LOI and has not received a Department response within the rule's deadlines may proceed directly to a permit application, are proposed for deletion. While this is always an option, it does not save the applicant any time because the Department still must delineate the wetlands before making a decision on the application. In addition, existing N.J.A.C. 7:7A-8.8(e) allows an LOI applicant in this situation to credit the LOI fee to the permit application. However, the amount of time required to review an LOI is extremely variable, depending on the season, the weather, the activities of various species of wildlife, and other factors. Thus, it does not make sense to provide this kind of fee credit when the Department has limited control over whether it meets the timeframes for LOI issuance.

7:7A-12.2 USEPA review

Proposed amendments to N.J.A.C. 7:7A-12.2(a) update the rule to reflect the fact that the Department has assumed authority for the Federal 404 program in most waters in New Jersey. The proposal also clarifies that, in waters over which New Jersey has responsibility to administer the Federal 404 program, the Department's freshwater wetlands permit satisfies Federal wetlands permit requirements unless the permit specifies otherwise. Besides these changes, the proposal makes only clarifying changes that do not affect meaning.

At existing N.J.A.C. 7:7A-12.2(b), language describing the types of discharges requiring EPA review is deleted and relocated into the proposed definition of "major discharge" at N.J.A.C. 7:7A-1.4. The proposed new N.J.A.C. 7:7A-12.2(b) provides for EPA review of all applications for a major discharge, including draft general permits, since these are also considered a major discharge. In addition, the proposal provides for EPA review of any application upon the Department's initiative or at EPA's request. This is a Federal requirement found in the existing rule at N.J.A.C. 7:7A-12.2(c)1. Finally, two items for EPA review are added. These are additions or changes made to an application after it has been transmitted to EPA, and initial decisions issued by an administrative law judge in a contested case involving an item which would require EPA review. These changes reflect the fact that, on occasion, applications are revised as a result of contested case proceedings. The new provisions will allow the Department to ascertain whether, as a result of those application revisions, EPA continues to have the same comments on the application, or wishes to revise its comments.

Proposed amendments to N.J.A.C. 7:7A-12.2(c) include clarifications that do not change its meaning, and the deletion of information from N.J.A.C. 7:7A12.2(c)1 that is now included in proposed N.J.A.C. 7:7A-12.2(b).

Minor clarifications that do not affect meaning are proposed to N.J.A.C. 7:7A-12.2(d), (e), and (f). The proposal deletes existing N.J.A.C. 7:7A-12.2(h) and (i), and consolidates the substance of those two provisions with the substance of existing N.J.A.C. 7:7A12.2(g) into reorganized provisions at proposed N.J.A.C. 7:7A-12.2(g), (h), and (i). The proposed provisions set forth the process by which the EPA and the Department interact during the period for EPA comment on a permit application. The

proposal clarifies that the Department has the option of issuing a state freshwater wetlands permit that does not constitute the Federal 404 permit for a project.

A minor change is proposed to N.J.A.C. 7:7A-12.2(j), to clarify that the Department has the option of issuing a state freshwater wetlands permit that does not constitute the Federal 404 permit for a project.

A new provision is proposed at N.J.A.C. 7:7A-12.2(k), providing for review of certain applications by the U.S. Fish and Wildlife Service (USFWS), pursuant to the Department's MOA with the USFWS. USFWS review is required for certain types of approvals, if the project is located in a municipality with documented occurrences of threatened or endangered species, or with critical habitat, as this term is defined by Federal law. The provision also notes that USFWS review lengthens application review time.

7:7A-12.3 Public comment on an application

The proposal makes changes to N.J.A.C. 7:7A-12.3(a), which clarify that the type of notice of an application provided by the Department is publication in the DEP Bulletin as required under N.J.A.C. 7:7A-12.1. The proposal deletes a provision requiring that the Department publish notice "upon receipt of the application" because the publication occurs not upon receipt of the application, but when the application is administratively complete. Often the date of administrative completeness is later than the Department's receipt of the application. The proposal also deletes language providing for a 30 day comment period, since this is included in proposed N.J.A.C. 7:7A-12.3(d). Other than this deletion, the proposed amendments make no change in the meaning of the provision.

The proposal makes clarifying changes to N.J.A.C. 7:7A-12.3(b) that do not affect its meaning. In addition, the proposal deletes language from this subsection, providing for applications to be inspected at municipal clerk's offices, and places this language in its own subsection at proposed N.J.A.C. 7:7A-12.3(c).

The proposal deletes existing N.J.A.C. 7:7A-12.3(c), since it repeats information found at proposed N.J.A.C. 7:7A-12.3(a).

Proposed new N.J.A.C. 7:7A-12.3(c) provides for the Department to send a copy of each application to the municipal clerk where the project is located, to be made available for public review. This is found in the existing rule at N.J.A.C. 7:7A-12.3(b).

Proposed new N.J.A.C. 7:7A-12.3(d) includes provisions found in the existing rule at N.J.A.C. 7:7A-12.3(a), providing for a 30 day comment period on each application.

The proposal recodifies existing N.J.A.C. 7:7A-12.3(d) at N.J.A.C. 7:7A-12.3(e), with minor clarifying changes that do not change its meaning.

7:7A-12.4 Hearings on an application for an individual permit or transition area waiver

The proposal makes clarifying changes to N.J.A.C. 7:7A-12.4(a) that do not change its meaning. Since the proposal consolidates application requirements for all approvals into this subchapter, it is necessary for this provision to specify that only individual permits and individual transition area waivers will be subject to public hearings.

The proposal makes clarifying changes to N.J.A.C. 7:7A-12.4(b) that do not affect its meaning. In addition, the proposal lengthens the amount of time within which a hearing request must be received for the Department to consider it in evaluating the degree of public interest in an application. In the existing rule at N.J.A.C. 7:7A-12.4(b) and N.J.A.C. 7:7A-7.7(h), the Department sets this time limit at 20 days. However, in existing N.J.A.C. 7:7A-12.4(a) and 7:7A-11.1(b)9vi, the Department allows 30 days to submit a hearing request. To correct this inconsistency, the proposal lengthens the time in proposed N.J.A.C. 7:7A-12.4(b) to 30 days.

The proposal amends N.J.A.C. 7:7A-12.4(c), which addresses the Department's obligations upon granting a public hearing on an application, to allow a more reasonable deadline within which the Department must schedule a public hearing. Existing N.J.A.C. 7:7A-12.4(c) requires the Department to schedule a public hearing within the same time period provided for requests for a public hearing. This would mean that a person could request a hearing on the 30th day of the request period, and the Department would be required to schedule the hearing, find a location, publish notice of the hearing, and notify the applicant of the hearing, all on that same day. Instead, the proposal provides 30 days for the Department to accomplish all of these things. The proposal also adds language at N.J.A.C. 7:7A-12.4(c)4, which is relocated from existing N.J.A.C. 7:7A-12.4(d), requiring the Department to publish notice of the hearing in the DEP Bulletin.

The proposal deletes N.J.A.C. 7:7A-12.4(d), which requires the Department to publish notice of the hearing in the DEP Bulletin, because this requirement has been relocated to proposed N.J.A.C. 7:7A-12.4(c)4.

Proposed new N.J.A.C. 7:7A-12.4(d) specifies that a public hearing on an application is non-adversarial. This is found in the existing rule at N.J.A.C. 7:7A-12.4(h), and in the definition of "public hearing" at N.J.A.C. 7:7A-1.4.

The proposal makes clarifying changes to N.J.A.C. 7:7A-12.4(e)1, which do not change its meaning. In addition, the proposal deletes the text of the required hearing notice. This form is available from the Department upon request. The proposal also shortens the provision by referring to the provisions for public notice on applications, rather than spelling out all public notice requirements here.

The proposal recodifies existing N.J.A.C. 7:7A-12.4(e)2 at 7:7A-12.4(f), which requires that an applicant submit proof of public notice. The proposal adds clarifications that do not change the meaning of the provision.

Existing N.J.A.C. 7:7A-12.4(f) is recodified at N.J.A.C. 7:7A-12.4(g), with minor clarifications that make no change in its meaning. The provision requires the Department to maintain hearing transcripts.

Existing N.J.A.C. 7:7A-12.4(g), which requires the applicant to pay for the hearing, is recodified at N.J.A.C. 7:7A-12.4(h), with no change.

Existing N.J.A.C. 7:7A-12.4(h), which sets forth basic parameters of the hearing process, is recodified at N.J.A.C. 7:7A-12.4(i), with no change.

Existing N.J.A.C. 7:7A-12.4(i), which allows for public comment, is recodified at N.J.A.C. 7:7A-12.4(j), with minor clarifications that make no change in its meaning.

7:7A-12.5 Final decisions

Changes are proposed to N.J.A.C. 7:7A-12.5(a) to reflect the fact that the Department has assumed the implementation of the Federal 404 program.

Minor clarifying changes are proposed to N.J.A.C. 7:7A-12.5(b), which requires the Department to notify the applicant of permit decisions. A reference to a Department request for modification of a permit is deleted, since this section deals only with final decisions.

Minor clarifying changes that do not affect meaning are proposed to N.J.A.C. 7:7A-12.5(c) and (d). No changes are proposed to N.J.A.C. 7:7A-12.5(e).

Proposed new N.J.A.C. 7:7A-12.5(f) clarifies the application review deadlines for an application for a combined general permit authorization and flood hazard area permit. Under the Department's Flood Hazard Area Control Act rules at N.J.A.C. 7:13, an application is deemed automatically approved if the Department does not make a final decision on the complete application within 90 days of its submittal. This is because flood hazard area permits are subject to the 90-Day Construction Permits law, N.J.S.A. 13:1D-29 et seq. and implementing rules at N.J.A.C. 7:1C. However, the permits issued under the FWPA are not subject to the 90-day law and there accordingly is no default issuance of a freshwater wetlands permit. While the Department will strive to make a final decision on an application for a combined general permit authorization and flood hazard area permit within 90 days or less, there may be times when this is not possible. In such a case, the portion of the application that is governed by the Flood Hazard Area Control Act rules would be automatically approved in accordance with those rules, while the portion of the application governed by the FWPA would not be approved until the Department issued a written authorization. This will ensure that the legal requirements of both programs are met.

7:7A-12.6 Cancellation, withdrawal, resubmission and amendment of applications

In the existing rule, this section addresses cancellation, withdrawal, resubmission and amendment of applications for individual permits. The proposal expands this section to cover cancellation, withdrawal, resubmission and amendment of all types of applications, and consolidates other existing provisions governing these issues at N.J.A.C. 7:7A-7.10, 8.9, and 9.8.

The proposal clarifies N.J.A.C. 7:7A-12.6(a), which addresses who may cancel, withdraw, amend, and resubmit applications, without changing its meaning. In addition, the provision clarifies that the section applies to all applications, including those for a permit or an LOI, and including a request for an exemption letter.

The proposal rewords N.J.A.C. 7:7A-12.6(b) for clarity, and makes two substantive changes. First, the rule shortens the time the Department must wait for information from an applicant before the Department cancels an application. The existing rule gives the applicant 60 days to provide further information. The proposal changes this to 30 days. This is based on the Department's experience that most applicants who wish to keep an application active respond to a Department request for information within the first 30 days, and that an applicant who waits longer than that to respond is usually not planning to pursue the application.

The second change wrought by the proposed rewording of N.J.A.C. 7:7A-12.6(b) is to make the provision more flexible in the event that an applicant notifies the Department of a reason for not submitting information, or submits a request for more time. Under the existing rule, an applicant who documents good cause for delay obtains an automatic 30 day extension, which can be renewed by the Department. The proposed language is less specific, and simply states that, if an applicant provides good cause, the Department shall extend the time for submittal of the information. This allows the Department to grant an extension for a time period based on the particular situation, rather than setting deadlines in the rule which may not be appropriate in all situations.

Proposed new N.J.A.C. 7:7A-12.6(c) includes information about what happens when the Department cancels an application. This information is found in the existing rule at N.J.A.C. 7:7A-12.6(b).

Proposed N.J.A.C. 7:7A-12.6(d), which governs withdrawal of an application by an applicant, is recodified from existing N.J.A.C. 7:7A-12.6(c), with clarifying changes. In addition, the proposal makes one substantive change. The existing rule states that an application fee is not returnable "when a significant portion of the review has been completed." The Department has found that this provision is almost never used, and that the standard of a "significant portion of review" is too vague to apply. Therefore, the proposal drops this provision and does not provide for fee refunds for withdrawn applications.

Proposed N.J.A.C. 7:7A-12.6(e), which addresses resubmittal of applications after cancellation or withdrawal, is recodified from N.J.A.C. 7:7A-12.6(d), with clarifying changes that do not change its meaning.

The proposal deletes existing N.J.A.C. 7:7A-12.6(e), which addresses amendments to applications, and replaces it with proposed new N.J.A.C. 7:7A-12.6(f), which is reworded for clarity. A change is proposed at N.J.A.C. 7:7A-12.6(f), adding the requirement that amended information be distributed to persons who received only notice (as opposed to complete copies) of the initial application, if the Department determines that the change will increase the environmental impact of the proposed project.

7:7A-12.7 Taking without compensation

This proposed new section is intended to provide an applicant an opportunity to bring to the Department's attention its assertion that these rules, as applied to a particular application for a permit, would result in a taking of private property without just compensation, which is prohibited under the Federal and State Constitutions. The FWPA, at N.J.S.A. 13:9B-22(b), provides that in the event of a taking, the Department shall have the option of compensating the property owner, condemning the property pursuant to the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq., or modifying its action or inaction to minimize the detrimental effect on the value of the property. Pursuant to this section of the FWPA, some applicants have asserted takings in the permit application process or in a contested case proceeding in the Office of Administrative Law. This proposed new section is intended to provide an administrative process for Department consideration of this issue. The Department believes that application of the practicable alternatives and public interest tests required by the FWPA may demonstrate that a project qualifies for a permit in many cases where takings assertions are raised.

Proposed new N.J.A.C. 7:7A-12.7(a) sets forth the contexts in which the taking issue can be raised and considered in the application process. The taking issue will not be considered in the review of an application for a general permit authorization, because if a general permit authorization is denied, an applicant still has the option to apply for an individual permit. If the individual permit is denied, then the taking issue can be considered.

Proposed new N.J.A.C. 7:7A-12.7(b) requires an application to meet all applicable application requirements, regardless of whether a takings assertion is included in an application. It is the Department's experience that some applicants, when faced with the requirement to consider a smaller or different project, would prefer not to explore these alternatives, but would prefer to proceed to court to pursue a takings claim. This provision is intended to ensure that all alternatives are considered, as required by the FWPA. The Department believes this provision has the potential to obviate the necessity for many takings claims.

Proposed new N.J.A.C. 7:7A-12.7(c) sets forth the demonstrations which must be made for a taking assertion, and provides that the inability to obtain a minimum beneficial use of the property may not derive from the action or inaction of the property owner or an entity controlled by the property owner. This standard is intended to conform to existing case law on this issue.

Proposed new N.J.A.C. 7:7A-12.7(d) defines the "property as a whole". These provisions are intended to preclude a property owner from obtaining a large property, developing or selling a part of the property so as to obtain a return on the property, and then asserting a takings because of the inability to build on the remaining portion. The provisions are also intended to conform to existing case law on this issue.

Proposed new N.J.A.C. 7:7A-12.70 sets forth the requirements for presenting a takings assertion in the application process. In addition to requiring development plans for a proposed minimum beneficial use, the rule requires detailed information, including information on the ownership of the property over time so that the Department can ascertain what constitutes the property as a whole, and documentation that the property has been offered for sale to neighbors, conservation groups, and government agencies.

7:7A-12.8 Resubmittal of a denied application

Hearing and appeal provisions found in the existing rule at N.J.A.C. 7:7A-12.7 are proposed to be deleted and consolidated with other hearing and appeal provisions at N.J.A.C. 7:7A-1.7.

Proposed new N.J.A.C. 7:7A-12.8 explains how the Department will handle the resubmittal of an application which has been denied in the past. This is found in the existing rule at N.J.A.C. 7:7A-7.10(d), 9.8(d), and 12.6(d), and is rephrased in the proposal for clarity. In addition, one substantive change is proposed, which would delete a provision allowing a resubmitted application to make references to a previously denied application. Due to the need for the Department to close out and archive old files, the Department cannot offer this option in cases where a long time has passed since the first application.

SUBCHAPTER 13 CONTENTS OF PERMITS AND WAIVERS

7:7A-13.1 Standard conditions that apply to all permits

The proposal makes clarifying changes to N.J.A.C. 7:7A-13.1(a)1 through 12, which lists the standard contents of all permits, including general permit authorizations and transition area waivers. The proposed clarifications do not change the meaning of the provision. In addition, the proposal relocates at N.J.A.C. 7:7A-13.1(a)5 a requirement to maintain work areas in good condition and in accordance with the permit, found in the existing rules at N.J.A.C. 7:7A-13.1(a)15.

The proposal relocates existing N.J.A.C. 7:7A-13.1(a)13 in its own subsection at proposed N.J.A.C. 7:7A-13.1(b), with clarifying changes that do not change its meaning. The provision allows noncompliance in emergencies.

New proposed N.J.A.C. 7:7A-13.1(a)13 includes a requirement that a permittee comply with mitigation requirements. The provision refers to a new requirement proposed at N.J.A.C. 7:7A-15.3(b), which increases the mitigation requirement if mitigation is not timely performed.

The proposal deletes N.J.A.C. 7:7A-13.1(a)14 because this provision is included in proposed N.J.A.C. 7:7A-2.1(f). The provision states that activities are not conducted under the authority of the permit if they are not specifically identified and authorized in the permit.

The proposal deletes N.J.A.C. 7:7A-13.1(a)15 because this provision is proposed to be included in N.J.A.C. 7:7A-13.1(a)5. The provision requires proper maintenance of permitted work areas.

The proposal deletes N.J.A.C. 7:7A-13.1(a)16 because it repeats provisions found at proposed N.J.A.C. 7:7A-13.2(b)3 and 4. The provision addresses modification of permits to incorporate changes in regulations.

A new provision is proposed at N.J.A.C. 7:7A-13.1(c). The provision requires a written acceptance by the permittee of the permit prior to the start of permitted activities. If the permittee begins activities without submitting this written permit acceptance, the permittee shall be deemed to have accepted all terms and conditions of the permit upon the date the activities were begun. This is intended to remedy a situation where a permittee may begin permitted activities while simultaneously appealing some aspect or condition of the permit. This can result in irreparable environmental damage which cannot be reversed even if the appeal fails. The proposal includes a complementary provision at N.J.A.C. 7:7A-1.7(f), which provides for an automatic stay of the permit if the applicant appeals any condition of the permit.

Existing N.J.A.C. 7:7A-13.1(a)17, which requires an informational sign at all permitted work sites, is proposed to be recodified at N.J.A.C. 7:7A-13.1(d), and a requirement is added that a permittee must make a copy of the permit available on site for public inspection.

Proposed new N.J.A.C. 7:7A-13.1(e) contains provisions clarifying that a permit runs with the land and is binding on all who own the land or any part of the land. This is not explicitly stated in the existing rules.

A new provision is proposed at N.J.A.C. 7:7A-13.1(f), emphasizing that obtaining a permit under this chapter does not relieve the permittee of the obligation to obtain approvals under other laws.

7:7A-13.2 Establishing permit conditions

This section applies to all permits, including general permit authorizations and transition area waivers. The proposal combines existing N.J.A.C. 7:7A-13.2(a) and (b), which provide for the Department to establish permit conditions on a case by case basis. In addition, the proposal adds clarifications that do not affect meaning.

Existing N.J.A.C. 7:7A-13.2(c), which requires certain basic information in every permit or waiver, is recodified as proposed N.J.A.C. 7:7A-13.2(b), with minor clarifications that do not change its meaning.

Proposed new N.J.A.C. 7:7A-13.2(c) provides for the Department to include a condition in a permit requiring a preconstruction meeting on the site. A preconstruction meeting can help the Department and the applicant to ensure that all activities and conditions in the permit are carried out as planned, especially with a large or complex project.

No changes are proposed to existing N.J.A.C. 7:7A-13.2(d), which addresses the manner in which permit conditions are incorporated into the permit.

7:7A-13.3 Duration of permits and waivers

Proposed N.J.A.C. 7:7A-13.3(a), which governs the terms of permits, including general permit authorizations and transition area waivers, is found in the existing rule at N.J.A.C. 7:7A-13.3. The proposal clarifies that the provision also applies to transition area waivers, and adds cross references to provisions governing LOIs and exemption letters.

Proposed new N.J.A.C. 7:7A-13.3(b) clarifies the scope of the section, and refers to other sections for provisions governing LOIs and exemption letters.

7:7A-13.4 Effect of a permit

The proposal makes clarifying changes, which do not affect meaning, to existing N.J.A.C. 7:7A-13.4(a), which explains that compliance with a permit or waiver constitutes compliance with certain laws.

The proposal makes a minor clarifying change to existing N.J.A.C. 7:7A-13.3(b), which stresses that a permit or waiver does not create a property right.

SUBCHAPTER 14 CHANGES TO ISSUED PERMITS OR WAIVERS

The existing rule sections that address changes to issued permits and waivers are found at N.J.A.C. 7:7A-13.6 through 13.9, and are drawn from Federal requirements at 40 CFR § 233.36. However, these sections of the rules have proved confusing to the regulated public. In addition, some of the Federal terminology for changes to permits has been modified since the freshwater wetlands rules were last amended. Therefore, the proposal deletes the existing sections, reorganizes and rewords them, and proposes them in a new subchapter 14, described in detail below.

7:7A-14.1 General provisions for changing an issued permit

Information found in proposed new N.J.A.C. 7:7A-14.1(a), providing that the Department will modify a permit, including a waiver or general permit authorization, at the request of the permittee or on its own initiative, is found in the existing rule at N.J.A.C. 7:7A-13.6(a).

Information found in proposed new N.J.A.C. 7:7A-14.1(b), providing that the Department shall suspend a permit, including a waiver or general permit authorization, for cause, is found in the existing rule at N.J.A.C. 7:7A-13.4(a). A provision is added providing for the Department to suspend a permit upon request from the permittee.

Information found in proposed new N.J.A.C. 7:7A-14.1(c), providing that the Department shall terminate a permit for cause, including a waiver or general permit authorization, is found in the existing rule at N.J.A.C. 7:7A-13.4(a). A provision is added providing for the Department to terminate a permit upon request from the permittee.

Proposed new N.J.A.C. 7:7A-14.1(d) provides for the Department to extend a permit, and refers to the section governing permit extensions.

Information found in proposed new N.J.A.C. 7:7A-14.1(e), providing that changes to issued permits are subject to the same EPA review requirements as original applications, is not specifically stated in the existing rule. However, the provision is included here because it clarifies that a discharge requiring EPA review could not avoid such review merely by virtue of being submitted to the Department as a change to an issued permit, rather than as a new permit application.

Proposed new N.J.A.C. 7:7A-14.1(f), prohibiting the Department from taking certain actions if EPA objects, is found in the existing rule at N.J.A.C. 7:7A-13.6(f), with clarifications that do not change its meaning. The terms "suspend" and "terminate" are proposed to replace the term "revoke and reissue". This reflects changes proposed at N.J.A.C. 7:7A-14, which revise the terminology used for changes to issued permits in order to make them easier to understand.

Proposed new N.J.A.C. 7:7A-14.1(g) provides that the Department may take enforcement action without modifying, suspending, or terminating a permit. This has always been true because the existing enforcement provisions authorize the Department to enforce permits and contain no requirement that a permit be modified,

suspended, or terminated prior to such enforcement. However, the Department has found that there is confusion over this issue in the regulated community, so this new provision is intended to clarify this point.

7:7A-14.2 Transfer of a permit

Proposed N.J.A.C. 7:7A-14.2 refers to the provisions at N.J.A.C. 7:7A-14.3 for direction on how to modify a permit to reflect a transfer of ownership or operational control.

7:7A-14.3 Modification of a permit

Proposed new N.J.A.C. 7:7A-14.3(a), providing that the Department may modify a permit, including a waiver or general permit authorization, at the request of the permittee or on its own initiative, is found in the existing rule at N.J.A.C. 7:7A-13.6(a).

Proposed new N.J.A.C. 7:7A-14.3(b) describes the three types of modifications which may be requested by a permittee. A minor modification can be made to any type of permit, major modifications are required for individual permits and individual transition area waivers, and a general permit authorization modification is required for a general permit authorization. This is found in the existing rule at N.J.A.C. 7:7A-13.6(b), except that the proposal provides for modifications of general permit authorizations, and limits major modifications to individual permits.

Proposed new N.J.A.C. 7:7A-14.3(c) lists the types of changes that require a minor modification. This is found in the existing rule at N.J.A.C. 7:7A-13.9(b), except that the proposal adds one further trigger for a minor modification – a change in materials, construction techniques, or the location of an activity on a site, if the change is required by another permitting agency and will not result in additional disturbance.

Proposed new N.J.A.C. 7:7A-14.3(d), which describes major modifications and explains the review standard for a major modification, is found in the existing rule at N.J.A.C. 7:7A-13.6(b) and (e). The provision is reworded for clarity, and limited to apply only to individual permits, including individual open water fill permits and individual transition area waivers, since the proposal adds separate modification provisions for general permit authorizations.

Proposed new N.J.A.C. 7:7A-14.3(e) provides for modifications to a general permit authorization. Because the general permit itself has already been subject to Department review and public comment during its adoption, and because the use of the general permit on a specific site has already been subject to Department review and public comment as part of the application for the general permit authorization, a less extensive review and public notice is required for a modification to a general permit authorization than for modifications to individual permits or transition area waivers. A modification to a general permit authorization will be issued if the project as modified would still meet the requirements of the general permit and the modification would not significantly change the scale, use, or environmental impact of the project.

Proposed new N.J.A.C. 7:7A-14.3(f), which lists the causes for which the Department may modify a permit on its own initiative, with or without the permittee's consent, is found in the existing rule at N.J.A.C. 7:7A-13.7(a). The provision is reworded for clarity. In addition, it is simplified and amended to make it consistent with EPA regulations governing assumed programs at 40 C.F.R. 233.36. Specifically, a new provision is added at N.J.A.C. 7:7A-14.3(g)3, allowing the Department to modify a permit if changed circumstances justify changed conditions, and provisions are added at N.J.A.C. 7:7A-14.3(g)4 which allow a modification rather than a termination if the modification will ensure compliance with the chapter. Finally, provisions at N.J.A.C. 7:7A-14.3(g)5, providing for a modification based on a change in rules or standards, are simplified.

Proposed new N.J.A.C. 7:7A-14.3(g) refers to the application provisions regarding modifications, and provides that an application for a general permit modification does not require public notice. The provision also exempts a minor modification application from the requirement for a fee and public notice. This is found in the existing rule at N.J.A.C. 7:7A-13.6(d) and (h).

Proposed new N.J.A.C. 7:7A-14.3(h) provides that an application for a modification will be reviewed under the standard procedures for review of applications.

7:7A-14.4 Suspension of a permit, waiver, or general permit authorization

This section provides for the Department to suspend a permit, including a waiver or general permit authorization for cause. Although the existing rule states that the Department may suspend permits in several places, it does not explain suspensions, their causes, or the procedures by which the Department may suspend a permit, waiver, or general permit authorization. Therefore, this proposed section includes this information, taken from the rules governing the Federal 404 program at 40 CFR ☏233.36.

Proposed new N.J.A.C. 7:7A-14.4(a) requires that all permitted activity stop immediately upon suspension of a permit.

Proposed new N.J.A.C. 7:7A-14.4(b) lists the two grounds for a suspension. These are not specifically stated in the existing rule. However, they are found in the rules governing the Federal 404 program at 40 CFR ☏233.36.

Proposed new N.J.A.C. 7:7A-14.4(c) requires the Department to notify a permittee of a suspension. This requirement is not specifically stated in the existing rule. However, it is found in the rules governing the Federal 404 program at 40 CFR ☏☏ 233.36, 233.32, and 233.33.

Proposed new N.J.A.C. 7:7A-14.4(d) specifies that the Department will follow the same procedures for a public hearing on a suspension as are followed for a public hearing on a permit application.

Proposed new N.J.A.C. 7:7A-14.4(e) requires the Department to reinstate, modify or terminate a suspended permit after a public hearing or within a reasonable time.

7:7A-14.5 Termination of a permit

This proposed section is found in the existing rules at N.J.A.C. 7:7A-15.10.

Proposed N.J.A.C. 7:7A-14.5(a), found in the existing rules at N.J.A.C. 7:7A-15.10, sets forth the causes for the Department to terminate a permit. A proposed change clarifies that the section applies to all permits, including general permit authorizations and transition area waivers. A proposed change at N.J.A.C. 7:7A-14.5(a)1 clarifies that pursuing a land use other than that authorized by the permit constitutes noncompliance with the permit. This is especially important as regards an individual permit. To issue an individual permit, the Department considers whether there are practicable alternatives to the project as proposed. Often, the proposed land use is a factor in the Department's decision on whether alternatives exist. Thus, if the Department approves an activity on the grounds that there is no practicable alternative for the type of land use proposed, changing the use can call into question the validity of the permit decision and therefore the Department may terminate the permit.

The proposal adds a provision at proposed N.J.A.C. 7:7A-14.5(a)3, clarifying that the Department may terminate a permit if it determines that the permit was issued based on false or inaccurate information. For example, if a permit were issued and neither the applicant nor the Department was aware that an endangered species was breeding on the site, the Department could terminate the permit after it is issued, upon learning of the breeding site.

Proposed N.J.A.C. 7:7A-14.5(b), found in the existing rules at N.J.A.C. 7:7A-15.10(b), requires notice to the permittee prior to a termination, and provides options for the permittee who receives such a notice. The proposal deletes a requirement that a violation be remedied within 60 days because this requirement is moved to proposed new N.J.A.C. 7:7A-14.5(d). In addition, the proposal rewords the provision for clarity.

Proposed N.J.A.C. 7:7A-14.5(c), found in the existing rules at N.J.A.C. 7:7A-15.10(c), provides for the permit to automatically terminate if the permittee fails to pursue any of the options in proposed N.J.A.C. 7:7A-14.5(b). The proposal makes minor changes that do not change the meaning of the provision.

Proposed new N.J.A.C. 7:7A-14.5(d) requires that, if a permittee exercises the option of submitting a plan to bring activities back into compliance, the implementation of the plan shall begin immediately upon the Department's approval of the plan and shall be completed within 60 days.

Proposed N.J.A.C. 7:7A-14.5(e), found in the existing rules at N.J.A.C. 7:7A-15.10(d), requires a permittee to restore the site to its pre-activity condition within 90 days after termination of the permit. The proposal makes minor changes that do not change the meaning of the provision.

Existing N.J.A.C. 7:7A-15.10(e) is proposed for deletion, because it contains information on where to request a hearing, which is included by reference in proposed N.J.A.C. 7:7A-14.5(b)3.

7:7A-14.6 Permit extensions

This proposed new section provides for a permit, including a general permit authorization or a transition area waiver, to be extended at the end of its term. It has been the Department's experience that a permittee can often become delayed in beginning permitted activities, sometimes by the process of obtaining approvals from other agencies, or by legal disputes with third parties. Often, a permit may expire before or during permitted activities, but there has been no change in the project applied for or the rules that apply to the project. In such cases, it is unnecessary for the Department and the applicant to invest the time and money required for an entirely new permit application. Therefore, this section is intended to provide the option to extend a permit in appropriate circumstances.

Proposed N.J.A.C. 7:7A-14.6(a) sets forth the scope of the section. This section does not apply to LOIs, which have always had provisions for extensions. Those provisions remain in the subchapter on LOIs. The section does not apply to exemption letters, which have separate requirements in order to remain valid.

Proposed N.J.A.C. 7:7A-14.6(b) sets forth the conditions which must be met for an extension, and provides that there may only be one extension for five years. The permittee must apply for the extension at least 90 days prior to expiration of the permit, and must demonstrate that conditions relevant to the permit review have remained unchanged since the issuance of the permit.

Proposed N.J.A.C. 7:7A-14.6(c) provides that the Department shall deny an extension if the permittee has violated the permit, or if cause exists for termination of the permit.

Proposed N.J.A.C. 7:7A-14.6(d) stresses that, absent an extension under this section, the permit will expire and permitted activities must stop, unless and until a new permit is applied for and issued.

Proposed N.J.A.C. 7:7A-14.6(e) requires that an application for an extension meet the application requirements for extensions, set forth at N.J.A.C. 7:7A-10.

SUBCHAPTER 15 MITIGATION

Enforcement provisions found in the existing rule at N.J.A.C. 7:7A-15 are consolidated with civil administrative penalty provisions found in the existing rule at N.J.A.C. 7:7A-17 and recodified at proposed N.J.A.C. 7:7A-16. The mitigation provisions found in the existing rule at N.J.A.C. 7:7A-14 are proposed for deletion, to be replaced with proposed at N.J.A.C. 7:7A-15, described below.

The proposed new mitigation provisions differ in two major ways from the mitigation provisions in the existing rule. First, they systematize the process of selecting a mitigation alternative, making it more predictable and consistent from project to project. Second, the proposed provisions codify the practice of mitigation banking to generate credits for possible purchase by those who must satisfy mitigation obligations.

7:7A-15.1 Mitigation definitions

The proposal includes a new section including definitions of many terms that are used primarily or solely in the mitigation subchapter.

A definition of "charitable conservancy" is proposed, in order to clarify several provisions in the mitigation section which require transfer of land to a non-profit conservation organization. The proposed definition is based on the definition in the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-2, which provides for government agencies and charitable conservancies to hold and enforce conservation restrictions.

The definition of "Council" is proposed to be relocated from the main definitions section at N.J.A.C. 7:7A-1.4 to the mitigation definitions section, and simplified to merely refer to the definition of "Wetlands Mitigation Council." See below for a description of the new proposed definition for "Wetlands Mitigation Council."

The definition of "creation" is proposed to be relocated into the section on mitigation definitions from existing N.J.A.C. 7:7A-14.2, and simplified slightly without changing its meaning.

A new definition of "credit purchase" is proposed, for use in provisions that provide for mitigation through the purchase of mitigation credits from a mitigation bank.

A new definition of "degraded" is proposed to replace the definition of "degraded wetland" found in the existing rule. The proposed definition applies to both wetlands and State open waters, and relies on whether the wetland or water serves the functions protected by the FWPA. The proposed definition also allows the Department to determine, for mitigation purposes only, that a farmed wetland is degraded. This will facilitate the enhancement of farmed wetlands through mitigation.

The definition of "enhancement" is proposed to be relocated in the section addressing mitigation definitions from existing N.J.A.C. 7:7A-14.2. The definition is

revamped to clarify that enhancement entails substantial alterations, and does not include improvements to a wetland that is not degraded.

New definitions of "in-kind mitigation" and "out-of-kind mitigation" are proposed, for use in provisions that require in-kind mitigation unless certain demonstrations are made.

A new definition of "land donation" is proposed, to more specifically describe this mitigation alternative.

The definition of "mitigation" is proposed to be repeated here in the mitigation definitions section, as well as in N.J.A.C. 7:7A-1.4, to assist the reader in easily locating the definition.

A new definition of "mitigation area" is proposed, in order to distinguish it from the term "site." A site includes all contiguous land owned or controlled by the same person, while a mitigation area could be only a portion of a site.

New definitions of "mitigation bank", "mitigation bank service area", and "mitigation bank site" are proposed for use in the provisions relating to credit purchase and to Council approval of mitigation banks.

A new definition of "monetary contribution" is proposed, to more specifically describe this mitigation alternative.

The definition of "restoration" is proposed to be relocated here from existing N.J.A.C. 7:7A-14.2(a)1, and a second meaning is added to the definition. In the existing rule, the term is defined to mean only the reversal of a temporary disturbance. However, the term "restoration" is used throughout the country on the Federal and state level to refer to the reestablishment of wetlands where they previously existed but are no longer present. Therefore, the proposal adds this as one of the meanings of the term "restoration" in order to reduce confusion and make New Jersey's mitigation terminology consistent with the rest of the country.

A new definition of "upland preservation" is proposed for use in implementing this new mitigation alternative, created by amendments to the FWPA.

A new definition of "watershed management area" is proposed. The Department's Division of Watershed Management has divided the State into watershed management areas for purposes of water quality planning and other environmental programs. The proposed mitigation provisions recognize this watershed-based approach by coordinating mitigation requirements with the watershed management areas wherever possible.

A new definition of "Wetlands Mitigation Council" is proposed. The definition clarifies that the Council administers the Wetlands Mitigation Fund.

A new definition of "Wetlands Mitigation Fund" is proposed. The FWPA establishes a "Wetlands Mitigation Bank" at N.J.S.A. 13:9B-14a. The FWPA provides that the Wetlands Mitigation Bank is the repository for donations provided to satisfy mitigation

obligations. The term used in the statute, however, is problematic because the term "mitigation bank" is understood throughout the country to mean something else. In the federal wetlands regulations, and throughout the scientific literature regarding mitigation, the term "mitigation bank" is used to describe a private entity that creates, restores, or preserves wetlands and then sells credits for each acre created, restored, or preserved. Permittees or others who are obligated to perform mitigation can then purchase these credits to satisfy their mitigation obligations. In order to differentiate the "Wetlands Mitigation Bank" created by the FWPA from this more common type of mitigation bank, the proposed definition renames the statutorily created entity as the "Wetlands Mitigation Fund." This name also more accurately describes the nature and function of the entity, which is solely a repository for contributions.

7:7A-15.2 General mitigation requirements

Proposed N.J.A.C. 7:7A-15.2(a) contains a provision found in the existing rule at N.J.A.C. 7:7A-14.1(d), requiring that the Department not consider a mitigation proposal in evaluating a permit. The provision, which originates in the FWPA at N.J.S.A. 13:9B-13b, is rephrased for clarity and brevity, with no change in meaning.

Proposed N.J.A.C. 7:7A-15.2(b), which sets forth the types of disturbances for which mitigation will be required, is relocated from existing N.J.A.C. 7:7A-14.1(a), with clarifications. An addition to the provision is proposed to clarify that mitigation is sometimes required for an unpermitted disturbance resulting from a violation. The proposal changes the term "shall" to "may" to reflect the fact that mitigation is not required for all permits and all violations.

Proposed N.J.A.C. 7:7A-15.2(c) specifically states the standard of "equal ecological value" which the Department will apply to determine if a mitigation project is acceptable. The proposal details specific elements of the standard, including the mitigation alternative used and the amount of mitigation that will be required. Most of these specifics are implied or stated in various provisions of the existing rule, but are not gathered in one provision.

Proposed new N.J.A.C. 7:7A-15.2(d) sets forth basic factors that the Department will consider in evaluating a mitigation project's likelihood of success. Again, many of these factors are mentioned or implied in the existing rule, but not concisely stated.

Proposed new N.J.A.C. 7:7A-15.2(e) clarifies that, to satisfy the mitigation requirements of the rule, a mitigation project must be approved by the Department prior to its construction. If a monetary contribution or land donation is proposed, the Department's approval concerns whether contribution or donation is an acceptable mitigation alternative. After the Department's approval, the Council must approve the amount of the contribution or the specific parcel of land to be donated.

Proposed new N.J.A.C. 7:7A-15.2(f) sets forth the address for contacting the Department regarding mitigation matters, and for contacting the Council and/or Council staff, and includes the e-mail address for the Land Use Regulation Program.

Proposed new N.J.A.C. 7:7A-15.2(g) addresses the issue of how mitigation that involves regulated activities in wetlands is approved. Activities required to accomplish mitigation for a disturbance authorized by a Department freshwater wetlands permit shall be authorized through the permit that authorizes the original disturbance. However, if no Department freshwater wetlands permit is issued for the disturbance, a permit will be required for the mitigation if any regulated activities will take place in wetlands, transition areas, and/or State open waters.

Proposed N.J.A.C. 7:7A-15.2(h) replaces existing N.J.A.C. 7:7A-14.1(g), which states that, when a mitigation requirement arises from a violation, approval of the mitigation plan and/or a permit may be conditioned on resolution of the violation. This provision is not needed because the Department's current practice is to include the required mitigation as part of the enforcement document that resolves the violation. Thus, the resolution of the violation and the mitigation requirement will be approved through one document. The proposed provision clarifies that mitigation for violations will be evaluated on a case-by-case basis, and that mitigation required as a consequence of a violation shall be at least as stringent as mitigation required to compensate for a permitted disturbance.

Proposed N.J.A.C. 7:7A-15.2(i) requires that a mitigation area be permanently protected from future development in accordance with the proposed N.J.A.C. 7:7A-15.14, which details the requirements for conservation restrictions. This is found in the existing rules at N.J.A.C. 7:7A-14.1(e).

Proposed new N.J.A.C. 7:7A-15.2(j) requires that, if mitigation is performed through uplands preservation or land donation, the mitigation area must be transferred to a government agency or charitable conservancy after the mitigation is complete. This also applies to a mitigation bank.

Proposed new N.J.A.C. 7:7A-15.2(k) allows a permittee with multiple disturbances to aggregate the mitigation for the disturbances into one mitigation project, upon approval by the Department. An example of this might be a public agency with multiple small disturbances, such as DOT or a county road commission. Allowing such a permittee to aggregate the mitigation for many small disturbances would result in a more environmentally beneficial mitigation project than requiring a separate mitigation project for each permitted disturbance.

Proposed new N.J.A.C. 7:7A-15.2(l) prohibits a mitigator from performing mitigation through activities that are already required by another government agency. This will ensure compliance with the FWPA standard requiring that mitigation provide equal ecological value to the values lost through a disturbance.

7:7A-15.3 Timing of mitigation

Proposed new N.J.A.C. 7:7A-15.3(a) sets forth the required timing of mitigation, depending on whether the mitigation is for a permitted temporary disturbance, a non-temporary permitted disturbance, or a disturbance resulting from a violation. Most of

the substance of the proposed provision is found in the existing rule at N.J.A.C. 7:7A-14.1(c).

Proposed new N.J.A.C. 7:7A-15.3(b) requires that additional mitigation be performed if the timing requirements at N.J.A.C. 7:7A-15.3(a) are not complied with. This is intended to remedy a situation the Department has encountered, where a permittee expeditiously pursues the permitted activities that cause wetlands disturbance, but delays starting or completing the mitigation that is required as compensation for the permitted disturbance.

The amount of mitigation required in the rules is based on the assumption that mitigation will be performed prior to or concurrently with the disturbance, as required by the FWPA. Thus, the functions lost through the disturbance are immediately offset by the functions created by the mitigation. The mitigation requirement is adjusted to account for the amount of time it will inevitably take a mitigation project to fully develop and begin providing beneficial wetlands functions to the ecosystem. When the mitigation lags behind the disturbance, there is a time period during which the ecosystem lacks the habitat, flood storage, and other values provided by the wetlands disturbed, and those functions have not been replaced by the mitigation. This results in a diminution in the total functions and values provided by the mitigation. What might have been sufficient mitigation to create functions and values to replace those lost through disturbance if performed immediately becomes something less by virtue of leaving the ecosystem with none of these values for a period of time. To make up for the functions and values lost during this time that no wetlands functions were being provided, the amount of mitigation required increases by 20% each year that the mitigation is not completed after the date mitigation was to begin. This will help to ensure that even delayed mitigation will meet the FWPA standard of equal ecological value. The Department understands that the environmental impact of a disturbance increases by degrees over time and thus that the annual 20% increase is not mathematically precise. However, an annual increase allows a grace period to allow permittees to comply, and provides the Department with an administratively manageable annual calculation to perform and apply.

Proposed new N.J.A.C. 7:7A-15.3(c) requires that mitigation for publicly funded projects be included in the contract awarded for the project causing the disturbance. This addresses problems the Department has encountered wherein a publicly funded project involving wetland disturbance moves ahead while the mitigation for the disturbance is delayed by problems with the public contracting process.

7:7A-15.4 Property suitable for mitigation

Proposed new N.J.A.C. 7:7A-15.4(a) requires that most mitigation occur on private property, and sets forth the situations when public property may be used for mitigation. The provisions limits the types of mitigation that may be performed on public property to restoration, creation, and enhancement, in accordance with the FWPA. The substance of this proposed provision is found in the existing rule at N.J.A.C. 7:7A-14.1(f). Unlike the existing rule, however, the provision allows use of public land in cases where the public agency did not obtain the land for any specific purpose, such as through a tax

lien. This will allow a local government to mitigate on a property that is suitable for mitigation, even if the property was not initially obtained or held for mitigation purposes.

Proposed new N.J.A.C. 7:7A-15.4(b) clarifies that certain activities do not qualify as mitigation. The Department has found that some mitigators mistakenly do not view mitigation as compensation for the habitat values and other natural functions lost through a disturbance, but view it as the creation or enhancement of open space for human use.

Proposed new N.J.A.C. 7:7A-15.4(c) requires that certain sources be consulted for assistance in locating suitable sites for mitigation. These are the applicable watershed management plan, if any; and the county mitigation inventory, if any. Both of these documents should include listings of areas that might be suitable for mitigation. Making sure they are consulted will increase coordination among local agencies and interests.

Proposed N.J.A.C. 7:7A-15.4(d) contains provisions found in the existing rule at N.J.A.C. 7:7A-14.2(a)2i, which discourage use of already valuable areas for mitigation. The provisions are rephrased for clarity, and broadened to apply to all mitigation alternatives.

Proposed new N.J.A.C. 7:7A-15.4(e) clarifies that mitigation may only be performed on property that is under full legal control of the mitigator. This addresses problems that have arisen from mitigators attempting to use land that is not under their control for mitigation.

Proposed new N.J.A.C. 7:7A-15.4(f) addresses problems the Department has encountered in relation to choosing a site for enhancement. Applicants often propose enhancement on a wetland that is not degraded. Such "enhancement" may actually damage the existing habitat values of the area. This proposed provision will allow the Department to require scientific assessments to ensure that the area is degraded and will benefit from, rather than be harmed by, enhancement.

Proposed new N.J.A.C. 7:7A-15.4(g) is similar to existing provisions at N.J.A.C. 7:7A-14.2(a)2i, which discourage use of already valuable areas for mitigation. The proposed provision extends this concept to focus on threatened and endangered species, in order to ensure that a mitigation project does not result in harm to such species. The standard is the same applied at N.J.A.C. 7:7A-4.3, which prohibits issuance of a general permit authorization for an activity that would adversely affect threatened or endangered species habitat.

7:7A-15.5 Mitigation for a smaller disturbance

The proposal splits mitigation projects into two categories: those compensating for a smaller disturbance, and those compensating for a larger disturbance. In general, the rule allows mitigation for a smaller disturbance to more easily be performed offsite, and through purchase of credits from a mitigation bank. This reflects the fact that mitigation projects tend to be more successful if performed on a large scale. Allowing smaller mitigation projects to be performed through credit purchase aggregates the smaller

projects into larger ones (a mitigation bank) and provides greater environmental benefit. In addition, it improves the Department's efficiency in approving and monitoring mitigation projects for smaller disturbances, because the Department can work with one mitigation bank rather than multiple small mitigation projects. A final benefit of credit purchase is that the mitigation is performed prior to the disturbance in most cases, unlike mitigation performed by a permittee, which is only occasionally performed prior to the permitted disturbance.

Proposed new N.J.A.C. 7:7A-15.5(a) sets forth the scope of the section. This section determines the mitigation alternative but does not determine the amount of mitigation, which is determined under proposed N.J.A.C. 7:7A-15.8.

Proposed new N.J.A.C. 7:7A-15.5(b) specifies what constitutes a smaller disturbance. A smaller disturbance is 1.5 acres or smaller, or a disturbance affecting only ordinary resource value wetlands. The 1.5 acre cutoff was chosen because the Department's experience with mitigation indicates that a mitigation area of three or more acres has a substantially higher likelihood of success than a smaller mitigation area. The larger wetlands can provide habitat that is farther from human activity, and the establishment of a successful wetland is easier with a larger area. The lowest ratio for mitigation is two acres of mitigation per acre of disturbance, so a disturbance of 1.5 acres or less would result in a mitigation area that would be a maximum of three acres. Thus, assuming the lowest mitigation ratio, a disturbance of 1.5 acres or less is likely to result in a three acre or smaller mitigation area, which will have less potential for success. A disturbance of ordinary resource value wetlands is considered a smaller disturbance because ordinary resource value wetlands fall into four categories, all of which are small wetland types: certain isolated wetlands no more than 5,000 square feet (0.11 acres), drainage ditches, swales, and certain human-made detention facilities.

Proposed new N.J.A.C. 7:7A-15.5(c) creates a rebuttable presumption that onsite mitigation for a smaller disturbance is not feasible and should be performed through credit purchase, unless the applicant demonstrates that onsite mitigation would be environmentally beneficial. This reflects the fact, discussed above, that it tends to be environmentally better to aggregate small mitigation projects through credit purchase. However, this tendency may not be borne out in all cases, so the rule contains a process for an applicant to show that mitigation in its particular case would be better performed onsite.

Proposed new N.J.A.C. 7:7A-15.5(d) sets forth the process for determining the mitigation bank from which credits for a smaller disturbance shall be purchased. In general, credits should be purchased from a bank that is as close to the disturbance as possible, and a bank that is in the same watershed (identified by its HUC 11 designation) as the disturbance. However, the Department has authorized some mitigation banks already, and each bank has a service area within which it may sell credits. Since the Department authorized these service areas, the Department intends to respect them until the credits in these banks are sold. Therefore, the intent of this subsection is to maximize the environmental benefit of the credit purchase while honoring existing bank service areas (see Figure 4 in proposed N.J.A.C. 7:7A-15.5).

Proposed new N.J.A.C. 7:7A-15.5(e) sets forth in detail the criteria for determining if onsite mitigation would be environmentally beneficial and thus whether the presumption in proposed N.J.A.C. 7:7A-15.5(a) is rebutted.

Proposed new N.J.A.C. 7:7A-15.5(f) allows for mitigation through a monetary contribution if credit purchase, onsite and offsite mitigation are all not feasible. Land donation is allowed only if all other mitigation alternatives, including monetary contribution, are determined not to be feasible. This is found in the existing rule at N.J.A.C. 7:7A-14.2(a)4 and is rephrased here for clarity with no change in meaning.

The flow chart in Figure 4 illustrates N.J.A.C. 7:7A-15.5, to help clarify the process of selecting a mitigation alternative for a smaller disturbance.

7:7A-15.6 Mitigation for a larger disturbance

Proposed new N.J.A.C. 7:7A-15.6(a) sets forth the scope of the section. This section determines the mitigation alternative for a larger disturbance, but does not determine the amount of mitigation, which is determined under proposed N.J.A.C. 7:7A-15.8. The section also determines the location of the mitigation.

Proposed new N.J.A.C. 7:7A-15.6(b) specifies that a larger disturbance is one not listed as a smaller disturbance.

Proposed new N.J.A.C. 7:7A-15.6(c) requires that mitigation be carried out onsite if feasible, through restoration, creation, or enhancement. Upland preservation as mitigation must occur offsite, in accordance with the FWPA at N.J.S.A. 13:9B-13c.

Proposed new N.J.A.C. 7:7A-15.6(d), (e), and (f) provide mitigation alternatives if onsite mitigation is not feasible. Like the provisions regarding mitigation for a smaller disturbance, the rule creates a hierarchy of mitigation alternatives, each of which must not be feasible if one is to move to the next alternative. As with a smaller disturbance, the general goal is to have the mitigation occur close to the disturbance, and within the same HUC 11. The least favored option, as with a smaller disturbance, is land donation.

Figure 5 includes a flow chart that illustrates N.J.A.C. 7:7A-15.6, to help clarify the process of selecting a mitigation alternative for a larger disturbance.

7:7A-15.7 Mitigation for a temporary disturbance

Proposed N.J.A.C. 7:7A-15.7(a) sets forth the basic mitigation requirements for a temporary disturbance. Disturbance of any kind of non-forested freshwater wetlands, or of State open waters, requires restoration of the area disturbed. However, disturbance of a forested wetland requires both restoration and additional mitigation. This is a new requirement which codifies the Department's existing interpretation of the requirements for equal ecological value and reflects the high ecological value of forested wetlands, and the extremely long time it takes to reestablish a forest once it is disturbed.

Proposed N.J.A.C. 7:7A-15.7(b) sets forth the transition area requirements for a disturbed area that is restored. These requirement are intended to ensure that the functions and values provided by the mitigation are equal to the functions and values lost through the disturbance.

7:7A-15.8 Amount of mitigation required

Proposed new N.J.A.C. 7:7A-15.8(a) sets forth the scope of the section. The section determines the amount of mitigation required, depending on the mitigation alternative to be used, except if monetary contribution or land donation will be used. The amount of mitigation in cases of monetary contribution or land donation is determined by the Mitigation Council in accordance with N.J.A.C. 7:7A-15.21 or 7:7A-15.22.

Proposed new N.J.A.C. 7:7A-15.8(b) requires a transition area to be included in a mitigation area. The transition area is not counted in calculating the area of mitigation. This provision is found in the existing rule at N.J.A.C. 7:7A-14.2(a)2iii, but in the existing rule this requirement applies only to mitigation through creation. However, this requirement is necessary for all mitigation areas to ensure that mitigated wetlands are not degraded by adjacent activities. The width of the required transition area is determined by the wetland areas adjacent to the mitigation area, with a minimum width of 50 feet, except for a temporary disturbance, which is addressed at proposed N.J.A.C. 7:7A-15.7(b).

Proposed new N.J.A.C. 7:7A-15.8(c) sets forth the amount of mitigation required when restoration is performed. Under the existing rule, restoration is defined only to apply to temporary disturbances. The proposal expands the definition to also include recreating wetlands functions where they once existed but no longer do. Thus, this section addresses the amount of restoration required for a non-temporary disturbance. Two acres of restoration are required for one acre of disturbance. This ratio was chosen because restoration in the sense of recreating wetlands functions where they once existed but no longer do is very similar to creation, which is required at a ratio of two to one.

Proposed new N.J.A.C. 7:7A-15.8(d) provides for mitigation at a ratio of two acres created to one acre disturbed. This is found in the existing rule at N.J.A.C. 7:7A-14. 2(a)2i. The provision is reworded in the proposal for clarity, without changing its meaning.

Proposed new N.J.A.C. 7:7A-15.8(e) provides for enhancement at a ratio based on the functions and values of the wetlands disturbed. This is found in the existing rule at N.J.A.C. 7:7A-14.2(a)3, and is rephrased here for clarity.

Proposed new N.J.A.C. 7:7A-15.8(f) provides for mitigation through credit purchase from a mitigation bank, through purchase of two credits for each acre disturbed, except for the additional mitigation required for temporary disturbance of forested wetlands, which shall be at a ratio of one credit to one acre of disturbance. The existing rule does not specify a ratio for credit purchase. The Department intends to systematize the

process of mitigation through credit purchase by setting forth these ratios. The Council will then be able to calibrate the credits awarded to mitigation banks to ensure that they will correspond with this ratio.

Proposed new N.J.A.C. 7:7A-15.8(g) refers to N.J.A.C. 7:7A-15.9(c), under which the amount of upland preserved for mitigation shall be determined.

Proposed new N.J.A.C. 7:7A-15.8(h) sets forth the standard for determining the amount of a monetary contribution, which will be applied by the Council. This standard is found in the existing rule at N.J.A.C. 7:7A-14.2(a)4i, and is rephrased here for clarity without changing its meaning. The standard is found in the FWPA at N.J.S.A. 13:9B-13c.

Proposed new N.J.A.C. 7:7A-15.8(i) provides for the Council to determine the acreage of land required for mitigation through land donation. This is found in the existing rule at N.J.A.C. 7:7A-14.2(a)4ii, and is rephrased in the proposal for clarity without changing its meaning.

Proposed new N.J.A.C. 7:7A-15.8(j), which provides for a scientific demonstration of equal functions and values, is found in the existing rule at N.J.A.C. 7:7A-14.1(b). The provision is rephrased in the proposal for clarity, with no change in its meaning.

Proposed new N.J.A.C. 7:7A-15.8(k) provides for the Department to determine the mitigation required for a violation on a case-by-case basis as part of the resolution of the violation. The mitigation required for a violation shall be at least as stringent as the mitigation that would have been required had the disturbance been part of a permitted activity.

7:7A-15.9 Requirements for upland preservation

Proposed new N.J.A.C. 7:7A-15.9(a) sets forth the scope of the section, which governs requirements for upland preservation. Mitigation through uplands preservation was added to the FWPA in 1993, and this entire section is new.

Proposed new N.J.A.C. 7:7A-15.9(b) requires that uplands preserved shall be valuable for the protection of a freshwater wetlands ecosystem. This standard is set forth in the FWPA at N.J.S.A. 13:B-13c. The proposal provides detailed factors the Department will consider in evaluating whether mitigation through uplands preservation will meet this standard.

Proposed new N.J.A.C. 7:7A-15.9(c) provides basic parameters for the amount of uplands that must be preserved for mitigation. Because preservation of uplands provides fewer of the values lost when a wetland is disturbed, as compared with other mitigation alternatives, a correspondingly greater area of uplands must be preserved in order to meet the statutory standard of equal ecological value. To ensure that the preserved area has substantial functions and values, the rule requires preservation of an area that is at least five or more acres in size. If the preserved uplands are adjacent to a wetland, a large protective transition area is also required.

Proposed new N.J.A.C. 7:7A-15.9(d) requires that uplands preserved for mitigation be transferred to a government agency or nonprofit conservation organization. This will ensure that the uplands continue to be preserved permanently, and will give a third party an interest in maintaining the land in its natural state.

7:7A-15.10 Conceptual review of a mitigation area

Proposed new N.J.A.C. 7:7A-15.10(a) provides for the Department to perform a conceptual review of a mitigation area. This is similar to a pre-application conference on a project for which a permit is sought. It provides the potential mitigator with guidance prior to investing major amounts of money and time.

Proposed new N.J.A.C. 7:7A-15.10(b) strongly encourages applicants to request conceptual review prior to buying land. This is intended to protect the applicant from making a major investment and then finding that the land is not suitable for mitigation purposes.

Proposed new N.J.A.C. 7:7A-15.10(c) sets forth the elements of a request for conceptual review.

Proposed new N.J.A.C. 7:7A-15.10(d) provides for an optional site inspection if necessary, and clarifies that a conceptual review is not binding.

7:7A-15.11 Basic requirements for all mitigation proposals

Proposed new N.J.A.C. 7:7A-15.11(a) sets forth the time period in which a mitigation proposal must be submitted, depending on whether the disturbance resulted from an individual permit, a general permit authorization, or a violation.

Proposed new N.J.A.C. 7:7A-15.11(b) requires that a mitigation proposal include all information on the application checklist for a mitigation proposal, and indicates how to obtain the application checklist.

Proposed new N.J.A.C. 7:7A-15.11(c) sets forth minimum requirements for demonstrating that an alternative is not feasible. This list narrows the universe of sites to those that have at least a reasonable possibility of being suitable for mitigation. This will prevent applicants from wasting time exploring sites that have no reasonable possibility of being suitable for mitigation, and will assist applicants in working through the hierarchy of mitigation alternatives.

Proposed new N.J.A.C. 7:7A-15.11(d) provides that mitigation for a violation shall be at least as ecologically valuable as the mitigation that would have been required as a result of a permit. This is important in order to ensure that a violator does not benefit from pursuing an activity illegally rather than through a permit.

Proposed new N.J.A.C. 7:7A-15.11(e) requires the applicant to provide as many copies of each item as are required by the application checklist.

7:7A-15.12 Contents of a mitigation proposal

Proposed new N.J.A.C. 7:7A-15.12(a) sets forth the basic organization of the section, and requires each mitigation proposal to include the information on the applicable application checklist.

Proposed new N.J.A.C. 7:7A-15.12(b) sets forth basic information that will be required for every mitigation proposal. This includes basic information about the applicant and the disturbance for which the mitigation is required.

Proposed new N.J.A.C. 7:7A-15.12(c) sets forth the additional information that will be required on an application checklist for a mitigation proposal for credit purchase.

Proposed new N.J.A.C. 7:7A-15.12(d) sets forth the additional information that will be required on an application checklist for a mitigation proposal that involves restoration, creation, or enhancement of wetlands, preservation of uplands, or land donation. This includes information regarding the location and characteristics of a parcel of land that will be used as the proposed mitigation area.

Proposed new N.J.A.C. 7:7A-15.12(e) sets forth the additional information that will be required on an application checklist for a mitigation proposal that involves restoration, creation, or enhancement of wetlands. This information is in addition to the basic information required at N.J.A.C. 7:7A-15.12(b), as well as the information required at N.J.A.C. 7:7A-15.12(d) for any mitigation that requires a mitigation area. The information at proposed N.J.A.C. 7:7A-15.12(e) focuses on the mitigation activities that the applicant proposes to carry out on the mitigation site.

Proposed new N.J.A.C. 7:7A-15.12(f) sets forth the additional information that will be required on an application checklist for a mitigation proposal to make a monetary contribution. Although a monetary contribution must be approved by both the Department and the Wetlands Mitigation Council, the application checklist provides for both approvals to be applied for simultaneously in one application.

Proposed new N.J.A.C. 7:7A-15.12(g) sets forth the additional information that will be required on an application checklist for a mitigation proposal to make a land donation. Although a land donation must be approved by both the Department and the Wetlands Mitigation Council, the application checklist provides for both approvals to be applied for simultaneously in one application.

7:7A-15.13 Financial assurance for a proposal to restore, create, or enhance

Proposed N.J.A.C. 7:7A-15.13(a), which requires financial assurance for restoration, creation, and enhancement, is found in the existing rules at N.J.A.C. 7:7A-14.1(c). The provision is rephrased for clarity, and two exceptions are proposed. The exceptions would apply to government agencies, and to an entity that is exempt from the requirement under Federal law. For example, a portion of a mitigation area might be

the subject of a cleanup under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or "superfund"). In such a case, CERCLA requires its own financial assurance, and precludes the Department from requiring any additional financial assurance. Thus the mitigator would be exempt from the financial assurance requirement under N.J.A.C. 7:7A-15.

Proposed new N.J.A.C. 7:7A-15.13(b) clarifies that the financial assurance must be provided by a firm licensed in New Jersey.

Proposed N.J.A.C. 7:7A-15.13(c), which sets forth the amount of the financial assurance, is found in the existing rule at N.J.A.C. 7:7A-14.1(c), and is rephrased here for clarity.

Proposed N.J.A.C. 7:7A-15.13(d) contains a provision found in the existing rules at N.J.A.C. 7:7A-14.1(c), requiring that the financial assurance be updated annually to reflect changing economic conditions.

Provisions proposed N.J.A.C. 7:7A-15.13(f) and (g), which provide for release of the financial assurance upon certain triggering events, are found in the existing rule at N.J.A.C. 7:7A-14.1(c)1, and are rephrased here for clarity, with no change in meaning.

7:7A-15.14 Protecting a mitigation area from future development

Proposed N.J.A.C. 7:7A-15.14(a), which requires a conservation restriction on every mitigation area (except restoration for a temporary disturbance), is found in the existing rule at N.J.A.C. 7:7A-14.1(e). The provision is rephrased for clarity, and is expanded to apply to all mitigation areas, rather than only to areas where creation or enhancement has occurred.

Proposed N.J.A.C. 7:7A-15.14(b), which provides that the conservation restriction must ensure permanent preservation of the mitigation area in its natural state, is found in the existing rule at N.J.A.C. 7:7A-14.1(e)1. The provision is rephrased for clarity with no change in meaning.

Proposed N.J.A.C. 7:7A-15.14(c), which provides that the conservation restriction shall run with the land and bind all successors, is found in the existing rule at N.J.A.C. 7:7A-14.1(e). The proposal rephrases the provision for clarity and adds requirements to ensure that all future buyers and local governments will have notice of the restriction. The Department's experience has been that later buyers of restricted land, and local agencies that must approve development or subdivisions of the land, are often not notified of the restriction. This proposed provision is intended to remedy this problem.

Proposed new N.J.A.C. 7:7A-15.14(d) sets forth a special requirement for preserved uplands and donated land. The conservation restrictions for these areas must be enforceable by the Department or another government agency, or by a charitable conservancy whose trustees have no other interest in the land. This is intended to ensure that the restriction is adequately enforced.

Proposed new N.J.A.C. 7:7A-15.14(e) provides that the conservation restriction for donated land or a mitigation bank must be approved by both the Department and the Wetlands Mitigation Council.

Proposed new N.J.A.C. 7:7A-15.14(f) requires that the restriction include all regulated features.

Proposed new N.J.A.C. 7:7A-15.14(g) requires that the restriction include a survey and a metes and bounds description of the mitigation area. This requirement will ensure accuracy to assist in future attempts to comply with and/or enforce the restriction.

7:7A-15.15 Department review of a mitigation proposal

This proposed new section replaces and expands existing provisions at N.J.A.C. 7:7A-14.5(b), addressing the Department's procedures for review of a mitigation proposal.

Proposed new N.J.A.C. 7:7A-15.15(a) provides for a completeness determination by the Department when a mitigation proposal is submitted.

Proposed new N.J.A.C. 7:7A-15.15(b) requires that the Department consult with the USEPA when a mitigation proposal is intended to compensate for a major discharge. This is a new provision intended to meet Federal requirements for assumption by the State of the Federal wetlands program.

Proposed new N.J.A.C. 7:7A-15.15(c) requires a mitigation proposal to meet all requirements of the mitigation subchapter in order to obtain Department approval. Although the existing rule requires the Department to make a decision on a complete mitigation proposal within 60 days of its submittal, the Department's experience has been that the time required for such a decision is extremely variable, depending on the type of mitigation proposed, the site, the season, and other factors. Therefore, the 60 day deadline has not been included in the proposal.

7:7A-15.16 Requirements that apply after the Department approves restoration, creation, or enhancement

This proposed new section provides detail regarding important requirements that arise after mitigation construction is completed, such as requirements for monitoring and conservation restrictions.

Proposed new N.J.A.C. 7:7A-15.16(a) requires that the conservation restriction for a restoration, creation or enhancement project must be executed and recorded after Department approval of the mitigation project but prior to the start of the mitigation activities.

Proposed new N.J.A.C. 7:7A-15.16(b) requires a completion report for a restoration, creation, or enhancement project, and details the contents of the report. This will assist the Department in ensuring that mitigation is properly completed.

Proposed new N.J.A.C. 7:7A-15.16(c) requires annual monitoring reports, and details the contents of these reports. This will assist the Department in ensuring that the mitigation proposal is implemented as approved, and in determining if the mitigation project is encountering problems.

Proposed new N.J.A.C. 7:7A-15.16(d) requires a demonstration of project success at the completion of monitoring, and details the elements of a successful mitigation project. This will allow the Department to determine whether the mitigation is performing as projected, and whether the financial assurance may be released.

Proposed new N.J.A.C. 7:7A-15.16(e) provides for the Department to issue a declaration that the mitigation is successful, which will then trigger other events such as release of certain financial assurances.

Proposed new N.J.A.C. 7:7A-15.16(f) requires remedial action if the mitigation is not successful.

7:7A-15.17 Requirements that apply after the Department approves credit purchase or uplands preservation

Proposed new N.J.A.C. 7:7A-15.17(a) provides that a mitigator who is pursuing credit purchase or uplands preservation shall, after the Department approves the use of this mitigation alternative, execute the necessary documents to accomplish the mitigation.

Proposed new N.J.A.C. 7:7A-15.17(b) sets forth the standards that the Department will apply in determining if mitigation through credit purchase or uplands preservation is successful.

Proposed new N.J.A.C. 7:7A-15.17(c) requires the mitigator to transfer preserved uplands to a government agency or charitable conservancy, and to provide the agency or conservancy with a maintenance fund for the property. In the Department's experience, mitigation sites often require upkeep in the form of litter cleanup, maintenance of fences or other safety features, and monitoring to ensure that any vandalism or damage is quickly remedied. The required maintenance fund will ensure that potential recipients of the property will not be discouraged from accepting the property because of this cost.

7:7A-15.18 Requirements that apply after the Department approves mitigation through a monetary contribution

Proposed new N.J.A.C. 7:7A-15.18(a) requires that, after the Department approves monetary contribution as the appropriate mitigation alternative, the mitigator must obtain

the approval of the Wetlands Mitigation Council for the amount of money to be donated. This is found in the existing rule at N.J.A.C. 7:7A-14.2(a)4i, and is rephrased here for clarity with no change in meaning.

Proposed new N.J.A.C. 7:7A-15.18(b) sets forth the elements of a successful monetary contribution.

7:7A-15.19 Requirements that apply after the Department approves mitigation through a land donation

Proposed new N.J.A.C. 7:7A-15.19(a) requires that, after the Department approves land donation as the appropriate mitigation alternative, the mitigator must obtain the approval of the Wetlands Mitigation Council for the specific parcel of land to be donated. This is found in the existing rule at N.J.A.C. 7:7A-14.2(a)4ii, and is rephrased here for clarity with no change in meaning.

Proposed new N.J.A.C. 7:7A-15.19(b) provides the elements of a successful land donation.

Proposed new N.J.A.C. 7:7A-15.19(c) requires the mitigator to transfer donated land to a government agency or charitable conservancy, to provide the agency or conservancy with a maintenance fund for the property, and to ensure that the transfer and conservation restriction are recorded. In the Department's experience, mitigation sites often require upkeep in the form of litter cleanup, maintenance of fences or other safety features, and monitoring to ensure that any vandalism or damage is quickly repaired. The required maintenance fund will ensure that potential recipients of the property will not be discouraged from accepting the property because of this cost. The recording requirement will ensure that there will be a public record of the restricted status of the property.

7:7A-15.20 Wetlands Mitigation Council

Proposed new N.J.A.C. 7:7A-15.20(a) details the functions and duties of the Wetlands Mitigation Council. These are established under the FWPA at N.J.S.A. 13:9B-15 and 13:9C, but are not set forth in the existing freshwater wetlands rules. These rules will codify the Council's current practices.

Proposed new N.J.A.C. 7:7A-15.20(b) requires that, prior to transferring funds or land, the Council must execute legally binding documents that restrict the funds or land to mitigation and freshwater wetlands conservation purposes only.

Proposed new N.J.A.C. 7:7A-15.20(c) provides that Council meetings are open to the public and indicates where to request a schedule of Council meetings.

Proposed new N.J.A.C. 7:7A-15.20(d) prohibits use of the Wetlands Mitigation Fund to aid a permittee or violator in locating a mitigation site. This is found in the existing

rules at N.J.A.C. 7:7A-14.6(c), and is rephrased here for clarity, with no change in meaning.

Proposed new N.J.A.C. 7:7A-15.20(e), which provides for the Council to contract with other agencies, in consultation with EPA, is found in the FWPA at N.J.S.A. 13:9B-15b.

7:7A-15.21 Council review of a proposed monetary contribution

Proposed new N.J.A.C. 7:7A-15.21(a) requires that, after the Department approves monetary contribution as the appropriate mitigation alternative, the mitigator must obtain the approval of the Mitigation Council for the amount of money to be donated. This is found in the existing rule at N.J.A.C. 7:7A-14.2(a)4i, and is rephrased here for clarity with no change in meaning.

Proposed new N.J.A.C. 7:7A-15.21(b) sets forth the standards the Council will use in reviewing a proposed monetary contribution. This is found in the existing rule at N.J.A.C. 7:7A-14.2(a)4i, and is rephrased here for clarity with no change in meaning.

Proposed new N.J.A.C. 7:7A-15.21(c) clarifies that, in determining the costs involved in the evaluation of a proposed monetary contribution, the Council will consult many sources and will exercise its judgment. The Department's experience has been that estimates of these costs can vary widely, and this provision is intended to ensure that the Council may exercise appropriate discretion and use the most up-to-date information in evaluating these estimates.

7:7A-15.22 Council review of a proposed land donation

Proposed new N.J.A.C. 7:7A-15.22(a) requires that, after the Department approves land donation as the appropriate mitigation alternative, the mitigator must obtain the approval of the Mitigation Council for the parcel of land to be donated. This is found in the existing rule at N.J.A.C. 7:7A-14.2(a)4ii, and is rephrased here for clarity with no change in meaning.

Proposed new N.J.A.C. 7:7A-15.22(b) and (c) set forth the standards the Council will use in reviewing a proposed land donation. These standards are intended to ensure that any land donated will be a valuable component of a freshwater wetlands or surface water ecosystem, as required by the FWPA. In addition, because land donation is not a favored mitigation alternative in the FWPA (see N.J.S.A. 13:9B-13c), the Council sets a high standard for parcels of land to be donated.

Proposed new N.J.A.C. 7:7A-15.22(d) requires that, if land to be donated is also being donated or restricted to meet another government's requirements, the mitigator must also enhance or restore the wetlands on the parcel. This is intended to ensure that, if mitigation is proposed through the preservation of open space which is already slated for preservation, the functions and values of the area will be improved through the mitigation. Without such a requirement, the mitigation project would not meet the

statutory standard of providing equal ecological value to the wetlands lost through the disturbance for which mitigation is required, because no functions and values would be added, since the parcel was already required to be preserved.

7:7A-15.23 Mitigation banks

Proposed new N.J.A.C. 7:7A-15.23(a) requires Council approval for a mitigation bank prior to the sale of credits, and clarifies that a bank may be approved prior to, during, or after construction.

Proposed new N.J.A.C. 7:7A-15.23(b) requires a permit for any regulated or prohibited activities involved in creating a mitigation bank.

Proposed new N.J.A.C. 7:7A-15.23(c) requires a mitigation bank operator to fully carry out all requirements of the Council resolution approving the mitigation bank, whether or not the mitigation bank operator sells any credits from the bank.

Proposed new N.J.A.C. 7:7A-15.23(d) provides for the Council to award credits to a mitigation bank, based on the increase in wetlands functions and values caused by the bank construction and maintenance. The provision lists factors the Council will consider in awarding credits.

Proposed new N.J.A.C. 7:7A-15.23(e) sets forth a schedule allowing the bank operator to sell a certain percentage of the bank's credits upon successfully achieving certain milestones in the completion of the bank. The milestones listed at 1 through 6 need not occur in order.

Proposed new N.J.A.C. 7:7A-15.23(f) requires a conservation restriction on the bank site, which meets the requirements for other mitigation area conservation restrictions.

Proposed new N.J.A.C. 7:7A-15.23(g) requires monitoring of the bank during and after construction, and submittal of progress reports to the Council both during and after construction.

Proposed new N.J.A.C. 7:7A-15.23(h) provides for the Council to amend the resolution approving the bank, require remedial action, and adjust the number of credits that may be sold, if the bank falls more than one year behind schedule. This will allow the Council and a mitigation bank operator to revisit a bank approval and make the changes necessary to ensure a successful bank.

Proposed new N.J.A.C. 7:7A-15.23(i) requires that, upon completion of the bank, the bank operator must demonstrate that the bank is successful and transfer the bank site to a government agency or charitable conservancy. The success criteria are the same as the criteria for a mitigation project involving creation, restoration, and enhancement.

Proposed new N.J.A.C. 7:7A-15.23(j) provides a term for the bank approval, and allows one one-year extension of this term, provided the mitigation bank operator makes certain demonstrations that will provide evidence that the bank can be

successfully completed during the one year. It is important that the bank approval expire at some point because if the bank is not constructed, an approved mitigation bank site may in some cases naturally develop certain wetlands values. In such a case, the Department might not approve a bank on the same site, or might approve different activities or a different number of credits.

Proposed new N.J.A.C. 7:7A-15.23(k) provides for the Council to assert its rights to the financial assurance for the bank if the bank approval expires and is not extended, and the amount of mitigation completed at the bank at that time is not commensurate with the number of credits that have been sold.

7:7A-15.24 Application for Wetlands Mitigation Council approval of a monetary contribution or land donation

Proposed new N.J.A.C. 7:7A-15.24(a) refers the reader to proposed N.J.A.C. 7:7A-15.12(f) or (g) for the application requirements for a monetary contribution or land donation, and indicates where to obtain the application checklist.

Proposed new N.J.A.C. 7:7A-15.24(b) sets forth the initial completeness review process for an application for approval of a monetary contribution or land donation, and requires that an application be submitted and complete at least 30 days prior to being considered by the Council.

Proposed new N.J.A.C. 7:7A-15.24(c) sets forth the Council's authority to condition an approval as necessary to ensure compliance with the FWPA rules.

7:7A-15.25 Application for Wetlands Mitigation Council approval of a mitigation bank

Proposed new N.J.A.C. 7:7A-15.25(a) recommends that a prospective mitigation bank operator obtain a conceptual review of the mitigation bank from the Council prior to investing in land. The provision details the elements of a request for conceptual review of a bank.

Proposed new N.J.A.C. 7:7A-15.25(b) requires that an application for final mitigation bank approval contain the information on the application checklist, and sets out the types of information that will be required by the checklist.

Proposed new N.J.A.C. 7:7A-15.25(c) sets forth the initial completeness review process for an application for approval of a mitigation bank, and requires that an application be submitted and complete at least 60 days prior to being considered by the Council.

Proposed new N.J.A.C. 7:7A-15.25(d) sets forth the Council's authority to condition an approval as necessary to ensure compliance with the FWPA rules.

SUBCHAPTER 16 ENFORCEMENT

This proposed subchapter consolidates the existing enforcement provisions of N.J.A.C. 7:7A, found at N.J.A.C. 7:7A-15 and N.J.A.C. 7:7A-17, into a single subchapter. Three existing sections of these two subchapters are not found in the proposed new subchapter 16 for enforcement: N.J.A.C. 7:7A-15.10, which addresses termination of permits, is recodified at proposed N.J.A.C. 7:7A-14.5; N.J.A.C. 7:7A-17.1, which includes general enforcement provisions, is proposed for deletion because it is redundant with portions of proposed N.J.A.C. 7:7A-16.1, 7:7A-16.5, and 7:7A-16.6; and N.J.A.C. 7:7A-17.3, which addresses civil administrative penalties for acting without a permit, is proposed for deletion because it is redundant with proposed N.J.A.C. 7:7A-16.5 and 7:7A-16.1(d).

Most of the proposed amendments will not change the meaning of the existing provisions. Each proposed amendment that will cause a change in the meaning of a provision is described in detail below.

7:7A-16.1 General provisions

Proposed new N.J.A.C. 7:7A-16.1(a) defines the term "applicable law and/or condition." The existing enforcement provisions, when referring to the complete universe of possible laws, documents, or conditions which may form the basis for a violation, uses the phrase "the Act or any rule, administrative order, approved mitigation plan, waiver or permit issued pursuant thereto." However, this is a very long phrase, and small, erroneous variations in the phrasing appear in different enforcement provisions. In order to use a shorter phrase, and to ensure that all possible violations are covered in every case, the proposal defines "applicable law and/or condition," and substitutes this phrase for the longer one throughout the enforcement provisions.

Proposed N.J.A.C. 7:7A-16.1(b) is found in the existing rules at N.J.A.C. 7:7A-15.1, and addresses the burden of proof and degrees of knowledge required to establish a violation of the FWPA. The provision is recodified, with a minor clarification that does not change its meaning.

Proposed N.J.A.C. 7:7A-16.1(c) is a new provision that lists the enforcement options available to the Department. The provision does not add any options or make any substantive change. It merely summarizes the enforcement options provided in the existing rule, and in the FWPA.

Proposed N.J.A.C. 7:7A-16.1(d) provides that each day that a violation continues constitutes a separate violation for which a separate penalty may be assessed. This provision is found in the existing rules at N.J.A.C. 7:7A-15.5(a), 7:7A-15.6(a), 7:7A-17.1(c), 7:7A-17.3(b), 7:7A-17.4(b), 7:7A-17.5(b), and 7:7A-17.6(c). Relocating the provision in the general provisions section of the enforcement subchapter clarifies that it applies to all violations, and reduces redundancy in the rules.

Proposed N.J.A.C. 7:7A-16.1(e), which provides that each violation of a different law and/or condition is subject to a separate penalty, is found in the existing rule at N.J.A.C. 7:7A-15.5(a), 7:7A-15.6(a) and 7:7A-17.1(b). Placing the provision in the general provisions section of the proposed consolidated enforcement subchapter clarifies that it applies to all violations, and reduces redundancy in the rules.

Proposed N.J.A.C. 7:7A-16.1(f) is a new provision. It clarifies that when the Department pursues a particular type of enforcement action, this does not limit the Department from also pursuing other enforcement actions against the violator, based on the same violation or on a different violation. This is existing Department practice, authorized under the FWPA at N.J.S.A. 13:9B-21a. The provision also clarifies that a violator's compliance with a Department enforcement order does not preclude other Department enforcement action in connection with the same violation.

7:7A-16.2 USEPA review

Proposed N.J.A.C. 7:7A-16.2 contains a provision found in the existing rule at N.J.A.C. 7:7A-15.2, providing for the Department to make information available to the EPA. The only proposed change to the provision is the clarification that the provision applies not only to Department actions based on the FWPA, but also based on the Department's authority under the New Jersey Water Pollution Control Act.

7:7A-16.3 Administrative order

Proposed N.J.A.C. 7:7A-16.3 includes provisions found in the existing rules at N.J.A.C. 7:7A-15.3, setting forth the Department's authority to issue an administrative order. The only proposed change substitutes "applicable law and/or condition" for a listing of documents issued under the FWPA. This also has the effect of clarifying that the provision applies not only to Department actions based on the FWPA, but also based on the Department's authority under the New Jersey Water Pollution Control Act.

7:7A-16.4 Civil action

Proposed N.J.A.C. 7:7A-16.4, which sets forth the Department's authority to bring a civil action against a violator, includes provisions found in the existing rules at N.J.A.C. 7:7A-15.4, with proposed minor clarifications that do not affect meaning. The substitution of "applicable law and/or condition" for a listing of documents issued under the FWPA has the effect of clarifying that the provision applies not only to the Department's actions taken under the authority of the FWPA, but also under authority of the New Jersey Water Pollution Control Act.

7:7A-16.5 Civil administrative penalty

Proposed N.J.A.C. 7:7A-16.5(a), which provides for the assessment of a civil administrative penalty, is found in the existing rules at N.J.A.C. 7:7A-15.5. The proposal

amends this provision by clarifying that this section applies only to a violation of the FWPA, and not to a violation arising from the New Jersey Water Pollution Control Act (those violations are subject to N.J.A.C. 7:14). In addition, the proposal deletes language providing that each day of violation is a separate offense, since this language has been moved into the general provisions section of this subchapter at N.J.A.C. 7:7A-16.1. Finally, the proposal deletes N.J.A.C. 7:7A-15.5(a)1, which cross-references the provisions setting civil administrative penalty ranges. The proposal replaces this provision with cross references to the specific sections (N.J.A.C. 7:7A-16.8 through 7:7A-16.12) under which the Department determines the amount of each civil administrative penalty.

Proposed N.J.A.C. 7:7A-16.5(b) is a new provision that clarifies that the civil administrative penalty provisions that apply to violations arising out of the New Jersey Water Pollution Control Act are found in the Department's rules implementing the enforcement provisions of that Act at N.J.A.C. 7:14-8.

Proposed N.J.A.C. 7:7A-16.5(c) provides that the Department may settle a civil administrative penalty assessed for a violation of the FWPA. This provision is found in the existing rules at N.J.A.C. 7:7A-17.1(e). Proposed N.J.A.C. 7:7A-16.5(c) also provides that settlement of a civil administrative penalty arising out of a violation of the New Jersey Water Pollution Control Act is subject to the rules implementing that Act at N.J.A.C. 7:14-8.

Provisions found in the existing rules at N.J.A.C. 7:7A-15.5(a)2 and 3 are proposed for deletion because the substance of the provisions is found at proposed N.J.A.C. 7:7A-16.6 and 7:7A-16.7.

Existing N.J.A.C. 7:7A-15.5(a)4 is proposed for deletion because it is redundant with proposed N.J.A.C. 7:7A-16.1(f), which states that the Department's pursuit of a remedy does not affect its authority to pursue other remedies for the same violation.

Existing N.J.A.C. 7:7A-15.5(a)5 is proposed for deletion because it is redundant with proposed N.J.A.C. 7:7A-16.6(c), which allows the Department to settle a civil administrative penalty.

Existing N.J.A.C. 7:7A-15.6, Civil Penalty, and existing N.J.A.C. 7:7A-15.7, Criminal action, are proposed to be relocated at N.J.A.C. 7:7A-16.13 and 7:7A-16.14 respectively. These provisions are described in detail below in this Summary.

Existing N.J.A.C. 7:7A-15.8, Notice of violation recorded on deed to property, and existing N.J.A.C. 7:7A-15.9, "After the fact" permit, are proposed to be relocated at N.J.A.C. 7:7A-16.16 and 7:7A-16.17 respectively. These provisions are described in detail below in this Summary.

Existing N.J.A.C. 7:7A-15.10, Termination of permits, is proposed to be relocated at N.J.A.C. 7:7A-14.5, Termination of a permit, which is described in detail above in this Summary.

Existing N.J.A.C. 7:7A-15.11, Public participation, is proposed to be relocated at N.J.A.C. 7:7A-16.18, which is described in detail below in this Summary.

7:7A-16.6 Assessment, settlement and payment of a civil administrative penalty

Proposed N.J.A.C. 7:7A-16.6, which addresses procedures for assessment, settlement, and payment of civil administrative penalties, is recodified from existing N.J.A.C. 7:7A-17.8, with clarifying changes.

Proposed N.J.A.C. 7:7A-16.6(a), which sets forth the procedure for the Department to notify a violator of the assessment of a civil administrative penalty, is proposed to be relocated, with minor editorial changes that do not change its meaning, from existing N.J.A.C. 7:7A-17.8(a).

Proposed N.J.A.C. 7:7A-16.6(b), which specifies when payment of a civil administrative penalty must be made, is proposed to be relocated, with minor editorial changes that do not change its meaning, from existing N.J.A.C. 7:7A-17.8(b).

Proposed N.J.A.C. 7:7A-16.6(c), which authorizes the Department to settle a civil administrative penalty, is proposed to be relocated from existing N.J.A.C. 7:7A-17.1(e) and 7:7A-15.5(a)5. The proposal also adds factors the Department will consider in making decisions regarding settlements, found at proposed N.J.A.C. 7:7A-16.6(c)1 through 4. These factors are being added to the rule in order to codify the Department's existing practice for settling assessed penalties. These factors are consistent with factors used in other Department enforcement rules, in order to ensure consistency in enforcement practice across the Department.

7:7A-16.7 Appeal of an administrative order and/or notice of civil administrative penalty assessment

Proposed N.J.A.C. 7:7A-16.7 is relocated from existing N.J.A.C. 7:7A-17.9, with clarifying changes that do not change its meaning.

Proposed N.J.A.C. 7:7A-16.7(a) sets forth the information that must be included in a request for an adjudicatory hearing. This is the same information that is required under the existing rule at N.J.A.C. 7:7A-17.9(a), and includes basic information regarding the violator and the violation.

Proposed N.J.A.C. 7:7A-16.7(b) sets forth the address to which all adjudicatory hearing requests must be sent. This is found in the existing rule at N.J.A.C. 7:7A-17.9(a).

Proposed N.J.A.C. 7:7A-16.7(c) provides that, if the Department does not receive a hearing request within 20 days after the violator receives the notice of civil administrative penalty assessment and/or the administrative order, the Department will deny the hearing request. This is found in the existing rule at N.J.A.C. 7:7A-17.9(b).

Proposed N.J.A.C. 7:7A-16.7(d) provides that, if the hearing request does not include all of the required information, the Department may deny the hearing request. This is found in the existing rule at N.J.A.C. 7:7A-17.9(c).

Proposed N.J.A.C. 7:7A-16.7(e) provides that all adjudicatory hearings must be conducted in accordance with the New Jersey Administrative Procedure Act and rules. This is found in the existing rule at N.J.A.C. 7:7A-17.9(d).

7:7A-16.8 Civil administrative penalty amount

Proposed N.J.A.C. 7:7A-16.8 is relocated, with clarifying changes, from N.J.A.C. 7:7A-17.2.

Proposed N.J.A.C. 7:7A-16.8(a), which introduces the section and explains its scope, is found in the existing rule at N.J.A.C. 7:7A-17.2(a). The proposal rewords this provision for clarity without changing its meaning, and relocates to proposed N.J.A.C. 7:7A-16.8(c) a listing of the factors the Department considers in setting a penalty.

Proposed N.J.A.C. 7:7A-16.8(b) is a new provision not found in the existing rule. It clarifies that the civil administrative penalty for a violation pertaining to State open waters will be set under the Department's rules implementing the enforcement provisions of the Water Pollution Control Act at N.J.A.C. 7:14-8.

Proposed N.J.A.C. 7:7A-16.8(c) sets forth the factors the Department will consider in assessing a civil administrative penalty, and the point value for each factor. This provision is found in the existing rule at N.J.A.C. 7:7A-17.2(b). Today's proposal rewords the provision for ease of understanding, but does not change its meaning.

Proposed N.J.A.C. 7:7A-16.8(d), which includes a table (Table D) determining penalty amounts based on the points assigned in proposed N.J.A.C. 7:7A-16.8(c), is found in the existing rule at N.J.A.C. 7:7A-17.2(c). The provision is reworded slightly for easier understanding, but its meaning is not changed.

7:7A-16.9 Civil administrative penalty for submitting inaccurate or false information

Proposed N.J.A.C. 7:7A-16.9, which addresses penalties for submitting inaccurate or false information, is relocated from existing N.J.A.C. 7:7A-17.4, with clarifying changes.

Proposed N.J.A.C. 7:7A-16.9(a), which describes the applicability of the section, is relocated from existing N.J.A.C. 7:7A-17.4(a) and reworded for clarity with no change in meaning.

Proposed N.J.A.C. 7:7A-16.9(b) is a new provision not found in the existing rule. It clarifies that the penalty for a violation pertaining to State open waters will be set under the Department's rules implementing the Water Pollution Control Act at N.J.A.C. 7:14-8.

Proposed N.J.A.C. 7:7A-16.9(c), which determines the period during which penalties accrue, is found in the existing rule at N.J.A.C. 7:7A-17.4(b). However, today's proposal changes the meaning of the provision. In the existing rules, the period during which penalties are calculated is based on when the violator knows or has reason to know that the submitted information is false. In today's proposal, the period is based on when the false information is submitted. The Department is proposing this change because the date that the Department receives a document is easily identified, and it is reasonable to assume that an individual knows or should know whether information submitted is false as of the time of submittal.

Proposed N.J.A.C. 7:7A-16.9(d), which sets forth a range within which the Department will set the penalty for intentional submittal of false information, is found in the existing rule at N.J.A.C. 7:7A-17.4(c)1. The proposal rewords the provision for clarity. Although the range (from $10,000 to $8,000) is the same as in the existing rule, today's proposal provides more specificity regarding how the penalty is determined within that range. Today's proposal requires that the penalty be set at the midpoint of the range, unless adjusted according to factors set forth in proposed N.J.A.C. 7:7A-16.9(f). This is consistent with other Department enforcement provisions.

Proposed N.J.A.C. 7:7A-16.9(e), which sets forth a range within which the Department will set the penalty for a submittal of false information not covered in proposed N.J.A.C. 7:7A-16.9(d), is relocated from N.J.A.C. 7:7A-17.4(c)2 in the existing rule, with a change in meaning. In the existing rule, the penalty is set at $1,000. However, today's proposal sets a range from $1,000 to $0, and requires that the penalty be set at the midpoint of the range, unless adjusted according to factors set forth in proposed N.J.A.C. 7:7A-16.9(f). This is consistent with other Department enforcement provisions.

Proposed N.J.A.C. 7:7A-16.9(f) is a new provision not found in the existing rules. It sets forth the factors the Department will consider when evaluating whether to adjust a penalty under proposed N.J.A.C. 7:7A-16.9(d) or 7:7A-16.9(e). These factors are being added to the rule in order to codify the Department's existing practice for adjusting penalties. These factors are consistent with factors used in other Department enforcement rules, in order to ensure consistency in enforcement practice across the Department.

7:7A-16.10 Civil administrative penalty for failure to allow entry and inspection

Proposed N.J.A.C. 7:7A-16.10 is relocated, with clarifying changes, from N.J.A.C. 7:7A-17.5.

Proposed N.J.A.C. 7:7A-16.10(a), which sets forth the scope of the section, is found in the existing rules at N.J.A.C. 7:7A-17.5(a), and is reworded for clarity. In addition, a sentence is added to clarify that the provision applies only to violations under the FWPA, and that a civil administrative penalty amount for such a violation under the WPCA would be determined under N.J.A.C. 7:14-8.7.

Proposed N.J.A.C. 7:7A-16.10(b), which clarifies that each day that a person refuses lawful entry and inspection is an additional violation, is found in the existing rule at

N.J.A.C. 7:7A-17.5(b). The proposed provision is reworded very slightly for clarity, with no change in meaning.

Proposed N.J.A.C. 7:7A-16.10(c)1, which sets forth a range within which the Department will set the penalty for refusing inspection of a premises for which the Department has issued an administrative order or other document, is found in the existing rule at N.J.A.C. 7:7A-17.5(c)1. Although the range (from $10,000 to $7,000) is the same as in the existing rule, today's proposal requires that the penalty be set at the midpoint of the range, unless adjusted according to factors set forth in proposed N.J.A.C. 7:7A-16.10(d). This is consistent with other Department enforcement provisions.

Proposed N.J.A.C. 7:7A-16.10(c)2, which sets forth a range within which the Department will set the penalty for refusing inspection of a premises not covered under proposed N.J.A.C. 7:7A-16.10(c)1, is found in the existing rule at N.J.A.C. 7:7A-17.5(c)2. Although the range (from $7,000 to $1,500) is the same as in the existing rule, today's proposal requires that the penalty be set at the midpoint of the range, unless adjusted according to factors set forth in proposed N.J.A.C. 7:7A-16.10(d). This is consistent with other Department enforcement provisions.

Proposed N.J.A.C. 7:7A-16.10(d) is a new provision not found in the existing rules. It sets forth the factors the Department will consider when evaluating whether to adjust a penalty under proposed N.J.A.C. 7:7A-16.10(c). These factors are the same factors considered in adjusting a civil administrative penalty for submitting false information under proposed N.J.A.C. 7:7A-16.9. These factors are being added to the rule in order to codify the Department's existing practice for adjusting penalties. These factors are consistent with factors used in other Department enforcement rules, in order to ensure consistency in enforcement practice across the Department.

7:7A-16.11 Civil administrative penalty for failure to pay a civil administrative penalty

Proposed N.J.A.C. 7:7A-16.11(a), which provides for a penalty for failure to pay a penalty, is found in the existing rule at N.J.A.C. 7:7A-17.6. Today's proposal makes minor clarifying changes that do not change its meaning.

Proposed N.J.A.C. 7:7A-16.11(b), which addresses the daily penalty for failure to pay a civil administrative penalty, is found in the existing rule at N.J.A.C. 7:7A-17.6(b). Under the existing rule, the penalty is restated in this subsection. However, the proposal refers to N.J.A.C. 7:7A-16.5(a) and (b) to determine the amount of the penalty, since it is already set forth there.

Proposed N.J.A.C. 7:7A-16.11(c), which clarifies that each day that a person fails to pay a civil administrative penalty after it is due is an additional violation, is found in the existing rule at N.J.A.C. 7:7A-17.6(c). The proposed provision is reworded very slightly for clarity, with no change in meaning.

7:7A-16.12 Economic benefit factor

Proposed N.J.A.C. 7:7A-16.12, which provides for an economic benefit factor that can increase a penalty, is found in the existing rule at N.J.A.C. 7:7A-17.7. In today's proposal, the section is divided into three subsections (proposed N.J.A.C. 7:7A-16.120, (b), and (c)) and reworded for ease of understanding, with no change in meaning.

Proposed N.J.A.C. 7:7A-16.120 sets forth the Department's authority to apply the economic benefit factor. The provision is reworded to clarify that the economic benefit factor is not a separate civil administrative penalty itself, but rather is used to increase the penalty when a violator has benefited economically from the violation.

Proposed N.J.A.C. 7:7A-16.12(b) provides that the economic benefit factor may not increase a penalty beyond the maximums provided for in N.J.A.C. 7:7A-16.5(a) and (b). This provision is reworded for clarity, with no change in meaning.

Proposed N.J.A.C. 7:7A-16.12(c) authorizes the Department to apportion the total economic benefit derived from multiple violations among the penalties for the violations. This provision is reworded for clarity, with no change in meaning.

7:7A-16.13 Civil penalty

Proposed N.J.A.C. 7:7A-16.13, which provides for a civil penalty, is found in the existing rule at N.J.A.C. 7:7A-15.6.

Proposed N.J.A.C. 7:7A-16.13(a) includes a provision found at N.J.A.C. 7:7A-15.6(a), providing for a civil penalty and listing the violations to which a civil penalty applies. The provision is reorganized and reworded for clarity, without changing its meaning.

Proposed N.J.A.C. 7:7A-16.13(b) includes a provision found at N.J.A.C. 7:7A-15.6(a), limiting a civil penalty to the maximums at N.J.A.C. 7:7A-16.5(a) and (b). The provision is reorganized and reworded for clarity, without changing its meaning.

Proposed N.J.A.C. 7:7A-16.13(c), which provides for a summary court proceeding to collect a civil penalty, is found in the existing rule at N.J.A.C. 7:7A-15.6(b). The proposal includes minor clarifications that do not change its meaning, including a clarification that the provision applies to penalties for violation of both the FWPA and the Water Pollution Control Act.

7:7A-16.14 Criminal action

Proposed N.J.A.C. 7:7A-16.14, which authorizes the Department to bring a criminal action in certain cases, is relocated from existing N.J.A.C. 7:7A-15.7. Today's proposal reorganizes and rewords this section, without changing its meaning.

Proposed N.J.A.C. 7:7A-16.14(a) clarifies that, in order to collect a criminal penalty, the Department must bring a criminal action in court.

Proposed N.J.A.C. 7:7A-16.14(b) clarifies that a criminal penalty pertaining to a violation of the New Jersey Water Pollution Control Act is not covered by this section, but is governed by that Act.

Proposed N.J.A.C. 7:7A-16.14(c), which sets the range within which a criminal penalty must fall, is found in the existing rule at N.J.A.C. 7:7A-15.7(a). Today's proposal makes minor clarifying changes that do not affect meaning.

Proposed N.J.A.C. 7:7A-16.14(d), which sets the penalty range for a second criminal offense, is found in the existing rule at N.J.A.C. 7:7A-15.7(b).

Proposed N.J.A.C. 7:7A-16.14(e), which sets the penalty range for two particular criminal offenses, is found in the existing rule at N.J.A.C. 7:7A-15.7(c). Today's proposal rewords and reorganizes the provision for ease of understanding, without changing its meaning.

7:7A-16.15 Forfeiture of conveyances

Proposed N.J.A.C. 7:7A-16.15 is a new provision that is not included in the existing rule. It authorizes the State to seize and confiscate any vessel, vehicle, or container, that is used in purposeful or knowing discharge into State open waters or any pollutant, including a toxic pollutant. This provision is consistent with the New Jersey Water Pollution Control Act at N.J.S.A. 58:10A-10g, and with the New Jersey statute prohibiting the willful discharge of harmful or destructive substances, N.J.S.A. 13:1K-1 et seq.

7:7A-16.16 Notice of violation recorded on deed to property

Proposed N.J.A.C.7:7A-16.16, which provides for a notice of violation to be placed upon the deed of a property where a violation has occurred, is found in the existing rule at N.J.A.C. 7:7A-15.8. The proposal breaks the provision into smaller subsections and rewords it for ease of understanding, but does not change its meaning.

Proposed N.J.A.C.7:7A-16.16(a) provides for the Commissioner to issue an order to the county clerk to record a notice of violation on the deed, and/or an order to the clerk of the Superior Court to record a notice of violation. The provision is proposed to be reworded for clarity with no change in meaning. Language stating that the notice of violation is in addition to all other penalties is relocated to N.J.A.C. 7:7A-16.1(f) to avoid redundancy.

Proposed N.J.A.C.7:7A-16.16(b), which specifies the duration of the notice of violation's attachment to the deed, is proposed to be reworded with no change in meaning.

7:7A-16.17 "After the fact" permit

Proposed 7:7A-16.17, which provides for an "after the fact" permit after a violation in certain circumstances, is found in the existing rule at N.J.A.C. 7:7A-15.9.

Proposed N.J.A.C. 7:7A-16.17(a), found in the existing rule at N.J.A.C. 7:7A-15.9, sets forth the conditions under which an after the fact permit may be issued. The proposal clarifies that an after the fact permit is only issued if a violation is not approvable under this chapter. If a violation were approvable, the Department would require the violator to apply for and obtain a permit under this chapter, as well as to pay penalties and/or pursue other remedial action. This is consistent with the enforcement provisions in the FWPA at N.J.S.A. 13:9B-21.

Proposed new N.J.A.C. 7:7A-16.17(b) emphasizes that the Department may pursue any other enforcement action against a violator, even if an after the fact permit is issued.

Proposed N.J.A.C. 7:7A-16.17(c), which clarifies that an after the fact permit is subject to the same enforcement provisions as other approvals under this chapter, is found in the existing rule at N.J.A.C. 7:7A-15.9(b). Minor clarifying changes are proposed, which do not affect meaning.

Existing N.J.A.C. 7:7A-15.10, Termination of permits, is recodified at proposed N.J.A.C. 7:7A-14.5.

7:7A-16.18 Public participation

Proposed N.J.A.C. 7:7A-16.18, which requires the Department to provide for public participation in the Department's enforcement process, is relocated from N.J.A.C. 7:7A-15.11. The proposal rewords and reorganizes the provision for ease of understanding, without changing its meaning.

Social Impact

The existing FWPA rules have a positive social impact because they protect crucial natural resources that contribute to the public health and the health of the environment. This readoption will continue and increase this positive social impact.

Wetlands provide many important societal benefits, including the following:

- Wetlands protect drinking water by filtering out chemicals, pollutants, and sediments that would otherwise clog and contaminate our waters.
- Wetlands soak up runoff from heavy rains and snow melts, providing natural flood control.
- Wetlands gradually release stored flood waters during droughts.
- Wetlands provide critical habitats for a major portion of the State's fish and wildlife, including endangered, commercial and recreational species.
- Wetlands provide high quality open space for recreation and tourism.

Many of the above values were not widely appreciated until the 1970s and 1980s. By then, more than half of the nation's wetlands were destroyed. The New Jersey freshwater wetlands program was developed to protect freshwater wetlands, open waters, and upland transition areas up to 150 feet of wetlands (sometimes called "buffers"), from development that impairs the wetlands' ability to provide the values listed above.

The freshwater wetlands rules also have a positive social impact in that they discourage construction of housing in wetlands and State open waters. Houses built in wetlands often experience settling and cracking of walls and foundations, flooding and seepage in basements, and moisture and dampness that ultimately results in mold and mildew. These conditions may not be readily apparent in new construction but are generally manifested over time. These rules minimize the likelihood that investments will be made in such risky projects.

The majority of the changes in the proposal are for clarification and simplification. The proposal reorganizes the subchapters into roughly chronological order, and rewords confusing passages with simpler, less legalistic phrasing. The proposal divides long narrative passages into smaller sections and bulleted lists, consolidates repetitive provisions, and moves unnecessary technical detail from the rule into application checklists. These changes, though not substantive, will make the rules easier to understand and use. This will have a positive social impact by reducing confusion, increasing compliance, and facilitating the Department's efforts at public education about freshwater wetlands and the Department's permitting program.

However, there are some substantive changes. The most significant substantive changes fall into four general categories:

- General clarifications
- Changes to existing general permits and proposed new general permits
- New mitigation provisions
- Other miscellaneous substantive changes

General clarifications

The proposed readoption includes a provision addressing the fact that construction of a building, especially a residence, inevitably results in disturbance of an area larger than the footprint of the building. The proposal acknowledges this reality by defining "residential development project" to include a 20 foot area of regulated activities surrounding the house. See the summary of proposed N.J.A.C. 7:7A-2.6(a) above, for a detailed explanation of this proposed change.

The social impact of this change will be beneficial. The existing rules allow a home to be placed immediately adjacent to a transition area, ignoring the fact that the residents will find it virtually impossible to live in the house without violating the law by conducting prohibited activities in the transition area immediately adjacent to their home. Often, a developer builds one or more residences adjacent to a transition area, leaving the buyers of the homes to try to avoid regulated activities in the backyard. In some cases, the developer fails to inform the buyer that the backyard is a regulated transition area in which activities must be strictly limited. The proposed addition to the definition of "project" will prevent these problems from recurring in the future.

Another proposed general clarification addresses what happens to wetlands that have been drained with tiles and used for farming, when the farming operation ends. The Department has encountered many cases in which a person attempts to continue minor drainage activity that is exempt under the farming exemption (found in the existing rules at N.J.A.C. 7:7A-2.7(b)), even after the farming has stopped and the property has been put to another use. Then, based on the fact that the land has been drained and does not at that time display wetlands hydrology, the person attempts to develop the land, claiming that the field is not a wetland and is therefore not regulated. This abuse of the farming exemption conflicts with the intent of the FWPA, and the proposed rule includes a clarification that will correct this. Proposed N.J.A.C. 7:7A-2.8(b)5 clarifies that an area drained for farming shall be presumed to have wetlands hydrology. This presumption can be rebutted if, after blocking or removing all drainage structures and waiting one year, wetlands hydrology is not present. This change will have a positive social impact, in that it will continue to encourage and protect existing farming operations, while carrying out the intent of the FWPA farming exemption by preventing a developer from using the exemption to facilitate non-farming development in wetlands. See the summary of proposed N.J.A.C. 7:7A-2.8(b)5 for a more detailed explanation of the proposed provision.

Changes to existing general permits and proposed new general permits

The proposed readoption includes many changes to existing general permits. The social impact of each change is described below (see the section-by-section description of these changes, above, for a detailed explanation of each change).

Proposed changes to general permit 1 (maintenance of existing features) at N.J.A.C. 7:7A-5.1(c) and (d) will reduce approval delays for two maintenance activities currently authorized under existing general permit 1: the application of herbicides to manage

vegetation in a utility line right-of-way, and ongoing maintenance of an off-stream stormwater management facility created in uplands. The expedited approval process will have a positive social impact in that it will continue to provide prior notice of the activities to the Department so that compliance can be assured, while reducing delays and paperwork.

Proposed changes to general permit 2 (underground utility lines) at N.J.A.C. 7:7A-5.2 add two allowable activities and increase allowable temporary disturbance, without increasing the existing one acre limit on total disturbance under the general permit. The new activities are a 400 square foot sewage pump station, and a municipal access road directly over an underground utility line, provided certain requirements are met. These changes will have a positive social impact by reducing permit processing time for two activities which themselves have positive effects, and by removing a conflict between Department rules and other laws.

The proposal also removes a prohibition on using general permit 2, as well as general permit 15 (mosquito control activities), in exceptional resource value wetlands. Instead, these general permits would be subject to the standard requirements for all general permits, including the requirement that the activity may not jeopardize the habitat of a threatened or endangered species. This change will have a positive social impact, because these two general permits authorize activities that serve a public need and usually cannot be accomplished in alternative locations.

Proposed changes to general permit 3 (discharge of return water from upland dredged disposal sites) at N.J.A.C. 7:7A-5.3 will have a small beneficial social impact because, while they do not change the meaning of the existing general permit, they make it clearer and easier to understand.

Proposed changes to general permit 4 (hazardous cleanups) at N.J.A.C. 7:7A-5.4 would delete the requirement for an alternatives analysis before a cleanup in exceptional resource value wetlands, as well as the mitigation requirement for any wetlands disturbed that were formed as a direct result of the cleanup activities. Both of these changes will have a positive social impact in that they will reduce permitting paperwork and delays without decreasing environmental protection. The Department's experience has shown that the alternatives analysis required under existing general permit 4 does not provide a substantial environmental benefit (see the detailed discussion of this change in the section-by-section description of proposed changes to general permit 4 above). However, expediting the cleanups covered by general permit 4 will have a positive social and environmental benefit. The deletion of the mitigation requirement for wetlands formed as a result of a cleanup will have a positive social impact in that it will encourage permittees to approach a cleanup in the best way possible, without worrying about whether they might be creating regulated wetlands during the cleanup.

Existing general permit 5 is proposed for deletion, to be replaced with proposed N.J.A.C. 7:7A-5.5, authorizing certain activities required to close a landfill. This will have a positive social impact, in that it will help speed the closure of landfills around the State. There are currently 300 landfills in the State that need to be properly closed in

order to protect the environment and the public health and safety. This new general permit will remove one source of delay in accomplishing those closures.

Proposed changes to general permit 6 (non-tributary wetlands) at N.J.A.C. 7:7A-5.6 would prohibit the use of the general permit in vernal habitats. This change would have a positive social impact because it would protect the breeding areas for many species of amphibians that, while not currently endangered, are diminishing rapidly. Without this prohibition, it is likely that at least some of these species will become endangered.

Proposed changes to general permits 7 (human-made ditches and swales) at N.J.A.C. 7:7A-5.7, and general permit 8 (house additions) at N.J.A.C. 7:7A-5.8, will have a small but beneficial social impact because, while they do not change the meaning of the existing general permits, they make them clearer and easier to understand.

Existing general permit 9 is proposed for deletion, to be replaced with proposed N.J.A.C. 7:7A-5.9, authorizing clearing of vegetation around public airports for safety reasons. Because the general permit authorizes clearing only as necessary to comply with FAA sight line requirements, it will have the positive social impact of promoting airport safety.

Proposed changes to general permit 10 (minor road crossings) at N.J.A.C. 7:7A-10A and 10B will have a positive social impact because they will increase the flexibility and efficiency of the general permit without reducing environmental protection. Separating out the very minor road crossings into a separate general permit 10A will allow the Department to more quickly approve very minor and simple projects, while focussing more attention on those projects more likely to have an environmental impact. Requiring an onsite alternatives analysis for the less minor projects will provide a more definite and protective standard for approvals.

Proposed changes to general permit 11 (outfalls and intakes) at N.J.A.C. 7:7A-5.11 will have a positive social impact, by allowing NJPDES permitted discharges and intake structures under the general permit. Currently, such structures must go through the lengthy and expensive individual permitting process, despite the fact that their environmental impact is similar to that of the stormwater outfalls covered by the existing permit.

Proposed changes to general permit 12 (surveying and investigating) at N.J.A.C. 7:7A-5.12 will have a small beneficial social impact because they will reduce permit processing time for geotechnical or archaeological investigations which have very minor and temporary impacts.

Proposed changes to general permit 13 (lake dredging) at N.J.A.C. 7:7A-5.13, requiring applicants to identify the sources of sediment in the lake being dredged, will have a positive social impact. Identifying the source of sediment is the first step toward sediment control measures that can reduce or eliminate the need for dredging in the future. This information can also be used in the future by the Department's Division of Watershed Management to help in the development of watershed plans that will improve water quality and reduce sediment.

Proposed changes to general permit 14 (water monitoring devices) at N.J.A.C. 7:7A-5.13 allow a "blanket" authorization for multiple monitoring wells in cases where an applicant cannot determine ahead of time how many monitoring wells will be needed, for example, in groundwater cleanups where contaminants may have migrated underground. This will have a positive social impact in that it will assist in expeditiously completing groundwater cleanups by allowing installation of monitoring wells as needed, rather than interrupting the cleanup each time a new well must be approved.

Proposed changes to general permit 15 (mosquito control activities) at N.J.A.C. 7:7A-5.15 allow newspaper notice as a substitute for the standard public notice procedures at N.J.A.C. 7:7A-10.9. This was required by a 1993 amendment to the FWPA and will have a positive social impact in that it will expedite activities that are necessary to address documented mosquito problems.

Proposed changes to general permit 16 (habitat creation and enhancement) at N.J.A.C. 7:7A-5.16 will shift the focus of the general permit from authorizing specific activities to implementing an approved plan sponsored or funded by one of various Federal and/or State agencies. This will have the positive social impact of encouraging the many worthwhile existing wetlands restoration programs, while reducing Department review time.

Proposed changes to general permit 17 (trails and boardwalks) at N.J.A.C. 7:7A-5.17 remove limits on trails or boardwalks on private property, add a ¼ acre limit on total disturbance, and require that the trail or boardwalk educate the user, for example through educational signs. These changes will have a positive social impact in that they will promote widespread and appropriate use of trails and boardwalks to increase public awareness and appreciation of wetlands and the environment.

Proposed changes to general permit 18 (dam repair and removal) at N.J.A.C. 7:7A-5.18 allow removal of a dam and allow the Department to require a temporary conservation restriction on a lake bottom in some cases. These changes will have the positive social impact of making it easier to remove an unsafe or abandoned dam.

Proposed changes to general permit 19 (docks and piers) at N.J.A.C. 7:7A-5.19 allow more than one public dock per lot, and will allow a public dock wider than six feet if necessary for barrier-free subcode or for educational purposes. These changes will have a beneficial social impact by increasing access to waters and wetlands by the public, disabled people, and educational groups.

Proposed changes to general permit 20 (bank stabilization) require vegetative methods of bank stabilization unless other methods are required by the Standards for Soil Erosion and Sediment Control in New Jersey, and allow longer bank stabilization projects if the project is on the Department's Division of Watershed Management "action now" list, or if the project is conducted using bioengineering techniques. These changes may have a beneficial social impact, in that they will increase coordination among the different units of the Department, and the NJDA Soil Conservation Districts, which administer the Standards for Soil Erosion and Sediment Control in New Jersey.

A proposed change to general permit 21 (above ground utility lines) at N.J.A.C. 7:7A-5.21(b)2, allows a wider maintained vegetative clearing if necessary to comply with other laws. This will have a positive social impact in that it will remove a conflict between Department rules and other laws.

Proposed new general permit 22 at N.J.A.C. 7:7A-5.22 allows placement of animal waste management facilities in farmed wetlands on ongoing farms, if the waste management facility is part of a farm plan approved by the USDA's Natural Resources Conservation Service (NRCS). This will have the positive social impact of encouraging farmers to work with the NRCS to develop and implement farm management plans.

No changes are proposed to general permit 23 (expansion of existing cranberry operations in the Pinelands).

Proposed new general permit 24 at N.J.A.C. 7:7A-5.24 allows placement of spring developments for the purpose of watering livestock in farmed wetlands on ongoing farms, if the waste management facility is part of a farm plan approved by the USDA's Natural Resources Conservation Service (NRCS). This will have the positive social impact of encouraging farmers to work with the NRCS to develop and implement farm management plans.

Proposed changes to general permit 25 (repair of malfunctioning individual subsurface sewage disposal (septic) systems) at N.J.A.C. 7:7A-25 add more detail to the application requirements for the general permit. These minor changes may have a slight positive social impact, in that they will improve the information available to the Department when reviewing applications for these general permits.

Proposed new general permit 26 (minor stream cleaning for local government agencies) at N.J.A.C. 7:7A-5.26 allows minor stream cleaning within certain limits. The general permit provides for a default issuance permitting process for county and municipal minor stream cleaning, and for a combined freshwater wetlands and stream encroachment permit. The process for approval of minor stream cleaning matches recent legislation regarding expedited approvals for stream cleaning projects. This general permit will have the positive social impact of reducing delays and paperwork for municipal and county agencies pursuing stream cleaning projects, thus reducing public money spent on obtaining these permits.

Proposed new general permit 27 will allow disturbance of degraded wetlands formerly used for industrial or commercial sites under certain circumstances. This general permit will have a positive social impact in that it will make it easier to develop already disturbed wetlands rather than undisturbed wetlands.

The proposed combined general permits and Flood Hazard Area Control Act permits will have a beneficial social impact by reducing paperwork and application review time for several activities that typically require both a Flood Hazard Area Control Act permit and a freshwater wetlands permit.

<u>New mitigation provisions:</u>

The proposal replaces the existing mitigation subchapter with a new, more comprehensive and systematic subchapter. The proposed new subchapter adds credit purchase and uplands preservation as mitigation options, encourages use of credit purchase as mitigation for smaller projects, and adds rules for the review of monetary contributions, land donation, and mitigation banks by the Wetlands Mitigation Council. The proposed new subchapter will have several beneficial social impacts. First, it is more thorough and systematic and thus will provide more information and predictability for the regulated public. Second, the addition of two more mitigation options (credit purchase and uplands preservation) will increase flexibility for persons who must satisfy a mitigation obligation. Finally, the inclusion of rules for the Wetlands Mitigation Council will help facilitate public understanding of and involvement with the Council. By clearly outlining the requirements for various types of mitigation, applicants and their consultants will be better informed about the options available and will be better able to satisfy their mitigation obligations, and the Department will be more efficient in its implementation of the mitigation program.

Other miscellaneous substantive changes:

The proposal amends provisions relating to transition area waivers for redevelopment at N.J.A.C. 7:7A-6.3(f). Under the existing rule, the redevelopment waiver only applies to an area that is covered with impervious surfaces. The proposal would allow use of the redevelopment waiver in an area that is not covered by impervious surfaces, but that is so substantially degraded that it no longer functions as a transition area, such as an unvegetated gravel area. This will have the positive social impact of encouraging redevelopment in substantially degraded transition areas rather than disturbance of previously undisturbed transition areas.

The proposal adds a presumption at N.J.A.C. 7:7A-7.2(c)3 that, for certain applicants proposing to construct a single family home, offsite alternatives are not practicable. To qualify for the presumption, an applicant must have owned the land since before enactment of the FWPA, and must meet several other requirements. This provision will have a positive social impact, in that it will relieve the burden on these applicants of preparing an exhaustive demonstration of the impracticability of buying alternative land upon which to build a single family home.

The proposal adds a section at N.J.A.C. 7:7A-12.7 relating to the constitutional issue of taking without compensation. The section provides that the Department may consider this issue on a case-by-case basis. This section will have a positive social impact, in that it will enable the Department to consider this issue during the permitting process. This may allow the Department and an applicant to address and resolve the issue without court proceedings.

The proposed amendments to the enforcement provisions reorganize and consolidate two existing enforcement subchapters (N.J.A.C. 7:7A-15 and 17) into one subchapter at proposed N.J.A.C. 7:7A-16. While only a few substantive changes are proposed (these are discussed in detail above in the section-by-section description of N.J.A.C. 7:7A-16), the amendments will nonetheless have a positive social impact by

reducing confusion and thus increasing compliance. The proposal will also result in more predictable penalty assessments, thus reducing the number of contested cases and leading to more rapid resolutions of violations.

Economic Impact

The economic impact of the readoption and amendment of the FWPA rules will vary. The proposal includes new options that will reduce costs, such as new general permits and combined freshwater wetlands and flood hazard area permits. However, the proposal also includes new limits that may diminish the development potential and thus the economic value of some property.

In some cases, avoiding regulated areas altogether will be more economical than seeking approval under this chapter. This stems not only from the cost of applying for permits, but also from the extra costs attendant upon building in wetlands. Wetland soils may be unstable and may have to be removed. Fill must be deposited in wetlands in order to elevate structures, or buildings must be placed on pilings. Depending upon the cost of the fill and the distance it must be transported, the cost of filling wetlands for construction may be high. In addition, unless a local sewer system serves the site, a septic system must be installed, and it will be more expensive than a standard septic system because it must function in an area with a high ground water table.

The reorganization and simplification of the rules will have a positive economic impact in that the rules will be easier to understand and comply with, and preparing an application will take less time, effort, and expert assistance. The proposed readoption will also have a positive economic impact on the Department, by reducing administrative duplication and streamlining the regulatory review process. By authorizing some new activities under general permits, some activities that required extensive staff time for review under an individual permit will now require less time to review. This will enable Department staff to focus on larger disturbances and more complicated projects. Similarly, the proposed mitigation provisions will systematize the mitigation program and result in greater predictability and efficiency in the administration of that portion of the freshwater wetlands permit program.

Freshwater wetlands produce economic benefits by protecting both surface and ground water quality, providing flood protection, habitat for commercially and recreationally important fish and wildlife, and other recreational opportunities. The connections between individual wetlands, aquatic systems, and terrestrial systems are critical to the support of many organisms. In one study, the public benefits derived from wetlands are estimated to range from $153,535 to $190,000 per acre (based upon a 1978 Tufts University study reported in an article entitled, "Wetlands Save You Money" by Abigail Fair of the Association of New Jersey Environmental Commissions, Autumn 1990 Report).

The elimination of wetlands as well as the elimination of connections between wetlands and other aquatic systems results in increased runoff and more frequent flooding. The Central Passaic River Basin, for example, is one of the most flood-prone basins in the nation. The severity and extent of the flooding in the Basin has been

compounded by the continued development of its remaining wetland areas. Current cost estimates to correct the flooding problem range from millions of dollars to purchase and remove structures from the Basin, to billions of dollars to construct a tunnel to carry flood waters elsewhere.

Wetlands purify both surface and ground waters. It is estimated that 49% of New Jersey's population is dependent upon ground water and 51% upon surface water for drinking water supplies (based upon Water for the 21st Century: the Vital Resource, NJ Water Supply Plan, DEP Office of Environmental Planning, September 1995). Wetlands directly protect the ground water by trapping and filtering pollutants from surface water as it is recycled back to the ground water. In many cases, the ground water is then, without treatment, pumped directly from individual or municipal wells into homes. Wetlands perform the same filtering functions for surface waters as they flow to streams and reservoirs. Water quality maintenance through the protection of wetlands can reduce the costs of treating water drawn from streams and reservoirs for potable water purposes. In addition, wetlands water quality functions may also reduce health care costs related to poor quality drinking water.

General clarifications

A proposed addition to the definition of "project," including a 20 foot area surrounding a home, will have both positive and negative economic impacts. For a developer of a multi-unit development, this provision may have a short term negative economic impact in that may reduce the number of houses that can be built on a property. The provision will have a positive economic impact for homeowners who buy from a multi-unit developer and for the Department, because it will reduce the number of Department enforcement actions against homeowners who buy these homes and then unwittingly conduct regulated or prohibited activities in their backyards.

The proposed clarifications to the provisions regarding minor drainage of farmed wetlands will have no economic impact on farmers engaged in farming. The provisions may have a negative impact on a farmer who plans to stop farming and develop the farmland or sell it for development. However, this impact does not result from the proposed provisions, but from the farming exemption itself, and the fact that the proposal ensures that the rule adheres to the original intent of the farming exemption, which is not to facilitate development but to facilitate farming. This proposal merely carries out and clarifies the exemption.

The proposed expansion of the types of LOIs which will require that the applicant provide a survey will likely have some negative economic impact on applicants who might otherwise be spared the expense of a survey. However, it may save applicants money in the long run by providing more accurate and long lasting wetlands boundary determinations.

Changes to existing general permits and proposed new general permits

The proposed 30-day default permit issuance process under general permit 1 for application of herbicides for vegetative maintenance in utility line rights of way, and

ongoing maintenance of certain stormwater facilities, will have a positive economic impact. Both of these activities are routine and their limits are easily codified. By providing for the expedited issuance process, the Department can reduce delay and therefore cost.

The proposal to add construction of a sewage pump station as an activity authorized under general permit 2 will likely have a beneficial economic impact on municipal sewage authorities, because it will reduce the cost and time required to obtain authorization for a sewage pump station. The proposal to add construction of an access road above an underground utility line will probably not have any economic impact, since the proposal requires mitigation for the area disturbed by the access road. Thus, any cost savings achieved by constructing an access road under the authority of the general permit will be offset by the cost of mitigation for the disturbance.

The proposed changes to general permit 2 and general permit 15, which remove the prohibition on using these general permits in exceptional resource value wetlands, will have a positive economic impact both for the regulated public and the Department. The applicants for these general permits will not have to prepare complex and expensive individual permit applications when these activities occur in exceptional resource value wetlands. Because the activities authorized under general permits 2 and 15 serve a public need and usually cannot be relocated, they are almost always eligible for individual permits, often with conditions that match those in the general permits. The proposal will allow the Department to free staff time previously spent reviewing individual permit applications for these activities, and devote the staff time to applications with more serious potential environmental impacts.

Proposed changes to general permit 3 (discharge of return water from upland dredged disposal sites) at N.J.A.C. 7:7A-5.3 may have a slight beneficial economic impact because, while they do not change the meaning of the existing general permit, they make it clearer and easier to understand and thus may save time for applicants.

Proposed changes to general permit 4 (hazardous cleanups) will delete the requirement for an alternatives analysis in exceptional resource value wetlands, and remove the mitigation requirement if the wetlands disturbed were formed as a direct result of the cleanup activities. These changes will have a positive economic impact, in that a party conducting a cleanup will spend less time and money on application preparation and mitigation, and will have more funds to devote to the cleanup.

Existing general permit 5 is proposed for deletion, to be replaced with proposed N.J.A.C. 7:7A-5.5, authorizing certain activities required to close a landfill. This is likely to have a beneficial economic impact for landfill owners, which are often public entities, in that it will make it quicker and less costly to obtain approval to close a landfill.

The proposed prohibition on the use of general permit 6 in vernal habitats will have a short term negative economic impact on developers and property owners, in that it will prevent development in some non-tributary wetlands that currently may be filled under general permit 6. In addition, many species that use vernal habitat are decreasing rapidly. If protecting vernal habitat can prevent these species from becoming threatened or endangered, this will avoid even stricter future regulation in areas where

these species are found. These stricter requirements would have a greater economic impact than the prohibition on use of general permit 6 in areas of vernal habitat.

Proposed changes to general permits 7 (human-made ditches and swales) at N.J.A.C. 7:7A-5.7, and general permit 8 (house additions) at N.J.A.C. 7:7A-5.8, may have a slight beneficial economic impact because, while they do not change the meaning of the existing general permits, they make them clearer and easier to understand, thus making it easier, faster, and less expensive to prepare and submit applications.

Existing general permit 9 is proposed for deletion, to be replaced with proposed N.J.A.C. 7:7A-5.9, authorizing clearing of vegetation around public airports for safety reasons. This will have a positive economic impact on public entities that operate public airports and must comply with FAA safety requirements.

Proposed changes to general permit 10 (minor road crossings) at N.J.A.C. 7:7A-10A and 10B will have a positive economic impact because the changes provide more flexibility. In addition, separating out the least complicated projects will make them quicker and easier to evaluate, saving time and money for both the applicant and the Department. This will also allow the Department to focus more attention on the more complicated projects under general permit 10B, making review of those projects faster and thus reducing costly construction delays.

The proposed changes to general permit 11 (outfalls and intakes) will have a positive economic impact, by reducing permit review time for outfalls covered by NJPDES permits and for intake structures. Currently, such structures must go through the lengthy and expensive individual permitting process, despite the fact that the Department has already reviewed the discharge under the NJPDES program, and despite the fact that the environmental impact of such a discharge is similar to that of a stormwater outfall.

Proposed changes to general permit 12 (surveying discharge of return water from upland dredged disposal sites) at N.J.A.C. 7:7A-5.12 will have a beneficial economic impact on persons conducting geotechnical or archaeological investigations, because the general permit will be quicker and easier to obtain than the individual permit which is required by the existing rules.

Proposed amendments to general permit 13 (lake dredging) are likely to have a slight negative economic impact on those who dredge lakes, because they reduce the allowable wetlands disturbance for access to a lake, pond, or reservoir being dredged, and because they require the applicant to gather and submit information on the source of the sediment being removed from the lake. However, the Department believes that the information gathered will help in preventing future sedimentation, which will have a positive economic impact in the long term by reducing the need for frequent dredging.

Proposed changes to general permit 14 (water monitoring devices) that allow a "blanket" authorization for multiple monitoring wells will have a positive economic impact in that it will reduce application costs and assist in expeditiously completing groundwater cleanups.

Proposed changes to general permit 15 (mosquito control activities) at N.J.A.C. 7:7A-5.15 allow newspaper notice as a substitute for the standard public notice procedures at N.J.A.C. 7:7A-10.9. This was required by a 1993 amendment to the FWPA and will have a positive economic impact in that the change will make it less expensive to obtain approval for activities that are necessary to address documented mosquito problems.

The proposed changes to general permit 16 (habitat creation and enhancement) will have a small positive economic impact on the Department because the Department will take an oversight role for these projects, rather than being the primary reviewer. This will reduce the amount of staff time required to review the activities.

Proposed changes to general permit 17 (trails and boardwalks) at N.J.A.C. 7:7A-5.17 remove limits on trails or boardwalks on private property, add a ¼ acre limit on total disturbance, and require that the trail or boardwalk educate the user, for example through educational signs. These changes will have a positive economic impact on private property owners who wish to construct a trail or boardwalk, but may have a negative economic impact on public entities with large properties, because a long trail or boardwalk may disturb more than ¼ acre of wetlands and thus may require an individual permit under the proposal, whereas it would be authorized under existing general permit 17.

Proposed changes to general permit 18 (dam repair and removal) at N.J.A.C. 7:7A-5.18 allow removal of a dam and allow the Department to require a temporary conservation restriction on a lake bottom in some cases. These changes will have a positive economic impact on dam owners by making it easier to remove an unsafe or abandoned dam.

Proposed changes to general permit 19 (docks and piers) at N.J.A.C. 7:7A-5.19 allow more than one public dock per lot, and will allow a public dock wider than six feet if necessary for barrier-free subcode or for educational purposes. These changes are likely to have little or no economic impact.

Proposed changes to general permit 20 (bank stabilization) require vegetative methods of bank stabilization unless other methods are required by the Standards for Soil Erosion and Sediment Control in New Jersey, allow longer disturbances if the project is on the Department's Division of Watershed Management "action now" list, or if the project is conducted using bioengineering techniques. These changes will have a positive economic impact on persons pursuing bank stabilization projects, in that they will allow longer bank stabilization projects using soil bioengineering, without requiring an individual permit.

A proposed change to general permit 21 (above ground utility lines) at N.J.A.C. 7:7A-5.21(b)2, allows a wider maintained vegetative clearing if necessary to comply with other laws. This is likely to have little or no economic impact.

Proposed new general permit 22 and general permit 24, at N.J.A.C. 7:7A-5.22 and 5.24 respectively, allow placement of spring developments and animal waste

management facilities in farmed wetlands on ongoing farms. These general permits will have a positive economic impact on livestock farmers.

No changes are proposed to general permit 23 (expansion of existing cranberry operations in the Pinelands).

Proposed changes to general permit 25 (repair of malfunctioning individual subsurface sewage disposal (septic) systems) at N.J.A.C. 7:7A-25 add more detail to the application requirements for the general permit. These minor changes are not likely to have any economic impact.

Proposed new general permit 26 (minor stream cleaning for local government agencies) will have a small positive economic impact on local government agencies that carry out stream cleaning projects, by making the permit review process quicker and simpler.

Proposed new general permit 27 will allow disturbance of degraded wetlands formerly used for industrial or commercial sites under certain circumstances. This general permit is likely to have a positive economic impact for developers of "brownfield" sites, in that it will reduce one expense attendant on the redevelopment of already disturbed wetlands.

The proposed combined general permits and Flood Hazard Area Control Act permits will have a beneficial economic impact on both applicants and the Department by reducing paperwork and application review time for certain projects that require both a Flood Hazard Area Control Act permit and a freshwater wetlands permit.

New mitigation provisions:

The proposal replaces the existing mitigation subchapter with a new, more comprehensive and systematic subchapter. The proposed new subchapter adds credit purchase and uplands preservation as mitigation options, encourages use of credit purchase as mitigation for smaller projects, and adds rules for the review of monetary contributions, land donation, and mitigation banks by the Wetlands Mitigation Council. The proposed new subchapter will have a beneficial economic impact. First, it is more thorough and systematic and thus it will be easier for the regulated public to comply with mitigation requirements with less professional assistance. Second, the addition of two more mitigation options (credit purchase and uplands preservation) will reduce compliance costs by increasing the range of compliance options.

Other miscellaneous substantive changes:

The proposed provision at N.J.A.C. 7:7A-3.4(b)2, which provides for a letter of interpretation on a portion of a publicly owned property that is greater than 10 acres, will have a positive economic impact on public agencies that hold large land areas. Since public agencies use public sources of income to perform all functions, this less

expensive mechanism for obtaining a letter of interpretation will reduce the financial burden on the agency and the public it serves.

The proposal amends provisions relating to transition area averaging plan waivers by limiting averaging on wetlands adjacent to trout production waters, and by requiring that an area expanded through averaging must have the same characteristics and vegetation type as the area reduced. See N.J.A.C. 7:7A-6.2(c). These proposed limits will have a slight negative economic impact on owners of property containing transition areas, in that it will be somewhat more difficult to develop property in certain transition areas.

The proposal adds a presumption at N.J.A.C. 7:7A-7.2(c)3 that, for certain applicants proposing to construct a single family home, offsite alternatives are not practicable. To qualify for the presumption, an applicant must have owned the land since before enactment of the FWPA, and must meet several other requirements. This provision will have a positive economic impact on persons who owned land prior to the enactment of the FWPA, in that it will relieve the burden on these applicants of preparing an exhaustive demonstration of the impracticability of buying alternative land upon which to build a single family home.

The proposal amends provisions relating to transition area waivers for redevelopment at N.J.A.C. 7:7A-6.3(f). Under the existing rule, the redevelopment waiver only applies to an area that is covered with impervious surfaces. The proposal would allow use of the redevelopment waiver in an area that is not covered by impervious surfaces, but that is so substantially degraded that it no longer functions as a transition area, such as an unvegetated gravel area. This will have a positive economic impact on those who would redevelop substantially degraded transition areas rather than disturb previously undisturbed transition areas.

The proposal adds a section at N.J.A.C. 7:7A-12.7 relating to the constitutional issue of taking without compensation. The section provides that the Department may consider this issue on a case-by-case basis when reviewing practicable alternatives and public interest. This section will have a positive economic impact on both the regulated public and the Department, in that it will provide the Department with the flexibility to consider this issue in the context of its analysis of practicable alternatives and public interest.

Environmental Impact

The FWPA rules have had a substantial positive environmental impact, and the proposed readoption with amendments will continue this. In fact, New Jersey's freshwater wetlands program is one of the most environmentally protective in the nation.

General clarifications

Proposed N.J.A.C. 7:7A-2.6(a), which provides for limits on a residential development project, is likely to have a positive environmental impact, in that it will decrease the likelihood of transition area disturbance.

The proposed clarifications to the farming, ranching and silviculture exemption (found in the existing rules at N.J.A.C. 7:7A-2.7) are likely to have a beneficial environmental impact because they will prevent a common problem wherein a developer attempts to claim that a farmed wetland is no longer a wetland by virtue of drainage installed to aid farming. This ensures that the rule will more effectively implement the original intent of the farming exemption, thus protecting and preserving farmed wetlands.

Changes to existing general permits and proposed new general permits

The proposed changes to general permit 1 (maintenance of existing features) at N.J.A.C. 7:7A-5.1(c) and (d) will have no environmental impact because the expedited approval process does not change the type or amount of disturbance authorized under general permit 1. Because the Department will have 30 days in which to deny authorization or require a standard general permit review, the expedited approval process will not increase the likelihood of approval of any project that raises environmental concerns.

The proposed changes to general permit 2 (underground utility lines) at N.J.A.C. 7:7A-5.2 are likely to have little, if any, environmental impact. The addition of a sewage pump station as an authorized activity will have no environmental impact because it will not increase the total amount of disturbance allowed under the general permit. Thus, if a pump station is installed, the disturbance caused by other activities under the general permit will decrease so as to meet the one acre limit, and no greater environmental impact will result. The authorization of a municipal access road over an underground utility line for maintenance of the line will have little or no impact for the same reason, and also because mitigation will be required for the disturbance caused by the access road.

The proposed removal of the prohibition against using general permit 2 in exceptional resource value wetlands is likely to have little environmental impact. The Department has found over the years that the bar to underground utility lines in exceptional resource value wetlands has produced project delays without benefiting the environment. The individual permit process, as applied to utility lines, often does not result in greater environmental protection because it is difficult to find a practicable alternative. In many cases a utility line location is chosen so as to share a right-of-way with other existing utility lines. Even if the existing line is in an exceptional resource value wetland, it is often better environmentally to place the utility line where there is already some existing disturbance, rather than to construct a new line in a new location that has been previously undisturbed. In addition, because a utility line's location is to a large extent determined by where the utility service is needed, it is often very difficult to find a practicable alternative that will provide the utility service to the necessary location. Finally, even without this prohibition, general permit 2 is subject to the general condition on all general permits at proposed N.J.A.C. 7:7A-4.3(b)3, which prohibits any activity

that would jeopardize threatened or endangered species habitat. Therefore, requiring an individual permit often does not significantly change the utility line project or reduce its environmental impact, and the proposed removal of the prohibition against use of the general permit in exceptional resource value wetlands will have little or no environmental impact.

Proposed changes to general permit 3 (discharge of return water from upland dredged disposal sites) at N.J.A.C. 7:7A-5.3 will have no environmental impact because they do not change the meaning of the existing general permit.

Proposed changes to general permit 4 (hazardous cleanups) at N.J.A.C. 7:7A-5.4 are likely to have little or no environmental impact. As noted in the section-by-section description of the proposed provisions, the alternatives analysis proposed for deletion has not proven to result in environmental benefits. Although the removal of the mitigation requirement for wetlands formed as a result of a cleanup may have a slight negative environmental impact, the removal of the mitigation requirement for these wetlands is likely to speed or facilitate these environmentally beneficial cleanups somewhat, thus offsetting any negative impact.

Proposed new general permit 5 at N.J.A.C. 7:7A-5.5 (landfill closures) will have a positive environmental impact because it will facilitate the proper closure of landfills. Although some negative environmental impact may arise from the disturbance of wetlands during closure of a landfill, the positive environmental impacts of speeding proper closure of landfills will offset any such negative impact.

Proposed changes to general permit 6 (non-tributary wetlands) at N.J.A.C. 7:7A-5.6 will have a significant and positive environmental impact. Recent research has shown that vernal habitats are much more environmentally important than previously understood. The proposed prohibition against use of general permit 6 in vernal habitats will significantly improve protection of these important features. See the section-by-section description of proposed general permit 6 for more detail regarding the environmental benefits of vernal habitats.

Proposed changes to general permits 7 (human-made ditches and swales) at N.J.A.C. 7:7A-5.7, and general permit 8 (house additions) at N.J.A.C. 7:7A-5.8, will have no environmental impact because they do not change the meaning of the existing general permits.

Existing general permit 9 is proposed for deletion, to be replaced with proposed N.J.A.C. 7:7A-5.9, authorizing clearing of vegetation around public airports for safety reasons. The proposed new general permit will have a small negative environmental impact. However, because the general permit authorizes only the cutting of vegetation, and does not authorize any permanent disturbances such as construction of structures or impervious surfaces, the environmental impact will be small. Further, this small impact must be weighed against the public interest in airport safety.

Proposed changes to general permit 10 (minor road crossings) at N.J.A.C. 7:7A-10A and 10B are likely to have a neutral or somewhat positive environmental impact overall. Although the proposed general permit allows longer road crossings than the

existing general permit 10 in some cases, the proposal also adds an onsite alternatives analysis in many cases. Thus, the net effect of the proposed changes is likely to be environmentally neutral or somewhat positive.

Proposed changes to general permit 11 (outfalls and intakes) at N.J.A.C. 7:7A-5.11, which authorize construction of outfalls for NJPDES permitted discharges, and construction of water intakes, are not likely to have major environmental impacts. The general permit includes conditions to prevent erosion or pollution that could be caused by the discharge from an outfall, or from the possibility that an intake structure could endanger wildlife that are sucked up by the intake. Erosion protection is ensured by the requirement in the general permit, and in the general provisions for all general permits, that the activities comply with the Standards for Soil Erosion and Sediment Control in New Jersey. These Standards specify the size and design of a riprap apron in order to prevent erosion. The general permit prevents pollution by requiring that any stormwater discharged must be pretreated, and that any non-stormwater discharge must be covered by a NJPDES permit. To prevent the possibility of impacts from an intake structure, the general permit includes a limit on intake velocity, and design requirements to prevent dangers to wildlife.

Proposed changes to general permit 12 (surveying and investigating) at N.J.A.C. 7:7A-5.12 will have little or no environmental impact because the activities authorized for geotechnical or archaeological investigations are minor and temporary, and the proposal requires restoration of any soil disturbed to its pre-activity elevation.

Proposed changes to general permit 13 (lake dredging) at N.J.A.C. 7:7A-5.13 require applicants to identify the sources of sediment in the lake being dredged, and limit disturbance for access. These proposed changes will have a beneficial environmental impact, both directly and indirectly. A direct, positive environmental impact will result from the stricter limit on disturbance for access, while an indirect positive impact will result from requiring applicants to determine the sources of sediment to the lake being dredged. This identification of sources will not only encourage applicants to take action to reduce sedimentation, but will be used by the Department's Division of Watershed Management to shape future sediment control efforts as part of watershed management plans that are currently under development.

Proposed changes to general permit 14 (water monitoring devices) at N.J.A.C. 7:7A-5.13, allowing a "blanket" authorization for multiple monitoring wells in certain cases, will have a positive environmental impact, in that this will facilitate speedy cleanups of sites with groundwater contamination.

Proposed changes to general permit 15 (mosquito control activities) at N.J.A.C. 7:7A-5.15 allow newspaper notice as a substitute for the standard public notice procedures at N.J.A.C. 7:7A-10.9. This was required by a 1993 amendment to the FWPA and will have no environmental impact as it affects only procedural aspects of the general permit. In addition, the proposal removes the prohibition against use of the general permit in exceptional resource value wetlands. A wetland can be classified as exceptional based on either of two factors: the presence of threatened or endangered species habitat, or a water quality classification of FW1 or FW2 trout production. A wetland that is classified as exceptional based on the presence of threatened or

endangered species habitat will still be protected by the standard condition for all general permits at proposed N.J.A.C. 7:7A-4.3(b)3, which prohibits a project that would jeopardize threatened or endangered species habitat. The proposed change would, however, authorize activities in FW1 waters and in FW2 trout production waters and their tributaries, where existing general permit 15 cannot be used in such waters. The environmental impact of this is expected to be small, for several reasons. First, the authorized activities are minor in nature. Second, waters classified as FW1 or FW2 trout production waters are generally fast moving, cold waters, which are not suitable mosquito habitat. Most of the waters in which general permit 15 is used are slower, warmer waters that are not suitable for trout. Finally, the authorized activities are important for health and safety, because of the diseases carried by mosquitoes.

In addition, the Department has found over the years that the prohibition against mosquito control projects in exceptional resource value wetlands has produced project delays without benefiting the environment. When an individual permit is required for a mosquito control project, it is very difficult to find a practicable alternative for dealing with a "documented mosquito problem" with a "demonstrated need for its remediation" (requirements quoted from the general permit). Alternative locations are not available, because the mosquito problem cannot be moved to another location before being eradicated. Alternative methods can be examined, but mosquito control techniques are fairly standardized, so requiring an individual permit does not usually result in major changes in the proposed project activities. In fact, in most cases the individual permit issued for the project looks very much like the general permit 15 authorization that would have been issued for the project.

Proposed changes to general permit 16 (habitat creation and enhancement) at N.J.A.C. 7:7A-5.16 will shift the focus of the general permit from authorizing specific activities to implementing an approved plan sponsored or funded by one of various Federal and/or State agencies. This will have a small positive environmental impact by facilitating existing, worthwhile habitat enhancement programs run by other agencies, and possibly increasing the number of habitat enhancement projects pursued.

Proposed changes to general permit 17 (trails and boardwalks) at N.J.A.C. 7:7A-5.17 remove limits on trails or boardwalks on private property, add a ¼ acre limit on total disturbance, and require that the trail or boardwalk educate the user, for example through educational signs. These changes are likely have a neutral environmental impact overall. Removing the prohibition against using the general permit on private property will likely result in construction of more trails and boardwalks. However, the limit of 1/4 acre per trail or boardwalk will reduce the allowable disturbance for each. The requirement for educational features will have an indirect environmental benefit by encouraging people to understand and value wetlands and the environment.

Proposed changes to general permit 18 (dam repair and removal) at N.J.A.C. 7:7A-5.18 allow removal of a dam and allow the Department to require a temporary conservation restriction on a lake bottom in some cases. These changes are likely to have a small beneficial environmental impact, in that they will facilitate restoration of wetland areas previously covered by impounded waters.

Proposed changes to general permit 19 (docks and piers) at N.J.A.C. 7:7A-5.19 allow more than one public dock per lot, and will allow a public dock wider than six feet if necessary for barrier-free subcode or for educational purposes. These changes will have little or no environmental impact, because they will not increase disturbance under the general permit by any appreciable amount.

Proposed changes to general permit 20 (bank stabilization), requiring vegetative methods of bank stabilization, and allowing longer bank stabilization projects if the project is conducted using bioengineering techniques, will have a substantial positive environmental impact. These changes will have increase the use of environmentally beneficial stabilization methods, and will decrease use of rip-rap and other "armor" type methods that permanently obliterate stream bank habitat.

A proposed change to general permit 21 (above ground utility lines) at N.J.A.C. 7:7A-5.21(b)2, which allows a wider maintained vegetative clearing if necessary to comply with other laws, will have a neutral environmental impact. The other laws governing the allowable width of such clearings are generally designed to protect against fire hazards to forested areas through which utility lines run. Thus, even if the proposed provision results in some widening of some clearings, the environmental benefit of preventing forest fires will compensate for this impact.

Proposed new general permits 22 and 24 at N.J.A.C. 7:7A-5.22 and 24 allow placement of animal waste management facilities and spring developments in farmed wetlands as part of a farm plan approved by the USDA's Natural Resources Conservation Service (NRCS). This will have a positive environmental impact. The placement of these structures in a wetland that is already highly disturbed by farming activities will have little negative environmental impact. However, the participation of a farmer in the NRCS farm management program will have substantial overall environmental benefits.

No changes are proposed to general permit 23 (expansion of existing cranberry operations in the Pinelands).

Proposed changes to general permit 25 (repair of malfunctioning individual subsurface sewage disposal (septic) systems) at N.J.A.C. 7:7A-25 will have no environmental impact, because they apply only to procedural aspects of the general permit.

Proposed new general permit 26, at N.J.A.C. 7:7A-5.26, allows minor stream cleaning, including removal of sediment, garbage, and debris. The removal of garbage and debris will have positive environmental impacts. The primary potential for environmental impacts resulting from sediment removal would result from the removal of any wetlands vegetation that may have formed on sediment in a stream, such as on a sand bar. Therefore, the general permit includes limits to ensure that there will be no more than minimal impact from sediment removal. To minimize impacts to habitat, general permit 26 may not be used in a municipality with a threatened or endangered species associated with its wetlands. In such a municipality, an individual permit would be required for a stream cleaning project.

Both general permits also prohibit sediment removal if the affected portion of the watercourse is more than 15 feet in average width, and general permit 26 limits sediment removal projects to 500 linear feet of stream. This will ensure that large sediment removal projects are reviewed through an individual permit process. General permit 26 restricts activities based on the water quality classification of a stream, limits stream bank disturbance for access to the stream to the minimum necessary, no alteration of the stream bank itself is authorized, and no vegetation may be removed from the southerly or westerly bank, in order to preserve shading over the waterway. Further, general permit 26 requires that work be performed from only one bank to the extent possible. To the extent that wetland vegetation is disturbed for access, the disturbance will be temporary and the area will naturally revegetate, thus minimizing environmental impact. General permit 26 includes a requirement that materials removed from a watercourse must be disposed of outside of wetlands, transition areas, state open waters, and flood hazard areas, unless the permittee demonstrates that to do so would cause more environmental harm than would be caused by disposal within these regulated areas. All of these limits and restrictions, taken together, will ensure that activities under proposed general permit 26 will have minimal environmental impacts.

Proposed new general permit 27 will allow disturbance of degraded wetlands formerly used for industrial or commercial sites, under certain circumstances. This general permit is likely to have a neutral overall environmental impact, because although it allows disturbance of wetlands, it will encourage use of already disturbed wetlands for development, rather than undisturbed wetlands.

New mitigation provisions:

The proposed new mitigation subchapter will have a positive environmental impact. By encouraging mitigation banking for small disturbances, the Department can ensure that the resources spent on mitigation will benefit from economies of scale and a greater environmental benefit per dollar spent on mitigation will result. By making the mitigation program more systematic and predictable, the rules will increase compliance with mitigation requirements.

Other miscellaneous substantive changes:

The proposed amendments regarding transition area waivers for redevelopment at N.J.A.C. 7:7A-6.3(f) would allow use of the redevelopment waiver in an area that is not covered by impervious surfaces, but that is so substantially degraded that it no longer functions as a transition area, such as an unvegetated gravel area. This is likely to have an overall neutral environmental impact. Although the provision may somewhat increase disturbance of degraded transition areas, it will offset this impact by encouraging use of substantially degraded transition areas rather than disturbance of previously undisturbed areas.

The proposal adds a presumption at N.J.A.C. 7:7A-7.2(c)3 that, for certain applicants proposing to construct a single family home, offsite alternatives are not practicable. To qualify for the presumption, an applicant must have owned the land

since before enactment of the FWPA, and must meet several other requirements. This provision will have a somewhat negative environmental impact, in that it may increase the number of single family homes built in wetlands. However, the impact will be minor, because many of the affected applicants can eventually demonstrate the impracticability of buying alternative land upon which to build a single family home, and thus qualify for an individual permit.

The proposed new section at N.J.A.C. 7:7A-12.7, addressing the constitutional issue of taking without compensation, will have no environmental impact because it reflects existing legal standards.

The proposed amendments to the enforcement section will have a positive environmental impact by reducing confusion and thus increasing compliance. The proposal will result in more predictable penalty assessments, thus reducing the number of contested cases and leading to more rapid resolutions of violations.

NEPPS Statement

FWPA rule readoption in light of the Department's Strategic Plan
and the National Environmental Performance Partnership System

The 1998-2001 NJDEP Strategic Plan reflects the Department's vision, mission and six broad goals. The goals relating to the Land Use Regulation Program are contained within the Healthy Ecosystems goal area in the Strategic Plan. The goal for Healthy Ecosystems is broad based and involves a number of programs throughout the Department. The goal for Healthy Ecosystems is:

- *The health, diversity and integrity of New Jersey's ecosystems will be restored, protected, enhanced and sustained.*

The National Environmental Performance Partnership System (NEPPS) provides a detailed outline of the Department's goals and includes focused milestones, strategies, activities and indicators for each. The Performance Partnership Agreement that is developed every two years under NEPPS serves two purposes: It is a comprehensive, cross-program planning document, providing more detail than the Strategic Plan, and it guides the relationship between the Department and USEPA Region II in federally funded or delegated programs.

The freshwater wetlands permitting program falls under the Land and Natural Resources area in the Performance Partnership Agreement. Within the Land and Natural Resources area, the following four goals are most relevant to the freshwater wetlands program:

- *Subgoal #1: Wetlands: improve quality and function and achieve no net loss. Explore innovative techniques for creation, enhancement, and maintenance of New Jersey wetlands.*

- *Subgoal #2: Headwaters and riparian corridors: maintain and restore headwaters, riparian corridors and associated buffers for water quality and wildlife habitat, flood control, public safety, stream bank stability.*

- *Subgoal #8: Open space: Preserve open space for current and future protection of natural resources, biological diversity, and recreation.*

- *Subgoal #9: Environmentally damaged land: Return environmentally damaged land to productive uses.*
  (1999-2000 PPA)

The proposed readoption of the FWPA rules will serve the above goals in the following ways:

1. By continuing the stringent protections already in place governing freshwater wetlands, transition areas, and State open waters; the proposed rules will help preserve open space (subgoal #8), including some headwaters and riparian areas (subgoal #2).
2. The new mitigation subchapter will improve quality and function of wetlands, and will implement innovative techniques for creation and enhancement of wetlands (subgoal #1).
3. The incentives to use environmentally friendly bioengineering techniques for stream bank stabilization, found in proposed amendments to general permit 20, will maintain and restore riparian areas, promote preservation of stream bank habitat, and further stream bank stability (subgoal #2).
4. Proposed transition area redevelopment provisions, and proposed new general permit 27, will both promote the return of environmentally damaged land to productive use (subgoal #9), while relieving development pressure on undisturbed land.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require State agencies that adopt, readopt, or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a comparison with Federal law. Such a comparison is especially appropriate in the case of the freshwater wetlands program rules, because the Department is also obligated under Federal law to ensure that its program is at least as stringent as the Federal 404 program.

Overall, the Department's freshwater wetlands program is more stringent than the Federal 404 program. This additional stringency is mandated by the FWPA, and is appropriate in New Jersey because of the intense development pressure in New Jersey, and because of the role of New Jersey's wetlands as a critical component of the migratory flyway along the Atlantic coast.

The basic structure of the Department's freshwater wetlands permitting program, and much of its substance, are essentially the same as the Federal 404 program. Both provide for individual and general permits. Both use similar key concepts and definitions, and apply similar standards in approving both general and individual

permits. However, while the New Jersey Legislature used the Federal 404 program as the basis for the FWPA, it also tailored the FWPA to meet the needs of New Jersey and to more strictly limit activities in and around wetlands in order to avoid excessive wetlands losses in New Jersey. As a result, the New Jersey program regulates more types of activities in freshwater wetlands than the Federal 404 program does, regulates an upland "transition area" around each wetland, and requires a more involved process to obtain approval from the Department for regulated activities. These differences from the Federal program are discussed in greater detail below.

In 1994, New Jersey assumed the responsibility for freshwater wetlands permitting from the U.S. Army Corps of Engineers (ACOE) pursuant to the Federal Clean Water Act. Since this assumption, New Jersey's program operates in place of the Federal 404 program throughout the State, except in the Hackensack Meadowlands, and in interstate and navigable waters enumerated in the Department's Memorandum of Agreement with the ACOE. The EPA oversees New Jersey's assumed program, and also the ACOE program in the above mentioned areas still regulated by the ACOE. In order to maintain its assumption of the wetlands program, the Department must demonstrate to EPA that any rules it adopts are at least as stringent as existing Federal wetlands regulations.

In general, the State program is much more stringent than the federal program, because of its greater scope of regulation, as required by the FWPA. There are a handful of general permits that contain some provisions that are not as stringent as the corresponding nationwide general permit. However, due to the fact that every other component of the State program is substantially more stringent than the Federal 404 program, these few provisions do not render the State program less stringent.

Scope of regulation

The New Jersey freshwater wetlands program is broader than the Federal program both in the natural features it regulates and in the types of activities regulated within those features. Because of this broader scope, the New Jersey wetlands program is more stringent overall than the Federal 404 program.

More different activities in wetlands are regulated under the New Jersey freshwater wetlands program than the Federal 404 program. While the Federal 404 program regulates only the discharge of dredged or fill material in wetlands, New Jersey regulates the driving of pilings, placement of obstructions, excavation, ditching, drainage or disturbance of the water table, and destruction of vegetation in wetlands. However, both programs regulate the same activities in State open waters -- the discharge of dredged or fill material.

The New Jersey freshwater wetlands program may also regulate more wetlands than are regulated under the Federal 404 program, because New Jersey uses a slightly different method of identifying wetlands. Under the FWPA, the Department must use the 1989 EPA Manual when identifying freshwater wetlands. It is generally believed that the 1989 EPA Manual addresses more difficult or disturbed-site wetland determinations, and therefore results in the identification of more wetlands than the

manual used by the ACOE when identifying wetlands for Federal 404 program purposes.

The New Jersey freshwater wetlands program regulates more different natural features than are regulated under the Federal 404 program. The Federal 404 program regulates only wetlands and open waters, while the New Jersey program regulates wetlands, open waters, and in addition an upland transition area around most wetlands, ranging in size from 50 to 150 feet. The Federal 404 program does not regulate uplands adjacent to a wetland at all.

Based upon the resource value classification of a wetland, a transition area is either 50 or 150 feet wide. Transition areas are a critical component of the freshwater wetlands ecosystem, providing temporary refuge for freshwater wetlands fauna during high water episodes, critical habitat for animals dependent upon but not resident in freshwater wetlands, and accommodating variations in freshwater wetland boundaries over time. In addition, transition areas provide a sediment and stormwater control zone to reduce the impacts of development upon freshwater wetlands and freshwater wetland species. Without a transition area, a wetland can be gradually destroyed or degraded by adjacent activities, a common occurrence under the Federal 404 program.

The broader scope of activities regulated in wetlands under the New Jersey freshwater wetlands program is paralleled in transition areas. In transition areas, New Jersey regulates much more than just the discharge of dredged or fill material. It also regulates removal, excavation, or disturbance of the soil; dumping or filling; erection of structures; placement of pavements; and destruction of plant life which would alter the existing pattern of vegetation.

The Department's freshwater wetlands program also provides extra protection to wetlands classified as exceptional resource value wetlands or as EPA priority wetlands. Special protections apply to these two types of wetlands, which do not receive additional protection under the Federal 404 program.

The Department's freshwater wetlands program is also somewhat more stringent than the Federal program in its protection of threatened and endangered species. New Jersey has adopted a State-specific list of threatened or endangered animal species, pursuant to the New Jersey Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq. The New Jersey freshwater wetlands program protects both federally listed and State listed endangered species, while the Federal 404 program only protects federally listed species.

Overall, the Department's freshwater wetlands permitting program regulates more activities and protects more natural features than the Federal 404 program. The Department covers a wider range of activities in wetlands, covers the same activities in open waters, and covers a wide range of activities in transition areas around most wetlands. This more stringent program is mandated by the FWPA, and provides an appropriately greater level of protection for crucial natural resources in the most densely populated state in the nation.

Substantive permitting standards

The Department's standards for review of individual freshwater wetlands and open water fill permits are almost identical to those used in the Federal 404 program, but the Department's standards are a step more stringent. Both require an alternatives test, and require more scrutiny for an activity that is not water-dependent. The one significant difference between the two programs is that the Department adds a further test for activities in exceptional resource value wetlands or in State open waters classified as trout production waters. In these waters, in addition to meeting all other tests, an applicant must also demonstrate either that there is a compelling public need for the project or that denial of the permit would impose an extraordinary hardship on the applicant. This is set forth in the FWPA at N.J.S.A. 13:9B-10(c).

The Department's standards for issuing a transition area waiver are, of course, more stringent than the Federal 404 program since the Federal 404 program does not regulate transition areas at all.

Adoption of general permits

The Department's standards for adopting a general permit are equivalent to those used in the Federal 404 program for issuing Nationwide general permits (NWPs). Both programs provide that a general permit may cover only activities that have minimal individual and cumulative environmental impacts. However, under the State freshwater wetlands program, each general permit is adopted as a regulation, while the NWPs are not rules but are issued directly by the ACOE after public notice and comment. Further, under the MOA with EPA, the Department must solicit comments from EPA on all draft general permits prior to adopting them. No general permit can be adopted if it would render the State program less stringent than the Federal program, and the State may not adopt a general permit if EPA objects to its terms or conditions.

While the standards for adopting general permits are the same in the State and Federal programs, the process by which an individual project is authorized under an existing general permit is more stringent at the State level. Nationwide permits are permits-by-rule. The standards and limits of the general permit are published, and in most cases no application or written approval is needed to proceed within the published limits. In some cases, an applicant must submit a notice describing the activity to be undertaken. But if no ACOE response is received within 30 days of submittal of this notice, the project generally is considered approved under the NWP. Unlike the NWPs, the Department's general permits all require an applicant to provide, at a minimum, written notice to the Department prior to pursuing a general permit activity. This is set forth in the FWPA at N.J.S.A. 13:9B-23. And, for all but four activities covered by general permits, the applicant must also wait for a written Department authorization prior to acting under the general permit. This provides the Department with much more control over compliance with the general permits and contributes to a more stringent general permit program.

Application of general permits

On March 9, 2000, late in the Department's development of this readoption, the ACOE adopted changes to its NWP program. This Federal Standards Statement compares the Department's proposed FWPA general permits and the newly adopted ACOE NWPs. In accordance with Federal rules at 40 CFR 233.16(b), the Department has one year from the ACOE adoption to make any changes to the FWPA rules that may be necessary to ensure that the FWPA rules remain as stringent as the ACOE rules (if a State statute must be amended, the Department has two years to make the change). When the ACOE rules were adopted, the Department had already drafted the general permit portion of the proposed readoption. Because the FWPA rules have already been extended several times, the Department does not believe it is appropriate to delay this proposal in order to immediately consider whether changes will be needed to the freshwater wetlands rules in response to the March 9th ACOE adoption. Furthermore, the Department believes that time will be needed for the careful consideration and close cooperation with EPA and the ACOE which are required to determine what changes, if any, are necessary. Therefore, the Department is proposing the FWPA rules as written, and will work with EPA and the ACOE over the coming year to evaluate the new ACOE adoption and implement any necessary changes to the FWPA rules.

Taken as a whole, the substance of the Department's general permit program is more stringent than the NWP program. While a handful of general permits are less stringent in one or more aspects than the corresponding NWP(s), many other general permits are more stringent, either because they regulate areas and activities that are not regulated at all under the Federal 404 program, or because the general permit limits are stricter than the limits in corresponding NWPs. Thus, the net effect of the Department's general permit program is to regulate more stringently than the NWP program.

In most cases, it is quite difficult to determine whether a specific general permit is more or less stringent than the NWP or NWPs that correspond to the general permit. This is attributable to several factors, including the lack of direct correspondence between the general permits and the NWPs, the multiple limits in each general permit and NWP, and the fact that the stringency of a general permit or NWP varies widely depending on the site and project.

In many cases, no NWP exists that covers the same specific class of activities covered by a general permit, but a more general NWP, or a combination of NWPs, may cover some or all of the general permit activities. For example, there is no NWP that specifically covers septic system repair, which is authorized by general permit 25. However, NWP 29 covers construction of new single family homes or additions to existing homes, including septic systems, and allows the same acreage of disturbance as general permit 25 (1/4 acre). Thus, the septic system repair authorized under general permit 25 would be authorized under NWP 29, but the fact that the two permits cover a different class of activities, each with different environmental impacts, makes a comparison of the stringency of the two approvals more difficult.

In addition, many general permits and NWPs include multiple limits, addressing many different aspects of a disturbance, such as acreage, volume of fill, width of disturbance, type of feature affected (freshwater wetlands, transition area, or open

water), etc. In many cases, a general permit is more stringent than the corresponding NWP regarding one limit, while the NWP may be more stringent than the general permit regarding a different limit. For example, general permit 10B (minor road crossings) is more stringent than its corresponding NWP (NWP 14) because general permit 10B has a lower acreage limit and requires an onsite alternatives analysis not required by NWP 14. However, NWP 14 is more stringent than general permit 10B in that it includes a shorter length limit and prohibits use of the NWP in the Pinelands and other special areas. It is far from clear whether the different degrees of stringency in different types of limits balance each other out in such a way as to render either permit more stringent overall than the other. Because most general permits and NWPs tend to contain multiple limits, this difficulty arises in the majority of attempts to compare the two types of permits.

Another complication is that the relative stringency of a general permit depends heavily on the project, the site, and the type of features that will be disturbed by the permitted activities. If a project disturbs only transition areas, any general permit issued for that project will be more stringent than the corresponding NWP, because transition areas are not regulated at all by the ACOE. However, if a project disturbs only wetlands, the same general permit might be less stringent than a corresponding NWP. For example, general permit 2 (underground utility lines) authorizes one acre of disturbance, but that acre must include all disturbances of freshwater wetlands, transition areas, and State open waters. The corresponding NWP (NWP 12) authorizes ½ acre of disturbance, but that ½ acre includes only wetlands and open water disturbances, while transition area disturbances are not considered because the ACOE does not regulate transition areas. Thus, if a one acre underground utility line were to cross a site that included only transition areas and no wetlands or open waters, general permit 2 would limit disturbance to one acre but disturbance would be unlimited under the NWP program, thus making general permit 2 more stringent than NWP 12. However, if the site were all wetlands, NWP 12 would authorize only ½ acre of wetlands disturbance, while general permit 2 would authorize one acre of wetlands disturbance, thus making NWP 12 more stringent. Thus, the stringency of a general permit as compared to a NWP will vary widely when applied to different sites and projects.

Finally, differences in limits are sometimes scattered among different State programs. For example, limits on fill in floodplains were imposed on several NWPs in the March 9th ACOE adoption through a new general condition on NWPs. However, because the Department has implemented a separate, comprehensive floodplain permitting program since the early 1970s, State general permits do not include limits in floodplains. This program, implemented through the Department's Flood Hazard Area Control Act rules at N.J.A.C. 7:13, regulates floodplains in a comprehensive manner that is far more stringent than the new general condition on NWPs. Nonetheless, the general condition makes it somewhat more confusing to assess whether the provisions in a single general permit are more or less stringent than the corresponding NWP provisions.

Another ACOE general condition, number 25, was included in the March 9, 2000 adoption of the NWPs. This general condition restricts the use of certain NWPs in "critical resource waters," which include outstanding national resource waters (this includes FW1 and Pinelands waters), wild and scenic rivers, State natural heritage

sites, coral reefs, and others. Many of these areas do not exist in New Jersey, or exist in such small numbers as to be insignificant. However, New Jersey does have a substantial number of FW1 and Pinelands waters. Therefore, the comparison below addresses this general condition in relation to the NWPs to which it applies.

Despite the fact that a clear comparison of general permits to NWPs is problematic, the Department has below provided such a comparison, in accordance with the mandates of Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. This comparison addresses the proposed general permits as they relate to the ACOE NWPs, as amended by the ACOE on March 9, 2000. The Department has not had time to work with ACOE to obtain a thorough understanding of the ACOE interpretations and practice regarding the newly adopted provisions, so the descriptions below of the newly adopted provisions are based solely on the Department's reading of the March 9th adoption document. Therefore, despite the Department's best efforts, the descriptions of the newly adopted provisions may not perfectly match the ACOE interpretations and implementation of these provisions.

General permit 1 corresponds to nationwide permit 3. Both authorize maintenance of existing structures or features. The March 9, 2000 ACOE adoption added two authorized activities to NWP 3, which are not found in general permit 1. These activities are 1) the restoration of upland destroyed by flood or storm within 2 years after the flood or storm; and 2) dredging around existing structures and reinforcing the structures with riprap. Thus, general permit 1 is somewhat more stringent than NWP 3.

General permit 2, for the placement of underground utility lines, corresponds to nationwide permit 12. There are several differences between the two approvals. First, NWP 12 limits disturbance to ½ acre of freshwater wetlands and open waters combined, while general permit 2 limits disturbance to one acre of freshwater wetlands, open waters *and transition areas* combined. Although the NWP thus might appear more stringent than the general permit, the ACOE does not include in the ½ acre any area disturbed by an underground utility line, if the project is restored to preconstruction contours and elevations. By contrast, the Department includes the entire area disturbed by the utility line (trench width times length), even though the permittee is required to return the area above the utility line to preconstruction contours and elevations. Thus, general permit 2 is more stringent than NWP 12 in terms of total acreage of disturbance allowed.

Second, NWP 12 may not be used in Pinelands waters or FW1 waters (waters wholly contained within publicly owned parks or preserves), whereas general permit 2 does not contain these prohibitions. However, the effect of these prohibitions may not be significant. An average of one underground utility line per year is authorized under general permit 2 in the Pinelands. Although the Department does not have data on how many utility lines per year are authorized in FW1 waters, it appears that, as to FW1 waters, NWP 12 is more stringent than general permit 2.

Third, NWP 12 may not be used in certain floodplains. While general permit 2 does not itself contain limits on use in floodplains, the Department's Flood Hazard Area Control Act rules apply to utility lines. These rules are part of a longstanding and

comprehensive floodplain protection program that provides greater protection than the limits on NWP 12.

Fourth, NWP 12 requires mitigation for any permanently maintained clearing in a forested area, whereas general permit 2 requires mitigation only if an access road will be constructed. Finally, general permit 2 includes other miscellaneous limits such as limits on the width of the trench into which the utility is placed. Considering all of the above limits, NWP 12 is more stringent than general permit 2 in two ways: NWP 12 may not be used in Pinelands waters and FW1 waters, and mitigation is required for more disturbances under NWP 12 than under general permit 2. However, general permit 2 is more stringent than NWP 12 in that NWP 12 does not count placement of an underground utility line when calculating acreage of disturbance, whereas this would be counted under general permit 2. In addition, general permit 2 applies to transition areas, and includes some miscellaneous limits not included in NWP 12. Thus, overall, the more restrictive acreage limit on general permit 2 ensures that general permit 2 is more stringent than NWP 12.

General permit 3 corresponds to nationwide permit 16, with no substantive difference between the two, except that NWP 16 may not be used in certain waters, including Pinelands waters and FW1 waters. Thus, general permit 3 is somewhat less stringent than NWP 16.

General permit 4, for activities involved in the investigation, clean-up, or removal of hazardous wastes, corresponds to NWP 38. However, general permit 4 contains a mitigation requirement not contained in NWP 38, and so is more stringent than the NWP.

General permit 5, for landfill closures, has no corresponding NWP. However, activities authorized under general permit 5 could be pursued under NWP 18 for minor discharges. NWP 18 limits disturbance to 0.10 acre of freshwater wetlands and open waters combined, while general permit 5 limits disturbance to one acre of freshwater wetlands, open waters *and transition areas* combined. General permit 5 also requires mitigation. Overall, general permit 5 is less stringent than NWP 18, except on a site where the bulk of the disturbance affects only transition areas.

General permit 6, for discharges into non surface water-connected wetlands, and general permit 7, for regulated activities in ditches of human construction or swales, are provided for by the FWPA (see N.J.S.A. 13:9B-23b). General permits 6 and 7 each have a limit of one acre of disturbance of freshwater wetlands, open waters *and transition areas* combined. General permit 6 is limited to non surface water-connected wetlands and State open waters, while general permit 7 is limited to ditches and swales in headwaters areas. These general permits were originally based on NWP 26, which authorized 3 acres of discharges into headwaters and isolated waters. However, NWP 26 was replaced in the March 9, 2000 ACOE adoption by several new NWPs. The three adopted NWPs that correspond most closely to general permits 6 and 7 are NWPs 29, 39, and 42, which authorize construction of a single family home; construction of a residential, commercial or institutional development; and construction of a recreational facility, respectively. Each of these NWPs authorizes ½ acre of disturbance.

It is difficult to compare the stringency of general permits 6 and 7 with the stringency of NWPs 29, 39, and 42. First, the general permits each allow one acre of disturbance and the NWPs each allow only ½ acre of disturbance. On its face, this might indicate that the NWPs are more stringent (at least as regards acres of impacts) than the general permits. However, as discussed above on page 283, the general permits include transition area disturbances in calculating the acreage of disturbance, while the NWPs only include disturbances of wetlands and waters. Thus, the relative stringency of the State and Federal authorizations will vary depending on the site, and on the proportion of the project that disturbs transition areas, as opposed to disturbing freshwater wetlands and open waters.

Second, the general permits differ from the NWPs as regards the types of wetlands and waters which may be disturbed. The two general permits are limited to non surface water tributary wetlands and waters, and ditches and swales in headwaters. By contrast, the three NWPs may be used in any type of wetlands or waters. In this regard, the general permits are clearly more stringent than the NWPs, because the class of waters that may be disturbed under the general permits is substantially smaller than the class that may be disturbed under the NWPs.

Third, the general permits and the NWPs differ in the activities which may be pursued. The NWPs limit activities to construction of single family homes; residential, commercial or institutional facilities; or recreational facilities. The general permits allow disturbances for any reason. Although the class of activities authorized under the NWPs is very broad, the general permits contain no limit on activities. Thus, in this respect, the NWPs are somewhat more stringent than the general permits.

Finally, the general permits and NWPs differ in the special protections provided for certain more valuable wetlands and waters. The two general permits are prohibited in exceptional resource value wetlands and EPA priority wetlands, and general permit 6 is prohibited in vernal habitats. The NWPs are prohibited in Pinelands waters and FW1 waters. There is no difference between the State and Federal authorizations as relates to FW1 waters, because all wetlands classified as FW1 waters are exceptional resource value wetlands. Because the NWPs are prohibited in FW1 waters and the general permits are prohibited in exceptional resource value wetlands (which includes all FW1 waters), both contain equal protection for FW1 waters.

The remaining question is how the State and Federal authorizations compare as relates to high value wetlands other than FW1 waters. General permits 6 and 7 may not be used in EPA priority wetlands or non-FW1 exceptional resource value wetlands, which include threatened or endangered species habitat and FW2 trout production waters. In addition, general permit 6 may not be used in vernal habitats. The NWPs may not be used in Pinelands waters. The Department estimates that the class of wetlands and waters classified as EPA priority wetlands, threatened or endangered species habitat, FW2 trout production waters, and vernal habitats is a much larger group than those classed as Pinelands waters. Thus, fewer wetlands and waters (not to mention transition areas) are eligible for disturbance under the general permits than under the NWPs, rendering the general permits more stringent than the NWPs.

Although comparison is complex, the above analysis indicates that general permits 6 and 7 are as stringent or more stringent than the corresponding NWPs 29, 39, and 42.

General permit 8, which authorizes additions to single family dwellings, limits the area of disturbance for an addition to a single family dwelling to 750 square feet. The most closely corresponding NWP is NWP 29 for construction of a single family home, which allows ¼ acre (10,890 square feet) of disturbance. General permit 8 requires that the home being added to was in existence prior to 1988, whereas NWP 29 allows new construction or additions to an existing home. Although NWP 29 may not be used in Pinelands or FW1 waters, the lower acreage limit on general permit 8, combined with the fact that it is restricted to homes existing in 1988, render general permit 8 more stringent than NWP 29.

General permit 9 (airport sight line clearing) authorizes only the clearing of vegetation. Since this is not regulated by the ACOE, there is no corresponding NWP and the general permit is more stringent.

General permits 10A and 10B cover minor road crossing fills and expansion of existing road crossing fills, including attendant features. General permit 10A allows smaller disturbances, while general permit 10B allows slightly larger ones, but disturbance may not exceed ¼ acre under either general permit. General permits 10A and 10B are very similar to NWP 14, but are more stringent. While the general permits limit disturbance to a maximum of ¼ acre of freshwater wetlands, State open waters *and transition area* combined, the NWP allows ½ acre of disturbance of freshwater wetlands and State open waters for public roads and 1/3 acre for private roads. In addition, general permit 10B requires an onsite alternatives analysis for any crossing that is over 100 feet long or disturbs more than one eighth acre, while NWP 14 does not require such an analysis for any project. NWP 14 may not be used in Pinelands waters or FW1 waters. However, because these limits do not offset the greater acreage of disturbance allowed under NWP 14, general permit 10A and 10B are more stringent.

General permit 11 authorizes the construction of outfall and intake structures, and corresponds to NWPs 7 and 12. NWP 7 authorizes construction and maintenance of outfalls and associated intakes, while NWP 12 authorizes construction of outfalls associated with utility lines. General permit 11 is more stringent overall than the NWPs. Both NWPs authorize the "minimum necessary" disturbance to wetlands and open waters, whereas general permit 11 allows 1/4 acre of disturbance to freshwater wetlands, State open waters *and transition area* combined. The conditions in the general permit address not only the potential impacts resulting from the placement of a structure, but also impacts resulting from the stormwater itself, such as erosion and water quality. The general permit is less stringent than the NWPs in some respects. The NWPs may not be used in Pinelands or FW1 waters, and authorizes intakes only if associated with an outfall, whereas the general permit does not include these limits. These limits, however, do not offset the lower acreage limit in general permit 11, and the fact that transition area disturbances must be included in calculating total disturbance. Taking all of these factors together, general permit 11 is more stringent overall than nationwide permits 7 and 12.

General permit 12, which authorizes disturbance for surveying activities such as soil borings and the cutting of vegetation for survey lines, is equivalent to nationwide permit 6. However, since the FWPA requires the Department to regulate the destruction of plant life that would alter the character of a freshwater wetland, including the cutting of trees, general permit 12 also includes limits on vegetation removal. This makes the general permit more stringent in that it regulates activities not regulated under the Federal 404 program.

General permit 13 covers dredging activities that disturb palustrine emergent wetlands as a result of lake, pond or reservoir maintenance. This general permit allows one acre of combined impacts to wetlands *and transition areas*, which may include 1/8 acre of temporary impacts to wetlands and/or transition areas for access to the lake, pond or reservoir. The general permit is equivalent in stringency to the NWP program as regards disturbances in open waters, because neither the Department nor the ACOE regulate dredging in open waters (except in non-delegable waters, where the ACOE does regulate dredging). However, the general permit is more stringent than the NWP program in that the Department regulates all dredging that disturbs wetlands, and limits such disturbance to one acre. The ACOE only regulates such dredging if it is accompanied by an activity involving a discharge of dredged or fill material. For example, if a temporary access road were constructed in wetlands to transport equipment to the dredging project, the discharge of fill material for the access road would trigger ACOE jurisdiction, at which point any disturbance of wetlands resulting from the dredging activities themselves would also be regulated. In such a case, one tenth acre of the disturbance could be authorized under NWP 18 for minor discharges, and any additional disturbance would require an individual ACOE permit. Because of the broader scope of the general permit, it is more stringent than corresponding ACOE provisions.

General permit 14 authorizes the placement of water level recording devices, water quality monitoring and testing devices, and similar scientific devices, the drilling of monitoring wells, and the construction of small weirs and flumes to record water quantity and velocity. With the exception of the drilling of monitoring wells, this permit is equivalent to NWP 5. However, the drilling of monitoring wells is often a prerequisite to the cleanup of hazardous wastes, so it is authorized under NWP 38 for hazardous cleanups. Therefore, the drilling of monitoring wells would be equivalent to activities included as part of NWP 38, and general permit 14 is equivalent to NWPs 5 and 38 taken together.

General permit 15 permits mosquito control water management activities. These activities involve shallow dredging to improve water circulation, with no removal of hydrology from the wetlands. The applicant must demonstrate to the Administrator of the State Office of Mosquito Control that there is a documented mosquito problem and submit a site-specific proposal indicating the activities to be performed. There is no NWP that is directly equivalent to general permit 15 because these activities would not be regulated under the Federal program. Thus, general permit 15 is more stringent than the NWP program.

General permit 16 authorizes habitat enhancement projects authorized or sponsored by other agencies. General permit 16 is essentially equivalent to NWP 27, except that

general permit 16 authorizes projects sponsored by a wider range of agencies than the NWP, such as other State agencies.

General permit 17 authorizes the construction of trails and/or boardwalks. There is no Federal equivalent for general permit 17 because most of the covered activities are unregulated under the Federal program, but the minor amounts of fill that could result in some cases would be covered under NWP 18 for minor discharges. Trails or boardwalks will either be constructed upon pilings, or will consist of a pathway created by clearing vegetation, with materials such as wood chips or pavement placed on the ground. The ACOE does not regulate the placement of pilings or the clearing of vegetation. The small amounts of wood chips or asphalt that would be authorized under general permit 17 would be minor discharges of fill covered under NWP 18. Thus, the general permit is more stringent than the NWP program, in that it regulates more activities, and regulates activities in transition areas.

General permit 18 authorizes up to one acre of disturbance for the repair, rehabilitation, replacement, maintenance, reconstruction, or removal of a previously authorized, currently serviceable dam structure, including appurtenant structures, lawfully existing prior to July 1, 1988 or permitted under the FWPA. There is no NWP that specifically covers dams. However, the portion of the disturbance that is limited to the footprint of the original dam would be covered under NWP 3 for maintenance of existing structures. If the repair could not be limited to the original footprint, 0.10 acres of additional disturbance would be authorized by NWP 18 for minor discharges. Therefore, the general permit is equivalent in overall stringency to the NWP program.

General permit 19, which allows impacts of up to 0.10 acre of wetlands *and transition area* for the placement of a public or private dock or pier, or a public boat ramp, is more stringent than the corresponding NWPs. The disturbances authorized under general permit 19 are covered by NWPs 36 (for boat ramps) and 18 (for minor discharges). General permit 19 is more stringent as it relates to docks and piers, in that construction of a dock or pier in wetlands and transition areas would not be regulated under the Federal 404 program. As to boat ramps, NWP 36 is both more and less stringent than general permit 19. General permit 19 is more stringent because it authorizes the construction of a public but not a private boat ramp, resulting in far fewer disturbances. General permit 19 also requires an onsite alternatives analysis, to ensure that the boat ramp is placed in the least environmentally damaging location on the site. However, NWP 36 allows only open water impacts and does not allow any wetlands impacts, while general permit 19 allows 0.10 acre of disturbance of wetlands and/or transition areas. In addition, NWP 36 limits fill for a boat ramp to 50 cubic yards of fill, 20 feet in width, while general permit 19 has no volume or width limitation. Thus, some boat ramps authorized by general permit 19 might not meet the requirements of NWP 36. However, any disturbances not covered by NWP 36 could be authorized under NWP 18 for minor discharges. Thus, general permit 19 is more stringent overall than the NWPs.

General permit 20 authorizes stabilization of the banks of a water body. This is covered by NWP 13. General permit 20 is slightly less stringent than NWP 13, in that general permit 20 allows disturbances in wetlands, State open waters, and transition areas, while NWP 13 does not apply in wetlands. In addition, general permit 20

authorizes stabilization of an unlimited length of bank if the project uses bioengineering techniques such as coconut matting or other vegetative methods. By contrast, NWP 13 limits all bank stabilization projects to 500 feet in length, regardless of the stabilization methods used.

General permit 21 authorizes the construction or installation of above-ground utility lines, or above-ground pipelines, and corresponds to NWP 12 for utility lines. Many of the activities authorized by the general permit are not regulated by the ACOE, such as the destruction of vegetation and the placement of utility poles. For those activities that are regulated, general permit 21 is probably less stringent than the NWP program, although it may be more stringent as applied in certain cases. General permit 21 allows one acre of disturbance, but that disturbance includes freshwater wetlands, State open waters, and transition areas. NWP 12 allows only ½ acre of disturbance, which includes only freshwater wetlands and open waters disturbance. In addition, NWP 12 may not be used in Pinelands waters and FW1 waters. Taken as a whole, general permit 21 is probably as stringent as NWP 12, despite its higher acreage limit, because of the greater range of activities regulated and the fact that activities in transition areas are regulated.

General permit 22 authorizes up to one acre of disturbance for the placement of animal waste management structures in farmed wetlands. This would be covered under NWP 40, which authorizes ½ acre of disturbance of farmed wetlands for agricultural improvement activities such as drainage and land clearing, and placement of farm buildings. General permit 22 is more limited in that it allows only waste management structures, where NWP 40 allows any type of farm building and many types of agricultural improvements. However, the NWP may not be used in Pinelands waters or FW1 waters. Overall, NWP 40 is more stringent than general permit 22 because of its lower acreage of disturbance.

General permit 23 authorizes expansion of existing cranberry growing operations in the Pinelands. The Federal equivalent is NWP 34. The Department's general permit is more stringent than the NWP, in that it is limited to existing operations located in the Pinelands, is subject to multiple acreage caps, and includes a requirement to donate Pinelands Development Credits for disturbance of higher quality wetlands.

General permit 24 authorizes disturbance of one quarter acre of farmed wetlands necessary for construction of a spring development for livestock watering. These activities would be covered by NWP 40 for agricultural improvements. Since NWP 40 authorizes ½ acre of disturbance, and general permit 24 allows only one quarter acre, the general permit is more stringent.

General permit 25 authorizes the repair or alteration of an existing malfunctioning individual subsurface sewage disposal system (septic system). This general permit allows up to ¼ acre of impacts to wetlands and/or transition areas for repair or alteration of such a system. General permit 25 is limited to repair of existing malfunctioning systems, and expressly forbids expansion of a system. Thus, while it allows some disturbances, the disturbances result in the environmental benefit of decreasing the pollution caused by a malfunctioning septic system. NWP 29 authorizes up to ¼ acre of disturbance of wetlands for the construction of a single family house, which could

include disturbances resulting from installation or repair of a septic system. NWP 29 may not be used in Pinelands waters or FW1 waters. While NWP 29 includes a restriction on the types of waters in which it may be used, the fact that general permit 25 is limited to repair of existing systems results in greater overall stringency.

General permit 26 authorizes removal of garbage, debris, and sediment as part of a stream cleaning project, and minimal disturbance to the stream bank for access to the stream. Disturbance under general permit 26 is limited to projects no more than 500 feet long in a stream that averages no more than 15 feet wide, thus resulting in a maximum disturbance of approximately 0.17 acres. The general permit is more stringent than the NWP program in that the Department regulates all dredging that disturbs wetlands. The ACOE only regulates dredging of wetlands if it is accompanied by an activity involving a discharge of dredged or fill material. For example, if a temporary access road were constructed in wetlands to transport equipment to the dredging project, the discharge of fill material for the access road would trigger ACOE jurisdiction, at which point any disturbance of wetlands resulting from the dredging activities themselves would also be regulated. In such a case, one tenth acre of the disturbance could be authorized under NWP 18 for minor discharges, and any additional disturbance would require an individual ACOE permit. Because general permit 26 will regulate more dredging projects, it is more stringent overall than the ACOE program, despite the fact that the general permit acreage limits are higher than those that would apply to projects regulated by the ACOE.

General permit 27 authorizes up to one acre of disturbance of freshwater wetlands, State open waters, and/or transition areas for redevelopment of a significantly degraded area. There is no equivalent NWP, but some of the disturbances authorized under general permit 27 could be authorized under NWP 18 for minor discharges. The one acre of disturbance under general permit 27 must include transition area disturbance as well as wetland and open water disturbances, and disturbances of over one acre under general permit 27 require mitigation. However, the fact that NWP 18 authorizes only 0.10 acre of disturbance probably makes general permit 27 less stringent overall than NWP 18, except when applied to a site that is mostly transition area.

The substantive standards of the Department's general permit program are, taken as a whole, more stringent than those of the nationwide permit program. This stems from the fact that the Department's program regulates more activities in more types of natural features, and in many cases imposes more or stricter limits. As with other aspects of the Department program, the stringency is largely statutorily mandated by the FWPA.

Standards that apply to all general permits

In general, the standards that apply to all general permits are consistent with the standard conditions for the nationwide permit program at 33 CFR Part 330.5. However, the Department's wetlands program includes additional conditions to minimize adverse impacts. These additional conditions include timing restrictions to prevent adverse impacts to fish resources, stormwater management requirements, a requirement for consistency with the Department's water quality management planning process, and

special monitoring requirements when excavation may expose acid-producing soils, both found at proposed N.J.A.C. 7:7A-4.3(b).

Proposed N.J.A.C. 7:7A-4.4 provides for use of more than one general permit on a single site. For most general permits, combined disturbance under all of the general permits must be limited to one acre. There are two exceptions. The first exception is where multiple general permits are used on a site and one or more of the general permits does not itself contain an acreage limit (for example, general permit 3 for discharge of return water, general permit 4 for hazardous cleanups, or general permit 15 for mosquito management activities). In such a case, disturbance under those general permits which do not contain an acreage limit could exceed one acre, while total disturbance under the other general permits would still be limited to one acre. The second exception is for general permit 27 for redevelopment. This general permit authorizes one acre of disturbance if used alone, but adds an additional authorized acre of disturbance when used in combination with other general permits. For example, if general permit 27 were used on a site in combination with general permits 10A (very minor road crossing) and general permit 12 (outfalls and intakes), the total disturbance under general permits 10A and 12 could not exceed one acre, and the total disturbance on the site under all three general permits could not exceed two acres.

The ACOE provision that addresses use of multiple NWPs on a single site, adopted March 9, 2000, allows the combination of NWPs to authorize a single project only if the acreage disturbance does not exceed the acreage limit of the NWP with the highest specified acreage limit. Like the Department's freshwater wetlands rules, the ACOE provision would not include a NWP with no acreage limit (such as NWP 12 for outfalls or NWP 38 for hazardous cleanups) when calculating whether the acreage limit had been reached. However, the relative stringency of the two provisions as applied to general permits or NWPs that do contain acreage limits depends largely on the site, the project, and which NWPs or general permits will be used.

In many cases, NWPs include a ½ acre limit. A combination of these NWPs could impact only ½ acre, as opposed to the one acre limit under combined general permits. However, as discussed above, the one acre limit for multiple general permits applies to freshwater wetlands, State open waters *and transition areas*, while the limit on multiple NWPs applies only to wetlands and open waters. Thus, if a project disturbs only transition areas, the authorization of one acre of disturbance under a combination of general permits will be more stringent than the rules that would apply under the ACOE program, because transition areas are not regulated at all by the ACOE. However, if a project disturbs only wetlands, the one acre of disturbance authorized under the same combination of general permits might be less stringent than the ½ acre authorized under a corresponding combination of NWPs. A further complication arises from the fact that in one case (outfalls), the Department's general permit includes a one acre limit while the corresponding NWP does not include any acreage limit. Thus, if a project includes construction of an outfall and involves more than one NWP or general permit, the one acre limit on activities under multiple general permits could result in a smaller impact than would be allowed for the same project under the ACOE program.

It is very difficult to definitively determine whether the standard conditions that apply to general permits are more or less stringent than the standard conditions that apply to

NWPs. However, it appears that the additional conditions on general permits listed above balance the differences in the provisions governing use of multiple general permits, resulting in rough equivalence in the stringency of the Department's general permit program and the NWP program.

New mitigation provisions

For the most part, the Department's mitigation provisions are the same as those of the Federal 404 Program. However, there are three notable differences:

1. The FWPA creates a Wetlands Mitigation Council, which is responsible for disbursements of funds to purchase land for enhancement of degraded freshwater wetlands, to preserve freshwater wetlands and transition areas determined to be of critical importance, and to enhance freshwater wetlands on public property. The Council also approves mitigation banks proposed by private operators. Although the EPA has published guidance for mitigation banks, there is no Federal counterpart to the Wetlands Mitigation Council;
2. The State program provides options for monetary contributions, and for preservation of uplands for the protection of adjacent wetlands. These options are not explicitly part of the Federal program; and
3. The State program allows an applicant to donate wetlands and/or transition areas as mitigation if approved by the Wetlands Mitigation Council and if other options are not feasible, while the Federal program considers the preservation of wetlands as mitigation only in "exceptional circumstances."

The ACOE requires mitigation for all NWP projects that require preconstruction notice to the ACOE. This includes any project under NWPs 12, 14, 39, 40 and 42, if the project disturbs more than 1/10 acre of wetlands or open waters. The mitigation must be at a ratio of at least 1:1. General permits which include mitigation requirements are general permit 2 (underground utility lines), 4 (hazardous cleanups), 5 (landfill closures), and 27 (redevelopment of degraded areas). Although mitigation is required for fewer general permits, the State mitigation requirements are more stringent than those of the 404 program. In addition, individual permits under the Federal program require mitigation, just as is required by the Department. However, the State wetlands program requires individual permits for more activities and therefore requires mitigation for a greater number of projects than does the Federal 404 program, resulting in a more stringent mitigation requirement overall.

Jobs Impact

The FWPA rules play a role in the planning and construction of development, whether residential, commercial or industrial. As a result, the jobs that are most closely tied to the implementation of the rules are planning, engineering and construction jobs. The wetlands rules do not appear to have decreased the amount of construction in New Jersey, but have caused displacement of construction to upland areas. Thus, the Department believes that the overall impact of these rules on employment is probably not significant.

Agriculture Industry Impact

The freshwater wetlands rules affect farmers in several ways. Most significantly, the proposal, like the existing rules, includes an exemption for existing farming operations that have been ongoing since the FWPA was enacted in 1987. This exemption is derived from the farming exemption in the Federal 404 program, and allows normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food and fiber, and soil and water conservation practices. The exemption does not apply to new farming, ranching, or silviculture operations, or expansion of existing farming activities into areas previously not used for farming. For example, clearing of a forested wetland area to expand an existing cornfield would not be exempt, but would be subject to freshwater wetlands permitting requirements to the same extent as would any other activity.

Amendments proposed to the definition of "degraded wetlands" allow a farmed wetland to be considered a degraded wetland for mitigation purposes. This will make it possible for a farmed wetland to be eligible for use in mitigation through enhancement, thus encouraging the use of marginal farmland for mitigation.

Amendments are proposed to the definition of "established, ongoing farming, ranching or silviculture operation." The existing definition provides that an operation ceases to be an established operation if the area has lain idle for so long that modifications to the hydrologic regime are necessary to resume operations. The Department has found that this standard is sometimes difficult to apply. Therefore, the proposed definition provides that an operation is no longer "established" if it has lain idle for more than five years, or for so long that hydrologic modifications are necessary, whichever is shorter. This will make the definition consistent with the standard used by the USDA's Natural Resources Conservation Service, and will provide an easily measurable and predictable standard for determining when a farming operation ceases to be "established."

A new definition is proposed for "farmed wetland." The language is taken from the ACOE definition. The definition is necessary to identify those wetlands which may be disturbed under proposed new general permits 22 and 24, which authorize animal waste management structures and spring developments in farmed wetlands.

Clarifications are proposed to the provisions at proposed N.J.A.C. 7:7A-2.8(b) (existing N.J.A.C. 7:7A-2.7(a)), which limit the farming exemption. The proposed rule provisions do not change the exemption but merely clarify it, which will assist farmers in understanding and following the exemption. One provision adds a presumption that a field that has been drained for farming has wetlands hydrology (see the description of proposed N.J.A.C. 7:7A-2.8(b)5 for a detailed description of the new provision). This will have no effect on farmers who use the farming exemption for farming purposes. The new provision would affect only a farmer who uses a farming exemption to drain a field in order to develop it or sell it for development. However, this is in keeping with the intent of the farming exemption, which has always been (both at the State and Federal level) to facilitate farming, and not to facilitate the development of farmland.

Amendments to general permit 16 (N.J.A.C. 7:7A-5.16), which authorizes habitat enhancement projects, explicitly authorizes projects approved under several wetlands restoration programs implemented by agricultural agencies and focussed on farm land. These amendments will make it easier for farmers who wish to participate in habitat enhancement and restoration programs to do so.

Proposed new general permit 22 (N.J.A.C. 7:7A-5.22) authorizes placement of certain animal waste management structures in farmed wetlands. This will assist farmers in carrying out NRCS approved farm management plans, by removing a regulatory barrier to use of farmed wetlands for animal waste management structures. The general permit will encourage appropriate animal waste management, which is a key component of improving water quality.

Proposed new general permit 24 (N.J.A.C. 7:7A-5.24) authorizes placement of spring developments that carry water to livestock in farmed wetlands. This will assist farmers in carrying out NRCS approved farm management plans, by removing a regulatory barrier to use of farmed wetlands for spring developments. The small disturbance allowed under the general permit will be more than offset by the environmental advantages of relocating livestock watering locations outside of wetlands and transition areas. The general permit will assist farmers who want to undertake this environmentally beneficial measure.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that a significant number of builders and property owners that will be affected by the proposed readoption are "small businesses" as defined by the Regulatory Flexibility Act. The FWPA rules apply to any person owning property containing freshwater wetlands, State open waters and/or transition areas, who intends to engage in a regulated activity. It is impossible for the Department to estimate the exact number of small businesses that own property affected by the rules. However, the Department has determined that the proposed readoption, taken as a whole, will not impose additional reporting or recordkeeping requirements on small businesses. While some provisions in the proposed readoption (such as the prohibition on using general permit 6 in vernal habitat) may impose some additional compliance requirements on small businesses along with the rest of the regulated community, these are offset by other provisions (such as new general permits) that will reduce compliance requirements.

The rules regulate based on environmental impacts and will generally have the same impact on a small business as on any other person. Because the values and functions of wetlands are important to all persons, and the permit criteria are necessary to maintain appropriate freshwater wetlands protection, no lesser requirements for small businesses are provided.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 7:7A. Full text of the proposed amendments follows (additions indicated in boldface thus; deletions indicated in brackets [thus]).

SUBCHAPTER 1 GENERAL INFORMATION

7:7A-1.1 Scope and authority

This chapter constitutes the rules governing the implementation of the Freshwater Wetlands Protection Act, [P.L. 1987, c.156] N.J.S.A. 13:9B-1 et seq.; and the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. [The provisions of any State law, rule or regulation to the contrary notwithstanding, the alteration or disturbance in and around freshwater wetland areas in the State, and the discharge of dredged or fill material into State open waters are subject to this chapter and the Act.] Certain violations of the New Jersey Water Pollution Control Act are also subject to enforcement provisions at N.J.A.C. 7:14.

7:7A-1.2 Construction of this chapter

This chapter shall be liberally construed to allow the Department to implement fully its statutory functions pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., and pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

7:7A-1.3 Forms and information, internet web site

(a) [Any forms, fees] Forms or other information [required to be submitted by] related to this chapter [shall] may be obtained from [and returned to] the Land Use Regulation Program as follows:

1. Through the Land Use Regulation Program website at www.state.nj.us/dep/landuse; or
2. By contacting the Land Use Regulation Program at:
   Land Use Regulation [Element,] Program
   New Jersey Department of Environmental Protection [and Energy, CN 401]
   P.O. Box 439 [,]
   Trenton, New Jersey 08625 – 0439 [.]
   (609) 292-0060
   Fax: (609) 292-8115

(b) Applications, fees, and correspondence shall be submitted to the address in (a) above, except that courier [Courier] and hand deliveries [may] shall be delivered to:

Land Use Regulation Program
New Jersey Department of Environmental Protection
5 Station Plaza
501 East State Street
Trenton, New Jersey 08609

(c) Applications or other materials sent or delivered to a Department address other than those in (a) and (b) shall not be deemed to have been received for the purposes of calculating application review deadlines or other time periods under this chapter.

(d) Other sources of information referred to in this chapter are available on the Land Use Regulation Program website at www.state.nj.us/dep/landuse, or from the Office of Maps and Publications, located at 428 State Street, Trenton, New Jersey 08625, (609) 777-1038.

7:7A-1.4 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. Additional definitions specifically applicable to N.J.A.C. 7:7A-15, Mitigation, are set forth at N.J.A.C. 7:7A-15.1.

. . .

"ACOE" or "Corps" means the United States Army Corps of Engineers.

"Acid producing deposits" means [those] geologic deposits [containing] in soil, which contain iron sulfide minerals (pyrite or marcasite) which [oxidize upon exposure] , when exposed to oxygen from the air or from surface waters, oxidize to produce sulfuric acid. Soils containing acid-producing deposits, upon excavation, generally have a pH of 4.0 or lower. After exposure to oxygen, these soils generally have a pH of 3.0 or lower.

["Act" means the Freshwater Wetlands Protection Act, P.L. 1987, c.156.]

["Administrator" means the Administrator of the Land Use Regulation Element.]

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

. . .

["Application for development" means the application form and all accompanying documents required by ordinance for approval of a subdivision plat, site plan, planned development, conditional use, zoning variance or direction of the issuance of a permit pursuant to N.J.S.A. 40:55D-34 or N.J.S.A. 40:55D-36.]

. . .

["Bank" means the Wetlands Mitigation Bank established pursuant to section 14 of the Act.]

"Best Management Practices" [(BMP's)] or “BMPs” means methods, measures, designs, performance standards, maintenance procedures, and other management

practices which prevent or reduce adverse impacts upon or pollution of freshwater wetlands, State open waters, and adjacent aquatic habitats, which facilitate compliance with the Federal Section 404(b)(1) guidelines (40 C.F.R. Part 230), New Jersey Department of Environmental Protection Flood Hazard Area [Regulations (] Control rules, N.J.A.C. 7:13[), 1982 Standards for Soil Erosion and Sediment Control in New Jersey,] ; the Department's Storm Water Management Regulations [(] , N.J.A.C. 7:8 [),] ; the Standards for Soil Erosion and Sediment Control in New Jersey, promulgated by the New Jersey State Soil Conservation Committee at N.J.A.C. 2:90; and effluent limitations or prohibitions under Section 307(a) of the Federal Act and [New Jersey Department of Environmental Protection and Energy] the Department's Surface Water Quality Standards [(N.J.A.C. 7:9-4)] , N.J.A.C. 7:9B. Examples include practices found at 33 C.F.R. 330.6, 40 C.F.R. 233.35(a)6, the Department's Technical Manual for Stream Encroachment, and "A Manual of Freshwater Wetland Management Practices for Mosquito Control in New Jersey". The manuals included in this definition [is] are only a partial listing, and interested [parties] persons should contact the Department for the most up to date list.

"Category one waters" means waters designated as category one waters in the Department's Surface Water Quality Standards at N.J.A.C. 7:9B. As of {effective date of this rule}, N.J.A.C. 7:9B-1.15 defines category one waters as those waters designated in the tables in N.J.A.C. 7:9B-1.15(c) through (h), for purposes of implementing the antidegradation policies set forth at N.J.A.C. 7:9B-1.5(d), for protection from measurable changes in water quality characteristics because of their clarity, color, scenic setting, other characteristics of aesthetic value, exceptional ecological significance, exceptional recreational significance, exceptional water supply significance, or exceptional fisheries resource(s). These waters may include, but are not limited to:

1. Waters originating wholly within Federal, interstate, State, county, or municipal parks, forests, fish and wildlife lands, and other special holdings that have not been designated as FW1 at N.J.A.C. 7:9B-1.15(h) Table 6;
2. Waters classified at N.J.A.C. 7:9B-1.15(c) through (g) as FW2 trout production waters and their tributaries;
3. Surface waters classified in this subchapter as FW2 trout maintenance or FW2 nontrout that are upstream of waters classified in this subchapter as FW2 trout production;
4. Shellfish waters of exceptional resource value; or
5. Other waters and their tributaries that flow through, or border, Federal, State, county, or municipal parks, forests, fish and wildlife lands, and other special holdings.

["Clean Water Act", "Federal Act", or "CWA" means the Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 (33 U.S.C. 1251 et seq.) and any amendments and supplements thereto, and the regulations adopted pursuant thereto.]

["Climax habitat" means a mature, well developed natural ecological community. See N.J.A.C. 7:7A-14.]

. . .

"Compelling public need" means that based on specific facts, the proposed regulated activity will serve an essential health or safety need of the municipality in which the proposed regulated activity is located, that the public health and safety benefit from the proposed use and that the proposed use is required to serve existing needs of

the residents of the State, and that there is no other means available to meet the established public need. [See N.J.A.C. 7:7A-3.4(a)1.]

"Conservation restriction" means a restriction, easement, covenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural, scenic or open or wooded conditions, or for conservation of soil or wildlife, or for outdoor recreation or park use, or as suitable habitat for fish or wildlife, to forbid or limit any or all:

1. Construction or placing of buildings, roads, signs, billboards or other advertising, or other structures on or above the ground;
2. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials;
3. Removal or destruction of trees, shrubs or other vegetation;
4. Excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance;
5. Surface use except for purposes permitting the land or water area to remain predominantly in its natural condition;
6. Activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or fish and wildlife habitat preservation;
7. Other acts or uses detrimental to the retention of land or water areas according to the purposes of this chapter.

"Contiguous" means adjacent properties, even if they are separated by human-made barriers or structures or legal boundaries. Contiguous properties shall include, but are not limited to, land areas which directly abut or are separated by a general access roadway or other right-of-way, including waterways; and properties which are part of a subdivision that was under common ownership on July 1, 1988.

["Council" means the Wetlands Mitigation Council established pursuant to Section 14 of the Act.]

. . .

"Cultivating" means physical methods of soil treatment, employed [within established farming, ranching and silviculture lands] upon planted farm, ranch or forest crops to aid and improve [their] the growth, quality or yield of the crops.

["Degraded wetland" means a wetland in which there is impaired surface water flow or groundwater hydrology, or excessive drainage; a wetland which has been partially filled or excavated, contaminated with hazardous substances, or which has an ecological value substantially less than that of undisturbed wetlands in the region.]

"Degraded" means, in regard to a wetland or State open water, substantially impaired in its ability to provide the values and functions enumerated at N.J.S.A. 13:9B-2. A degraded wetland is usually characterized by sparse or absent vegetation, or by a predominance (over 85%) of a noxious or invasive type of vegetation. An example of a degraded wetland would be an unvegetated wetland on the shore of a water-filled gravel pit. For mitigation purposes only, the Department may deem a farmed wetland a degraded wetland if it is devoid of wetland vegetation but would otherwise meet the definition of a wetland.

"Delegable waters" means all waters of the United States, as defined [at N.J.A.C. 7:7A-1.4] in this section, within [the legal boundaries of the State] New Jersey, [that will be regulated by the Department as part of the Federal 404 program with the exception of:

1. Those] except waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce, shoreward to their ordinary high water mark [, including] . This term includes all waters which are subject to the ebb and flow of the tide, shoreward to their mean high water mark, including [adjacent] wetlands [. In those waters over which the Department does not assume jurisdiction under the 404 program, the Department will retain jurisdiction under State law, and both State and Federal requirements will apply.

2. Specific bodies of water over which the Department will not assume 404 program jurisdiction include, but are not limited to:] that are partially or entirely located within 1000 feet of their ordinary high water mark or mean high tide. Waters that are not delegable waters include, but are not limited to:

[i.] 1. The entire length of the Delaware River within the State of New Jersey;

[ii.] 2. Waters of the United States under the jurisdiction of the Hackensack Meadowlands Development Commission; and

[iii.] 3. Greenwood Lake.

"Department" means the Department of Environmental Protection.

["Destruction of plant life which would alter the character of a freshwater wetland including the cutting of trees" means:

1. The physical removal of existing wetland vegetation; or
2. Causing the loss of life of vegetation by the application of herbicides or by other means which cause mortality to the established vegetative community.]

"Detention basin" or "detention facility" means [an] a human-made impoundment area made by constructing an embankment, or excavating a pit, or both, for the purpose of temporarily storing stormwater.

"Developable upland" means an upland area that could be developed under the laws that apply to the site.

"Discharge of dredged material" means any addition of dredged material into State open waters or freshwater wetlands. The term includes the addition of dredged material into State open waters or freshwaters wetlands and the runoff or overflow from a contained land or water dredge material disposal area. Discharges of pollutants into State open waters resulting from the subsequent onshore processing of dredged material are not included within this term [and are]. Such discharges of pollutants may, however, be subject to the New Jersey Pollutant Discharge Elimination System [, N.J.S.A. 58:10A-1 et seq., program even though the extraction and deposit of such material may also require an open water fill permit or a 404 permit from the U.S. Army Corps of Engineers or a Water Quality Certification] (NJPDES) rules at N.J.A.C. 7:14A.

"Discharge of fill material" means the addition of ["]fill [material"] into State open waters or freshwater wetlands. The term includes, but is not limited to, the following activities:

1. Placement of fill that is necessary for the construction of any structure;
2. The building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction;
3. Site-development fill for recreational, industrial, commercial, residential, and other uses;
4. Causeways or road fills;
5. Dams and dikes;
6. Artificial islands;

7. Property protection or reclamation devices, or both, such as rip-rap, groins, seawalls, breakwaters, and revetments;
8. Beach nourishment;
9. Levees;
10. Fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and [subaqueous] underground utility lines; and
11. Artificial reefs.

["Disturbance of the water level or water table" a term used to define regulated activity in N.J.A.C. 7:7A-2.3(a)2, means the alteration of the existing elevation of groundwater or surface water, regardless of duration of such alteration, by:

1. Adding or impounding a sufficient quantity of stormwater or water from other sources to modify the existing vegetation, values or functions of the wetland; and

2. Draining, ditching or otherwise causing the depletion of the existing groundwater or surface water levels such that the activity would modify the existing vegetation, values or functions of the wetland.]

"Ditch" means a linear topographic depression with bed and banks of human construction, which conveys water to or from a site, which is surrounded by uplands and which is not located within a wetland. This does not include channelized or redirected natural water courses.

. . .

["Element" means the Land Use Regulation Element.]

"Environmental commission" means a municipal advisory body created pursuant to [P.L. 1968, c.245 (] N.J.S.A. 40:56A-1 et seq.[).]

"EPA priority wetlands" means wetlands which are designated as priority wetlands by EPA [. The] , and are listed on the "Priority Wetlands List for the State of New Jersey", which is available from the Department's Office of Maps and Publications at the address listed at N.J.A.C. 7:7A-1.3.

["Equal ecological value" means functional equivalency, including similar wildlife habitat, similar vegetative species coverage and density, equivalent flood water storage capacity, and equivalency of any other values or functions specific to a particular wetland.]

"Established, ongoing farming, ranching or silviculture operation" means activities on areas subject to a farming, ranching, or silviculture use as of June 30, 1988 , which use has been pursued continuously since June 30, 1988. Activities on areas lying fallow as part of a conventional rotational cycle that does not exceed five years are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an [establishing] established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle for so long that modifications to the hydrological regime are necessary to resume operations , or for more than five years, whichever is shorter.

. . .

"Farmed wetland" means a freshwater wetland, as defined in this section, which was both manipulated and cropped before December 23, 1985, and has been in active agricultural use continuously since then. This term also includes a wetland that was manipulated and used for pasture or hayland before December 23, 1985, which has been in active use for pasture or hayland continuously since then.

"Federal act" means the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., including any amendments and supplements, and implementing regulations. This statute is sometimes referred to as the Federal Clean Water Act.

. . .

"Fill" means the deposition or placement of material [(for example,] such as soil, sand, earth, rock, concrete, pavement, or solid material of any kind [, etc.) into an area which changes the resultant] ; so as to change the ground elevation in relation to surface water or groundwater level. "Fill" also means the material deposited.

. . .

"FW" means the general surface water classification applied to fresh waters in the Department's Surface Water Quality Standards, N.J.A.C. [7:9-4, and subsequent amendments thereto] 7:9B.

"FW1 waters" means [those fresh] waters [that originate in and are] designated as FW1 waters in the Department's Surface Water Quality Standards, N.J.A.C. 7:9B. As of {effective date of this rule}, N.J.A.C. 7:9B-1.15 defines FW1 waters as those fresh waters wholly within Federal or State [parks, forests, fish and wildlife] lands[, and other] or special holdings, that are [to be maintained in their natural state of quality (set aside] preserved for posterity, and are not [subjected to any] subject to wastewater discharges of human origin[), as designated in the Department's Surface Water Quality Standards, N.J.A.C. 7:9-4, and subsequent amendments thereto].

"FW2 waters" means [the general surface water classification applied] waters designated as FW2 waters in the Department's Surface Water Quality Standards, N.J.A.C. [7:9-4] 7:9B. [, and subsequent amendments thereto, to those fresh waters that are not designated as FW1 or Pinelands Waters.]

"Freshwater wetland" or "wetland" means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation; provided, however, that the Department, in designating a wetland, shall use the three-parameter approach (that is, hydrology, soils and vegetation) enumerated in the ["]Federal Manual [for Identifying and Delineating Jurisdictional Wetlands," and any subsequent amendments thereto, incorporated herein by reference] as defined in this section. These include tidally influenced wetlands which have not been included on a promulgated map pursuant to the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq.

"Freshwater wetlands permit" means a permit to engage in a regulated activity in a freshwater wetland issued pursuant to the Freshwater Wetlands Protection Act and this chapter.

"Gabion" means a shore or stream bank protection structure, that is made of wire mesh basket(s) or mattress(es) filled with rocks and usually used in multiples as a structural unit installed to withstand the forces of waves and currents.

"General permit" means a permit, adopted as a rule, under which the Department issues authorizations. A general permit may authorize regulated activities in freshwater wetlands and/or State open waters, and/or activities in transition areas which are described as prohibited activities at N.J.A.C. 7:7A-2.6. An authorization issued under a general permit satisfies the requirement for a freshwater wetlands permit, open water fill permit, and/or transition area waiver, as applicable.

“Government agency” means any department, division, authority, board, commission, office, bureau, agency, committee or other instrumentality of the United States, or of the State or any political subdivision thereof.

. . .

["Head waters" means the point on a non-tidal stream above which 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 streams that are dry for long periods of the year, the Department may establish headwaters as that point of the stream where flow of five cubic feet per second is exceeded 50 percent of the time.]

"HUC 11" or "hydrologic unit code 11" means an area within which water drains to a particular receiving surface water body, which area is identified by an eleven digit hydrologic unit boundary designation, as shown on the map included in the United States Geological Survey, Water Resources Investigations Report 95-4134, 1995, entitled "Development of a 14-digit Hydrologic Coding Scheme and Boundary Data Set for New Jersey." The HUC codes for New Jersey can be viewed through the Department's Geographic Information System. The information can also be obtained by e-mail at dc_nj@usgs.gov, or by writing to:

District Chief
U.S. Geological Survey
Water Resources Division
810 Bear Tavern Road
West Trenton, NJ 08628.

[NOTE to OAL: Underscore character in Internet e-mail address above is intentional and should remain.]

"Hydric soil[s]" means a soil that in its undrained condition is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions that favor the growth and regeneration of hydrophytic vegetation. These soils may be [on] described in several places, including New Jersey's Official List of Hydric Soils, developed by the [United States Department of Agriculture Soil] Natural Resources Conservation Service; [and] the [United States Fish and Wildlife Service] National Wetlands Inventory, [in] entitled "The Wetlands of New Jersey" [1985], published in 1985 by the United States Fish and Wildlife Service; or in the [Federal Manual for Identifying and Delineating Jurisdictional Wetlands and amendments thereto] Federal manual. Alluvial land, as mapped [by] on soil surveys, or other soils exhibiting hydric characteristics identified through field investigation as described in Part III [, field indicators and other available information] of the ["]Federal Manual["] may also be considered a hydric soil for the purposes of wetland classification. Also, wet [phase] phases of somewhat poorly drained soils not on New Jersey's Official List of Hydric Soils may [also, on occasion,] be associated with a wetland and therefore for the purposes of this [Act] chapter shall be considered a hydric soil.

"Hydrophyte" means plant life adapted to growth and reproduction under periodically saturated root zone conditions during at least a portion of the growing season. A listing of these plants can be found in the "National List of Plant Species that Occur in Wetlands: 1988-New Jersey" and amendments thereto, compiled by the USFWS, [United States Army Corps of Engineers (Corps)] ACOE, [US]EPA and the [United States Soil] Natural Resources Conservation Service.

"Impervious surface" means any structure or surface which prevents absorption of stormwater into land. Examples of impervious surfaces are pavement, rooftops, sidewalks, driveways, tennis courts and swimming pools.

"Individual permit" means a freshwater wetlands permit or open water fill permit [issued pursuant to N.J.A.C. 7:7A-3] that is issued by the Department after an alternatives test and other site-specific and project-specific reviews required at N.J.A.C. 7:7A-7.

"Individual transition area waiver" means a transition area waiver issued by the Department under N.J.A.C. 7:7A-6, which is not granted as part of a general permit authorization. The following are the types of individual transition area waivers: an averaging plan transition area waiver, a special activity transition area waiver, a matrix type width reduction transition area waiver, a hardship transition area waiver, and an access transition area waiver.

. . .

"Isolated wetlands [or isolated State open waters]" means a freshwater wetland [or State open water which] that is not [connected to] "part of a surface water tributary system", as defined in this section. [discharging into a lake, pond, river, stream or other surface water feature. The term "connected to" includes all surface water connections whether regulated or not, as well as connections by way of stormwater or drainage pipes. "Connected to" does not include a groundwater connection nor does it include overland flow unless there is evidence of scouring or erosion.]

"Lake, pond, or reservoir" means any impoundment of water, whether naturally occurring or created in whole or in part by the building of structures for the retention of surface water.

"Letter[s] of interpretation" [are letters] or "LOI" means the document issued by the Department [for the purpose of] under N.J.A.C. 7:7A-3, indicating the presence or absence of wetlands, State open waters, or transition areas [(see N.J.A.C. 7:7A-8)]; [for the purpose of] verifying or delineating the boundaries of freshwater wetlands, State open waters, and/or transition areas; or [to obtain] assigning a wetland a resource value classification.

. . .

"Major discharge" means any of the following:

[1. Discharges of dredged or fill material into areas identified by the Department, in consultation with USEPA, the Corps and the USFWS, which could have the following impacts:

i. Significant adverse effects on freshwater wetlands or State open waters which are unique for a particular geographic region;

ii. Significant reductions in the ecological, commercial, or recreational values of more than five acres of a freshwater wetland or State open water; or

iii. Affects to a Federally listed or proposed endangered or threatened species;

2. Wetland fills involving more than 10,000 cubic yards of material.]

1. A draft general permit;
2. A discharge with reasonable potential to affect Federally listed or proposed endangered or threatened species as determined by the U.S. Fish and Wildlife Service;
3. A discharge of dredged or fill material which has the potential for adverse impacts on the waters of a state other than New Jersey;
4. A discharge known or suspected to contain:
   - i. Toxic pollutants as identified by Section 307(a)(1) of the Federal act;
   - ii. Hazardous substances identified pursuant to Section 311 of the Federal act and Section 101(14) of the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. 9601 et seq.;
   - iii. Toxic substances as defined by Section 3 of the Toxic Substances Control Act, 15 U.S.C. 2601 et seq.; or
   - iv. Hazardous waste as defined by Section 1004(5) of the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq.;

5. A discharge located in the proximity of a public water supply intake;
6. A discharge within a critical area established under State or Federal law, including but not limited to a National or State park; fish or wildlife sanctuary or refuge; National or historical monument; wilderness area or preserve; a site identified or proposed under the National Historic Preservation Act; or a component of the National Wild and Scenic Rivers system;
7. The filling of five or more acres of freshwater wetlands and/or State open waters;
8. Any regulated activity that results in a significant reduction in the ecological, commercial, or recreational values of five or more acres of freshwater wetlands or State open waters;
9. A culvert enclosure longer than 100 feet; or
10. Channelization of more than 500 feet of a river or stream.

. . .

"Mitigation" means activities carried out pursuant to N.J.A.C. [7:7A-14] 7:7A-15 in order to compensate for freshwater wetlands or State open waters loss or disturbance caused by regulated activities.

"Natural Resources Conservation Service" means the arm of the U.S. Department of Agriculture (USDA) that provides technical assistance with USDA conservation programs associated with soil, water, and other related natural resources. The Natural Resources Conservation Service was previously known as the Soil Conservation Service.

"Non-delegable waters" mean waters that are not delegable waters.

"Offsite" means the area not onsite.

"Onsite" means the area located within the [legal boundary of the property or properties on which the regulated activity or activities are proposed, are occurring, or have occurred, as set forth in the deed for that area, plus any contiguous land owned by the same person as set forth in the deed or deeds for that contiguous land, as these boundaries existed on July 1, 1988 or on the date of submission of the application if lots and blocks were merged subsequent to July 1, 1988.] site, as defined in this section.

. . .

"Palustrine emergent" means a wetlands vegetation pattern in which persistent and non persistent grasses, rushes, sedges, forbs and other herbaceous or grass-like plants are the dominant vegetation.

"Part of a surface water tributary system" means connected to a surface water that discharges into a lake, pond, river, stream or other surface water feature. The connection may be through any surface water feature, whether regulated or not, including a stormwater or drainage pipe. The connection may be through overland flow only if there is evidence of scouring, erosion, or concentrated flows. The connection may not be through groundwater alone. Wetlands adjacent to a surface water are connected to the surface water and are part of the surface water tributary system.

"Permit" means an approval to engage in a regulated activity in a freshwater wetland[,] or State open water, or an approval to engage in an activity described as a prohibited activity at N.J.A.C. 7:7A-2.6 in a transition area, issued [pursuant to the Act and] by the Department under this chapter. The Department issues the following permits under this chapter: freshwater wetlands permits including general permit authorizations, open water fill permits, and transition area waivers.

“Permittee” means a person to whom the Department has issued a permit or a waiver under this chapter.

. . .

["Placing of obstructions" means to deposit, construct, install or otherwise situate any obstacle which will affect the values or functions of a freshwater wetland.]

"Plowing" means all forms of primary tillage, including moldboard, chisel, or wide-blade, plowing, discing, harrowing, and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of [spoil] dredged material, rock, sand, or other [surficial] surface materials in a manner which changes any area of wetlands to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing will never involve a discharge of material.

. . .

"Preliminary approval" means the conferral of certain rights pursuant to the Municipal Land Use Law at N.J.S.A. 40:55D-46, 48 and 49 prior to final approval after specific elements of a development plan have been agreed upon by the planning board and the applicant.

"Project" means the following:

1. For [an] the purpose of a transition area exemption under N.J.A.C. [7:7A-2.7(d)] 7:7A-2.8(f) based on the application for or the grant of a preliminary site plan approval ["project" means]:
   i. [all] All buildings, structures, pavements, and other improvements specifically depicted on the site plans referenced in the resolution approving the site plan [.] ; and
2. For [an exemption under N.J.A.C. 7:7A-2.7(d), based on the application for or the grant of] the purpose of a transition area exemption under N.J.A.C. [7:7A-2.7(d)] 7:7A-2.8(f) based on the application for or the grant of a preliminary subdivision approval[, "project" means]:
   i. Where subdivision approval is the last stage of municipal review before the owner/applicant may apply for a building permit to begin construction, the "project" is the development of the subdivision consistent with the lot coverage, use, and density restrictions of the zoning ordinance in effect at the time of the subdivision approval; or
   ii. Where site plan approval is required prior to construction, "project" means the proposed economic development, whether commercial, industrial or residential, intended to be constructed on that portion of a tract of land that is the focus of the qualifying approval. Although "project" is not limited to specific structures shown on the subdivision plans, it is limited to development on those portions of a tract of land that were the focus of the qualifying subdivision application or approval. Development on other lands, such as development on the remainder of a larger tract or on a contiguous property in common ownership, are not included within a "project."

      In order to determine if an applicant qualifies for an exemption under this definition, the Department will determine the existence of a proposed economic development at the time of the subdivision application. Because the purpose of the exemption is to protect that degree of investment in planning and development that the preliminary site plan or subdivision application normally represents, where the subdivision is merely a division of land and no

substantial investment was made in planning or development, there can be no exempted project. Therefore, an application for the subdivision of lands simply for future development, yet to be planned, or simply for resale shall not qualify for an exemption. To determine the existence of a proposed economic development and to determine which portion of a tract was the focus of subdivision approval or application, the Department will examine the resolution granting approval and any documentation submitted with the application, including, but not limited to, drainage, engineering, traffic, utility, landscaping, soil and environmental plans and reports as well as the subdivision plan. In cases where the above information is unclear, the Department may consider money spent or obligated on engineering and design in the preparation of the subdivision application to determine if a substantial investment has been made in an economic development. Money spent or obligated for the initial purchase, carrying costs, or legal services will not be considered in determining the existence of a proposed economic development.

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

(1) Where a project was to be developed in three sections but a complete application for preliminary approval was submitted, accepted and subsequently approved for only one section, only the development planned for that section is exempt and the development envisioned for sections two and three is not exempt. This is not altered by the fact that some depiction of that future development on the remainder of the parcel might be required by a local planning board in concept or sketch form[.] ;

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

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

(4) Where land is divided for the sole purpose of bequeathing it sometime in the future to one's children to be developed as they wish, no economic development was contemplated when the application was made or approval granted. After the land passes to the children and one of them decides to build, that development is not exempt. The purpose of the exemption is to protect that degree of investment in planning and development that the preliminary site plan

or subdivision application normally represents. Where the subdivision is merely a division of land and no investment was made in the planning or development, there can be no exempted project[.] ; and

(5) Where land is subdivided but requires further subdivision, other than de minimis changes for road right of ways or other infrastructure, before the applicant can proceed to the next step of municipal approval (either building permits or site plan approvals), there is no evidence of intended economic development at the time of initial subdivision application or approval, because the proposed economic development only comes into being with the subsequent, untimely subdivision. Therefore, there is no basis for exemption.

(Agency note: the provision below is proposed to relocated at N.J.A.C. 7:7A-2.8(g)4, with minor rewording that does not change its meaning.)

[3. For all development determined to be exempt by the Department, it should be noted that once the development is constructed, the exempted "project" has been built. If, for example, the owner of a commercial building decides 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 the Act. Similarly, for residential approvals, once the houses and any accessory structures planned along with the house (for example, detached garages, barns, storage sheds, pools) are constructed, the exemption has been exhausted and any later additions or structural improvements are subject to the permitting requirements of the Act. Note that if there is an interruption of 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. See also N.J.A.C. 7:7A-2.7(e)1 and 2 for changes that void exemptions for projects still in the local approval process.]

["Property" means the area contained within the legal boundary as defined by municipal block and lot, or right-of-way description, as set forth in the deed for that area.]

. . .

"Redevelopment" means the construction of structures or improvements on or below impervious surfaces [such as buildings, asphalt, concrete, and other materials which will not allow infiltration of liquids, legally existing in the transition area prior to July 1, 1989] , as defined in this section, or other significantly disturbed area.

"Regulated activity" means any of the activities [defined] described at N.J.A.C. [7:7A-2.3] 7:7A-2.2.

"Residential development project" means the construction of a structure for residential use and the area within 20 feet of the structure on all sides, measured outward from the outside edge of the structure or from any porch, deck, or other appurtenance attached to the structure. A residential development project may include construction of one or more single family home(s) or multi-unit residential building(s).

. . .

["Significant adverse impact" shall be deemed to exist where it is determined that a modification of a wetland will negatively affect the ecological integrity of the wetland and its biotic components. Such modifications may include, but are not limited to:

1. An alteration of the water table or hydrologic patterns in the wetland or its subwatershed;

2. An increase in erosion resulting in increased sedimentation in the wetland or State open water;

3. A change in the natural chemistry of the ground or surface water in the wetland;
4. A loss of wetland habitat;
5. A reduction in wetland habitat diversity;
6. A change in wetlands species composition; or
7. A significant disturbance of areas used by indigenous and migratory wildlife for breeding, nesting, or feeding.]

"Sewage pump station" means a structure that houses, shelters and secures the equipment needed to pump sewage from one location to another through a utility line. A sewage pump station may also contain odor control equipment.

"Silviculture" means the [planting, cultivating and harvesting by cutting or digging, of Christmas trees or nursery stock. After harvesting, new seedlings are replanted for a future crop. For the purposes of this chapter, "silviculture" does not include forestry activities such as the production of lumber products or firewood] art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society on a sustainable basis. The normal harvesting of forest products is a part of some silviculture operations.

"Site" means the area within the legal boundary of the property(ies) or right-of-way for which a letter of interpretation is requested, or upon which a regulated or prohibited activity is proposed, is occurring, or has occurred, plus any contiguous land owned or controlled by the same person(s). This term also includes an area which is the subject of an application for a letter of interpretation or which is the location of a proposed mitigation bank. For the purposes of this definition, the legal boundary of a property or right-of-way shall be the boundary as it existed on July 1, 1988 or, if lots and/or blocks were acquired and/or merged after July 1, 1988, on the date an application is submitted under this chapter. The legal boundary of a property is set forth in the deed(s) for the property. The legal boundary of a right-of-way is set forth in the document creating the right-of-way.

"Soil Conservation District" means a local subdivision of the New Jersey Department of Agriculture (NJDA). Generally, each Soil Conservation District administers NJDA programs for a single county, although some administer programs for more than one county. The Soil Conservation Districts are overseen by the New Jersey State Soil Conservation Committee in the NJDA, which promulgates the Standards for Soil Erosion and Sediment Control in New Jersey, N.J.A.C. 2:90.

"Special aquatic site" means [any] a site described in subpart E of the 404(b)1 guidelines (40 C.F.R. 230 et seq.[, or any amendments thereto]), [with the exception of] except freshwater wetlands which, for the purposes of this chapter, shall not be considered special aquatic sites. In general, special aquatic sites are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted functions and values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region. As of {effective date of this rule}, the following special aquatic sites are described in subpart E of the 404(b)1 guidelines (40 C.F.R. 230 et seq.): sanctuaries and refuges, wetlands (note: while freshwater wetlands are excluded from the definition of a special aquatic site for purposes of this chapter, other wetlands, such as most coastal wetlands, would be considered special aquatic sites), mud flats, vegetated shallows, coral reefs, and riffle and pool complexes.

. . .

"State open waters" means [those] all waters of the State as defined in this section, including waters of the United States [within the boundary of the State or subject to its jurisdiction that are not] as defined in this section, but excluding ground water as defined at N.J.A.C. 7:14A, and excluding freshwater wetlands as defined in this section. The following waters will generally not be considered State open waters for the purposes of this chapter. However, the Department shall determine, on a case-by-case basis, if a particular watercourse or water body listed below is a State open water:

1. Non-tidal drainage and irrigation ditches excavated on dry land;
2. Artificially irrigated areas which would revert to upland if the irrigation ceased;
3. Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
4. Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons;
5. Water-filled depressions created in dry land incidental to construction or remediation activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of "waters of the United States";
6. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Federal act (other than cooling ponds);
7. Erosional channels less than two feet wide and six inches deep in upland areas resulting from poor soil management practices; and
8. Stormwater management facilities created in uplands.

"Stormwater management facility" means any structural stormwater management measure, including stormwater management basins and filtration or other treatment measures.

"Swale" means a linear topographic depression, either naturally occurring or of human construction, which [drains less than 50 acres. Swales are wetland features meeting the three parameter approach, do not have distinguishable bed and banks and are not intermittent streams. A swale can not be within a larger wetland complex, nor is it an undulation in the boundary of a wetland complex. A swale is a natural or human-made feature, which has formed or was constructed in uplands to convey surface water runoff from the surrounding upland areas. The definition of swales generally does not include wetland features over 50 feet in width at the widest point which are considered by the Department to be independent wetland features.]

meets all of the following criteria:

1. It is surrounded by uplands. A depression is not a swale if it is located within a larger wetland or if it is merely an undulation in a wetland boundary;
2. It has formed or was constructed in uplands to convey surface water runoff from the surrounding upland areas;
3. It drains less than 50 acres;
4. It is not a seep or spring;
5. It is not an intermittent stream;
6. It has no definite bed and banks; and
7. At its widest point, it is generally 50 feet wide or narrower.

"Temporary disturbance" means a disturbance caused by permitted regulated and/or prohibited activities that are permanently discontinued within six months after they are begun.

"Threatened or endangered species" [shall be those] means a species identified pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq., or those identified pursuant to the Endangered Species Act of 1973, 16 U.S.C. 1531 et [al.] seq., and subsequent amendments thereto.

. . .

"Transition area" means an area of [land] upland adjacent to a freshwater wetland which minimizes adverse impacts on the wetland or serves as an integral component of the wetlands ecosystem.

"Transition area waiver" or "waiver" means a waiver issued by the Department [to engage in] under this chapter, authorizing any of the prohibited activities enumerated at N.J.A.C. [7:7A-6.2(a)] 7:7A-2.6 in a transition area [issued by the Department pursuant to the Act and this chapter. A transition area waiver may be issued by the Department in the transition area adjacent to either a freshwater wetlands of exceptional or intermediate resource value and may take one of the following forms:

1. Transition area waiver, Reduction. This waiver may be approved on the basis of a finding of no substantial impact or if the waiver is necessary to avoid an extraordinary or substantial hardship as defined at N.J.A.C. 7:7A-7.2(g) or 7.3(f), respectively. The waiver would result in a reduction in the standard width of a transition area without requiring an expansion of the remaining transition area for compensation;

2. Transition area waiver, Special Activities. This waiver may be issued to approve the partial elimination of the standard transition area, without requiring an expansion of the remaining transition area for compensation for the special activities set forth below:

i. Stormwater management facilities as defined at N.J.A.C. 7:7A-7.4(b)1;

ii. Linear development as defined at N.J.A.C. 7:7A-1.4;

iii. Activities permitted under the specific Statewide general permits listed at N.J.A.C. 7:7A-7.4(e). The Statewide general permits themselves are set forth at N.J.A.C. 7:7A-9.2(a); or

iv. Activities defined as redevelopment pursuant to N.J.A.C. 7:7A-7.4(f); or

3. Transition area waiver, Averaging Plan. This waiver may be issued to approve a plan to modify the overall shape of the standard transition area without reducing the total square footage of the standard transition area] .

"Tree" means a woody plant which is five inches or greater in diameter at a height of four and one half feet above the ground.

"Trout production waters" [(TP)] means [water] waters designated in the Department's Surface Water Quality Standards, N.J.A.C. [7:9-4] 7:9B, for use by trout for spawning or nursery purposes during their first summer.

"USEPA" [(EPA)] or "EPA" means the United States Environmental Protection Agency.

. . .

"USGS" means the United States [Geologic] Geological Survey.

"USGS quad map" means a topographic quadrangle map issued by the USGS, 7.5 minute series, drawn at a scale of 1:24,000, available from the Department's Maps and Publications Office at the address listed in N.J.A.C. 7:7A-1.3.

"Utility line" means a pipe, cable, line, or wire for the transport or transmission of gases, liquids, electrical energy or communications. This term includes a tower required to support a utility line, but does not include a tower that only transmits waves through

the air, such as for radio, television, or telephone transmission. The term "utility line" does not include a stormwater pipe, or a pipe that drains a wetland or State open water, such as a drainage tile.

"Vernal habitat" means a wetland or water that meets all of the following criteria:

1. Occurs in a confined basin depression without a flowing outlet;
2. Features evidence of breeding by one or more species of fauna adapted to reproduce in ephemeral aquatic conditions, identified in N.J.A.C. 7:7A, Appendix 1. The following shall constitute evidence of breeding by such a species, and shall create a rebuttable presumption that the criteria at 3 and 4 below are met:
   i. One or more obligate species listed in Appendix 1, or evidence of such a species, is found in the area of the pool; or
   ii. Two or more facultative species listed in Appendix 1, or evidence of such a species, are found in the area of the pool;
3. Maintains ponded water for at least two continuous months between March and September of a normal rainfall year; and
4. Is free of fish throughout the year, or dries up at some time during the year.

"Water-dependent [uses] activity" means [development] an activity that cannot physically function without direct access to the body of water along which it is proposed. [Uses, or portions of uses,] An activity that can function on [sites] a site not adjacent to the water [are] is not considered water dependent regardless of the economic advantages that may be gained from a waterfront location.

"Water Pollution Control Act" means the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

["Watershed" means the smallest drainage area of a specific creek, stream, river, pond, lake or other surface water body within which a particular site is located.]

"Waters of the State" means the ocean and its estuaries, all springs, streams, wetlands, and bodies of surface or ground water, whether natural or artificial, within the boundaries of the State of New Jersey or subject to its jurisdiction.

"Waters of the United States" means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters including interstate wetlands;
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), wetlands, mudflats, sand flats, sloughs, wet meadows, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
   i. Which are or could be used by interstate or foreign travelers for recreational or other purposes;
   ii. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
   iii. Which are used or could be used for industrial purposes by industries in interstate commerce;
   iv. Which are or would be used as habitat by birds protected by Migratory Bird Treaties;
   v. Which are or would be used as habitat by other migratory birds which cross state lines;
   vi. Which are or would be used as habitat for endangered and threatened species; or

vii. Which are used to irrigate crops sold in interstate commerce;

4. All impoundments of waters otherwise defined as waters of the United States under [the] this definition;
5. Tributaries of waters identified in paragraphs 1 through 4 of this definition;
6. The territorial seas; and
7. Wetlands adjacent to waters identified in paragraphs 1 through 6 of this definition, other than those that are themselves wetlands.

"Water [Quality Certification (WQC)" is the] quality certificate" means a Department determination [that the Department shall make pursuant to Section 401] pursuant to 33 U.S.C. 1341 of the Federal Act and N.J.S.A. 58:10A-1 et seq., certifying that [in the evaluation of] a proposed activity which requires a Federal license or permit complies with Department water pollution standards and limits.

"Working day" means a day upon which the offices of the New Jersey Department of Environmental Protection are open for business.

7:7A-1.5 Severability

If any subchapter, section, subsection, provision, clause, or portion of this chapter, or the application thereof to any person, 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 [such] the judgment [shall have been] was rendered and it shall not affect or impair the remainder of this chapter or the application thereof to other persons.

7:7A-1.6 Other statutes and regulations

(a) The powers, duties and functions vested in the Department under [the provisions of the Act or] this chapter shall not [be construed to] limit in any manner the powers, duties and functions vested therein under any other [provisions of] 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 [prior to July 1, 1988] by any municipality, county, or political subdivision thereof, regulating freshwater wetlands [except to the extent that such law or ordinance regulates or requires a transition area. Local laws and ordinances governing] or freshwater wetlands transition areas [shall remain in effect until July 1, 1989, at which time the transition area provisions of the Act shall supersede such local laws and ordinances]. With the exception of political subdivisions under the jurisdiction of the Pinelands Commission, no municipality, county, or political subdivision thereof shall enact[, after July 1, 1987,] any law, ordinance, or rule or regulation requiring a transition area adjacent to a freshwater wetland.

(c) This section shall not, however, preclude municipal advice to the Department concerning letters of interpretation [pursuant to N.J.A.C. 7:7A-8.5] or other matters.

(d) This chapter shall not preempt [pre-existing] 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, [except pursuant to (e) below,] those programs will not use freshwater wetlands concerns as a basis for regulation, and any [such] 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 [otherwise] exempt [from the provisions of the Act and] under this chapter, the final decision on the application shall be based solely on the requirements of other applicable permit programs. [For projects exempted under the Act and this chapter's wetlands requirements under N.J.A.C. 7:7A-2.7(d) or (g), the final decision on the application will be based on the requirements of other applicable permit programs as they existed on June 30, 1988.

N.J.A.C. 7:7A-1.7 Effective and operative dates

This chapter, with the exception of N.J.A.C. 7:7A-6 and 7, became effective June 6, 1988, and became operative on July 1, 1988. N.J.A.C. 7:7A-6 and 7 became operative on July 1, 1989.]

(Agency note: The proposed new section below consolidates and replaces provisions regarding hearings and appeals, found in the existing rule at 7:7A-2.10, 7:7A-7.8, 7:7A-8.10, 7:7A-9.6, and 7:7A-12.7.)
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-16.18.

(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:

   Office of Legal Affairs
   Attention: Administrative Hearing Requests
   Department of Environmental Protection
   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 the person receives notice of the decision being appealed, or within 30 days after notice of the decision is published in the DEP Bulletin, whichever is later. If a person submits the hearing request after this time, the Department shall deny the request.

(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 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, 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.

(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:
   i. Each person provided notice of the application for the permit or approval which is the subject of the appeal; and
   ii. Each person who commented on the application;

2. The Department shall publish a notice of intent to settle in the DEP Bulletin, and shall accept comments on the notice for at least 30 days;
3. After the 30 day comment period provided for in (h)2 above, the person who requested the hearing shall send by certified mail a notice of settlement. 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:
   i. Each person provided notice of intent to settle under (h)1 above; and
   ii. Each person who commented on the notice of intent to settle provided under (h)2 above; and
4. The Department shall publish a notice of the final settlement in the DEP Bulletin.

(i) After a hearing, the administrative law judge will submit an initial decision to the Commissioner. Within forty five days of receiving the initial decision, the Commissioner shall affirm, reject, or modify the decision, 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.

(j) The Commissioner's action under (i) above shall be considered final agency action for the purposes of the Administrative Procedure Act, and shall be subject only to judicial review in the Appellate Division of the Superior Court, as provided in the Rules of Court.

(k) Nothing in this section shall be construed to provide a right to an administrative hearing in contravention of the Administrative Procedure Act, N.J.S.A. 52:14B-3.1 through 3.3.

SUBCHAPTER 2 APPLICABILITY

7:7A-2.1 Jurisdiction; permit or waiver requirement

[(a) This chapter shall apply to all regulated activities within the State of New Jersey, except as specifically provided in this chapter. This chapter shall also apply to any discharge of dredged or fill material into State open waters which are not freshwater wetlands.]

(a) [(b)] A person proposing to engage in a regulated activity [in a wetland shall apply to the Department for], as described at N.J.A.C. 7:7A-2.2, shall first obtain a [Statewide] general permit authorization or an Individual freshwater wetlands or open water fill permit [, and a person proposing to discharge dredged or fill material into State open waters shall apply to the Department for a Statewide general permit authorization or an Individual open water fill permit] . A person proposing to engage in a prohibited activity, as described at N.J.A.C. 7:7A-2.6, in a transition area shall first obtain approval from the Department through a transition area waiver or general permit authorization. The discharge of dredged or fill material in a State open water or wetland may also [need] require a stream encroachment permit pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq. [or a Water Quality Certification.]

(b) [(c)] An agency of the State proposing to engage in a regulated activity or prohibited activity shall [apply to the Department for] first obtain a freshwater wetlands and/or open water fill permit, and/or a transition area waiver, but shall not be required to pay [a fee therefor] an application fee. [An agency of the State proposing to discharge dredged or fill material into State open waters shall apply for an open water fill permit, but shall not be required to pay a fee therefor.]

(Agency note: the provisions at (d) and (e) below are proposed for relocation, with clarifying changes, at N.J.A.C. 7:7A-10.1(m).)
[(d) Where a proposed project requires more than one permit from the Element, the Element will require the submittal of only one application, but that application shall comply with the requirements of each applicable permit program. including all fee requirements. This provision does not preclude an applicant from submitting separate applications if the timing or magnitude of a project requires it.

(e) Where a proposed project requires more than one permit from the Element, applicants are strongly encouraged to apply for all required permits at one time. In most cases this will allow the Department to issue joint permits.]

(c) On March 2, 1994, the Department assumed responsibility for administering the Federal wetlands program (also known as the 404 program) in delegable waters, as defined at N.J.A.C. 7:7A-1.4. In non-delegable waters, the ACOE retains jurisdiction under Federal law, and both Federal and State requirements apply. A project in non-delegable waters requires two permits, one from the Department under this chapter and one from the ACOE under the Federal 404 program.

(d) A permit issued under this chapter shall constitute the water quality certificate required under the Federal Act at 33 §U.S.C. 1341. If a discharge of dredged or fill material into waters of the United States, as defined at N.J.A.C. 7:7A-1.4, does not require a permit under this chapter but does require a water quality certificate, the Department shall use the standards and procedures in this chapter to determine whether to issue the water quality certificate, except in the New Jersey Coastal zone, as described at N.J.A.C. 7:7E-1.2(b). For a discharge of dredged or fill material in the Coastal zone, the Department shall use the standards and procedures in the Coastal Permit Program rules and the Coastal Zone Management rules, N.J.A.C. 7:7 and 7:7E, respectively, to determine whether to issue a water quality certificate.

(e) A permittee shall be solely responsible for ensuring that the permitted project complies with all requirements in this chapter, regardless of whether others manage, oversee or work on the project.

(f) Only an activity specifically identified as authorized in a permit, including a transition area waiver or general permit authorization, shall be authorized under that permit.

[7:7A-2.2 Subchapters which apply to freshwater wetlands permits or open water fill permits
Any person proposing to engage in a regulated activity in a freshwater wetlands or State open water shall comply with the provisions of subchapters 1 (General information), 2 (Applicability), 3 (General standards for granting individual freshwater wetlands and open water fill permits), 5 (Emergency permits), 6 (Transition areas), 7 (Transition area waivers), 8 (Letters of Interpretation), 9 (General permits), 10 (Pre-application conferences), 11 (Application procedure), 12 (Review of applications), 13 (Permit contents), 14 (Mitigation), 15 (Enforcement), and 16 (Fees) of this chapter.]

7:7A-2.2 [7:7A-2.3] Regulated activities in freshwater wetlands and State open waters

(a) The following activities are regulated under this chapter when performed in a freshwater wetland [are regulated pursuant to the Act and are subject to the requirements of this chapter as set forth in N.J.A.C. 7:7A-2.2] unless excluded under (c) below:

1. (No change.)
2. The drainage or disturbance of the water level or water table[;] so as to alter the existing elevation of groundwater or surface water, regardless of the duration of such alteration, by:
   i. Adding or impounding a sufficient quantity of stormwater or other water to modify the existing vegetation, values or functions of the wetland; or
   ii. Draining, ditching or otherwise causing the depletion of the existing groundwater or surface water so as to modify the existing vegetation, values or functions of the wetland;
3. - 4. (No change.)
5. The placing of obstructions, including depositing, constructing, installing or otherwise situating any obstacle which will affect the values or functions of a freshwater wetland; [or]

6. The destruction of plant life which would alter the character of a freshwater wetland, including killing vegetation by applying herbicides or by other means, the physical removal of wetland vegetation, and/or the cutting of trees [except the approved harvesting of forest products pursuant to N.J.A.C. 7:7A-2.7(b)] ; and
7. Placement of any portion of a residential development project, as defined at N.J.A.C. 7:7A-1.4.

(b) The term "regulated activity" shall also mean the discharge of dredged or fill material into State open waters, except for a discharge into a non-delegable State open water which is subject to the Waterfront Development Law, N.J.S.A. 12:5-3.

(c) [For the purposes of this chapter, the] Notwithstanding (a) above, the following activities are not [considered to result in the alteration of the character of a freshwater wetland] regulated activities:

1. Surveying or wetlands investigation activities, for the purpose of establishing or reestablishing a boundary line or points, which use only hand held equipment and do not involve the use of motorized vehicles to either clear vegetation or extract soil borings. The clearing of vegetation along the survey line or around the survey points shall not exceed three feet in width or diameter respectively and shall not be kept clear or maintained once the survey or delineation is completed; [and]
2. The placement of temporary structures ([those not requiring] such as observation blinds, waterfowl blinds, artificial nesting structures, or sign posts) for observing, managing, or harvesting fish or wildlife, provided the structures:
   i. Do not have permanent foundations [nor] ;
   ii. Do not require the deposition of fill material[) not to exceed] ; and
   iii. Have a footprint no larger than 32 square feet [for the purposes of observing or harvesting fish or wildlife. These activities include the construction of observation or waterfowl blinds and the placement of traps.] ;
3. Placement of one or more small guy anchors that screw into the ground to secure a guy wire supporting a utility pole, provided that each guy anchor is no more than 20 inches long and no more than 3 inches in diameter;
4. Hand trimming of trees or other vegetation, provided the trimming does not alter the character of the freshwater wetland; and
5. The driving of one or more pilings in a State open water, if the pilings are not regulated by the ACOE under the Federal 404 program. The ACOE regulates the placement of pilings if the placement would have the effect of a discharge of fill material. Examples of activities that are and are not regulated by the ACOE are:
   i. Activities that generally do not have the effect of a discharge of fill material and thus are not regulated are:
      (A) Placing pilings for linear projects, such as bridges, elevated walkways, and utility line structures; and
      (B) Placement of pilings for piers or docks;
   ii. Activities that generally do have the effect of a discharge of fill material and thus are regulated include, but are not limited to:
      (A) Projects where the pilings are so closely spaced that sedimentation rates would be increased;
      (B) Projects in which the pilings themselves effectively would replace the bottom of a water body;

(C) Projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States;
(D) Projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions; and
(E) Projects where the pilings are intended to be used for structural support of a building such as a commercial or residential structure.

7:7A-2.3 [7:7A-2.4 Designation of] Identifying freshwater wetlands

(a) [The designation of freshwater wetlands shall be based upon] Freshwater wetlands shall be identified and delineated using the three-parameter approach (that is, hydrology, soils and vegetation) enumerated in the ["]Federal Manual [for Identifying and Delineating Jurisdictional Wetlands" and any subsequent amendments thereto] , as defined at N.J.A.C. 7:7A-1.4.

[(b) The three-parameter approach is a methodology for determining, in a consistent and repeatable manner, the presence of wetlands and the boundaries of wetlands. It requires careful consideration of such factors as vegetative species composition, saturated soil conditions, depth to seasonal high water table and the presence or absence of hydrologic indicators.]

(b) [(c)] To aid in determining the presence or absence of freshwater wetlands, the Department may refer to any of the following sources of information:

1. New Jersey Freshwater Wetlands maps [(as they become available)] prepared by the Department and available as indicated in (f) below;
2. - 3. (No change.)
3. [United States Geologic Survey topographic] USGS quad maps;
4. - 6. (No change.)

(c) [(d)] Vegetative species classified as hydrophytes and indicative of freshwater wetlands shall include, but not be limited to, those plants listed in "National List of Plant Species that Occur in Wetlands: 1988-New Jersey," compiled by the United States Fish and Wildlife Service in cooperation with the [United States Army Corps of Engineers] ACOE, USEPA, and the United States Soil Conservation Service, and any subsequent amendments thereto.

(d) To obtain a determination from the Department of the presence, absence, or boundaries of freshwater wetlands on a particular site, a person may apply to the Department for a letter of interpretation under N.J.A.C. 7:7A-3.

(e) The Department [is developing functional, complete, and up-to-date composite] has developed freshwater wetlands maps [and inventory] at a scale of 1:12000 to provide guidance and for [freshwater wetlands] general informational purposes. These [maps do not supersede wetland delineations which have been accepted and approved by DEPE for a specific site. The Department will make appropriate sections of this map and inventory available on a periodic basis to the county clerk or register of deeds and mortgages in each county, as appropriate, and to the clerk of each municipality.

(f) When available, the up-to-date composite] freshwater wetlands [map and inventory shall be used to locate wetlands as definitively as is practicable, as an informational tool in advising the public of] maps can help to determine the approximate extent and location of wetlands[, and in preparing some letters of interpretation]. However, [exact delineation of wetlands boundaries is required, and measurements shall be made in accordance with the three-parameter approach.] these maps do not take the place of nor supersede a wetland delineation that the Department has approved through a letter of interpretation issued for a particular site.

(f) The Department has provided the New Jersey freshwater wetlands maps to the following offices for public inspection:

1. The county clerk or registrar of deeds and mortgages in each county;
2. The municipal clerk of each municipality; and
3. The Department's Maps and Publications Sales Office, located at the address listed in N.J.A.C. 7:7A-1.3.

7:7A-2.4 [7:7A-2.5] Classification of freshwater wetlands by resource value

(a) Freshwater wetlands shall be divided into three classifications based on resource value. The Department shall consider the resource value classification of a [particular] wetland [shall be a factor] in, among other things, [considering] evaluating alternatives to the proposed regulated activity, in determining the size of the transition area, and in [assessing mitigation] determining the amount and/or type of mitigation required.

(b) A freshwater wetland [Freshwater wetlands] of exceptional resource value, or exceptional resource value wetland, [shall be] is a freshwater [wetlands] wetland which [exhibit any of the following characteristics]:

1. [Those which discharge] Discharges into [FW-1 waters or FW-2] FW1 or FW2 trout production [(TP)] waters or their tributaries; [or]
2. [Those which are] Is a present [habitats] habitat for threatened or endangered species[,] ; or
3. [those which are] Is a documented [habitats] habitat for threatened or endangered species, and which [remain] remains suitable for breeding, resting, or feeding by these species during the normal period these species would use the habitat.

(c) [i.] An applicant [shall have the opportunity to] may request [of the Department] that a documented habitat not result in the classification of a freshwater wetland as a freshwater wetland of exceptional resource value [if the applicant can demonstrate] . Such a request shall include a demonstration of the long-term loss of one or more habitat requirements of the specific documented threatened or endangered species, including, but not limited to, wetlands size or overall habitat size, water quality, or vegetation density or diversity. Upon such a request, the Department shall review all available information, and shall make a final classification of the wetland.

(d) [(c) Freshwater wetlands] A freshwater wetland of ordinary value, or an ordinary value wetland, [shall be] is a freshwater [wetlands] wetland which [do] does not exhibit any of the characteristics [enumerated] in (b) above, and which [are] is:

[1. Isolated wetlands which are more than 50 percent surrounded by development and less than 5,000 square feet in size:

i. For the purposes of this subsection, "development" shall mean the following uses that were legally existing prior to July 1, 1988, or were permitted under the Act:]

1. An isolated wetland, as defined at N.J.A.C. 7:7A-1.4, which:

i. Is smaller than 5,000 square feet; and

ii. Has the uses listed below covering more than 50 percent of the area within 50 feet of the wetland boundary. In calculating the area covered by a use, the Department will only consider a use that was legally existing in that location prior to July 1, 1988, or was permitted under this chapter since that date:

(1) - (5) (No change.)

[ii. For the purposes of this subsection, development must occupy more than 50 percent of the area within 50 feet of the wetland boundary in order for the wetland to meet the criterion of more than 50 percent surrounded by development.]

2. [Drainage ditches] A drainage ditch;
3. [Swales] A swale; or
4. [Detention facilities] A detention facility created by humans in an area that was upland at the time the facility was created.

(e) [(d) Freshwater wetlands] A freshwater wetland of intermediate resource value, or intermediate resource value wetland, [shall be all] is any freshwater [wetlands] wetland not defined as exceptional or ordinary.

(f) [(e)] The classification system established under this section shall not restrict the Department's authority to require the creation or restoration of freshwater wetlands [pursuant to the provisions of N.J.A.C. 7:7A-14] under N.J.A.C. 7:7A-15.

(g) To obtain a Department determination of the resource value classification for a particular wetland, an applicant may obtain a letter of interpretation from the Department under N.J.A.C. 7:7A-3.

[7:7A-2.6 Designation of State open waters

State open waters means those waters of the United States, as defined at N.J.A.C. 7:7A-1.4, within the boundary of the State or subject to its jurisdiction that are not wetlands as defined at N.J.A.C. 7:7A-1.4.]

(Agency note: The provisions at N.J.A.C. 7:7A-2.5 through 2.7 below are recodified, with minor clarifying changes, from N.J.A.C. 7:7A-6.1 through 6.3. Changes from the existing provisions are indicated.)

7:7A-2.5 [7:7A-6.1] General transition area provisions

(a) (No change.)

(b) Acts or acts of omission in a transition area that adversely affect a transition area's ability to serve as any of the areas described below at (b)1 to 7 shall be deemed inconsistent with [the provisions of] (a) above [and with N.J.S.A. 13:9B-16a]:

1. - 7. (No change.)

(c) A transition area is required adjacent to a freshwater wetland[s] of exceptional resource value and of intermediate resource value as classified in N.J.A.C. [7:7A-2.5] 7:7A-2.4. A transition area is not required adjacent to a freshwater [wetlands] wetland of ordinary resource value [as classified in N.J.A.C. 7:7A-2.5] or adjacent to a State open [waters as defined at N.J.A.C. 7:7A-1.4] water.

(d) The standard width of a transition area adjacent to a freshwater wetland of exceptional resource value shall be 150 feet. This standard width shall only be modified through the issuance of a transition area waiver [by the Department pursuant to the Act and this chapter]. The types of transition area waivers are listed at N.J.A.C. [7:7A-7.1(c)] 7:7A-6.1(a).

(e) The standard width of a transition area adjacent to a freshwater wetland of intermediate resource value shall be 50 feet. This standard width shall only be modified through the issuance of a transition area waiver [by the Department pursuant to the Act and this chapter]. The types of transition area waivers are listed at N.J.A.C. [7:7A-7.1(c)] 7:7A-6.1(a).

(f) A person shall not engage in [activities] prohibited activities, as described at N.J.A.C. 7:7A-2.6, in a transition area [as set forth at N.J.A.C. 7:7A-6.2] except pursuant to a transition area waiver [issued by the Department pursuant to this chapter].

(g) A transition area shall be measured outward from a freshwater wetland boundary line on a horizontal scale perpendicular to the freshwater wetlands boundary line as shown in N.J.A.C. 7:7A-6, Appendix A, which is incorporated by reference in this chapter. The outside boundary line of a transition area shall parallel, that is, be equidistant from, the freshwater wetlands boundary line, unless the Department issues a transition area waiver [is approved under N.J.A.C. 7:7A-7.4 or N.J.A.C. 7:7A-7.5]. The width of the transition area shall be measured as the minimum distance between the freshwater wetlands boundary and the outside transition area boundary.

(Agency note: the provision below, found in the existing rules at N.J.A.C. 7:7A-6.1(h), has been consolidated with similar provisions at proposed N.J.A.C. 7:7A-2.7(a).)
[(h) The outside boundary of a transition area is determined solely by reference to the freshwater wetlands boundary and is no way affected by property lines. Therefore, a property within 150 feet of a freshwater wetlands may contain a transition area which arises from a freshwater wetlands on another property. Any property or piece of property encompassing the transition area of a freshwater wetlands is subject to the Act and this chapter, not withstanding that the freshwater wetland is located on another property.]

(Agency note: proposed Figure 1 below is recodified from existing Figure 1, Appendix A, with no changes.)
Figure 1 - Transition Area
Example of a transition area adjacent to a freshwater wetland. Depicted are a plan and elevation view.

7:7A-2.6 [7:7A-6.2] Prohibited activities in transition areas

(a) Except as provided in (b) and (c) below, [a person shall not conduct] the following are prohibited activities when they occur in transition areas:

1. - 3. (No change.)
4. Placement of pavements; [and]
5. Destruction of plant life which would alter the existing pattern of vegetation[.] ; and
6. Placement of any portion of a residential development project, as defined at N.J.A.C. 7:7A-1.4.

(b) [The] Notwithstanding (a) above, the following activities [may be conducted (that is,] are not prohibited[)] in transition areas and do not require Department approval under this chapter, provided that the activities are performed in a manner that minimizes adverse effects to the transition area and adjacent freshwater wetlands:

1. Normal property maintenance;
   i. For the purposes of this paragraph, "normal property maintenance" means activities required to maintain lawfully existing artificial and natural features, landscaping and gardening. These activities include:
      (1) - (7) (No change.)
      (8) Maintenance of artificial features including the repair, rehabilitation, replacement, maintenance or reconstruction of any previously authorized, currently serviceable structure, lawfully existing prior to July 1, 1989, or permitted under [the Act and] this chapter, provided such activities do not result in additional disturbance of the transition area upon completion of the activity. Minor deviations from the existing structure 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 transition area upon completion of the activity.
   ii. (No change.)
2. Minor and temporary disturbances of the transition area resulting from, and necessary for, normal construction activities on land adjacent to the transition area[;
   i. For the purposes of this paragraph, "minor and temporary disturbances of the transition area resulting from, and necessary for, normal construction activities on land adjacent to the transition area," means activities which] , provided the activities do not result in adverse environmental effects on the transition area or on the adjacent freshwater wetlands, and [which activities] do not continue for [a period of] more than six months. [Normal construction activities which would be minor] For the purposes of this paragraph, minor and temporary disturbances include, but are not [necessarily] limited to, the placement of scaffolds or ladders, the removal of human-made debris by non-mechanized means which does not destroy woody vegetation, the placement of temporary construction supports, and the placement of utility lines over or under a previously authorized, currently serviceable [existing] paved roadway surface[.] ;
3. The erection of one or more temporary structures covering a combined total of 150 square feet or less of the transition area[; i]. For the purposes of this paragraph, a "temporary [structures] structure" means [sheds or fences which do not have] a shed or fence without a foundation, or [other structures that remain] a

structure that remains in the transition area for no more than [a total of] six months.

(c) [Projects or activities which are exempt from the requirement of a] Certain prohibited 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 [pursuant to] requirements under N.J.A.C. [7:7A-2.7(b), (c) and (d) shall also be] 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[. These transition area exemptions are] , subject to the [same limitations as the corresponding freshwater wetlands permit exemptions. These limitations can be found] limits on freshwater wetlands exemptions at N.J.A.C. [7:7A-2.7] 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.

[(d) To confirm that an activity or project is exempt, an exemption letter may be requested from the Department through the procedures established for freshwater wetlands permit exemptions in N.J.A.C. 7:7A-2.9 , including submittal of the fee specified at N.J.A.C. 7:7A-16.]

7:7A-2.7 [7:7A-6.3] [Determination of transition] Transition areas due to [the presence of] freshwater wetlands on adjacent property

(a) [Any person engaging in prohibited activities in a transition area without Department approval shall be in violation of the Act and this chapter. A transition area may be located on a property even though the freshwater wetlands adjacent to that transition area are located on a different property (see N.J.A.C. 7:7A-6.1(h)).] 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 transition area is required on a parcel, where freshwater wetlands may exist on other nearby parcels, a person may follow the procedures at (c) below or follow those procedures at (b)1 through 6 below as applicable:

1. Locate any freshwater wetlands that may be within 150 feet of the subject parcel property lines and any freshwater wetlands that may be within 50 feet of the subject parcel property lines. If there are no freshwater wetlands on the subject parcel or on land within 150 feet of the subject parcel property line, no transition areas exist on the subject parcel.

2. If there are freshwater wetlands on neighboring land within 150 feet of the parcel boundary, determine if they are classified as freshwater wetlands of ordinary resource value as specified in N.J.A.C. 7:7A-2.5. If a determination of classification by the Department is desired, a letter of interpretation classifying any freshwater wetlands can be obtained from the Department pursuant to N.J.A.C. 7:7A-8. No transition area is required adjacent to ordinary resource value wetlands.

3. If any of the freshwater wetlands on neighboring land within 150 feet of the subject parcel boundary cannot be classified as ordinary, determine whether they are freshwater wetlands of intermediate or freshwater wetlands of exceptional resource

value as specified in N.J.A.C. 7:7A-2.5. If a determination of classification by the Department is desired, a letter of interpretation, including a notice of classification, classifying any freshwater wetlands can be obtained from the Department pursuant to N.J.A.C. 7:7A-8.

4. If the freshwater wetlands on the subject parcel or within 150 feet of the subject parcel property boundary are freshwater wetlands of exceptional resource value, a transition area exists on the subject parcel. In order to determine the size and shape of the transition area, obtain a delineation of the freshwater wetlands on neighboring land within 150 feet of the subject parcel boundary and determine the shape and size of the standard transition area on the subject parcel according to N.J.A.C. 7:7A-6.1(d).

i. To avoid the necessity of delineating exceptional resource value freshwater wetlands on other properties, a person may ensure compliance with transition area requirements arising from freshwater wetlands on other properties by refraining from prohibited activities on the subject parcel within 150 feet of the property boundary.

5. If there are freshwater wetlands of intermediate resource value on land within 50 feet of the subject parcel boundary, a transition area exists on the subject parcel. In order to determine the size and shape of the transition area, obtain a delineation of the freshwater wetlands on neighboring land within 50 feet of the subject parcel boundary and determine the shape and size of the standard transition area on the subject parcel according to N.J.A.C. 7:7A-6.1(e).

i. To avoid the necessity of delineating intermediate resource value freshwater wetlands on other properties, a person may ensure compliance with transition area requirements arising from freshwater wetlands on other properties by refraining from prohibited activities on the subject parcel within 50 feet of the property boundary.]

(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 prohibited activities within 150 feet of the site's property line.

(c) [6.] It may be necessary to obtain written permission from adjacent property owners to investigate their land [to] within 150 feet of the [subject parcel] site's boundary. [If a transition area waiver or letter of interpretation is needed, the applicant shall provide written notice to adjacent landowners that the Department may conduct an onsite field inspection as part of the application process. This notification shall be included as part of the notification process pursuant to N.J.A.C. 7:7A-7.6(a)7v, Application contents for transition area permits; N.J.A.C. 7:7A-8.3(a)10iv, Application for a letter of interpretation; N.J.A.C. 7:7A-9.5(b), Application for Statewide general permit authorization; or N.J.A.C. 7:7A-11.1(b)9, Application contents.

(c) Instead of following the procedures at (b)1 to 6 above, a person may ensure compliance with transition area requirements arising from freshwater wetlands on other properties by refraining from prohibited activities on the subject parcel within 150 feet of the subject parcel property line.]

(Agency note: Appendix A, which contains a diagram of a transition area, is recodified at proposed N.J.A.C. 7:7A-2.5, with no changes.)
[Appendix A – Example of a transition area adjacent to a freshwater wetland. Depicted are a plan and elevational view.
Figure 1 - Transition Area
Appendix B (Reserved)]

7:7A-2.8 [7:7A-2.7] 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.

(b) [(a)] The farming, ranching, and silviculture exemptions in [(b) and] (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 at 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 and half has not, the half that has not been actively farmed would not be considered to be part of an established, ongoing farming operation and would therefore not be eligible for the farming exemption;
4. Clear cutting of a non-cultivated, wooded wetland area is not covered by the exemptions unless it is part of the normal harvesting of forest products performed in accordance with a written approval from the State Forester; 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 year of normal rainfall, 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 Federal manual.

(c) [(b)] Subject to the limitations of this section, the following activities, when part of an established, ongoing farming, ranching or silviculture operation, on properties which have received or are eligible for a farmland assessment 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 [permit,] or open water fill permit, or transition area [permit] 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[;] .

[i.] For the purposes of this paragraph, "minor drainage" means:

i. [(1)] 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. [(2)] 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 these activities and the discharge occur in waters which are in established use for such agricultural and silvicultural wetlands crop production;

iii. [(3)] 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; [or]

iv. [(4)] 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 formation 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. [(5)] 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 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 [which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area]. Any discharge of dredged or fill material into the wetlands or State open waters incidental to the construction of any such structure or waterway requires a freshwater wetlands or State open water permit, and will not be considered minor drainage[.] ;

2. Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches, provided that such facilities are for farming, ranching or silvicultural purposes and do not constitute a change in use. Any [spoil] 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; and
3. (No change.)

(d) [(c)] Normal harvesting of forest products in accordance with a forest management plan approved by the State Forester 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. 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.

(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) [(d)] 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 [the requirements of the Act until the State assumes the Federal 404 program. These activities may need Federal 404 permits and/or a WQC]:

1. [Projects (as defined in N.J.A.C. 7:7A-1.4)] A project for which a preliminary site plan or subdivision [applications have] 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, [1988] 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 [. To qualify for an exemption under this N.J.A.C. 7:7A-2.7(d)1, a project

must have received preliminary approval (as defined in N.J.S.A. 40:55D-6) of a subdivision or site plan. Sketch plat approval, a classification determination, or any other types of approvals referred to in the Municipal Land Use Law (e.g., building permits, variances or conditional use approval) is not sufficient to make the project eligible for an exemption under this N.J.A.C. 7:7A-2.7(d)1.] ; and

2. [Projects (as defined in N.J.A.C. 7:7A-1.4)] A project for which a preliminary site plan or subdivision [applications as the term is used] application, as defined in N.J.S.A. 40:55D-1 et seq. [) have been] , was submitted to the local authorities prior to June 8, 1987 and was subsequently approved. [If a project meets all criteria under this subsection to qualify for an exemption, except that the project has not yet received municipal approval, the Department will issue a letter certifying that the qualifying application was filed prior to June 8, 1987 and the project will receive an exemption upon receipt of preliminary approval from the municipality.] To qualify for an exemption under this [N.J.A.C. 7:7A-2.7(d)2] paragraph, an application for preliminary approval must have been in proper form, must have been accompanied by all plans, data and information called for by the local land use ordinance and by statute [for either a subdivision or site plan, as the case may be], and thus must have been in fact complete prior to June 8, 1987. [An application for sketch plat approval, classification determination, or any of the other types of approvals referred to in the Municipal Land Use Law (e.g., building permits, variances or conditional use approval) is not sufficient to make the project eligible for an exemption under this N.J.A.C. 7:7A-2.7(d)2;
3. Projects for which permit applications have been approved and Individual permits have been issued by the United States Army Corps of Engineers prior to July 1, 1988 , for projects which would otherwise be subject to State regulation on or after July 1, 1988. Such project shall be governed only by the Federal Act, and shall not be subject to any additional or inconsistent substantive requirements of the Act; provided, however that upon the expiration of a permit issued pursuant to the Federal Act any application for a renewal thereof shall be made to the appropriate regulatory agency.]

(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. [(e) The activities listed in (d)1 and 2 above] A project listed in (f) above shall no longer be exempt from [the requirement of a freshwater wetlands permit or open water fill permit] 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 [, the] :
   i. The change would void the preliminary approval [. In addition, a significant change will be deemed to have been made if the change, while not voiding the approval,] ; 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.] (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.] (2) The change [in the project as approved by the local authorities,] would [result in more than a de minimus] increase [in] 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, 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.

[(f) Projects for which preliminary site plan or subdivision applications have been approved prior to July 1, 1989 shall not require transition areas.

(g) Activities authorized under United States Army Corps of Engineers Nationwide Permits prior to July 1, 1988 shall not require a freshwater wetlands permit from the Department provided the property owner can demonstrate that a Nationwide Permit provided authorization for a particular site and use prior to July 1, 1988.]

(h) If any discharge of dredged or fill material resulting from the activities exempted by this section contains any toxic pollutant listed under section 307 of the [CWA] 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) If the USEPA's regulations providing for the delegation to the State of the Federal wetlands program conducted pursuant to section 404 of the Federal Act require a permit for any of the activities exempted by this section, the Department shall require a permit for those activities so identified by the USEPA upon assumption of the Federal program. The exemptions in (d)1 and 2 and (f) above shall be void as of the date of assumption by the Department of the Federal 404 program unless all requisite permits or concurrences with Federal permits were received from the United States Army Corps of Engineers prior to July 1, 1988 and remain valid, in which case the exemption will still be valid. Upon expiration of a permit issued pursuant to the Federal Act any application for renewal shall be made to the appropriate regulatory agency. The Department shall not require the establishment of a transition area as a condition of any renewal of a permit issued pursuant to the Federal Act prior to July 1, 1988.

1. The Department will not require a permit or waiver pursuant to the Act to allow the completion of individual buildings, structures or other improvements, which are already

in "advanced stages of construction," as defined in N.J.A.C. 7:7A-1.4, prior to the date of assumption. In addition to the completion of buildings, structures or other improvements, the Department will allow the completion of their appurtenant improvements. An applicant seeking to complete improvements which are in "advanced stages of construction" prior to the date of assumption shall submit the following documentation to the Department: a valid building permit (where legally applicable), and/or a valid ACOE permit for those activities regulated under the 404 program. In addition, the applicant shall submit any of the following proofs if available and applicable: documentation that the local construction official has completed the inspection listed at N.J.A.C. 5:23-2.18(b)1i(2) or (b)1i(3) for foundations of structures; reports from the municipal engineer documenting inspections of road bed construction; billing receipts documenting the completion of the above construction activities; or any other evidence documenting construction activities prior to the date of assumption.]

(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.

7:7A-2.9 [7:7A-2.8] Geographic areas exempted from [freshwater wetlands] permit and/or waiver requirement

(a) Regulated activities in [the following geographic] areas [shall not require a freshwater wetlands permit, State open water fill or transition area permit] 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 [. However, upon assumption of the 404 program, the discharge of dredged or fill material into Waters of the United States in the following areas may require a 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. [:

1. Areas under the jurisdiction of the Hackensack Meadowlands Development Commission pursuant to N.J.S.A. 13:17-1 et seq.; and
2. Areas]

(b) The discharge of dredged or fill material in a freshwater wetlands or State open water under the jurisdiction of the Pinelands Commission [pursuant to N.J.S.A. 13:18A-1 et seq.] 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. [In addition] 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) 894-9342 or through its website at www.state.nj/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) [(b) Activities] 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. [shall not require a freshwater wetlands or open water fill permit] are not subject to this chapter, but may require other State and/or Federal approvals.

7:7A-2.10 [7:7A-2.9] Exemption letters

(a) A person with a project or activity which qualifies for an exemption under this subchapter may obtain a letter from the Department certifying that an activity is exempt [from the Act and this chapter]. The letter will be based on the information required by this section, and will be void if the information submitted is not complete and accurate, if the approval upon which it was based becomes invalid for any reason, or if the project or activity is not carried out as represented in the submittal(s) to the Department [upon which the letter is based]. This exemption will remain valid for the duration of the approval upon which it was based [or until the State's assumption of the Federal 404 program, whichever comes first].

(b) To [obtain] apply for an exemption letter[, the] for a farming, silviculture or ranching exemption under N.J.A.C. 7:7A-2.8(c), an applicant shall submit the following [shall be submitted]:

1. [For a farming, silviculture or ranching exemption pursuant to N.J.A.C. 7:7A-2.7(a):
   i.] Certification of farmland assessment eligibility under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq. [(]The Department will accept a copy of the applicant's tax bill showing farmland assessment to document this requirement[)];
2. [ii.] A [brief] description of the activities for which the exemption is requested, including the total area covered, the types of farming, silviculture, or ranching, best management practices currently employed or to be employed and the length of time the operation has been ongoing; [and]
3. [iii.] The fee specified in N.J.A.C. 7:7A-[16] 11; and

4. Any other information reasonably necessary for the Department to determine if the applicant is eligible for the exemption, as listed in the Department's application checklist for the exemption letter.

[2. For]

(c) To apply for an exemption letter for a forest products harvesting exemption pursuant to N.J.A.C. [7:7A-2.7(c)] 7:7A-2.8(d), an applicant shall submit the following:

1. [i.] A copy of a forest management plan approved by the State Forester which includes the size of the site, the length of time required to complete the project, and a [brief] detailed description of the activities [involved] to take place in wetlands, transition areas, and/or State open waters, including the best management practices to be employed; and
2. [ii.] The fee specified in N.J.A.C. 7:7A-[16] 11; and
3. Any other information reasonably necessary for the Department to determine if the applicant is eligible for the exemption, as listed in the Department's application checklist for the exemption letter.

(d) [3. For] To apply for an exemption letter for a transition area exemption pursuant to N.J.A.C. [7:7A-2.7(f)] 7:7A-2.8(f), an applicant shall submit the following:

1. [i.] A folded copy of the preliminary local approval of the site plan or subdivision, including a copy of the site plan or subdivision itself and a copy of the resolution approving the site plan or subdivision;
2. A letter from a municipal official with knowledge of and authority over the approval, including the following:
   i. A statement that the site plan or subdivision approval is still within the period of protection from zoning changes provided for in the Municipal Land Use Law; or if the period of protection has expired, that there have been no changes to the municipal land use ordinances since the approval that would prohibit construction of the project; and
   ii. A statement that the municipal approval that forms the basis for the exemption is still valid;
3. [ii.] The fee specified in N.J.A.C. 7:7A-[16]11; and
4. Any other information reasonably necessary for the Department to determine if the applicant is eligible for the exemption, as listed in the Department's application checklist for the exemption.

[4. For a site plan or subdivision application exemption pursuant to N.J.A.C. 7:7A-2.7(d)2:

i. A copy of all of the application materials submitted to the municipality, proof that the municipality received them, and proof from the municipality that the application was under continuous consideration from the time of submittal (prior to June 8, 1987) to eventual preliminary approval or to the date of application to the Department for a letter of exemption. For the purposes of this subsection, "continuous consideration" shall mean that the application was either on the municipal board's agenda or was continued with the applicant's and the board's consent from the time of submittal until such time that a decision was made. An application that was withdrawn, or which received a final denial and subsequently resubmitted is not considered to be under "continuous consideration";

ii. A folded copy of the approved preliminary site plan or subdivision plan and a copy of the resolution approving the site plan or subdivision; and

(1) If a preliminary site plan or subdivision approval has not yet been received, the applicant shall submit a folded copy of the preliminary site plan or subdivision plat as submitted to the municipality prior to June 8, 1987, see N.J.A.C. 7:7A-2.7(d)2; and

iii. The fee specified in N.J.A.C. 7:7A-16.

5. For a Corps approved individual permit exemption pursuant to N.J.A.C. 7:7A-2.7(d)3:

i. A copy of the valid Corps permit;

ii. A folded copy of a site plan showing all activities authorized by the Individual permit; and

iii. The fee specified in N.J.A.C. 7:7A-16;

6. For an exemption letter under a Corps Nationwide permit exemption pursuant to N.J.A.C. 7:7A-2.7(f):

i. A copy of the valid Corps Nationwide permit authorization issued prior to July 1, 1988, or a copy of all information submitted to the Corps requesting authorization under an issued Nationwide permit, proof that the information was received by the Corps prior to June 10, 1988, and received subsequent authorization;

(1) The Department may inspect the site to confirm that all of the activities included in the exemption request are authorized by the applicable nationwide permits;

ii. A folded copy of a site plan showing all activities authorized by the Nationwide permit and a statement regarding how each activity meets the criteria of the approved Nationwide permit; and

iii. The fee specified in N.J.A.C. 7:7A-16.]

(Agency note: All hearings and appeals provisions are proposed to be consolidated and recodified at N.J.A.C. 7:7A-1.7.)

[7:7A-2.10 Hearings and appeals

The applicant or other affected party, if aggrieved by the Department's decision on a exemption request, may request a hearing on this decision pursuant to N.J.A.C. 7:7A-2.7.]

(Agency note: Provisions for individual permits, currently codified at N.J.A.C. 7:7A-3, are proposed for recodification, with minor clarifying changes, at N.J.A.C. 7:7A-7. The letter of interpretation provisions below at N.J.A.C. 7:7A-3 are proposed for recodification, with major rewording and organizational changes, from existing N.J.A.C. 7:7A-8.)

SUBCHAPTER 3 [8] LETTERS OF INTERPRETATION

[7:7A-8.1 Purpose
(a) A person proposing to engage in a regulated activity in a freshwater wetland and/or open water, or in a regulated activity which requires a transition area waiver, or desiring the information for other purposes, may request from the Department a letter of interpretation (LOI) to establish either the presence or absence, of freshwater wetlands, State open waters or transition areas or the verification of the boundary of wetlands, open waters, and/or transition areas on a project site. The information provided by this letter then may be used in applying for a permit from the Department, for activities proposed in a freshwater wetland, State open water, or transition area.

(b) In addition to the information, in (a) above if the subject property has wetlands within or adjacent to its boundaries, or transition areas located within its boundaries, a resource value classification will be provided with the letter of interpretation.

(c) A letter of interpretation only provides information on the location or presence of wetlands, open waters, and/or transition areas and does not grant an approval to the applicant to conduct any regulated activities.

7:7A-8.2 Types of letters of interpretation
(a) Various types of letters of interpretation are available from the Department, depending on the type of information requested by the applicant, the size of the right-of-way or size of the parcel (based on municipal tax block and lot), or the project (based on the proposed limits of disturbance) for which the letter will be issued. The types of letters of interpretation are as follows:

1. Presence or absence determination: The Department will issue an LOI determining whether any freshwater wetlands, State open waters or transition areas exist on a right-of-way or parcel (limits defined by municipal tax block and lot boundaries or ROW description). This LOI will not determine the location of these features, but only whether they are present and the resource value classification if wetlands are present. This LOI will be issued for any size parcel.
2. Footprint of disturbance/Presence or absence determination: The Department will issue an LOI determining only the presence or absence of wetlands, State open waters or transition areas for projects which have proposed limits of disturbance totally contained within an area of one acre or less. The limits of disturbance of the proposed project shall be flagged in the field and indicated on an out bound survey. The Department may at its discretion require that the limits of disturbance be surveyed upon completion of the field inspection. The project limits shall include all possible disturbances, either temporary or permanent in nature, that are a result of the proposed regulated activities listed in N.J.A.C. 7:7A-2.3, Prohibited activities, and N.J.A.C. 7:7A-6.2, Regulated activities in transition areas. Examples of activities that shall be indicated on the plans include, but are not limited to, the following: clearing of vegetation, grading or

earth work, construction of any buildings, location of wells and septic systems, placement of any impervious surfacing for walkways, driveways, or parking lots, and any landscaping.

4. Regulatory line delineation: The Department will issue a letter of interpretation, delineating the limits of any wetlands, State open water or transition areas present on a parcel or right of way of one acre or less, whose limits are defined by municipal tax block(s) and lot(s) boundaries or ROW description. The Department may require that the wetlands line be surveyed upon completion of the field inspection.
5. Regulatory line verification: The Department will issue a letter of interpretation verifying an applicant's delineation of the boundaries of a wetland, open water and/or transition area present on parcels or rights-of-way over one acre in size. The limits of the parcel or right of way must be defined by municipal tax block(s) and lot(s) boundaries or ROW description.]

(Agency note: the application provisions at N.J.A.C. 7:7A-8.3 below are proposed for deletion here and consolidation with other application provisions at proposed N.J.A.C. 7:7A-10.)

[7:7A-8.3 Application for letters of interpretation

(a) The application for a letter of interpretation shall include the applicable fee for the review and processing of a letter of interpretation application specified at N.J.A.C. 7:7A-16.2 and three copies of the following information:

1. Name and address of owner(s) of the property, municipality, county, block and lot number(s) or ROW description;

2. A folded out-bound survey of the property or a folded site plan, if available. If the applicant is applying for a presence or absence determination pursuant to N.J.A.C. 7:7A-8.2(a)1, a tax map may be substituted to satisfy this requirement. The survey or site plan should include all natural or human-made features such as structures, fences, streams, ponds, tree lines, etc. In addition, the corners of the property boundary shall be visibly flagged and/or staked in the field to facilitate the onsite inspection;

3. A copy of the current municipal tax map for the subject property;

4. A copy of the appropriate county road map or other local street map clearly indicating the location of the subject property;

5. A folded copy of the appropriate portion of a U.S. Geologic Survey Quadrangle Map for the parcel site with the boundaries of the parcel (defined by tax block and lot) or project (limits of disturbance) clearly outlined, and a determination of the State Plane Coordinates for the center of the parcel. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the end-points of those projects which are 1999 feet or less, and for those projects which are 2000 feet and longer, additional coordinates at each 1000-foot interval;

6. A copy of the appropriate United States Department of Agriculture, Soil Conservation Service County Soil Survey sheet, with the boundaries of the subject parcel (defined by tax block and lot) or project (limits of disturbance) clearly outlined. The sheet number of the Soil Survey shall be included;

7. For the copies of the applications submitted to the Department, clear color photographs of the property (a minimum of four views is recommended) with a description and the location of each view;

8. Verification that a certified mail notice with return receipt requested (white receipt or green card is acceptable) and a complete copy of the request for a letter of interpretation including all materials required by this subsection, have been forwarded to the clerk of the municipality in which the parcel or project is located;

9. Verification that certified mail notice with return receipt requested (white receipt or green card is acceptable) has been forwarded to the environmental commission, or any public body with similar responsibilities, the planning board and the municipal construction official of each municipality, and the planning board of each county in which the parcel or project is located and landowners within 200 feet of the legal boundary line of the subject property or properties. Applicant must also provide a list of landowners within 200 feet. The written notices satisfying this item and item 9 above may be filed concurrently with notices required pursuant to N.J.S.A. 40:55D-1 et seq. (The Municipal Land Use Law), but should be mailed no sooner than two working days before the application package is delivered to the Department. This will allow ample time for the application to be processed to accommodate public review. The written notice shall include, at a minimum, the following information and statement:

i. The name(s) and address(es) of the property owner(s);

ii. The property location described by block(s) and lot(s), municipality, county, and street address;

iii. A description of the proposed project or the reason for applying for a letter of interpretation; and

iv. The following statement:

"This letter is to provide you with legal notification that the referenced property owner is applying to the New Jersey Department of Environmental Protection and Energy, Land Use Regulation Element for a letter of interpretation."

A letter of interpretation is a legal document that establishes either the presence or absence or limits of wetlands, open water or transition areas on a subject property as defined at N.J.S.A. 13:9B-1 et seq. The width of the transition area adjacent to a wetland is determined by the resource value classification of the wetland. This information is also provided by a letter of interpretation. If any of these features are present on a parcel the Department will regulate many aspects of development on those areas as defined in N.J.A.C. 7:7A-1.4, Regulated activities.

The complete letter of interpretation application package can be reviewed at either the municipal clerk's office or by appointment at the Land Use Regulation Element office at the address listed below. The Department welcomes comments and any information that you may provide concerning the presence of wetlands, open water or transition areas on the referenced parcel. Written comments should be submitted within 15 days of receiving this letter. Comments will be accepted until the Department makes a decision on the application. Please submit your written comments along with a copy of this letter to:

New Jersey Department of Environmental Protection and Energy
Land Use Regulation Element
Bureau of Regulation
CN 401
5 Station Plaza
Trenton, New Jersey 08625
att: (County in which the property is located) Section Chief

As part of the Department's review of this application, Department personnel may perform a site inspection on your property. This site inspection will involve only land

within 150 feet from the applicant's property line. This site visit will involve a visual inspection and possibly minor soil borings using a 4" diameter hand auger. The inspection will not result in any damage to vegetation or any improvements on your property.

"The Department will notify the environmental commission, the planning board of the municipality and the municipal construction official of the Department's determination in the letter of interpretation.";

v. If the proposed project involves a linear facility such as a pipeline or road of more than .5 miles, instead of notifying all landowners within 200 feet of the property(ies) lines, the applicant shall give public notice by publication of a display advertisement. The advertisement shall be a minimum of four column inches and be published in at least one newspaper of local circulation and one of regional circulation in the municipality. In addition, notice shall be given to owners of all real property within 200 feet of any above surface structure related to the linear facility, such as pumping stations, treatment plants, power substations, grade separated interchanges or similar structures. This does not include utility support structures or conveyance lines.

10. Unconditional written consent by the owner of the subject property to allow access to the site by representatives or agents of the Department for the purpose of conducting a site inspection or survey of the freshwater wetlands, State open waters or transition areas thereon; and

11. A fee pursuant to N.J.A.C. 7:7A-16, as indicated on the printed fee schedule which is available from the Department.

(b) In addition to the information required in (a) above, the following information shall be submitted depending on the type of letter of interpretation requested in the application:

1. For a letter of interpretation for a footprint of disturbance/presence or absence determination pursuant to N.J.A.C. 7:7A-8.2(a)2:

i. The limits of all disturbance of any proposed regulated activities, including grading, shall be clearly indicated and labeled on an outbound survey with a scale of one inch equals no more than 50 feet. These limits must encompass no more than one acre in total. In addition, the project limits shall be visibly flagged and/or staked in the field with numbered flags and referenced by matching numbers on the out-bound survey. The flags and/or stakes shall be set in relation to known points and landmarks if available so that the limits can be reestablished. The Department may at its discretion require that the limits of disturbance be surveyed upon completion of the field inspection.

2. For a letter of interpretation for a regulatory line verification pursuant to N.J.A.C. 7:7A-8.2(a)4:

i. The applicant shall provide a folded out-bound survey or folded site plan of the property. The scale of the survey shall be one inch equals no more than 100 feet. If the subject parcel is located in either Middlesex or Mercer County or north of these counties, the survey must include topography depicting contours at no greater than five foot intervals. For counties south of Middlesex and Mercer, the survey must include topography depicting, at a minimum, two foot contours.

(1) The proposed wetlands and/or open waters boundary must be clearly indicated and labeled on the out-bound survey. The boundary must be accurate enough to allow Department personnel to locate the wetland boundary in the field. A surveyed line will only be required after the line has been verified by the Department and only for properties of five acres or more;

(2) The locations of all soil borings or pits, if applicable, shall be indicated on the survey and numbered. Soil logs should be presented with an indication of the depth to the seasonal high water table. Soil borings must be to a minimum depth of 24 inches on transects perpendicular to the wetlands boundary starting in the definite wetlands area and moving towards the uplands. In wetlands with atypical characteristics, or in wetlands which have been disturbed by human activities or as otherwise deemed appropriate, the Department may require deeper borings as needed;

(3) Vegetative species, recorded at soil boring locations, and classified using United States Fish and Wildlife Service categories as listed under "R/IND" and "NAT-IND" (Regional and National Indicators) columns in the "National List of Plant Species that Occur in Wetlands: 1988-New Jersey" and amendments thereto, compiled by the USFWS. United States Army Corps of Engineers (Corps), USEPA and the United States Soil Conservation Service;

(4) The wetlands and/or open water boundary line shall be visibly flagged and/or staked in the field with numbered flags, placed no greater than 75 feet apart, and referenced by matching numbers on the out-bound survey. The flags and/or stakes are to be set in relation to known points and landmarks if available so that the boundary can be re-established;

(5) Name of the person who prepared the proposed wetland and/or open water boundary.]

(Agency note: the substance of the provisions at N.J.A.C. 7:7A-8.4 below is relocated at proposed N.J.A.C. 7:7A-3.1.)

[7:7A-8.4 Onsite inspections

(a) For properties greater than one acre in size, the Department shall require an applicant for a letter of interpretation to submit to the Department an onsite wetlands delineation using the three-parameter method to determine or verify the location of the freshwater wetland boundary. The line shall be subject to approval and verification by the Department.

(b) If the Department determines that onsite inspection by the Department is necessary, the Department shall conduct an inspection, and the time specified in this subchapter for issuance of the letter of interpretation shall be extended by 45 days.

(c) Depending upon the specific project location and its proximity to documented hydrologic indicators, and other available information and documentation, the Department may issue a letter of interpretation without conducting a site inspection.]

(Agency note: provisions at N.J.A.C. 7:7A-8.5 through 8.7 below are proposed for recodification at N.J.A.C. 7:7A-3.5(c), and N.J.A.C. 7:7A-3.6(a), (b), and (c).)

[7:7A-8.5 Local review

The Department, in determining the presence or absence of freshwater wetlands, State open waters and transition areas and the location of their boundaries if they are present, shall consider comments filed by municipal and county governments and interested citizens. Comments filed by the clerk, environmental commission or any public body with similar responsibilities and planning board of a municipality or county, or municipal construction official will be actively considered as part of all determinations. Written comments should be submitted to the Department within 15 days of receiving

notice. Comments will be accepted until the Department makes a decision on the application.

7:7A-8.6 Effect of a letter of interpretation

A person who receives a letter of interpretation pursuant to this subchapter shall be entitled to rely on the determination of the Department, concerning the present or absence, or the extent, of freshwater wetlands and/or State open waters, for a period of five years unless the letter of interpretation is determined to have been based on inaccurate information, in which care it shall be void.

7:7A-8.7 Reissuance of a letter of interpretation

A letter of interpretation may be extended beyond the five year time period, but not to exceed five years from the original expiration date. Requests for extensions shall be made in writing to the Department before the letter has expired and shall include the file number, a copy of the originally approved plans, and fee as specified at N.J.A.C. 7:7A-16.2. Applicants will be required to submit a new application if an extension is not applied for prior to the expiration date of the letter of interpretation. The term of the letter may be extended provided that the information upon which the original letter was based remains valid.]

(Agency Note: The substance of the following sections, N.J.A.C. 7:7A-8.8 and 8.9, has been relocated and consolidated with other application review requirements at N.J.A.C. 7:7A-12.)

[7:7A-8.8 Effect of non-issuance of a letter of interpretation within time allotted

(a) Within 20 days after receipt of a request for a letter of interpretation, the Department may require the submission of any additional information necessary to issue the letter of interpretation.

(b) If no additional information is requested, the Department shall issue a letter of interpretation within 30 days after receiving the request.

(c) If additional information is requested by the Department in order to issue a letter of interpretation, the Department shall issue a letter of interpretation within 45 days after receipt of the information sufficient to declare the application complete.

(d) Any person who requests a letter of interpretation pursuant to the provisions of the Act and this chapter, and does not receive a response from the Department within the deadlines imposed in this subchapter, shall not be entitled to assume that the site of the proposed activity which was the subject of the request for a letter of interpretation is not in a freshwater wetland or a transition area.

(e) A person who requests a letter of interpretation and does not receive a response within the above deadlines may directly apply for a freshwater wetlands permit. In the event that a letter of interpretation is not issued within the deadlines imposed in this subchapter, the letter of interpretation fee will be applied to a permit application fee at the applicant's request.]

(Agency note: the substance of the provisions below at N.J.A.C. 7:7A-8.9 is relocated at proposed N.J.A.C. 7:7A-12.6.)

[7:7A-8.9 Cancellation and resubmission of applications

If an application is not complete for final review within 60 days of a request for additional information, the Department shall send a letter canceling the application and requiring the application for a freshwater wetlands permit or transition area waiver. A new application will be required to reactivate the Department's review. If the applicant sends the Department a letter documenting good cause for not supplying the requested information within the 60 day period the Department will grant an automatic extension of thirty days. The Department will grant additional 30-day extensions upon receiving a written request for such extension from the applicant.]

(Agency note: the hearings and appeal provisions below have been consolidated at N.J.A.C. 7:7A-1.7.)

[7:7A-8.10 Hearings and appeal

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

(b) Before requesting an adjudicatory hearing, the applicant or other affected party shall make a good faith effort to resolve any dispute arising during the letter of interpretation process with the project review officer.

(c) If the good faith efforts provided in (b) above do not resolve the dispute, the applicant or other affected party may submit a request for an adjudicatory hearing to the Department in writing at the following address:

Office of Legal Affairs
Attention: Adjudicatory Hearing Request
Department of Environmental Protection and Energy
CN 402
Trenton, New Jersey 08625-0402

(d) The applicant or other affected party shall submit the written request under (c) above within 30 days of the Department's decision or the date on which the decision is published in the DEPE Bulletin, whichever is later. Failure to submit the written request within the allotted time shall operate as a waiver of any right to an adjudicatory hearing.

1. Upon receipt of such a request, the Commissioner may refer the matter to the Office of Administrative Law, which shall assign an administrative law judge to conduct a hearing on the matter in the form of a contested case hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

2. Within 45 days of receipt of the administrative law judge's decision, the Commissioner shall affirm, reject, or modify the decision.

3. The Commissioner's action shall be considered final agency action for the purposes of the Administrative Procedure Act, and shall be subject only to judicial review as provided in the Rules of Court.]

<u>7:7A-3.1 Basic LOI information</u>

(a) A letter of interpretation (LOI) provides the Department's official determination of one or more of the following:

1. Whether there are any freshwater wetlands, transition areas, and/or State open waters present on a site or portion of a site;
2. Where the boundaries of freshwater wetlands, transition areas and/or State open waters are located on a site; and/or
3. What is the resource value classification, under N.J.A.C. 7:7A-2.4, of freshwater wetlands on a site.

(b) A letter of interpretation does not grant approval to conduct any regulated or prohibited activities. The sole function of a letter of interpretation is to provide or confirm information about the presence or absence, boundaries, and/or resource value classification of freshwater wetlands, transition areas, and/or State open waters.

(c) The Department issues the following three types of LOIs:

1. A presence/absence LOI, in which the Department determines whether any freshwater wetlands, transition areas, and/or State open waters exist on a site or on a portion of a site (also called a footprint of disturbance LOI). See N.J.A.C. 7:7A-3.2 for further details regarding presence/absence LOIs;
2. A line delineation LOI, in which the Department delineates the boundary lines of freshwater wetlands, transition areas, and/or State open waters for an applicant. See N.J.A.C. 7:7A-3.3 for further details regarding line delineation LOIs; and
3. A line verification LOI, in which the Department confirms or modifies a delineation proposed by the applicant. See N.J.A.C. 7:7A-3.4 for further details regarding line verification LOIs.

(d) If an area with hydric soils has been drained, for example for farming purposes, through the use of drainage structures or features 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 year of normal rainfall, 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 Federal manual.

(e) Each LOI that indicates the presence of freshwater wetlands will state the resource value classification of the wetlands under N.J.A.C. 7:7A-2.4 and will specify the width of the transition area. However, in some cases, seasonal conditions make it difficult to determine the resource value classification of a wetland. For example, if there has been a past sighting of a wood turtle (an endangered species) in the area, and an LOI application is submitted in December when the turtles are hibernating, Department staff cannot perform an adequate survey for wood turtles until they come out of hibernation in late March or early April. In such a case, the Department will notify the applicant that seasonal conditions do not permit an accurate assessment of resource value, and shall give the applicant the option to accept an exceptional resource value classification, or to wait for the LOI until the Department can determine the resource value of the wetland.

(f) The Department shall issue an LOI within the applicable time period below:

1. If the Department does not request additional information regarding an LOI application under N.J.A.C. 7:7A-12.1(c)4, within 30 days after receiving the application;
2. If the Department requests additional information regarding an LOI application under N.J.A.C. 7:7A-12.1(c)4, within 45 days after receipt of information sufficient to declare the application complete;
3. If the applicant chooses to wait for a determination of resource value classification under (e) above, as soon as the Department determines that the resource classification of the wetlands can be definitively determined; and
4. If the Department conducts a site inspection, the time set forth in this subsection for issuance of the letter of interpretation shall be extended by 45 days.

(g) In some cases, the Department will issue an LOI for a portion of a site, also called a footprint of disturbance. Special application requirements will apply to such an LOI, in order to ensure that the portion of the site is clearly marked on the plan and on the ground.

(h) The Department shall not issue an LOI if the Department determines that the information submitted in the application for the LOI is inaccurate. In such a case, the applicant may provide corrected information upon the Department's request, or may apply directly for a permit without obtaining an LOI. If the applicant applies for the permit without first obtaining an LOI, the wetland delineation will be performed as part of the permit review process.

(i) In order to ensure that a delineated wetlands boundary can be located in the future after the LOI is issued, an LOI applicant shall provide the Department with a survey of any approved delineated wetlands boundary line. The survey shall be submitted after the Department inspects the site and approves the delineation as marked on the site with flags or other markers. The issued LOI will reference the surveyed line. The Department may waive the survey requirement if the applicant demonstrates that the extent of wetlands on the site can be easily determined in the future without a survey, so that the expense of a survey is not warranted. For example, the Department may waive the survey requirement if an entire site is covered completely with freshwater wetlands.

(j) If an LOI covers only a portion of a site, the applicant shall provide, in addition to the survey required at (i) above, a survey of the boundaries of the portion of the site that are covered by the LOI. Like the survey required at (i) above, the survey shall be submitted after the Department inspects the site and approves the delineation as marked on the site with flags or other markers.

7:7A-3.2 Presence/absence LOI

(a) A presence/absence LOI identifies whether any freshwater wetlands, State open waters or transition areas exist on a site, or on a portion of a site (footprint of disturbance). A presence/absence LOI also provides the resource value classification for any wetlands on the site.

(b) A presence/absence LOI does not identify the boundaries or location of any freshwater wetlands, transition areas, and/or State open waters found within a site or portion thereof. To obtain an LOI indicating the location or the boundaries of freshwater wetlands, transition areas, and/or State open waters, an applicant must apply for a line delineation LOI under N.J.A.C. 7:7A-3.3, or a line verification LOI under N.J.A.C. 7:7A-3.4.

(c) The Department shall issue a presence/absence LOI for either of the following:

1. An entire site, as defined at N.J.A.C. 7:7A-1.4, regardless of its size; or
2. A portion of a site, also known as a footprint of disturbance, provided the portion is no larger than one acre.

(d) The Department shall issue a presence/absence LOI for more than one portion of a site, provided that:

1. Each portion is no larger than one acre;
2. The applicant submits a separate application and fee for each portion; and
3. No more than three presence/absence LOIs shall be issued for a single site under this subsection.

7:7A-3.3 Line delineation LOI

(a) A line delineation LOI identifies the boundaries of any freshwater wetlands, transition areas, and/or State open waters on a site that is one acre or smaller, and identifies the resource value classification of any freshwater wetlands on the site. For a line delineation LOI, the applicant need not submit a delineation. Rather, the Department will inspect the site and delineate the boundary lines of any freshwater wetlands, transition areas, and/or State open waters on the site.

(b) The Department shall issue a line delineation LOI for a site, as defined at N.J.A.C. 7:7A-1.4, that is one acre or smaller. The Department shall not issue a line delineation LOI for a site larger than one acre, or for a portion of a site.

7:7A-3.4 Line verification LOI

(a) A line verification LOI identifies the boundaries of any freshwater wetlands, transition areas, and/or State open waters on a site, and the resource value classification of any freshwater wetlands on the site. For a line verification LOI, the applicant must submit a proposed delineation of wetlands, transition areas, and/or State open waters, which the Department will confirm or modify.

(b) The Department shall issue a line verification LOI for either of the following:

1. A site, as defined at N.J.A.C. 7:7A-1.4, regardless of its size; or
2. A portion of a site, if all of the following criteria are met:
   i. The site is publicly owned;
   ii. The site is larger than 10 acres;
   iii. The portion is one acre or smaller; and

iv. The portion is bounded by easily identifiable, permanent landmarks such as roadways or streams.

7:7A-3.5 Application for a letter of interpretation

(a) An applicant for a letter of interpretation shall follow all application procedures and information requirements at N.J.A.C. 7:7A-10, Application contents and procedures.

(b) The Department shall review an application for a letter of interpretation using the procedures at N.J.A.C. 7:7A-12, Department review of an application.

(Agency note: the substance of the provision below is relocated from existing N.J.A.C. 7:7A-8.5.)
(c) The Department, in reviewing an application for an LOI, shall consider comments filed by municipal and county governments and interested citizens. Comments should be submitted to the Department in writing within 15 days after the commenter receives notice of the LOI application, to ensure adequate time for the Department to fully consider them. However, comments will be accepted until the Department makes a decision on the application.

(Agency note: the provisions below are recodified, with minor clarifying changes that do not affect meaning, from existing N.J.A.C. 7:7A-8.6 and 8.7. Changes from the existing text are indicated.)
[7:7A-8.6 Effect of a letter of interpretation]

7:7A-3.6 Effect, duration, and extension of a letter of interpretation

(a) A person who [receives] is issued a letter of interpretation pursuant to this subchapter shall be entitled to rely on the determination of the Department, concerning the [present] presence or absence, or the extent of freshwater wetlands and/or State open waters, for a period of five years from its issuance, unless the letter of interpretation is determined to have been based on inaccurate information, in which [care] case it shall be void.

[7:7A-8.7 Reissuance of a letter of interpretation]

(b) [A] The term of a letter of interpretation may be extended [beyond the five year time period] , provided that the information upon which the original letter was based remains valid, but shall not [to] exceed five years from the original expiration date.

(c) Requests for extensions shall be made in writing to the Department before the letter of interpretation has expired and shall [include the file number, a copy of the originally approved plans and fee as specified at N.J.A.C. 7:7A-16.2] be subject to the application requirements at N.J.A.C. 7:7A-10. Applicants will be required to submit a new application if an extension is not applied for prior to the expiration date of the letter of interpretation. [The term of the letter may be extended provided that the information upon which the original letter was based remains valid.]

(Agency note: The provisions proposed below set forth general provisions that apply to general permits. They are found in the existing rules at N.J.A.C. 7:7A-9.1, 9.2(b) and (c), and 9.3, and 9.4, and are recodified here with changes. The general permits themselves, which are found in the existing rule at N.J.A.C. 7:7A-9.2, are recodified at N.J.A.C. 7:7A-5 with substantial changes. Changes from the existing provisions are indicated.)

SUBCHAPTER 4 [9.] GENERAL PROVISIONS FOR GENERAL PERMITS

7:7A-4.1 [7:7A-9.1] [General standards for issuing Statewide] Department issuance of general permits

(a) This section details [the process for the issuance of new Statewide General permits and the readoption of previously issued Statewide] how the Department will adopt General permits [(] except for [Statewide] general permits numbers 6 and 7 [). The remaining sections in this subchapter detail the process for authorizing various activities under the issued Statewide general permits. Before issuing or reissuing] . To adopt a [Statewide] general permit, the Department will [propose] publish a draft [Statewide] general permit [in the form of] as a rule proposal pursuant to the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. In addition [to these public notice and comment procedures], the Department will send a copy of the draft general permit to USEPA, [and will issue a public notice meeting the requirements of N.J.A.C. 7:7A-11.1(a)] and will follow the procedures for EPA comment found at N.J.A.C. 7:7A-12.2.

(b) The Department may [issue Statewide general permits] adopt a general permit only if all of the following conditions are met:

[1. The activities meet the limitations specified in (c)1 below;]

1. [2.] After conducting an environmental analysis, the Department determines that the regulated activities will cause only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment, and will cause only minor impacts on freshwater wetlands and State open waters;
2. [3. After determining] The Department determines that the activity will [be in conformance with] conform to the purposes of the Freshwater Wetlands Protection Act, and will not violate the Federal Act; and
3. [4. After providing] The Department provides public notice and opportunity for a public hearing.

(c) In addition to the conditions [in N.J.A.C. 7:7A-13.1, N.J.A.C. 7:7A-9.3, and the applicable requirements of N.J.A.C. 7:7A-13.2] required by this subchapter, each general permit shall contain limitations as [follows:

1. (No change.)
2. A precise description of the geographic area to which the general permit applies, including, when appropriate, limitations on the type(s) of water(s) or wetlands where operations may be conducted, to ensure that the requirements of (a) above are satisfied.] necessary to comply with Federal regulations governing the Department's assumption of the Federal 404 program at 40 CFR §233.21(c).

(d) The Department may modify [a] an adopted general permit [issued pursuant to this subchapter] as it applies to a particular project by adding special conditions [applicable to a particular project or activity] which must be met in order to qualify for authorization under the general permit.

(e) The Department may [rescind a] repeal an adopted general permit and thereafter require individual permits for activities previously covered by the general permit, if it finds that the general permit no longer meets the standards of the Freshwater Wetlands Protection Act and this chapter.

(f) The Department shall review each general permit [a minimum of] at least every five years. This review shall include public notice and opportunity for public hearing. Upon this review the Department shall [either] modify, [reissue or revoke all] readopt or repeal each general [permits] permit.

(g) If a general permit is not modified or [reissued] readopted in accordance with (f) above within five years of publication of its adoption in the New Jersey Register, it shall automatically expire.

7:7A-4.2 Using a general permit to authorize specific activities

(a) To use a general permit to authorize regulated activities or activities described at N.J.A.C. 7:7A-2.6 as prohibited activities, an applicant shall submit an application for a general permit authorization, using the application procedures for all permits and waivers set forth at N.J.A.C. 7:7A-10.

(b) Each general permit specifies whether it covers activities in freshwater wetlands, transition areas, State open waters, or a combination thereof. An authorization issued under a general permit that covers activities in freshwater wetlands satisfies the requirement for a freshwater wetlands permit. An authorization issued under a general permit that covers activities in State open waters satisfies the requirement for an open water fill permit. An authorization issued under a general permit that covers activities in a transition area satisfies the requirement for a transition area waiver.

(c) Usually, a general permit is the only wetlands approval required for activities in freshwater wetlands in New Jersey. However, if an activity is located in non-delegable waters, as defined at N.J.A.C. 7:7A-1.4, both a general permit authorization from the Department and a Federal 404 program approval from the ACOE may be required.

(Agency note: The substance of the provisions at (d) and (e) below is found in the existing rule at N.J.A.C. 7:7A-9.2(b) and (c). The provisions have been reworded with no change in meaning.)
(d) The Department shall deny an application for a general permit authorization and require an application for an individual permit if the Department finds that:

1. Additional permit conditions added under N.J.A.C. 7:7A-4.1 and/or 13.2 would not be sufficient to ensure compliance with this chapter and other applicable laws; or

2. Special circumstances make an individual permit necessary to ensure compliance with the Freshwater Wetlands Protection Act, this chapter, any permit or order issued pursuant thereto, or the Federal Act.

(e) The limits on disturbance in each general permit apply to the entire site upon which activities authorized under the general permit occur. An applicant shall not segment a project or its impacts by applying for general permit authorization for one portion of the project and applying for an individual permit for another portion of the project. Similarly, an applicant shall not segment a project or its impacts by separately applying for general permit authorizations for different portions of the same project.

(f) Unless otherwise specified, the limits on disturbance under a general permit apply to total disturbance, including both temporary and permanent disturbance.

(g) If a regulated activity is not covered by any general permit or combination of general permits, an individual freshwater wetlands or open water fill permit must be obtained under N.J.A.C. 7:7A-7 in order to authorize the activity under this chapter. If a prohibited activity is not covered by any general permit or combination of general permits, a transition area waiver must be obtained under N.J.A.C. 7:7A-6 in order to authorize the activity under this chapter.

[N.J.A.C. 7:7A-9.2 Statewide General Permit Authorizations]
(Agency note: the list of adopted general permits found in the current rule at N.J.A.C. 7:7A-9.2(a) has been recodified, with substantial changes and additions, at N.J.A.C. 7:7A-5 below.)

(Agency Note: The following two subsections are proposed to be relocated, with clarifying changes that do not change their meanings, at proposed N.J.A.C. 7:7A-4.2.)
[(b) The Department may require an application for an Individual permit if the Department finds that additional permit conditions would not be sufficient, or that special circumstances make this action necessary to ensure compliance with the Act, this chapter, any permit or order issued pursuant thereto, or the Federal Act. In addition, when the regulated activity(ies) of a project exceed either the individual limits allowed under the issued Statewide general permits or the cumulative limit of stacked Statewide general permits, then the impacts of the entire project shall require an Individual Permit and will be reviewed under the standards at N.J.A.C. 7:7A-3.

(c) Under no circumstances shall a project's impacts be segmented and a portion of the project submitted for review under Statewide general permits while the remainder of the project is submitted for review under an Individual Permit.]

(Agency Note: The substance of the following section is proposed for recodification here from N.J.A.C. 7:7A-9.3. Changes to the existing rule text are indicated.)
7:7A-4.3 [7:7A-9.3 Standards and] Conditions [for] that apply to all [Statewide] General Permit Authorizations

(a) [All regulated activities authorized under Statewide General Permits listed in N.J.A.C. 7:7A-9.2 are subject to the specific] A person acting under the authority of a general permit shall comply with:

1. The conditions listed under [each] the general permit [. In order to be authorized to conduct activities under these general permits, persons must comply with the] itself;
2. The standard conditions for all general permits set forth at (b) below;
3. [, as well as the conditions] The conditions for all permits at N.J.A.C. 7:7A-13[.1 and 13.2];
4. [, the procedures] The limits on the use of multiple general permits in N.J.A.C. 7:7A-[9.4] 4.4; and
5. If required under a particular general permit, mitigation pursuant to N.J.A.C. 7:7A-[14 where specified must be followed] 15.

(b) The following [standards must be met in order for a regulated activity to be authorized under the Statewide General Permits identified in N.J.A.C. 7:7A-9] conditions apply to all activities conducted under the authority of a general permit:

1. [The request for authorization to fill or modify wetlands or State open waters is] Activities performed under a general permit shall be associated with a proposed project. The Department shall not authorize activities under a general permit [or construction activity and is not solely being requested] for the purpose of eliminating a natural resource in order to avoid [future] regulation. For the purposes of this [specific] subsection, project shall mean the use and configuration of all buildings, pavements, roadways, storage areas and structures, and [the extent of] all [activities] associated activities [with the proposal];
2. (No change.)
3. [The regulated activity shall not jeopardize a threatened or endangered species and the activity shall not destroy, jeopardize, or adversely modify the historic or documented habitat of such species] The activities shall not jeopardize present or documented habitat for, or the continued existence of, a local population of a threatened or endangered species;
4. The activity will not occur in a component of either the Federal or State Wild and Scenic River System; nor in a river officially designated by Congress or the State Legislature as a "study river" for possible inclusion in either system while the river is in an official study status ; except that the activity may occur in these waters if approved by the National Park Service; [and]
5. The activity shall not adversely affect properties which are listed or are eligible for listing on the National Register of Historic Places. If the permittee, before or during the [course of] work authorized, encounters a probable historic property that [has not been listed or determined eligible for listing on the National Register, but which] may be eligible for listing in the National Register, the permittee shall immediately notify the Department and proceed as directed [by the Department.] ;

[(c) The following conditions shall be met in order for a regulated activity to be authorized under the Statewide General Permits identified in N.J.A.C. 7:7A-9:]

[1.] 6. Any discharge of dredged or fill material shall consist of clean, suitable material free from toxic pollutants (see [section 307 of the Federal Act] 40 CFR

401) in toxic amounts, and shall comply with all applicable Department rules and specifications regarding use of dredged or fill material;

[2.] 7. Any structure or fill authorized shall be maintained as specified in the construction plans;

[3. In order to protect the fishery resources and/or the spawning of the downstream resident fish population, any activity within or adjacent to a stream channel which may introduce sediment into the stream or cause the stream to become turbid is prohibited during the time frames listed below or any subsequent updates to this listing as provided by the New Jersey Division of Fish, Game and Wildlife. The total restriction period will not exceed six months:

Timing restrictions:

Stream Classification	Dates of Restriction
Trout Production general brook/brown rainbow trout	September 15-March 15
	February 1-April 30
Trout Maintenance	March 15-June 15
Trout Stocked	March 15-June 15
Anadromous	
American Shad -- For the Delaware River upstream of the Delaware Memorial Bridge, and for tidal Rancocas and Raccoon Creeks	April 1-June 30 and September 1-November 30
American Shad -- For the Delaware River from the Delaware Bay to the Delaware Memorial Bridge, and tidal Maurice River	March 1-April 30 and October 1-November 30
All other waterways classified for anadromous fish	April 1-June 30;
For waterways classified, on a case by case basis, as spawning areas for warm water fish	May 1-June 30.]

[4.] 8. During construction activities, all excavation must be monitored [to check] for the presence of acid-producing deposits [pursuant to N.J.A.C. 7:13-5.10 of the Flood Hazard Area Control Rules]. If any such deposits are encountered, the permittee shall implement the mitigation and disposal standards [described] in the Flood Hazard Area Control Act Rules at N.J.A.C. 7:13[-5.10 must be implemented. If any such deposits are encountered,] and shall establish an annual post-planting monitoring program [shall be established] to ensure [that] the reestablishment of vegetation in temporarily disturbed areas[,] . The plantings shall have a minimum 85 percent plant survival and coverage rate after two complete growing seasons. [Failure] If the plantings fail to achieve this survival rate, the Department will require [implementation of] the permittee to implement additional corrective measures [and/or reevaluation of the acid producing soils mitigation proposal to ensure the 85 percent survival rate requirement.] ;

[5.] 9. The activity will not result in a violation of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 or implementing rules at N.J.A.C. 7:13[-1.] ;

10. If activities under the general permit will result in a ¼ acre or greater increase in impervious surfaces, the stormwater resulting from the general permit activities shall be treated in accordance with the water quality requirements in the Department's Flood Hazard Area Control Act rules at N.J.A.C. 7:13-2.8;

11. If activities under the general permit involve excavation or dredging, the applicant shall use an acceptable disposal site for the excavated or dredged material. No material shall be deposited or dewatered in freshwater wetlands, transition areas, State open waters or other environmentally sensitive areas. The Department may require testing of dredged material if there is reason to suspect that the material is contaminated. If any dredged material is contaminated with toxic substances, the dredged material shall be removed and disposed of in accordance with Department-approved procedures;

12. The amount of rip-rap or other energy dissipating material shall not exceed the minimum necessary to prevent erosion, as calculated under the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90;

13. [6.] 13. Best management practices, as defined at N.J.A.C. 7:7A-1.4, shall be followed whenever applicable[.] ;

14. If the general permit activities are subject to the Department's Water Quality Management Planning rules at N.J.A.C. 7:15, the activities shall be consistent with those rules and with the applicable approved Water Quality Management Plan (208 Plan) adopted under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.; and

15. The timing requirements at (c) below shall be met.

(c) In order to protect the fishery resources and/or the spawning of the fish population, any activity which may introduce sediment into a stream or cause a stream to become turbid is prohibited during the time periods listed in Table A below:

Table A[1]
RESTRICTED TIME PERIODS FOR WATERS WITH FISHERY RESOURCES

Water body or water body classification	Time period (inclusive) during which activities are prohibited
Brook trout production waters; Brown trout production waters; and All other trout production waters except Rainbow trout production waters	September 15 through March 15
Rainbow trout production waters	February 1 through April 30
Trout-stocked waters; Trout maintenance waters; and An area within one mile upstream of a trout-stocked or a trout maintenance water	March 15 through June 15
All unimpeded tidal waters open to the ocean, including: Coastal bays; Delaware Bay and River up to any impassable barrier; and Water bodies identified as anadromous migratory pathways.	April 1 to June 30
Water bodies that support general game fish	May 1 to June 30
Water bodies that support pickerel	Ice out to April 30
Water bodies that support walleye	March 1 to May 30
Water bodies used by American Shad for migrations in the Delaware River:	
- Mouth of Delaware Bay to Delaware Memorial Bridge; and - Tidal Maurice River.	March 1 through June 30; and October 1 through November 30
- Delaware Memorial Bridge to Trenton; and - Tidal portions of Rancocas, Raccoon, and Crosswicks Creeks.	March 1 through June 30; and September 1 through November 30
- Delaware River from Trenton to New York State line.	April 1 through June 30; and September 1 through November 30

[1] Note that the Delaware River Basin Commission (DRBC) imposes additional timing restrictions on certain activities in waters under DRBC jurisdiction. Contact the U.S. Fish and Wildlife Service's River Basin Coordinator through the DRBC at (609) 883-9500 for information on these additional timing restrictions.

(d) The Department may reduce, extend or otherwise modify the timing requirements listed at (c) above on a case-by-case basis provided:

1. The applicant demonstrates that the impact to the fishery resource will be less if the regulated activities occur during the timing restriction rather than during an unrestricted period;
2. The combined effects of the timing restrictions above would restrict activities to less than six months per year. In such a case, the Department may allow regulated activities to occur for up to six months if the applicant demonstrates to the Department that proper steps will be taken that will minimize the impact to the fishery resources;
3. The Department determines that regulated activities must occur during periods when local schools are not in session in order to avoid increased risks or excessive delays to school buses or vans; or
4. The Department determines that, due to the nature of the project or an unusual circumstance on site, the timing restriction must be modified or extended in order to prevent a substantial adverse impact to the fishery resource.

(e) If an activity will take place in a non-delegable water, as defined at N.J.A.C. 7:7A-1.4, and the activity requires approval from the ACOE under the Federal 404 program, the activities authorized under the general permit shall not begin until the permittee obtains the required Federal 404 program approval.

(f) No activity is authorized under a general permit without a written approval from the Department, except for the following, which are subject to the notice and application requirements set forth in the applicable provisions cited below:

1. Application of herbicides to manage vegetation in a utility line right-of-way, as authorized under general permit 1 at N.J.A.C. 7:7A-5.1(c);
2. Maintenance of an off-stream stormwater management facility, as authorized under general permit 1 at N.J.A.C. 7:7A-5.1(d);
3. Repair of a malfunctioning septic system, as authorized under general permit 25 at N.J.A.C. 7:7A-5.25; and
4. Minor stream cleaning activities, as authorized under general permit 26 at N.J.A.C. 7:7A-5.26.

7:7A-4.4 [7:7A-9.4] Use of multiple [Statewide] General Permits

(a) The Department may [approve] authorize activities under [the authority of more than one Statewide General Permit onsite as defined at N.J.A.C. 7:7A-1.4, Definitions. No activity is authorized by a Statewide General Permit without an approval letter from the Department indicating that a Statewide General Permit authorizes the particular activity at the particular location.

(b) The Department may issue an approval letter, authorizing activities covered under a single [Statewide] General Permit, for more than one location on a single property, provided that the total area of wetlands or State open waters disturbed or modified by activities covered by the [Statewide] General Permit does not exceed the maximum allowed under that general permit.

(c) The Department may approve activities covered by different general permits onsite, provided that the] one or more general permits on a single site, provided that:

1. The individual limits of each general permit are complied with. If activities under one general permit are conducted in more than one place on a site, the total disturbance caused by all activities at all locations onsite under that general permit shall be summed in order to determine if the limits in the general permit are met; and [that the]
2. The total combined area of wetlands, [and] State open waters, and transition areas disturbed or modified [does] on the site under general permits 2, 6, 7, 8, 10A, 10B, 11, 12, 13, 14, 17, 18, 19, 21, 22, 24, 25, and 26 does not exceed one acre with the exception of [Statewide general permit number 17. For example, the Department could approve onsite a minor road crossing disturbing 0.25 acres, stormwater outfall structures disturbing a total of 0.25 acres, and the filling of 0.5 acres of a ditch.] the following:
   i. Disturbance of State open waters as part of a lake dredging project under general permit 13 at N.J.A.C. 7:7A-5.13. However, disturbance of wetlands or transition area in the lake or for access to the dredging project shall be counted toward the one acre limit in this subsection; and
   ii. Disturbance of State open waters as part of a stream cleaning project under general permit 26 at N.J.A.C. 7:7A-5.26. However, disturbance of wetlands or transition area in the stream or for access to the stream cleaning project shall be counted toward the one acre limit in this subsection.

(b) The Department may authorize activities under a general permit more than once 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) An individual permit will be required for review of all regulated impacts onsite (as defined at N.J.A.C. 7:7A-1.4) if the cumulative impact of one acre will be exceeded by any combination of Statewide General Permits, or if the individual limits of Statewide General Permits 2, 6, 7, 8, 10, 11, 19, 21, or 24 will be exceeded by the proposed activities.

(e) For Statewide General Permits at N.J.A.C. 7:7A-9.2(a)1, 3, 4, 5, 12, 14, 16 and 17, the Department may issue approvals for any number of activities on a single property covered by any number of these general permits. Later activities on the same property will also be eligible for approval under these Statewide general permits.]

(d) [(f) Statewide] In addition to the limits above, the Department shall not authorize activities under general permit numbers 13, 15, or 18 [, and 20 shall be authorized onsite only] more often than once every five years on a single site.

(Agency note: the substance of the provisions deleted below are proposed to be consolidated with other application requirements at N.J.A.C. 7:7A-10.)
7:7A-4.5 [7:7A-9.5] Application for [activities] authorization to act under [Statewide] 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. Application of herbicides to manage vegetation in a utility line right-of-way under N.J.A.C. 7:7A-5.1(c);
2. Maintenance of an off-stream stormwater management facility under N.J.A.C. 7:7A-5.1(d);
3. Repair or modification of a malfunctioning individual subsurface sewage disposal system under N.J.A.C. 7:7A-5.25; or
4. Minor stream cleaning under N.J.A.C. 7:7A-5.26.

[(a) Except for Statewide General Permit number 25 pursuant to N.J.A.C. 7:7A-9.2(a)25, a person proposing to engage in an activity covered by a Statewide General Permit shall provide a fee pursuant to N.J.A.C. 7:7A-16 and three copies of the following information to the Department at least 30 working days prior to commencement of work. Applicants seeking authorization pursuant to N.J.A.C. 7:7A-9.2(a)25, shall comply with the notification procedures found at (f) below:

1. An application form completed as per the instructions for a Statewide general permit;
2. Any information necessary to determine whether the conditions of the general permit will be satisfied, including, but not limited to, the following information:
   i. Complete wetlands delineation including field delineation, folded plans at an appropriate scale, and wetlands field data sheets including soils and vegetation information (no formal report is required) for the area to be disturbed under the Statewide general permit application;
   ii. A copy of the appropriate portion of the U.S. Geologic Survey Quadrangle (USGS) Map for the project site and a determination of the State Plane Coordinates for the center of the project. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the end-points of those projects which are 1,999 feet or less, and for those projects which are 2,000 feet and longer, additional coordinates at each 1,000 foot interval;
   iii. For projects that are located in municipalities listed below at (a)2iii(1) and all amendments thereto, pursuant to (a)2iii(2) below, the applicant shall submit a signed statement certifying that the proposed activities will not result in any direct or indirect adverse impacts to Swamp pink (Helonias Bullata) or its documented habitat; and]

(Agency note: the list below, containing municipalities with documented records of Swamp Pink, or Helonias Bullata, is proposed to be deleted from the rule and will be relocated as an appendix to the application checklists. The list will also be updated to reflect the addition of new municipalities in which Swamp Pink has been found.)

[(1) Municipalities which have documented record of Helonias Bullata:
Atlantic County

Egg Harbor Township
Town of Hammonton
Mullica Township
Burlington County
Evesham Township
Maple Shade Township
Medford Township
Pemberton Township
Southampton Township
Woodland Township
Medford Township
Camden County
Berlin Township
Clementon Borough
Gibbsboro Borough
Gloucester Township
Haddonfield Borough
Lindenwold Borough
Pine Hill Borough
Pine Valley Borough
Runnemede Borough
Voorhees Township
Waterford Township
Winslow Township
Cape May County
Cape May Point Borough
Dennis Township
Lower Township
Middle Township
Upper Township
Cumberland County
Bridgeton City
Downe Township
Fairfield Township
Hopewell Township
Lawrence Township
Millville City
Stow Creek Township
Upper Deerfield Township
Vineland City
Gloucester County
Clayton Borough
Deptford Township
East Greenwich Township
Elk Township
Franklin Township
Glassboro Borough
Mantua Township
Monroe Township

Newfield Borough
Washington Township
Wenonah Borough
West Deptford Township
Woodbury Heights Borough
Woolwich Township
Mercer County
West Windsor Township
Middlesex County
East Brunswick Township
Edison Township
New Brunswick City
Sayreville Borough
Monmouth County
Brielle Borough
Colts Neck Township
Freehold Township
Howell Township
Wall Township
Morris County
Mount Olive Township
Randolph Township
Roxbury Township
Ocean County
Barnegat Township
Brick Township
Dover Township
Jackson Township
Lacey Township
Lakewood Township
Little Egg Harbor Twp.
Manchester Township
Plumsted Township
Stafford Township
Salem County
Alloway Township
Lower Alloways Township
Pittsgrove Township
Quinton Township
Upper Pittsgrove Township

(3) The Department will publish notice in the New Jersey Register of any amendments to the list at (a)2iii(1) above based upon updated information and make such information available at its offices and through the Office of Administrative Law.

4. Photographs of the portion of the property for which authorization is being requested.

(b) In addition, a person proposing to engage in an activity covered by a Statewide General Permit shall provide verification that a certified mail notice with return receipt

requested and a complete copy of the application has been forwarded to the clerk of the municipality and that a certified mail notice with return receipt requested (white receipts or green cards are acceptable) has been forwarded to the environmental commission, or any public body with similar responsibilities, municipal planning board, county planning board, municipal construction official, and landowners within 200 feet of the legal boundary lines of the property(ies) on which the proposed activity will occur. Applicant must also provide a list of landowners within 200 feet. The notice shall contain:

1. A description of the proposed activity;
2. A description of the location of the activity including county, municipality, lot(s), block(s), and a plan of the site detailing existing structures, wetlands boundaries and proposed structures or activities, or both; and
3. The following statement:

"This letter is to provide you with legal notification that the referenced property owner is applying to the New Jersey Department of Environmental Protection and Energy, Land Use Regulation Element for a Statewide general permit."

A Statewide general permit will allow the property owner to conduct certain limited activities in freshwater wetlands or State open waters.

The complete Statewide general permit application package can be reviewed at either the municipal clerk's office or by appointment at the Land Use Regulation Element office at the address listed below. The Department of Environmental Protection and Energy welcomes comments and any information that you may provide concerning the wetlands or open waters on the referenced parcel. Written comments should be submitted to the Department within 15 days of receiving notice. Comments will be accepted until the Department makes a decision on the application. Please submit your written comments along with a copy of this letter to:

New Jersey Department of Environmental Protection and Energy
Land Use Regulation Element
Bureau of Regulation
CN 401
5 Station Plaza
Trenton, New Jersey 08625
att: (County in which the property is located) Section Chief

As part of the review of this application, Department personnel may perform a site inspection on your property. This site inspection will involve only that area within a maximum of 150 feet from the border of the applicant's property. This site visit will involve a visual inspection and possibly minor soil borings using a 4" diameter hand auger. The inspection will not result in any damage to the vegetation or improvements on your property.

"The Department will notify your municipal environmental commission, planning board and the municipal construction official, as well as the county planning board of the Department's approval or denial of the Statewide general permit application."

(c) If the proposed project involves a linear facility such as a pipeline or road of more than .5 miles, instead of notifying all landowners within 200 feet of the property(ies) lines, the applicant shall give public notice by publication of a display advertisement. The advertisement shall be a minimum of four column inches and be published in at least one newspaper of local circulation and one of regional circulation in the municipality. In addition, notice shall be given to owners of all real property within 200

feet of any above surface structure related to the linear facility, such as a pumping station or treatment plant, power substations, grade separated interchanges or similar structures. This does not include utility support structures or conveyance lines.

(d) The Department, within 30 days of receipt of this notification, shall either return the package as incomplete or accept the application as administratively complete and notify in writing proposing to engage in the activity covered by a general permit as to whether they are covered by the Statewide General Permit, or whether an individual permit is required for the activity pursuant to (e) below. Activities begun or carried out without this written notification shall be a violation of the Statewide General Permit, the Act and this chapter. Issuance of authorizations shall be published in the DEPE Bulletin.]

(Agency note: the following provision is proposed for deletion because it repeats provisions found at proposed N.J.A.C. 7:7A-4.2.)
[(e) Upon receiving an application for a general permit, the Department may require that the owner apply for an individual permit. Cases where an individual permit may be required include, but are not limited to:

1. The activity has more than a minimal adverse environmental effect;
2. The cumulative effects on the environment of the authorized activities are more than minimal;
3. The applicant or project is not in compliance with the conditions of the general permit; or
4. Public comment indicates that the application does not meet general permit criteria.]

(Agency note: the substance of the following provision is proposed to be relocated at N.J.A.C. 7:7A-5.25.)
[(f) A person proposing to engage in activities pursuant to N.J.A.C. 7:7A-9.2(a)25, repair or alteration of malfunctioning individual subsurface sewage disposal systems, shall submit written notice containing a description of the proposed activities to the Department at least 30 days prior to commencement of work. This notification shall include a description and plan of the activities and their location including municipality, county, block, and lot; and an approval from the Board of Health or its designated agent for the proposed activities. If the Department fails to notify the applicant within 30 days of receiving the notification, the activity shall be deemed to have been authorized, to the extent that the activity does not violate other statutes or regulations then in effect, and subject to any standard terms and conditions pursuant to N.J.A.C. 7:7A-9.3.]

(Agency note: the hearings and appeal provisions at existing N.J.A.C. 7:7A-9.6 have been recodified and consolidated with other appeal provisions at proposed N.J.A.C. 7:7A-1.7.)
[7:7A-9.6 Hearings and appeal

An applicant or other affected party may request an administrative hearing on any decision to issue or deny an authorization made by the Department pursuant to N.J.A.C. 7:7A-12.7.]

<u>7:7A-4.6 Combined general permit authorization and flood hazard area permit</u>

(a) An applicant may obtain a combined freshwater wetlands general permit authorization and flood hazard area permit for an activity that is in a freshwater wetlands and also in an area regulated under the Department's Flood Hazard Area Control Act rules under the following provisions:

1. N.J.A.C. 7:7A-5.2A, authorizing an underground utility line;
2. N.J.A.C. 7:7A-5.10C, authorizing a minor road crossing;
3. N.J.A.C. 7:7A-5.11A, authorizing an intake or outfall structure;
4. N.J.A.C. 7:7A-5.20A, authorizing bank stabilization activities; and
5. N.J.A.C. 7:7A-5.26A, authorizing stream cleaning activities.

(b) The combined permit issued under this section shall constitute both the general permit authorization and the flood hazard area permit for the covered activities. However, if a project includes elements other than the activities covered by the combined general permit and flood hazard area permit, those elements may require a separate flood hazard area or freshwater wetlands approval.

(c) Application requirements for combined permits are set forth at N.J.A.C. 7:7A-10.7.

(Agency note: the provisions below have been consolidated with other provisions regarding the duration of permits and waivers, and have been relocated to N.J.A.C. 7:7A-13.3.)
[7:7A-9.7 Duration of permit authorizations
(a) Authorizations for Statewide general permits shall be effective for a fixed term not to exceed five years from the date of authorization.

(b) The term of an authorization shall not be extended beyond the maximum duration specified in this section. However, if necessary, an authorization may be renewed through the application process set forth in this chapter.

(c) If the term of the authorization exceeds the expiration date of the issued general permit, and the permit upon which the authorization is based is modified to include more stringent standards or conditions, or is not reissued, the applicant must comply with the requirements of the new regulations by applying for a new GP authorization or an Individual permit. For those applicants whose activities will no longer comply with the new regulations, if prior to the expiration date of the GP, the applicant is able to document that the activity was either under contract or under construction, the Department will allow the applicant one additional year, from the date of expiration of the issued general permit (not the authorization date), to complete the authorized activity. If the GP authorizing a particular activity is reissued without amendments, or with amendments expanding the authorized scope of activities, the authorization remains effective for the authorized five-year term.]

(Agency note: The substance of this section has been relocated, with changes, to proposed N.J.A.C. 7:7A-12.6).
[7:7A-9.8 Cancellation, withdrawal, resubmission and amendment of applications
(a) Applications may be cancelled by the Department; or withdrawn, amended, or resubmitted by an applicant.

(b) If an application is not complete for final review within 60 days of a request for additional information, the Department shall send a letter canceling the application and stating that the application will be purged from Department files and that a new application will be required to reactivate the Department's review. If the applicant sends the Department a letter documenting good cause for not supplying the requested information within the 60 day period the Department will grant an automatic extension of 30 days. The Department will grant additional 30-day extensions upon receiving a written request for such extension from the applicant.

1. All fees submitted with an application subsequently cancelled shall be non-refundable.

(c) An applicant may withdraw an application at any time in the application review process. All fees submitted with such applications are non-returnable when a significant portion of the review has been completed. In some cases however (see (d) below) the fees may be credited toward future applications.

(d) If an application is cancelled, denied or withdrawn, the applicant may resubmit an application for a revised project on the same site. The resubmitted application will be treated as a new application, although references may be made to the previously submitted application. A new fee will be required unless application is resubmitted within one year of the date of denial or withdrawal, in which case the original permit fee may be credited to the new application.

(f) A permit application may be amended at the applicant's discretion at any time as part of the permit review process. Copies of amendments and amended information shall be distributed by the applicant to the same person to whom copies of the initial application were distributed. All amendments to pending applications shall constitute a new submission and may at the Department's discretion require reinitiation of the entire review process.

7:7A-9.9 through 9.22 (Reserved.)]

(Agency note: provisions for general permit 23, found in the existing rule at N.J.A.C. 7:7A-9.23, are proposed for recodification, with no changes, at N.J.A.C. 7:7A-5.23.)

SUBCHAPTER 5 ADOPTED GENERAL PERMITS

[7:7A-9.2 Statewide General Permit Authorization

(a) Activities in freshwater wetlands and State open waters shall be authorized under the following Statewide General Permits and general permit 23, found at N.J.A.C. 7:7A-9.23, provided the activity complies with the requirements in (b) below; the conditions for all Statewide General Permits in N.J.A.C. 7:7A-9.3; and the Act, this chapter, and the Federal Act:]

7:7A-5.1 General Permit 1 – Maintenance and repair of existing features

[1. The] (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 [any] a previously authorized, currently serviceable structure, fill, roadway, [public] utility line, active irrigation or drainage ditch, or stormwater management facility lawfully existing prior to July 1, 1988 or permitted under [the Act, provided such activities do not deviate from plans of the original activity and further provided that] this chapter. General permit 1 does not cover transition areas because these activities are not prohibited 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 [has] shall not have been and will not be put to any use[s differing from those] 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 [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 application of herbicides to manage vegetation in a utility line right-of-way:

1. The activities shall be authorized under a valid permit issued by the Department's Pesticide Control Program under N.J.A.C. 7:30;
2. The application for authorization shall be subject to the public notice requirements at N.J.A.C. 7:7A-10.9, but shall not be subject to the other application requirements in N.J.A.C. 7:7A-10;
3. The Department shall process the application for authorization using the procedures at (e) below; and
4. 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 a permit authorizing the application of herbicides, issued by the Department's Pesticide Control Program.

(d) 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 {effective date of this rule}, the following shall apply:

1. The application for authorization shall be subject to the public notice requirements at N.J.A.C. 7:7A-10.9 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 (e) 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.

(e) Upon receipt of an application for authorization under (c) or (d) 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) or (d) above). If the Department so notifies the applicant, the time period in (e)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.

(f) 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.

7:7A-5.2 General Permit 2 – Underground utility lines

[2. Discharge of material for backfill or bedding for utility lines, provided there is no change in preconstruction elevation and bottom contours. Excess material must be removed to an upland disposal area. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. The activities allowed by this Statewide General Permit shall comply with the following conditions:

i. The activity encompasses no more than one acre of wetlands;

ii. The width of the area of disturbance within the right-of-way for the project is no more than 20 feet;
iii. The project is not located in a wetland of exceptional resource value;
iv. The upper-most 18 inches of any excavation is backfilled with the original soil material if feasible and otherwise with suitable material. The excavation must be backfilled to the preexisting elevation;
v. The area above the excavation is replanted in accordance with applicable BMPs with indigenous wetland species; and
vi. The activity is designed so as not to interfere with the natural hydraulic characteristics of the wetland and watershed;]

(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, a pump station connected to a sewer line, and/or an access road directly above certain utility lines.

(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, no Department approval is required under this chapter.

(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 one acre;
2. Permanently maintained clearing over the utility line shall be no wider than 20 feet unless a wider area is required by law;
3. An access road shall meet the criteria at (d) below;
4. 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;
5. 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;
6. The above ground portion of any sewage pump station that is located in freshwater wetlands, transition areas, and/or State open waters shall be no larger than 400 square feet; and
7. Except for an elevation change required for a sewage pump station, the activities shall not cause any change in preconstruction elevation of a freshwater wetland, transition area, or State open water.

(d) An access road shall be authorized under general permit 2 only if it meets all of the following criteria:

1. The applicant is a municipal utilities authority;
2. The access road is placed directly over a trunk main;
3. The applicant demonstrates that an access road in wetlands or transition area is necessary in order to obtain access to the underground utility line for maintenance;
4. The access road is located and constructed so that it will not impede the flow of ground or surface water;

5. The access road is located and constructed so as to minimize disturbance to wetlands, transition areas, and State open waters. For example, the access road shall be unpaved whenever possible;
6. The access road is not located in a State open water, or in a wetland in which the water table is at the ground surface; and
7. Mitigation is provided in accordance with N.J.A.C. 7:7A-15 for the disturbance caused by the access road and attendant features such as shoulders and embankments.

(e) 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;
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.

(f) 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.

(g) 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.

7:7A-5.2A Combined general permit 2 and flood hazard area permit

(a) If an activity authorized under general permit 2 also requires a flood hazard area permit under N.J.A.C. 7:13, the Department shall issue a combined flood hazard area permit and general permit 2 authorization for the project if the requirements of this section are met.

(b) An activity shall be eligible for a combined flood hazard area permit and general permit 2 authorization if it meets the requirements for authorization under general permit 2 at N.J.A.C. 7:7A-5.2 and also meets all of the following criteria:
1. The applicant demonstrates that alternatives will be used to minimize disturbance to wetlands, transition areas, and State open waters. Examples of such alternatives are jacking or directionally drilling the utility line under a stream, or attaching the utility line to the downstream side of an existing bridge or culvert;

2. The exact method of proposed construction is described on a site plan, including a timetable for the construction and details of the proposed soil erosion techniques. All trenching, diversionary channels or temporary piping of the channel must be indicated. The excavation of an open trench across a channel resulting in contact with flowing water is highly discouraged and shall be avoided wherever possible;
3. The top of any utility and its encasement is at least three feet below the lowest point in the channel at the location of the proposed crossing. On a case-by-case basis, the Department may allow a distance of less than three feet wherever this requirement is impractical, such as in an area with a solid rock channel bed;
4. The width of the construction trench within 50 feet of any channel is no more than 20 feet, unless the applicant demonstrates to the Department that a wider trench is necessary;
5. A pipe which conveys a fluid other than potable water is protected in one of the following ways:
   i. Encased within six inches of concrete;
   ii. Encased within a larger steel pipe;
   iii. Covered above by a stainless steel plate at least 0.25 inches thick, and provided with six inches of concrete encasement around the side and bottom of the pipe; or
   iv. Covered by at least four feet of stable material within the channel.
6. If a channel is present, the following standards are met, or the applicant demonstrates to the Department that these standards are impractical or that another configuration would pose less risk to life, property and the environment:
   i. All cables and pipes are placed horizontally under the entire channel and 10 feet beyond each top of bank;
   ii. The inclined portion of all cables or pipes approaching the channel has a slope no steeper than 50% (a ratio of two horizontal to one vertical);
   iii. The encasement extends under the entire channel and 10 feet beyond each top of bank;
   iv. All manholes are constructed at least 10 feet beyond each top of bank; and
   v. If an underground utility is proposed within 50 feet of the channel, the proposed disturbance shall be justified, the utility line is placed at least three feet below the invert of the channel and at least 10 feet beyond the top of banks.
7. Any manhole along a sanitary sewer line has a watertight cover;
8. The top of any manhole in a floodway is flush with the ground;
9. The top of any manhole in a flood fringe is flush with the ground wherever possible; and
10. After the utility line is installed:
    i. Any trench outside the channel is backfilled to the pre-excavation ground elevation;
    ii. Any trench within the channel is backfilled to the pre-excavation ground elevation and stabilized in a manner that mimics the characteristics of the natural channel as closely as possible; and
    iii. Any area over 300 square feet within the riparian buffer, from which vegetation is cleared, cut or removed, is replanted with indigenous, non-invasive vegetation and restored to its original condition; and
11. A cable laid directly on a channel bed meets the following standards:

i. The cable is laid within a channel that is sufficiently large so as not to be affected by the cable; and
ii. The cable is laid with enough slack so that it can be easily moved.

(c) If a utility line is jacked or directionally drilled underground, so that there is no surface disturbance of any area regulated under the Flood Hazard Area Control Act rules at N.J.A.C. 7:13, or of any freshwater wetlands, transition areas, or State open waters, no Department approval is required under this chapter or under N.J.A.C. 7:13.

(d) The combined permit provided for under this section shall be subject to the conditions for combined permits found at N.J.A.C. 7:7A-4.6. An application for the combined general permit 2 and flood hazard area permit shall meet the application requirements at N.J.A.C. 7:7A-10.7.

7:7A-5.3 General Permit 3 – Discharge of return water

(a) [3. Discharge] 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 for the discharge through freshwater wetlands and/or transition areas [provided the State has issued a site specific or generic certification (Water Quality Certificate) under section 401 of the Federal Act]. 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.

7:7A-5.4 General Permit 4 – Hazardous site investigation and cleanup

[4. All] (a) General permit 4 authorizes activities in freshwater wetlands, transition areas, and State open waters, [including work, discharges, and the construction or placement of structures,] which are undertaken [, authorized] by the Department or [otherwise] expressly approved in writing by the Department's Site Remediation Program, for the investigation, cleanup or removal of:

1. [hazardous] Hazardous substances as defined [by or pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq.] in the Department's rules governing hazardous substances at N.J.A.C. 7:1E, Appendix A; or
2. [pollutants] Pollutants, as defined [by] in the New Jersey Water Pollution Control Act [, N.J.S.A. 58:10A-1 et seq., provided the following conditions are met.] implementing rules at N.J.A.C. 7:14A.

[i. If the proposed cleanup activity is to take place in an exceptional resource value wetland, the Statewide General Permit authorization shall be issued only if the Department finds that there are no practicable alternatives to the investigation, cleanup and removal of the hazardous substances or pollutants that would involve less or no disturbance or destruction of wetlands or State open waters.]

[ii.] (b) There is no acreage limit on activities under general permit 4. However, [Mitigation] mitigation shall be performed [according to the procedures for mitigation at N.J.A.C. 7:7A-14] for all [disturbance or destruction] 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 [plan] proposal required under (b) above may be incorporated [as part of] into the document by which the Department approves the cleanup and/or it may be submitted as part of the [Statewide] General Permit [authorization] application. The [Statewide General Permit] Department shall not issue an authorization [will not be issued] under general permit 4 until the mitigation [plan is submitted and approved by the Element according to the standards at N.J.A.C. 7:7A-14.] 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.

(Agency note: existing general permit 5, which covers removal of abandoned vessels and other navigation obstructions, is proposed for deletion because it has never been used.)
[5. Minor work or temporary structures required for the removal for non-historic wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This Statewide General Permit does not authorize maintenance dredging, stream cleaning, shoal removal, or river bank snagging.]

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 redevelopment 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.

7:7A-5.6 General Permit 6 – Non-tributary wetlands

[6. Regulated] (a) General permit 6 authorizes regulated or prohibited activities in freshwater wetlands [(applicants should be advised that these wetlands may not qualify for filling under Nationwide permit 26 in areas below NGVD elevation 10)] transition areas adjacent to those wetlands, and/or State open waters [which] 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[, provided:] .

[i.] (b) [The activity would] Activities under general permit 6 shall not result in the loss or substantial modification of more than one acre of freshwater wetland, transition area, and/or State open waters[;] .

[ii. The activity will] (c) Activities under general permit 6 shall not take place in any of the following, nor in a transition area adjacent to the following:

1. An [a wetland of] exceptional resource value wetland, as [defined in] described at N.J.A.C. 7:7A-[2.5(a)1] 2.4;
2. [nor in] A State open [waters defined as] water that is a special aquatic site, as defined at N.J.A.C. 7:7A-1.4 ; [and

iii. The activity will not take place in wetlands designated as priority wetlands by the USEPA.]

3. USEPA priority wetlands;
4. A State open water that is larger than one acre; or
5. A vernal habitat, as defined at N.J.A.C. 7:7A-1.4.

(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.

7:7A-5.7 General Permit 7 – Human-made ditches or swales in headwaters

[7. Regulated] (a) General permit 7 authorizes activities in freshwater wetlands that are ditches of human construction or are swales, provided[:

i. They are located in] the ditch or swale is located in a headwater [areas;] . 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.

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

[ii. They are not an]

1. A ditch or swale that is, or is located within, an exceptional resource value wetlands, as [defined in] described at N.J.A.C. 7:7A-[2.5(a)1] 2.4; or

[iii. They are not designated a priority wetlands by the]

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.[;

iv. The activity would] (c) Activities under general permit 7 shall not result in either of the following:

1. The [the] loss or substantial modification of more than one acre of freshwater wetlands [or State open waters; and] ; or

[v. The proposed activity will not result in a]

2. A disruption of a surface water connection , resulting in [and] the isolation of [adjacent] 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.

7:7A-5.8 General Permit 8 – House additions

[8. The] (a) General permit 8 authorizes activities in freshwater wetlands and/or transition areas, necessary for the construction of additions or appurtenant improvements to [be constructed within 100 feet of] residential dwellings lawfully existing prior to July 1, 1988, provided that the improvements or additions require less than a cumulative surface area of 750 square feet of fill and/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.

(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 apply to all general permits.

(Agency note: existing general permit 9, which authorizes construction of certain roads approved prior to July 1, 1988, is proposed for deletion because all such roads have now been completed.)

[9. The construction of State or Federally funded roads which:

i. Were planned and developed in accordance with the "National Environmental Policy Act of 1969", the Federal Act, and Executive Order Number 53 (approved November 21, 1983); and

ii. Were the subject of an application made prior to July 1, 1988 to and were subsequently approved by the United States Army Corps of Engineers for an individual or general permit under the Federal Act, provided that:

(1) Upon expiration of a permit, any application for a renewal or modification thereof shall be made to the Department; and

(2) The Department shall not require transition areas as a condition of the renewal or modification of the permit.]

7:7A-5.9 General permit 9 – Airport sight line clearing

(a) General permit 9 authorizes the selective cutting of certain vegetation in freshwater wetlands and transition areas, at a public use aeronautical facility, as defined in the New Jersey Department of Transportation (NJDOT) rules at N.J.A.C. 16:54-1.3.

(b) General permit 9 authorizes the cutting of vegetation only as necessary to comply with the protected air space provisions for a public use aeronautical facility, mandated by the Federal Aviation Administration and set forth in the New Jersey Department of Transportation rules at N.J.A.C. 16:54-4.2(a)1iii.

(c) General permit 9 covers only activities necessary to enable an aeronautical facility to comply with New Jersey Department of Transportation rules. The cutting of vegetation in wetlands and/or transition areas as part of a project that increases the area of pavement or buildings at an airport is not authorized under general permit 9, and would require an individual permit under this chapter.

(d) In addition to meeting all applicable application requirements at N.J.A.C. 7:7A-10, an applicant for authorization under general permit 9 shall provide a certification from the Director of the Division of Aeronautics in the New Jersey Department of Transportation, containing:

1. A statement of how the airport meets the definition of a public use aeronautical facility, set forth at N.J.A.C. 16:54-1.3;
2. A description of the slope of unobstructed air space required under New Jersey Department of Transportation rules for the runway that is the subject of the application; and
3. A statement of why the proposed cutting of vegetation is necessary to bring existing operations into compliance with New Jersey Department of

Transportation rules, or to maintain the compliance of existing operations with those rules.

(e) The permittee shall minimize adverse environmental impacts as follows:

1. Activities shall be timed to minimize disturbance of threatened and endangered species. The Department will specify the required timing in the general permit authorization when issued;
2. The permittee shall leave all tree stumps, brush stumps, and root systems in place;
3. The permittee shall minimize disturbance of freshwater wetlands and transition areas through use of matting, equipment running on oversized tires, or other similar practices; and
4. Cut vegetation shall be disposed of in a manner that will minimize adverse environmental impacts on wetlands and transition areas, taking into consideration State Forest Fire Service requirements at N.J.S.A. 13:9-23 and/or other applicable laws.

(f) Activities under general permit 9 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.10 A General Permit 10A – Very minor road crossings

[10. Minor road crossing fills and expansion of existing road crossing fills including attendant features, both temporary and permanent, that are part of a single and complete project for crossing a freshwater wetland or State open water, provided that:

i. The crossing is bridged, culverted or otherwise designed to prevent the restriction of, and to withstand, expected high flows;

ii. The disturbance of any freshwater wetlands does not extend more than 50 feet on either side of the ordinary high water mark of State open waters. Where no State open waters are present, the total length of the disturbance or modification of freshwater wetlands caused by the crossing shall be no greater than 100 feet. The 50 or 100 foot crossing length limit does not apply to widening of existing roadways;

iii. The total area of freshwater wetlands and/or State open waters disturbed or modified does not exceed 0.25 acres;

iv. The total fill (gross) to be placed, per crossing, in State open waters does not exceed 200 cubic yards of fill below the top of bank or high water mark;

v. The crossing is designed to minimize disturbance and other detrimental effects upon freshwater wetland or State open waters through the use of best management practices including, but not limited to:

(1) Minimizing cartway, shoulder widths and side slopes of the roadway;

(2) Stabilizing all disturbed areas in accordance with the Standards for Soil Erosion and Sediment Control;

(3) Using suitable, clean, non-toxic fill material; and

(4) Designing the crossing so as not to impede fish passage, when a watercourse is present, by maintaining the existing gradient and bottom contours of the watercourse; using open arch or box culverts; and using single large open arches or culverts to span the watercourse.]

(a) General permit 10A authorizes the following activities in freshwater wetlands, transition areas, and/or State open waters:

1. Construction of one or more new road crossings, including attendant features such as shoulders, sidewalks and embankments;
2. Expansion, widening, or upgrading of one or more existing paved or unpaved roads or drives; and
3. Activities necessary to reduce horizontal curves in an existing paved road to comply with New Jersey Department of Transportation safety regulations.

(b) The Department shall issue a general permit 10A authorization only if the activities comply with the limits in one of the following scenarios:

1. Short crossing scenario:
   i. The disturbance of freshwater wetlands and/or State open waters is no longer than 100 feet for each crossing, as calculated under (e) below; and
   ii. The total cumulative disturbance of freshwater wetlands, transition area, and State open waters onsite under general permit 10A is one quarter acre or less; or
2. Long crossing scenario: The total cumulative disturbance of freshwater wetlands, transition area, and State open waters onsite under general permit 10A is one eighth acre or less. Under the long crossing scenario, the length of the crossing is not limited.

(c) If a proposed road crossing skirts along the edge of a wetland or transition area or touches the wetland or transition area, without actually crossing through the wetland or transition area, the applicant shall, in addition to meeting the requirements at (b) above, demonstrate in accordance with N.J.A.C. 7:7A-5.10B(d) that there is no alternative onsite location and/or configuration for the road crossing that would provide access to the developable upland with less adverse environmental impact.

(d) Activities under general permit 10A shall minimize environmental impact as follows:

1. The applicant shall design the crossing to ensure that fish passage is unimpeded during times when the water level is at its lowest, unless the applicant demonstrates that the water body is unsuitable for habitation by fish and will remain so for the foreseeable future. The applicant shall ensure fish passage by maintaining the existing gradient and bottom contours of the water body to the extent possible, and by using arches, culverts, or other structures that will ensure fish passage;
2. The applicant shall install cross drains or other devices to ensure that the crossing does not alter the hydrology of the freshwater wetlands and/or State open waters on either side of the crossing; and
3. The amount of rip-rap or other energy dissipating material used shall be the minimum necessary to prevent erosion, and shall not exceed 200 cubic yards of fill below the top of bank or high water mark, unless a larger amount is required in order to comply with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90.

(e) The length limit at (b)1 above applies to each separate road crossing on the site. The following apply to the calculation of the length of disturbance caused by a road crossing:

1. The length of the disturbance resulting from a crossing is measured along its longest dimension;
2. A crossing that connects more than two upland areas that are separated by the same wetland or State open water is considered one crossing. Thus, the total length of disturbance is the sum of all the lengths of crossing that traverse that particular wetland or water. For example, if a road crosses three arms of an irregularly shaped wetland, the total length of disturbance would be the sum of the lengths of all three crossings; and
3. If the road crosses State open waters with adjacent wetlands, the total length of disturbance is the sum of the disturbances in both the State open waters and the adjacent wetlands.

(f) Activities under general permit 10A shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

Figure 2
One Road Crossing That Crosses Two Fingers Of One Freshwater Wetland

Insert figures?

Figure 3
Two Road Crossings, Each Crossing A Different Freshwater Wetland

N.J.A.C. 7:7A-5.10B General permit 10B – Minor road crossings

(a) General permit 10B authorizes the following activities in freshwater wetlands, transition areas, and/or State open waters:

1. Construction of one or more new road crossings, including attendant features such as shoulders, sidewalks and embankments;
2. Expansion, widening, or upgrading of one or more existing paved or unpaved roads, including attendant features such as shoulders, sidewalks and embankments; and
3. Activities necessary to reduce horizontal curves in an existing paved road to comply with New Jersey Department of Transportation safety regulations.

(b) The Department shall issue a general permit 10B authorization only if all of the following criteria are met:

1. The applicant demonstrates in accordance with (d) below that there is no alternative onsite location and/or configuration for the road crossing that would provide access to the developable upland with less adverse environmental impact; and
2. The total area of freshwater wetlands, transition areas, and/or State open waters disturbed under general permit 10B shall not exceed one quarter of an acre.

(c) Activities under general permit 10B shall minimize environmental impact as follows:

1. The applicant shall design the crossing to ensure that fish passage is unimpeded during times when the water level is at its lowest, unless the applicant demonstrates that the water body is unsuitable for habitation by fish and will remain so for the foreseeable future. The applicant shall ensure fish passage by maintaining the existing gradient and bottom contours of the water body to the extent possible, and by using arches, culverts, or other structures that will ensure fish passage;
2. The applicant shall install cross drains or other devices to ensure that the crossing does not alter the hydrology of the freshwater wetlands and/or State open waters on either side of the crossing;
3. The amount of rip-rap or other energy dissipating material used shall be the minimum necessary to prevent erosion, and shall not exceed 200 cubic yards of fill below the top of bank or high water mark, unless a larger amount is required in order to comply with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90; and
4. The cartway, shoulder, and side slopes of the roadway shall be the minimum necessary for the crossing and shall not exceed the limits in the New Jersey Department of Community Affairs' Residential Site Improvement Standards at N.J.A.C. 5:21. If the project is not a residential development, the cartway, shoulder, and side slopes of the roadway shall be the minimum necessary for safety.

(d) In evaluating whether there is an alternative onsite location and/or configuration for a road crossing under (b)1 above, the Department shall make the presumptions at 1 through 4 below. However, these presumptions may be rebutted based on site-specific or unusual circumstances:

1. Disturbance of a non-transition area upland would have less adverse environmental impact than disturbance of a transition area, State open water or freshwater wetland;
2. Disturbance of a transition area would have less adverse environmental impact than disturbance of a freshwater wetland or State open water;
3. Disturbance of a freshwater wetland would have less adverse environmental impact than disturbance of a State open water;
4. Expansion or upgrading of an existing and currently serviceable drive or crossing would have less adverse environmental impact than placement of a new crossing; and
5. Placement of a new crossing in an area that is already significantly disturbed would have less adverse environmental impact than disturbance of a previously undisturbed wetland and/or State open water.

(e) Activities under general permit 10B shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

N.J.A.C. 7:7A-5.10C Combined general permit 10A and flood hazard area permit

(a) In cases listed at (b) below, a road crossing that meets the requirements for authorization under general permit 10A above and also requires a flood hazard area permit under N.J.A.C. 7:13 shall be eligible for a combined flood hazard area permit and general permit 10A.

(b) To be eligible for a combined permit under this section, all of the following criteria shall be met:
1. The road crossing meets all requirements for authorization under N.J.A.C. 7:7A-5.10A;
2. The road crossing meets all requirements for authorization under the Department's Flood Hazard Area Control Act rules at N.J.A.C. 7:13; and
3. Either of the following criteria is met:
   iii. The site of the road crossing is covered by a valid letter of interpretation showing the boundaries of any wetlands on the site, issued by the Department under N.J.A.C. 7:7A-3; or
   iv. The road crossing will result in disturbance of State open waters only, and will not involve regulated activities in a freshwater wetland or prohibited activities in a transition area, as described at N.J.A.C. 7: 7A-2.

(c) The combined permit provided for under this section shall be subject to the conditions for combined permits found at N.J.A.C. 7:7A-4.6. An application for the combined general permit 10A and flood hazard area permit shall meet the application requirements for combined permits at N.J.A.C. 7:7A-10.7.

[11. Construction of stormwater outfall structures and associated stormwater conveyance structures such as pipes, headwalls, rip-rap and other energy dissipation structures, provided the following conditions are met:

i. The structures are designed to minimize the area of freshwater wetlands or State open waters disturbance;

ii. The limit of disturbance or modification of freshwater wetlands or State open waters for any conveyance structures does not exceed 20 feet in width;

iii. The total area of freshwater wetlands or State open waters disturbed or modified does not exceed 0.25 acres;

iv. The facility is designed in accordance with the Standards for Soil Erosion and Sediment Control in New Jersey, promulgated by the New Jersey State Soil Conservation Committee, Division of Rural Resources, New Jersey Department of Agriculture. If applicable, the facility shall be designed in accordance with a soil erosion and sediment control plan approved by the appropriate Soil Conservation District. If no plan is required the applicant shall certify to the Department that the proposed facility is in accordance with the standards for Soil Erosion and Sediment Control;

v. All stormwater which is discharged into a freshwater wetland or State open water from an outfall constructed under this Statewide general permit is first filtered or otherwise treated outside of the freshwater wetland or State open water, to minimize sediment, pollutants, and any other detrimental effects upon the freshwater wetland or State open water. Detention basins, contour terraces and grassed swales are examples of pre-discharge treatment techniques which may be required by the Department. This Statewide General Permit does not authorize placement of detention facilities in freshwater wetlands or State open waters. The Department will take into consideration whether the outfall is part of a Regional Stormwater Management Plan already approved by the Department;

vi. The total amount of rip-rap or any other material used for energy dissipation at the end of the headwall placed in the freshwater wetland or State open water does not exceed 10 cubic yards per outfall structure;

vii. Excavated areas for the placement of conveyance pipes shall be returned to the pre-existing elevation using the original topsoil to backfill from a depth of 18 inches to the original grade and revegetated with indigenous wetland species (indigenous includes species found on a particular site as well as those found in a particular physiographic region of the State;

viii. Pipes used for stormwater conveyance through the wetlands shall be properly sealed with anti-seep collars at a spacing sufficient to prevent drainage of the surrounding wetlands and designed not to exceed the pre-existing elevation;

ix. If a detention basin is being proposed as the method of pre-treatment for water quality, routing calculations shall show that the basin has been designed for the one-year storm event according to the Stormwater Management Regulations (N.J.A.C. 7:8) and all subsequent amendments thereto; and

x. If a swale is being proposed to convey stormwater through the wetlands, profiles from the outlet to the receiving water body, cross-sections, and design support information shall show that the proposed swale will not result in drainage of the wetlands. Swales in wetlands will only be permitted where onsite conditions prohibit the construction of a buried pipe to convey stormwater to the outfall.]

7:7A-5.11 General Permit 11 – Outfalls and intake structures

(a) General permit 11 authorizes activities in freshwater wetlands, transition areas, and State open waters necessary for the construction of:

1. A stormwater outfall structure;

2. An outfall structure that discharges other than stormwater, and which is covered by a valid NJPDES permit issued by the Department under N.J.A.C. 7:14A;
3. An intake structure located in a State open water, for which all approvals required by the Department other than this general permit authorization have been obtained;
4. A well that is part of a non-public water system, as defined under the Department's Safe Drinking Water Act rules at N.J.A.C. 7:10-1.3, provided that:
   i. There is no alternative onsite location for the well that would have less environmental impact;
   ii. The source of the water supply to the well does not affect the hydrology of the freshwater wetlands; and
   iii. All approvals required by the Department other than this general permit authorization have been obtained;
5. Conveyance structures, such as pipes and headwalls, associated with an outfall or intake listed in 1, 2, or 3 above; and
6. Energy dissipation structures, such as rip-rap, gabion baskets, and scour holes, associated with an outfall or intake listed in 1, 2, or 3 above.

(b) General permit 11 does not authorize the construction or placement of a detention or retention facility in freshwater wetlands, transition areas, or State open waters.

(c) Activities under general permit 11 shall comply with the following limits:
1. The activities shall disturb no more than one quarter acre of freshwater wetlands, transition areas, and/or State open waters, including both temporary and permanent disturbance;
2. The area disturbed during construction of a conveyance structure shall be no wider than is 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; and
3. The amount or rip-rap or other energy dissipating material placed shall be the minimum necessary to prevent erosion, and shall not exceed 10 cubic yards of fill per outfall, unless a larger amount is required in order to comply with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90.

(d) In addition to meeting all other requirements under general permit 11, an intake structure shall:
1. Be designed and equipped so as to minimize impacts to fish and other fauna through measures including, but not limited to, the following:
   i. The structure's location and orientation;
   ii. Protective structures that prevent entrapment of fauna in the structure itself, or in a diversionary canal or embayment;
   iii. Protective structures that prevent aquatic biota from being sucked up against the structure (impingement) or being sucked up into the structure (entrainment). Examples of such structures are radial wells, fish bucket screens, and wedge-wires; and
2. Be designed so as to ensure that the wetlands are not drained;
3. Have an intake velocity no greater than 0.5 feet of water per second; and
4. Comply with all applicable requirements for intake structures in the Department's Safe Drinking Water Act rules at N.J.A.C. 7:10-11.8(c).

(e) All activities under general permit 11 shall comply with the specifications and requirements in the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90, including activities which are exempted from or not regulated by those Standards.

(f) Stormwater discharged from an outfall authorized under general permit 11 shall be treated in accordance with water quality requirements in the Department's Flood Hazard Area Control Act rules at N.J.A.C. 7:13-2.8.

(g) For any excavated area in freshwater wetlands, transition areas, and/or State open waters, the following requirements apply:

1. The excavation shall be backfilled to the preexisting elevation;
2. The uppermost 18 inches of the excavation shall be backfilled with the original topsoil material if feasible; and
3. The area above the excavation shall be replanted, in accordance with applicable BMPs, with indigenous wetlands species.

(h) 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 a path for groundwater to be discharged or drained from the wetland; and
3. Placed entirely beneath the pre-existing ground elevation unless the applicant shows that placing some or all of the pipe above ground would be more environmentally beneficial.

(i) A swale in a wetland or transition area shall not be used as a substitute for stormwater treatment. However, a swale may be used to convey stormwater through a wetland or transition area if:

1. Conditions on the site make it impracticable to use a buried pipe; and
2. The applicant demonstrates that the swale will not result in drainage of the wetlands or transition areas. To demonstrate this, the applicant shall provide profiles and cross-sections along the entire length of the swale, and any other information necessary to demonstrate that drainage will not occur.

(j) Activities under general permit 11 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.11A Combined general permit 11 and flood hazard area permit

(a) If an activity authorized under general permit 11 also requires a flood hazard area permit under N.J.A.C. 7:13, the Department shall issue a combined flood hazard area permit and general permit 11 authorization for the activity if it meets the requirements for authorization under general permit 11 at N.J.A.C. 7:7A-5.11 and also meets the applicable requirements of N.J.A.C. 7:13.

(b) The combined permit provided for under this section shall be subject to the conditions for combined permits found at N.J.A.C. 7:7A-4.6. An application for the

combined general permit 11 and flood hazard area permit shall meet the application requirements for combined permits at N.J.A.C. 7:7A-10.7.

7:7A-5.12 General Permit 12 – Surveying and investigating

[12. Surveying activities such as soil borings and the cutting of vegetation for narrow (three to five feet in width) survey lines. Survey lines of less than three feet in width shall not require Department authorization. Soil borings dug by hand, using non-mechanized means, no greater than three feet in diameter or in depth, shall not require Department authorization pursuant to N.J.A.C. 7:7A-2.3(c).]

(a) General permit 12 authorizes activities in freshwater wetlands, transition areas and State open waters necessary for surveying and investigative activities such as:

1. Soil borings dug by machine;
2. Hand dug soil borings larger than three feet in diameter or depth. A hand dug soil boring three feet or less in diameter and depth is not regulated pursuant to N.J.A.C. 7:7A-2.2(c) and thus does not require Department approval;
3. Cutting of vegetation by machine for a survey line;
4. Cutting of vegetation by hand for a survey line larger than three feet wide. Cutting of vegetation by hand for a survey line that is three feet wide or less is not regulated pursuant to N.J.A.C. 7:7A-2.2(c) and thus does not require Department approval; and
5. Digging of exploratory pits and/or other temporary activities necessary for a geotechnical or archaeological investigation.

(b) Disturbance under general permit 12 shall be the minimum necessary to obtain the desired information.

(c) If activities under general permit 12 disturb soil, the soil shall be restored to its pre-existing elevation unless other permits which allow permanent impacts in the same location have been obtained.

(d) Activities under general permit 12 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.13 General Permit 13 – Lake dredging

[13. Dredging activities in wetland for lake maintenance or restoration provided:

i. The lake is lowered in accordance with a lake lowering permit approval by the Division of Fish, Game and Wildlife;

ii. The lake remains lowered for the minimal amount of time necessary to accomplish the desired maintenance activities;

iii. Documentation (documentation may include aerial photography, original construction plans, core borings, etc.) shows that the area to be dredged will be confined to the original configuration and bottom contours of the lake;

iv. The total wetlands area to be disturbed for access is no more than 0.25 acre. Temporary effects on adjacent wetlands due to the draw down of the lake to perform maintenance activities are not included in the acreage calculation;

v. The Department may require sediment sampling and laboratory analysis if the project site is known or suspected to be contaminated with toxic substances. The results of representative samples shall indicate that the spoil materials to be removed are non-contaminated;

vi. There is no detrimental effect to spawning of resident or downstream fish populations;

vii. If located in exceptional resource value wetlands, the activity will not negatively impact the documented threatened or endangered species or its habitat;

viii. No spoil material will be deposited and no dewatering will occur in freshwater wetlands, open waters or other environmentally sensitive areas; and

ix. Dredging for a specific lake will not be authorized more than once every five years.]

(a) General permit 13 authorizes up to one acre of dredging in palustrine emergent freshwater wetlands, as defined at N.J.A.C. 7:7A-1.4, necessary to restore or maintain a lake, pond, or reservoir, as defined at N.J.A.C. 7:7A-1.4, to its original bottom contours. General permit 13 does not authorize dredging or other disturbances in wetlands that are not palustrine emergent wetlands. General permit 13 does not authorize disturbance of transition areas except as necessary to obtain access to a dredging project pursuant to (e) below.

(b) If a dredging project disturbs State open water only, and does not disturb wetlands located in the lake, pond, or reservoir; and does not disturb wetlands or transition areas adjacent to the lake, pond, or reservoir, the project does not require Department approval under this chapter.

(c) If the lake, pond or reservoir is to be lowered during dredging:

1. The permittee shall obtain a lake lowering permit from the Department's Division of Fish and Wildlife;
2. Regulated activities shall not begin until the lake, pond or reservoir is lowered in accordance with the lake lowering permit; and
3. All regulated activities shall be discontinued before the lake, pond or reservoir is refilled.

(d) In order to minimize adverse impacts on fish and on the downstream environment, the permittee shall:

1. Take all necessary measures, including adjusting the timing of the dredging, to prevent any detrimental effect to spawning of fish in the lake, pond or reservoir or downstream; and
2. Ensure that there is a continuous flow of sediment-free water to the area downstream of the lake, pond or reservoir at all times during activities under general permit 13.

(e) The permittee may temporarily disturb wetlands (palustrine emergent or otherwise), transition areas, or State open waters, beyond those disturbed directly by the dredging, in order to obtain vehicular access for the dredging. Disturbance for access shall be

limited to one eighth of an acre, unless the applicant demonstrates in accordance with the standards at N.J.A.C. 7:7A-5.10B(d) that there is no alternative onsite location and/or configuration that would provide access to the dredging with less adverse environmental impact. If such a demonstration is made, the access disturbance may be increased as necessary but shall not exceed one quarter acre. All access disturbances under this subsection shall be restored to their pre-existing elevation and condition upon completion of dredging.

(f) The application for authorization under general permit 13 shall include:

1. Documentation, including but not limited to, aerial photography, original construction plans, core borings, and/or other information, showing that dredging will go no deeper than the original configuration and bottom contours of the lake, and will not enlarge the lake beyond the original configuration; and
2. For a lake larger than five acres, the following information:
   i. A USGS quad map showing the HUC 11, as defined at N.J.A.C. 7:7A-1.4, for the lake, marked to identify the main land uses in the HUC 11; and
   ii. A list of the sources of sediment in the lake, ranked according to each source's relative contribution to the sediment in the lake.

(g) The Department shall not authorize activities under general permit 13 more frequently than once every five years for a particular lake, pond or reservoir.

(h) The permittee shall dispose of dredged material in accordance with the requirements in the standard conditions for all general permits at N.J.A.C. 7:7A-4.3. The Department may require testing of dredged material if there is reason to suspect that the material is contaminated.

(i) Activities under general permit 13 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.14 General Permit 14 – Water monitoring devices

[14. Placement of water level recording devices, water quality monitoring and testing devices, and similar scientific devices, and the drilling of monitoring wells.]

(a) General permit 14 authorizes the placement and use of the following in freshwater wetlands, transition areas, and State open waters:

1. Water level recording devices;
2. Water quality monitoring and testing devices;
3. Small weirs or flumes for recording water quantity or velocity;
4. The drilling of monitoring wells; and
5. Similar small scientific devices.

(b) General permit 14 does not authorize any activity that significantly disrupts the movement of aquatic species native to the water body, or of species which normally migrate through the area.

(c) If an applicant cannot determine at the time of application how many monitoring wells will be needed, the Department may issue a "blanket" authorization under general

permit 14 for drilling of monitoring wells, such as those used in cleanups of contaminated groundwater. A "blanket" authorization allows the placement of multiple monitoring wells on a site over the term of the permit authorization, provided that the permittee reports the number and location of all wells to the Department when all of the wells have been drilled. To be eligible for a "blanket" authorization, the monitoring wells must be approved by the Department's Site Remediation Program or by the U.S. Environmental Protection Agency.

(d) Activities under general permit 14 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.15 General Permit 15 – Mosquito control activities

[15. Mosquito] (a) General permit 15 authorizes activities in freshwater wetlands, transition areas, and State open waters necessary for mosquito control water management activities conducted by a county mosquito control agency, or by a Federal agency on Federal land[, provided:] .

(b) The agency shall submit an individual, site-specific project proposal to the State Office of Mosquito Control Coordination. If the State Office of Mosquito Control Coordination determines that the project is necessary to control a documented mosquito problem affecting existing residents, the agency shall submit an application to the Department for authorization to act under general permit 15.

[i. Best] (c) In conducting activities under general permit 15, an agency shall:

1. Comply with "Best Management Practices for Mosquito Management", issued by the State Mosquito Control Commission, and available from the Department at P.O. Box 400, Trenton, N.J., 08625;
2. Use best management practices [are employed] including, but not limited to, shallow swales no more than three feet wide, and low sills no more than three feet wide; [ii. Disturbance]
3. Minimize disturbance of vegetation [is minimized]; and
4. Use only [iii. Only] light equipment [is used;] .

[iv. Excavated spoils are removed or] (d) The agency shall remove excavated or dredged material. Alternatively, if the agency demonstrates that the material will not alter the character of the wetlands, the agency may spread it evenly in a shallow layer no more than three inches deep [onsite;].

[v. The] (e) The agency shall ensure that excessive drainage does not occur, and that the existing hydrologic condition of the hydric soils is maintained [(that is, excessive drainage is not permitted);] .

(f) A county agency applying for authorization under general permit 15 shall provide public notice of the application in accordance with this subsection, and shall not be subject to the public notice requirements found at N.J.A.C. 7:7A-10.9. The county agency shall publish a display advertisement describing the proposed general permit activities. The advertisement shall be:

1. At least four column inches in size;
2. Published in a newspaper with local circulation, including the municipality; and
3. Published in a newspaper with regional circulation, including the county.

(g) The Department shall not authorize activities under general permit 15 more frequently than once every five years for a particular site.

(h) Activities under general permit 15 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

[vi. The activities do not take place in exceptional resource value freshwater wetlands; and
vii. The county mosquito control agency or Federal agency submits individual, site-specific project proposals to the Administrator of the State Office of Mosquito Control Coordination, and the Administrator determines that the project is necessary to control a documented mosquito problem to existing residents. After approval by the Administrator, the project shall then be submitted to the Department for Statewide General Permit review in accordance with the requirements of this chapter.]

7:7A-5.16 General Permit 16 – Habitat creation and enhancement activities

[16. Fish and wildlife management activities which do not involve the discharge of more than 10 cubic yards of clean fill, carried out in publicly owned or controlled wildlife management areas, parks or reserves. These activities include, but are not limited to:
i. The placement of artificial nesting structures, nesting islands, observation blinds, sign posts, or fencing;
ii. The clearing, burning or removal of vegetation to increase habitat diversity or to control nuisance flora (when carried out in accordance with an approved wildlife management plan); and
iii. The blocking or filling of human-made drainage ditches for the purpose of restoring previously existing wetland conditions.]

(a) General permit 16 authorizes habitat creation and enhancement activities in freshwater wetlands, transition areas, and State open waters, necessary to implement a plan for the restoration, creation or enhancement of the habitat and water quality functions and values of wetlands, which is sponsored or partially funded by a Federal or State agency or other resource protection agency. For the purposes of this general permit, a "sponsor" shall be an active participant in or financial contributor to the activities, and shall approve the activities in writing.

(b) General permit 16 authorizes any of the following:
1. A fish and/or wildlife management plan created or approved by the Department's Division of Fish and Wildlife;
2. A project plan approved under the Partners for Fish and Wildlife program, administered by the U.S. Fish and Wildlife Service;
3. A project plan created by the U.S. Department of Agriculture's Natural Resources Conservation Service under the Wetlands Reserve program, the Conservation Reserve program, the Conservation Reserve Enhancement program, the wildlife

habitat incentive program (WHIP), or a similar program, and approved by the local Soil Conservation District;

4. A plan approved by the Department's Office of Natural Resource Damages for the restoration, creation or enhancement of natural resources injured as the result of an oil spill or release of a hazardous substance;
5. A mitigation project required by and approved by a government agency, such as the U.S. Army Corps of Engineers;
6. A habitat creation or enhancement plan carried out by one of the Federal or State agencies at 1 through 5 above; or
7. A habitat creation or enhancement plan carried out by a charitable conservancy, as defined at N.J.A.C. 7:7A-15.1, provided that the plan is sponsored or approved by one of the Federal or State agencies at 1 through 5 above.

(c) To be eligible for authorization under general permit 16, an applicant shall demonstrate that the proposed project:

1. Is part of a comprehensive plan for the restoration, creation or enhancement of the habitat and water quality functions and values of wetlands, transition areas, and/or State open waters;
2. Is sponsored or partially funded by a Federal or State agency or other resource protection agency;
3. Is consistent with the goals of the Freshwater Wetlands Protection Act;
4. Will improve the values and functions of the ecosystem; and
5. Will have a reasonable likelihood of success.

(d) General permit 16 does not authorize an activity unless the sole purpose of the activity is habitat creation or enhancement. For example, general permit 16 does not authorize construction of a detention basin in wetlands for stormwater management, even if the detention basin or the project of which the basin is a part will also result in habitat creation or enhancement. Similarly, general permit 16 does not authorize a flood control project that may also result in creation or enhancement of some wildlife habitat.

(e) Examples of habitat creation and enhancement activities that may be authorized under general permit 16 are:

1. Altering hydrology to restore or create wetlands conditions, such as by blocking, removing, or disabling a human-made drainage ditch or other drainage structure such as a tile, culvert or pipe;
2. Breaching a structure such as a dike or berm in order to allow water into an area;
3. Placing habitat improvement structures such as:
   i. Nesting islands;
   ii. Fencing to contain, or to prevent intrusion by, livestock or other animals; and
   iii. Fish habitat enhancement devices or fish habitat improvement structures such as placed boulders, stream deflectors, or brush piles;
4. Regrading to provide proper elevation or topography for wetlands restoration, creation, or enhancement; and
5. Cutting, burning or otherwise managing vegetation in order to increase habitat diversity or control nuisance flora.

(f) Activities under general permit 16 shall meet the following requirements:

1. The activities shall disturb the minimum amount of freshwater wetlands, transition areas, and/or State open waters necessary to successfully implement the project plan; and
2. The activities shall not decrease the total combined area of freshwater wetlands, State open waters and/or transition areas on a site. However, the Department may approve such a decrease if the Department determines that the activities causing the decrease are sufficiently environmentally beneficial to outweigh the negative environmental effects of the decrease. In addition, the Department may approve conversion of wetlands to State open waters or transition area, conversion of State open waters to wetlands or transition area, or the conversion of transition area to freshwater wetlands or State open waters, if the Department determines that such conversion is environmentally beneficial.

(g) An application for authorization under general permit 16 does not require an application fee under N.J.A.C. 7:7A-11.

(h) If a project complies with general permit 16 and also includes an activity covered under another general permit, the entire project shall be authorized through general permit 16 and shall not require authorization under the other general permit, provided that each activity covered by another general permit complies with that general permit's requirements and limits. For example, if a habitat creation project includes bank stabilization activities, and meets all requirements of general permit 20 as well as general permit 16, the Department may authorize the project under general permit 16 alone.

(i) If an activity is exempt under this chapter, it shall not require authorization under general permit 16 solely by virtue of being conducted as part of a program included in (b) above. For example, if a farmer proposes a habitat enhancement project that is eligible for authorization under general permit 16, and some of the activities involved in the project meet the requirements for the farming exemption under N.J.A.C. 7:7A-2.8(c), those activities do not lose their exempt status merely by virtue of being part of a project authorized under general permit 16.

(j) Activities under general permit 16 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.17 General Permit 17 – Trails and boardwalks

[17. Trail] (a) General permit 17 authorizes activities in freshwater wetlands, transition areas, and/or State open waters necessary for construction of a trail and/or boardwalk [construction on publicly owned or controlled park land, wildlife management areas or reserves, in freshwater wetlands or State open waters, provided:] for use by pedestrians, bicycles, and other non-motorized methods of transport. General permit 17 does not authorize construction of a restroom, gazebo, rain shelter, or any covered or enclosed structure. General permit 17 does not authorize construction of a roadway for use by automobiles, golf carts, or other motor vehicles.

(b) The total area of freshwater wetlands, transition areas, and/or State open waters disturbed under general permit 17 shall not exceed one quarter acre.

[i.] (c) The [width of the] trail or boardwalk [does not exceed] shall be no wider than six feet, [except for barrier free trails or boardwalks designed in accordance] unless the applicant demonstrates that it must be wider in order to comply with the Barrier Free Subcode of the Standard Uniform Construction Code, N.J.A.C. 5:23-7. [This general permit does not authorize construction of restrooms, gazebos, rain shelters, or any covered or enclosed structure;

ii. Natural materials such as wood chips or wooden planks are used to the maximum extent practicable;]

(d) The trail or boardwalk shall:

1. Be located and configured so as to minimize adverse environmental impact; and
2. Incorporate features designed to educate the user about the importance of freshwater wetlands, transition areas, and State open waters; for example, through signs identifying plants and animals or explaining hydrology, ecology, or other significant environmental features or phenomena.

[iii. The project does] (e) The permittee shall take all measures necessary to ensure that activities under general permit 17 do not interfere with the natural hydrology of the area [; and] , such as installation at grade or use of cross drains to allow the passage of water. The permittee shall minimize the impact of the activities on vegetation.

[iv. The project does not encroach upon or adversely affect the habitat of any threatened or endangered species.]

(f) An application for authorization under general permit 17 for a project on publicly owned land does not require an application fee under N.J.A.C. 7:7A-11.

(g) Activities under general permit 17 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.18 General Permit 18 – Dam repair

[18. The repair, rehabilitation, replacement, maintenance or reconstruction as required by the Dam Safety Standards (N.J.A.C. 7:20-1), of any previously authorized, currently serviceable dam structure, as defined at N.J.A.C. 7:20-1.2, including appurtenant structures, lawfully existing prior to July 1, 1988 or permitted under the Act, provided that the previously authorized structure has not been put to uses differing from those specified in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repairs, rehabilitation, replacement, maintenance or reconstruction are allowed provided that:

i. The activity is conducted in accordance with a Dam Permit issued pursuant to N.J.A.C. 7:20-1;

ii. The activity results in the filling of no more than one acre of wetlands or State open waters;

iii. If located in exceptional resource value wetlands, the activity will not negatively impact the documented threatened or endangered species or its habitat;

iv. The activity is designed to minimize disturbance and other detrimental effects upon freshwater wetlands or State open waters through the use of best management practices including, but not limited to:

(1) Stabilizing all disturbed areas; and

(2) Using suitable, clean, non-toxic fill material; and

v. The activity will not increase the normal water surface elevation. The normal water surface elevation is the historic level as of the date of completed dam construction and inundation.]

(a) General permit 18 authorizes the repair, rehabilitation, replacement, maintenance, reconstruction, or removal of a dam, as defined in the Department's dam safety rules at N.J.A.C. 7:20-1.2.

(b) A dam that is currently serviceable may be repaired, rehabilitated, replaced, maintained or reconstructed under general permit 18. A dam that is not currently serviceable may not be repaired, rehabilitated, replaced, maintained or reconstructed, but may be removed. A dam is considered currently serviceable if it meets any of the following criteria:

1. The dam is in use at the time of submittal of the general permit application;
2. The dam has been out of use for no more than five years prior to submittal of the general permit application; or
3. The dam has been out of use for up to ten years prior to submittal of the general permit application, but the applicant documents that public funding was actively sought for repairs during the ten years.

(c) Activities under general permit 18 are subject to the following limits:

1. All activities shall be conducted in accordance with a permit issued pursuant to N.J.A.C. 7:20 by the Department's Dam Safety Section in the Division of Engineering and Construction;
2. There shall be no more than one acre of permanent disturbance of wetlands, transition areas, and/or State open waters. Draining a State open water by removing a dam shall not be considered permanent disturbance under this paragraph;
3. Temporary disturbance shall be the minimum necessary to comply with the dam safety permit;
4. The permittee shall minimize adverse impacts on freshwater wetlands, transition areas, and/or State open waters through the use of best management practices including, but not limited to:
   i. Disposing of any excess soil, gravel, or other 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;
   ii. Backfilling the uppermost 18 inches of any excavation with the original topsoil material;
   iii. Replanting the disturbed area with indigenous wetlands plants;
   iv. Stabilizing the disturbed area in accordance with the requirements of the appropriate Soil Conservation District; and

5. A repaired, rehabilitated, replaced, maintained or reconstructed dam shall not deviate from its original structure, except for minor deviations due to changes in materials or construction techniques; and
6. Activities under general permit 18 shall not increase the normal water surface elevation over the historic elevation as of the date the dam was originally completed.

(d) If a dam is removed under general permit 18, and the dam owner also owns or controls any of the property containing the lake bottom, the Department may require the owner to execute and record a conservation restriction covering the lake bottom area. The conservation restriction shall prohibit any development or regulated activity for five years from the date the dam is removed, in order to allow the stream corridor and associated wetlands in the lake bottom area to revert to their natural state. The conservation restriction shall include the land covered by the lake bottom, and all associated wetlands, as they exist at the time the dam is removed. When the conservation restriction expires, the Department's jurisdiction under this chapter shall be based on existing conditions on the site.

(e) Activities under general permit 18 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.19 General Permit 19 – Docks and piers

[19. The construction of public or private recreational and fishing docks, or piers on pilings, cantilevered or floating, and public boat ramps that meet the following criteria:

i. The following criteria shall be met for the construction of docks and piers:

(1) There shall be a maximum of one dock per lot;

(2) If located in exceptional resource value wetlands, the activity will not have a negative impact on a documented threatened or endangered species or its habitat;

(3) The proposed activity does not fill or disturb more than 0.10 acres of wetlands or State open waters. This limitation includes the area shaded directly under the dock;

(4) The width of the dock or pier does not exceed six feet, will be constructed perpendicular to the shoreline, where feasible, and the maximum allowable length will be the minimum length necessary to reach deep water from the shoreline for launching. However, structures shall be constructed a minimum of 50-feet outside of any authorized navigation channel and shall not hinder navigation. The 50 foot limitation does not apply to construction of docks or piers in human-made lagoons;

(5) Space between horizontal planking is no less than 0.25 inches and the width of horizontal planking is no more than four inches; and

(6) The height of the dock or pier above the ground surface shall be no less than four feet.

ii. The following criteria shall be met for the construction of a boat ramp:

(1) It shall be demonstrated that there is no feasible onsite alternative location that will involve less or no disturbance of wetlands;

(2) The boat ramp shall be constructed of concrete or natural materials such as crushed stone or shells and placed at a location requiring the minimum feasible cut or fill;

(3) The proposed activity does not fill or disturb more than 0.10 acres of wetlands or State open waters; and

(4) If located in exceptional resource value wetlands, the activity will not impact a documented threatened or endangered species or its habitat.]

(a) General permit 19 authorizes:

1. Activities in freshwater wetlands and/or transition areas necessary to construct or improve a dock or pier on pilings in order to obtain access to State open waters. General permit 19 does not cover docks or piers on pilings in State open waters because the placement of pilings to support a dock or pier in State open waters is not a regulated activity pursuant to N.J.A.C. 7:7A-2.2(c)3 and therefore does not require approval under this chapter; and
2. Activities in freshwater wetlands, transition areas, and/or State open waters, necessary for the construction of a public boat ramp. Private boat ramps are not covered by this general permit.

(b) All activities under general permit 19, when combined, shall meet the following criteria, as applicable:

1. For a dock or pier, the activities shall disturb no more than one tenth acre of wetlands and/or transition area. Wetlands or transition area shaded by a dock or pier shall be considered disturbed for the purposes of general permit 19;
2. For a boat ramp, the activities shall disturb no more than one tenth acre of freshwater wetlands, transition areas, and/or State open waters; and
3. For a dock or pier and a boat ramp on the same site, the combined activities shall disturb no more than one tenth acre of freshwater wetlands, transition areas, and/or State open waters.

(c) A dock or pier shall be elevated on pilings so that it does not affect the hydrology of the surrounding wetland. In tidal wetlands that are subject to this chapter but not subject to the Department's coastal permitting program under N.J.A.C. 7:7 or N.J.A.C. 7:7E, a dock or pier shall be elevated at least four feet above the ground surface.

(d) The portion of a dock, pier or boat ramp that crosses freshwater wetlands and/or transition areas shall be perpendicular to the shoreline of the State open waters, unless a different configuration would cause less impact to wetlands and aquatic resources.

(e) A public dock or pier is a dock or pier which is open to all members of the public. A private dock or pier is a dock or pier which is not a public dock or pier.

(f) A private dock or pier shall meet the following requirements, in addition to the requirements at (b) through (d) above:

1. There shall be no more than one crossing over wetlands and/or transition areas per lot for dock or pier access. If there is an existing dock on the lot, general permit 19 does not authorize another crossing over wetlands and/or transition areas for dock or pier access. However, general permit 19 does authorize improvements to the portion of the dock or pier that crosses wetlands and/or transition areas, within the limits in general permit 19. In such a case, the total disturbance resulting from the existing dock or pier and additions made under general permit 19 shall not exceed one tenth of an acre; and

2. The portion of the dock or pier that crosses wetlands and/or transition areas shall be no wider than six feet.

(g) An applicant who proposes to build a public dock or pier shall, in addition to meeting the requirements at (b) through (d) above, ensure that the portion of the dock or pier that crosses wetlands and/or transition areas is no more than six feet wide unless:

1. The portion must be wider in order to comply with the Barrier Free Subcode of the Standard Uniform Construction Code, N.J.A.C. 5:23-7, in which case the portion shall be the minimum width necessary to comply; or
2. The primary purpose of the dock or pier is to provide group instruction or a similar function, in which case the portion of the dock or pier shall be the minimum width necessary to accomplish this purpose.

(h) An applicant who proposes to build a public boat ramp shall, in addition to meeting the requirements at (b) through (d) above, demonstrate that there is no feasible onsite alternative location that will involve less or no disturbance of wetlands, transition areas, and/or State open waters.

(i) Activities under general permit 19 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.20 General Permit 20 – Bank Stabilization

[20. The placement of gabions, rip-rap, geo-textiles, or other binding mat material for the purpose of bank stabilization activities in State open waters provided:
i. The bank stabilization activity is less than 150 feet in length;
ii. The activity is required by and designed in accordance with the Standards for Soil Erosion and Sediment Control in New Jersey , N.J.S.A. 4:24-42;
iii. The activity is limited to an average of less than one cubic yard of rip-rap per running foot placed along the bank within State open waters;
iv. The material to be placed is the minimum necessary for erosion protection according to the 1982 Standards for Soil Erosion and Sediment Control in New Jersey;
v. No material is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;
vi. Only suitable, clean, non-toxic fill material is used;
vii. The activity is a single and complete project, not associated with any other construction activity. For example, this activity cannot be used at the same location as a minor road crossing or a stormwater outfall structure; and
viii. The activity will not violate the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 or implementing rules at N.J.A.C. 7:13-1.]
(a) General permit 20 authorizes activities in freshwater wetlands, transition areas, and/or State open waters, necessary to stabilize the bank of a water body in order to reduce or prevent erosion. Examples of bank stabilization activities are the placement of gabions, rip-rap, or geotextiles along a stream bank. General permit 20 does not authorize the channelization of a stream or the stabilization of the bottom of the stream.

(b) The applicant shall use vegetative or bioengineering stabilization methods unless the applicant demonstrates that, based on the velocity and configuration of the channel

or other factors, the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90 require other methods.

(c) The total cumulative length of water body bank affected by bank stabilization activities under general permit 20 shall meet the applicable length limit below. These limits apply to the total linear footage of stream bank affected, regardless of which side of the stream it is on, or whether the activities are contiguous:

1. For bank stabilization activities involving the placement of rip-rap, no more than 150 feet of stream bank;
2. For the following bank stabilization activities, no more than 300 feet of stream bank:
   i. Soil bioengineering systems for stream bank stabilization set forth at, and performed in accordance with, 650.1601(d)(2) in Chapter 16 of the NRCS Engineering Field Handbook, published December 1996; and
   ii. Soil bioengineering systems not included in (c)2i above but approved by the Department in writing, which are appropriate to the site and which provide environmental benefits similar to those provided by the measures in (c)2i above. Examples of such measures are the placement of coconut fiber rolls or sand filled textile containers, parallel to the shoreline of a stream bank; and
3. For bank stabilization activities that meet the following criteria, no more than 500 feet of stream bank:
   i. The activities are funded by the Department's Division of Watershed Management, or are included on an "action now" list, prepared for each region of the State by the Division of Watershed Management. These "action now" lists are available from the Division of Watershed Management at (609) 984-0058; and
   ii. The stream bank is not located in a municipality that has a threatened or endangered species associated with its wetlands; and
4. For vegetative planting measures for stream bank stabilization set forth at, and performed in accordance with, 650.1601(d)(1) in Chapter 16 of the NRCS Engineering Field Handbook, there is no length limit.

(d) The bank stabilization activities described in (c) above may be used in combination. For example, a bank stabilization project might involve 100 feet of rip-rap authorized under (c)1 above, 300 feet of soil bioengineering authorized under (c)2i above, and 400 feet of vegetative planting measures authorized under (c)3i above.

(e) A permittee shall minimize environmental impacts as follows:

1. Activities under general permit 20 shall not impair surface water flow into or out of any wetland area;
2. If wetlands or transition areas must be disturbed to provide access to stabilization activities, the area disturbed shall be the minimum necessary, and shall be no wider than 20 feet at any point;
3. The Department shall allow replacement of previously eroded material as part of the bank stabilization only if the applicant demonstrates that such replacement would be environmentally beneficial;
4. Activities under general permit 20 shall comply with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90;

5. The activity shall be a single and complete project, not associated with any other regulated activity. For example, the bank stabilization activity cannot be conducted at the same location as a minor road crossing or a stormwater outfall structure; and
6. The amount of rip-rap or other stabilization material placed shall be the minimum necessary to prevent erosion, and shall not exceed 150 cubic yards of fill below the top of bank or high water mark, unless a larger amount is required in order to comply with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90.

(f) Activities under general permit 20 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.20A Combined general permit 20 and flood hazard area permit

(a) If an activity authorized under general permit 20 also requires a flood hazard area permit under N.J.A.C. 7:13, the Department shall issue a combined flood hazard area permit and general permit 20 for the activity if it meets the requirements for authorization under general permit 20 at N.J.A.C. 7:7A-5.20 and also meets the applicable requirements of the Department's Flood Hazard Area Control Act rules at N.J.A.C. 7:13.

(b) The combined permit provided for under this section shall be subject to the conditions for combined permits found at N.J.A.C. 7:7A-4.6. An application for the combined general permit 20 and flood hazard area permit shall meet the application requirements for combined permits at N.J.A.C. 7:7A-10.7.

7:7A-5.21 General permit 21— Above ground utility lines

[21. The construction or installation of new above ground utility lines including the installation of wood poles, steel poles, lattice towers, conductors, guy anchors, and pad mount transformers for the transport of electrical energy, telephone or telegraph messages, radio or television communication, or the discharge of fill to provide access to these new lines. The activities allowed by this Statewide General Permit shall comply with the following conditions:

i. The construction of the line (which constitutes a single and complete project of independent utility) including installation of structures, placement of fill for access and the clearing and maintenance of vegetation which would alter the character of the freshwater wetland, including the clearing of trees disturbs no more than one acre of wetlands or State open waters;

ii. The limits of clearing for construction is no more than 60 feet wide;

iii. The area to be maintained including vegetative clearing and maintenance of fill as a permanent right-of-way is a maximum of 20 feet in width;

iv. If located in exceptional resource value wetlands, the activity will not negatively impact associated water quality or the documented threatened or endangered species or its habitat;

v. When practicable, installation is done from outside wetland areas. If installation requires encroachment in wetlands, the activity shall be performed when the ground is frozen or extremely dry; otherwise only matting or track equipment shall be used. Matting will remain in place for no more than five days to the maximum extent practical;

vi. After completion the area used to gain access to the installation location is replanted as required in accordance with applicable BMPs with indigenous wetland species; and

vii. The activity is designed so as not to interfere with the natural hydraulic characteristics of the wetland and watershed.]

(a) General permit 21 authorizes the following activities in freshwater wetlands, transition areas, and/or State open waters, necessary for the construction of an above ground utility line, as defined at N.J.A.C. 7:7A-1.4:

1. Installation of poles, towers, or other supports from which to suspend a pipe, wire or cable;
2. Construction of a pad mounted transformer;
3. Placement of an above ground pipe, wire or cable;
4. Clearing of vegetation under and around utility lines, within the limits at (b) below; and
5. Minor, temporary disturbances, as defined at N.J.A.C. 7: 7A-1.4, necessary for access during construction.

(b) Activities under general permit 21 shall comply with the following limits:

1. Temporary disturbance of freshwater wetlands, transition areas, and/or State open waters during construction shall be no more than sixty feet wide, including vegetative clearing and disturbance for access under (a)5 above; and
2. Permanent disturbance of freshwater wetlands, transition areas, and/or State open waters, including the area of vegetative clearing to be maintained underneath the utility line, shall be:
   i. No greater than one acre; and
   ii. No wider than twenty feet, unless the applicant demonstrates that a wider disturbance is necessary to comply with applicable laws.

(c) Activities under general permit 21 shall not interfere with the natural hydrologic characteristics of the wetland, transition area, or State open water. The applicant shall place the utility line on pilings if necessary, in order to satisfy this condition.

(d) After the utility line is constructed, any freshwater wetlands, transition areas, or State open waters disturbed, which are not within the cleared area to be maintained under (b)2 above, shall be allowed to revert to their natural condition.

(e) Activities under general permit 21 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

[22. (Reserved)]

7:7A-5.22 General permit 22 – Animal waste management activities

(a) General permit 22 authorizes activities in certain farmed wetlands, as defined at N.J.A.C. 7:7A-1.4, in accordance with an animal waste management plan developed by the Natural Resources Conservation Service and approved by the appropriate Soil Conservation District. General permit 22 does not authorize activities in State open waters. Animal waste management systems and structures authorized under general permit 22 include diversions, pipes, lagoons, silos, artificial wetlands, concrete slabs, and tanks or other animal waste containment structures, approved by the Soil Conservation District with jurisdiction over the area in which the farming operation is located.

(b) Activities authorized under general permit 22 shall disturb no more than one acre of farmed wetlands.

(c) An activity is authorized under general permit 22 only if:

1. The activity is necessary to implement an animal waste management plan developed by the Natural Resources Conservation Service and approved by the appropriate Soil Conservation District;
2. The activity will be conducted at an established, ongoing farming, ranching or silviculture operation, as defined at N.J.A.C. 7:7A-1.4; and
3. The animal waste management activities are located in a farmed wetland, as defined at N.J.A.C. 7:7A-1.4, that is eligible for a farmland assessment under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq.

(d) If an animal waste management system, or any discharge from it, requires a NJPDES permit under N.J.A.C. 7:14A, the NJPDES permit shall be obtained prior to the start of the activities authorized under general permit 22.

(e) Activities under general permit 22 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

[23. (Reserved)]

(Agency note: general permit 23, Expansion of cranberry growing operations in the Pinelands, is proposed for recodification here from existing N.J.A.C. 7:7A-9.23, with no changes.)

7:7A-5.23 [7:7A-9.23] General permit 23 – Expansion of cranberry growing operations in the Pinelands

(a) - (v) (No change.)

[24. The placement of bulkheads adjacent to human-made lagoons provided that:

i. The bulkhead is to be placed between two lawfully existing bulkheads which are not more than 75 feet apart;

ii. The connecting bulkhead shall not extend waterward of a straight line connecting the ends of the existing bulkheads;

iii. The width of wetlands on the subject lot, adjacent to the lagoon does not exceed an average of five feet;

iv. The total area of wetlands to be filled or disturbed does not exceed 375 square feet; and

v. The activities will not take place in a wetland of exceptional resource value as defined in N.J.A.C. 7:7A-2.5(b) or in a State open water defined as a special aquatic site (in 40 CFR 230.1).]

7:7A-5.24 General permit 24 – Spring developments

(a) General permit 24 authorizes activities in farmed wetlands, or in State open waters, necessary for the construction of a spring development or other structure that diverts or collects water for the purpose of watering livestock. Activities authorized under general permit 24 include the installation of a collecting trench, a cutoff wall, crushed rock, perforated tubing, and/or a spring box. General permit 24 does not authorize diversion or use of water for irrigation, or for any purpose other than watering livestock.

(b) Activities under general permit 24 shall disturb no more than one quarter acre of freshwater wetlands and/or State open waters. Activities under general permit 24 shall not drain, or remove from jurisdiction, any additional or adjacent wetlands other than the one quarter acre directly impacted by the general permit activities.

(c) An activity is authorized under general permit 24 only if:

1. The activity is necessary to implement a farm management plan developed by the Natural Resources Conservation Service and approved by the appropriate Soil Conservation District;
2. The activity will be conducted at an established, ongoing farming, ranching or silviculture operation, as defined at N.J.A.C. 7:7A-1.4; and
3. The activity is located in a farmed wetland, as defined at N.J.A.C. 7:7A-1.4, that is eligible for a farmland assessment under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq.

(d) Any portion of a spring development from which livestock will drink, such as a watering trough or tub, shall be located outside of wetlands and State open waters.

(e) Activities under general permit 24 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.25 General permit 25 – Malfunctioning individual subsurface sewage disposal (septic) systems

[25. The repair or alteration of malfunctioning individual subsurface sewage disposal systems provided:

i. There is no expansion or change in the use of the building or facility which will result in an increase in the volume of sanitary sewage;

ii. Alterations made to correct a malfunctioning system shall meet the requirements of N.J.A.C. 7:9A-3.3(c) and shall be undertaken only at the authorization of the administrative authority (the board of health having jurisdiction or its authorized agent acting on its behalf);

iii. It is demonstrated to the administrative authority that there is no alternative location onsite available with a seasonally high water table deeper than 1.5 feet from

the existing ground surface which can support a properly functioning subsurface sewage disposal system; and

iv. The total wetland area to be affected by the repair or alteration does not exceed 0.25 acres.]

(a) General permit 25 authorizes activities in freshwater wetlands and transition areas necessary for the repair or modification of a malfunctioning individual subsurface sewage disposal system. General permit 25 does not authorize activities in State open waters.

(b) All activities under general permit 25 on the site shall disturb no more than one quarter acre of freshwater wetlands and/or transition areas combined.

(c) The Department shall not authorize activities under general permit 25 if the need for repair or modification is directly or indirectly caused by an expansion of the facility the individual subsurface sewage disposal system serves, or by a change in its use.

(d) Activities under general permit 25 are not subject to the application contents requirements at N.J.A.C. 7:7A-10, except for the public notice requirements at N.J.A.C. 7:7A-10.9, and there is no application fee for an authorization under general permit 25. Instead, an applicant for authorization under general permit 25 shall submit the following in writing to the Department, at least thirty days prior to starting work:

1. A description and plan of the activities;
2. The location of the site, including the county and municipality, and the block and lot; and
3. A letter from the local board of health with jurisdiction over the individual subsurface sewage disposal system, stating that:
   i. The proposed activities are authorized under, and comply with, the Department's Standards for Individual Subsurface Sewage Disposal Systems at N.J.A.C. 7:9A;
   ii. The proposed activities are not directly or indirectly caused by an expansion of the facility the individual subsurface sewage disposal system serves, or a change in its use; and
   iii. There is no alternative location on the site that:
      A) Has a seasonal high water table deeper than one and one half feet below the existing ground surface; and
      B) Can be used for a subsurface sewage disposal system.

(e) Upon receipt of an application under general permit 25, 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 (d) above). If the Department so notifies the applicant, the time period in (e)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 includes all of the information required under (d) above, 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 25, 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.

(f) Activities under general permit 25 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.26 General permit 26 – minor stream cleaning for local government agencies

(a) General permit 26 authorizes a county, municipality or a designated agency thereof to conduct activities in freshwater wetlands, transition areas and State open waters within their jurisdiction, necessary to remove accumulated sediment, debris and garbage from a stream in order to remove obstructions to flow, or to desnag the stream.

(b) To be authorized under general permit 26, a stream cleaning, clearing, or desnagging project shall meet all of the following criteria:

1. The sole purpose of the activities is to remove obstructions to flow, or to desnag a stream;
2. The activities are necessary and in the public interest;
3. The activities will disturb only the stream bed, and shall not disturb the stream bank or its vegetation, except in areas necessary to gain access to the stream. Where access is needed, disturbance to the stream bank and its vegetation shall be the minimum necessary for access;
4. The activities shall not alter the natural banks of the stream. Such modification may in some cases be authorized under general permit 20. General permit 26 does not authorize the straightening or realignment of a stream. Straightening or realignment constitutes channel modification and requires an individual permit;
5. The activities shall consist only of:
   i. The removal of accumulated sediment, debris and/or garbage from a stream with a natural bed. General permit 26 does not authorize removal of material below the natural bottom; or
   ii. The removal of any accumulated material from a stream previously channelized with concrete or similar artificial material;
6. The permittee shall make every effort to perform work from only one stream bank;
7. The permittee shall ensure that the use of heavy equipment within the stream channel is avoided to the maximum extent practicable; and
8. The permittee shall ensure that vegetation and tree canopy on the more southerly or westerly stream banks is preserved in order to shade the stream.

(c) If a stream cleaning, clearing, or desnagging project involves removal of sediment, it shall meet all of the requirements at (b) above, and in addition, the affected portion of the stream shall meet all of the following criteria:

1. It is less than 500 feet long;
2. The stream bed is 15 feet or less in average width;

3. The stream has a documented history of flooding that is sufficiently severe so that the flooding results, or can result, in property damage necessitating the proposed cleaning, clearing, or desnagging;
4. The stream is not classified as a Pinelands water or category one water under the Department's Surface Water Quality Standards at N.J.A.C. 7:9B; and
5. The stream is not located in an area that has a threatened or endangered species, as defined at N.J.A.C. 7:7A-1.4, associated with its wetlands.

(d) All materials, including dredged material, removed from a stream during activities authorized under general permit 26 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, unless the applicant demonstrates that this would cause more environmental harm than disposing of the material in these areas. For example, if removal of dredged material requires construction of a long temporary road through a very wet area to enable trucks to transport the dredged material offsite, this might cause more environmental harm than using a large blower to spread the dredged material thinly over a large area of wetlands.

(e) Activities under general permit 26 are not subject to the application requirements in N.J.A.C. 7:7A-10, except for the public notice requirements at N.J.A.C. 7:7A-10.9. An application for authorization under general permit 26 shall include the following:
1. The location of the affected portion of the stream, including the county and municipality, and the block(s) and lot(s);
2. A USGS quad map showing the affected portion of the stream;
3. Color photographs and a brief narrative description of the affected portion of the stream, including the access points where workers and equipment will be brought to the stream;
4. The classification, under the Department's Surface Water Quality Standards, N.J.A.C. 7:9B, of the affected portion of the stream;
5. A description of the nature of the project and the methods that will be used;
6. A description of the disposal location and methods for all material that will be removed from the stream;
7. Documentation that the public notice requirements of N.J.A.C. 7:7A-10.9 have been met; and
8. A certification that meets both of the following criteria:
   i. The certification is signed by a licensed professional engineer who is the county or municipal engineer, or who is employed by the appropriate Soil Conservation District; and
   ii. The certification lists each condition in (b), (c) and/or (d) above that applies to the project, and states whether the condition has been satisfied or will be satisfied.

(f) Within 15 days of the Department's receipt of an application submitted under (e) above for a project that does not involve sediment removal, the Department shall do one of the following:
1. Notify the applicant that the application is not administratively complete (that is, that it does not include all of the information required under (e) above) and request more information;

2. Notify the applicant that the project does not qualify for authorization under general permit 26; or
3. Take no action. If the Department takes no action, the stream cleaning project is authorized under general permit 26 to the extent that the project does not violate other laws then in effect.

(g) Within 60 days of the Department's receipt of an application submitted under (e) above for a project that does involve sediment removal, the Department shall do one of the following:

1. Notify the applicant that the application is not administratively complete (that is, that it does not include all of the information required under (e) above) and request more information;
2. Notify the applicant that the project does not qualify for authorization under general permit 26; or
3. Take no action. If the Department takes no action, the stream cleaning project is authorized under general permit 26 to the extent that the project does not violate other laws then in effect.

(h) If the Department notifies the applicant under (f)2 or (g)2 above that a stream cleaning, clearing, or desnagging project is not authorized under general permit 26, the Department shall provide the applicant with the technical reasons for the decision. If the Department's technical reasons are based upon the inability to determine the natural stream bed, the Department shall, at the request of the applicant, assist in identifying the natural stream bed.

(i) Upon completion of a project under general permit 26 that involves the removal of sediment, the permittee shall submit to the Department a written notice that the project has been completed. The notice shall contain a certification that meets both of the following criteria:

1. The certification is signed by a licensed professional engineer who is the county or municipal engineer, or who is employed by the appropriate Soil Conservation District; and
2. The certification states each condition in (b), (c) and/or (d) above that applies to the project, and states whether the condition has been satisfied.

(j) Activities under general permit 26 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

7:7A-5.26A Combined general permit 26 and flood hazard area permit

(a) If an activity authorized under general permit 26 also requires a flood hazard area permit under N.J.A.C. 7:13, the general permit 26 authorization shall constitute a combined freshwater wetlands general permit authorization and flood hazard area permit for the project.

(b) The combined permit provided for under this section shall be subject to the conditions for combined permits found at N.J.A.C. 7:7A-4.6. An application for the

combined general permit 26 and flood hazard area permit shall meet the application requirements for an authorization under general permit 26, set forth at N.J.A.C. 7:7A-10.

7:7A-5.27 General permit 27— Redevelopment of previously disturbed areas

(a) General permit 27 authorizes the disturbance of degraded freshwater wetlands, transition areas, and/or State open waters necessary for redevelopment, as defined at N.J.A.C. 7:7A-1.4, of an area previously significantly disturbed by industrial or commercial activities.

(b) General permit 27 authorizes activities only if:

1. The activities are located in an area that was previously disturbed by commercial or industrial activities;
2. The area is abandoned or underutilized;
3. The area meets at least one of the following criteria:
   i. It has been identified on the inventory of brownfield sites compiled by the Brownfields Redevelopment Task Force pursuant to N.J.S.A. 58:10B-23b;
   ii. It is the subject of a redevelopment agreement entered into pursuant to N.J.S.A. 58:10B-27;
   iii. It has been identified as an environmental opportunity zone pursuant to N.J.S.A. 54:4-3.150 et seq.; or
4. The freshwater wetlands, transition areas, and/or State open waters to be disturbed are significantly degraded by human disturbance or alteration and are of little ecological value.

(c) Activities under general permit 27 shall disturb no more than one acre of freshwater wetlands, transition area, and/or State open water. However, this acre does not count toward the one acre allowed under multiple general permits under N.J.A.C. 7:7A-4.4(a)2.

(d) If activities under general permit 27 disturb more than one half acre of freshwater wetlands or State open waters, the applicant shall perform mitigation under N.J.A.C. 7:7A-15 for all of the disturbance authorized under general permit 27.

(e) Activities under general permit 27 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits.

(Agency note: The transition area provisions currently codified at N.J.A.C. 7:7A-6 have been recodified, with minor clarifying changes, at N.J.A.C. 7:7A-2.6 through 2.8. The transition area waiver provisions below at N.J.A.C. 7:7A-6 are recodified, with minor changes, from N.J.A.C. 7:7A-7. Changes from the existing provisions are indicated.)

SUBCHAPTER 6 [7.] TRANSITION AREA WAIVERS

(Agency note: the following section is proposed to be recodified, with major rewording and organizational changes that do not change its meaning, at proposed N.J.A.C. 7:7A-6.1.)

[7:7A-7.1 General provisions

(a) A transition area waiver shall not be granted by the Department pursuant to the Act and this chapter unless it includes conditions as necessary to ensure that a particular project or activity results in minimal environmental impact and unless the purposes and functions of transition areas as set forth in N.J.A.C. 7:7A-6.1(a) and (b) are satisfied.

(b) Any person proposing to engage in a prohibited activity within 150 feet of an exceptional resource value wetland, or within 50 feet of an intermediate resource value wetland, shall apply to the Department for a transition area waiver.

(c) The Department may authorize the following through a transition area waiver:

1. A reduction in the standard transition area width established in N.J.A.C. 7:7A-6.1(d) and (e). Reductions are determined at N.J.A.C. 7:7A-7.2 for exceptional resource value freshwater wetlands and at N.J.A.C. 7:7A-7.3 for intermediate resource value freshwater wetlands;

2. A modification in the shape, but not the square footage, of the standard transition area through a transition area averaging plan pursuant to N.J.A.C. 7:7A-7.5. This waiver is available for transition areas adjacent to both exceptional and intermediate resource value freshwater wetlands;

3. A partial elimination of the standard transition area width along a portion of the freshwater wetland to allow special activities as established in N.J.A.C. 7:7A-7.4. This waiver is available for transition areas adjacent to both exceptional and intermediate resource value freshwater wetlands; or

4. Any combination of (c)1, 2, and 3 above.

(d) Reduction or modification of a transition area shall be based solely on the transition area adjacent to a particular freshwater wetland. For property with more than one freshwater wetland, the standard transition area width and the criteria for reducing or modifying the standard width shall be applied separately to each freshwater wetland. In no case may expansion of a transition area adjacent to one freshwater wetland compensate for reduction of a transition area adjacent to a separate freshwater wetland. However, one transition area waiver application may be used to request transition area waivers for more than one transition area located on a single property.

(e) In determining whether to issue or deny a transition area waiver, the Department shall consider information submitted by the applicant; local, county, state and Federal government agencies; and interested citizens and may consider any other available information.

(f) The Department's authorization of activities under a Statewide general permit, individual freshwater wetlands permit or mitigation plan shall automatically include a transition area waiver. In addition, the approval of a mitigation plan in a transition area as a result of either a permit approval or resolution of an enforcement action under the Act and Federal Act will automatically include a transition area waiver. No fee or application will be required for these waivers. The transition area waiver will allow encroachment only in that portion of the transition area bordering on that portion of the freshwater wetland in which the authorized activity is to take place which the Department determines is necessary to accomplish the authorized activity. Any additional prohibited activities in the transition area not directly required for the authorized activity shall require a separate transition area waiver from the Department pursuant to the Act and this chapter.

(g) Every approved transition area waiver, except for those issued pursuant to (f) above and N.J.A.C. 7:7A-7.4, Special Activity waivers, shall be conditioned on the recording of a Department-approved deed restriction of activities which may be undertaken in the transition area. Prior to construction, the deed restriction shall be recorded in the office of the clerk of the county or through the register of deeds and mortgages in which the premises are situated. The restriction shall run with the land and be binding upon the applicant and the applicant's successors in interest in the premises or in any part thereof and shall include the following:

1. The Department-approved restriction shall provide that no prohibited activities will occur in the modified transition area unless the Department finds that:

i. There is compelling public need for the activity greater than the need to protect the modified transition area; and

ii. That the activity has no practicable alternative which would:

(1) Not involve a transition area;

(2) Involve a transition area but would have less adverse impact on the transition area and the adjacent wetland; and

(3) Not have other significant adverse environmental consequences, that is, it shall not merely substitute other significant environmental consequences for those attendant on the original proposal.

2. The applicant shall provide proof that the deed restriction is recorded in the office of the clerk of the county or through the register of deeds and mortgages in which the premises are situated, or provide documentation that the restriction has been accepted for recording at the above offices.

7:7A-7.2 Exceptional resource value freshwater wetlands: standards for transition area width reduction

(a) This section addresses standards for overall width reduction of transition areas adjacent to exceptional resource value wetlands. A transition area adjacent to a freshwater wetland of exceptional resource value shall be 150 feet wide except pursuant to a transition area waiver approved by the Department. Except pursuant to a transition area waiver for access to an authorized activity, granted by the Department pursuant to N.J.A.C. 7:7A-7.1(f), a transition area adjacent to a freshwater wetland of exceptional resource value shall not be reduced to less than 75 feet wide unless the applicant demonstrates, to the satisfaction of the Department, that if the activity was

instead proposed in the exceptional resource value wetland it would meet the standards for granting a freshwater wetlands permit.

(b) The Department shall grant a transition area waiver to reduce a transition area adjacent to a freshwater wetland of exceptional resource value from the standard transition area width only if:

1. The proposed activity would have no substantial impact as determined pursuant to (c), (d) or (e) below, on the adjacent freshwater wetland; or
2. The waiver is necessary to avoid an extraordinary hardship to the applicant, as described at (g) below.

(c) For the purposes of N.J.A.C. 7:7A-7, a substantial impact shall be deemed to exist on a freshwater wetland of exceptional resource value if one or more of the following is true, unless the applicant demonstrates otherwise to the Department's satisfaction pursuant to (h) below:

1. The freshwater wetland contains a present or "documented habitat for threatened or endangered species" as defined at N.J.A.C. 7:7A-1.4;
2. The freshwater wetland is located adjacent to FW1 waters or FW2 trout production waters;
3. The freshwater wetland is located adjacent to a component of either the Federal or State Wild and Scenic River System designated pursuant to 16 U.S.C. § 1271 et seq. or N.J.S.A. 13:8-45 et seq.; or adjacent to a waterway officially designated by Congress or the State Legislature as a "study river" for possible inclusion in either system, while the river is in an official study status;
4. The proposed project would cause the disturbance or exposure of acid producing deposits as defined at N.J.A.C. 7:13-5.10;
5. The property is located adjacent to a local, county, State, or federal park, wildlife refuge, sanctuary, management area or area listed on the New Jersey Register of Natural Areas; or
6. The proposed activity or project includes one or more of the following:

i. Construction or expansion of a commercial or industrial facility within the following Standard Industrial Classification (SIC) major groups as designated in the Standard Industrial Classification Manual prepared by the Office of Management and Budget in the Executive Office of the President of the United States.

SIC	Industry Category
22	Textile Mill Products
23	Apparel
24	Lumber & Wood Products
25	Furniture & Fixtures
26	Paper & Allied Products
27	Printing, Publishing & Allied Industries
28	Chemicals & Allied Products
29	Petroleum Refining & Related Industries
30	Rubber & Miscellaneous Plastics Products
31	Leather & Leather Products
32	Stone, Clay, Glass & Concrete Products
33	Primary Metal Industries
34	Fabricated Metal Products

35 Machinery
36 Electrical & Electronic Machinery
37 Transportation Equipment
38 Measuring Analyzing & Controlling Instruments, Photographic, Medical & Optical Goods
39 Miscellaneous Manufacturing Industries
47 Transportation Services
48 Communications
49 Utilities (Electric, Gas, Sewer), excluding linear Equipment
51 Nondurable Goods Wholesaling
55 Automotive Dealers and Gasoline Service Stations;

ii. Establishment of new or expansion of existing mineral extraction and/or processing operations. This includes mining or processing of construction sand, industrial sand, gravel, ilmenite, glauconite, limestone, or other minerals; or

iii. Construction or expansion of wastewater treatment or septic systems which are located within 150 feet of an exceptional resource value wetland or within 50 feet of an intermediate resource value wetland;

iv. Establishment of a new or expansion of an existing solid waste facility.

(d) The Department will consider the proposed project to have no substantial impact, and will issue a transition area waiver reducing the standard transition area width to 100 feet, if no activity prohibited pursuant to N.J.A.C. 7:7A-6.2 is conducted within the reduced 100 foot transition area and if all of the following transition area characteristics and proposed project factors are true:

1. The property or proposed project or activity does not fall into any of the categories indicating a substantial impact as listed at N.J.A.C. 7:7A-7.2(c)1, 2, 4, or 6.

2. The existing, pre-development transition area is unvegetated or has a herbaceous vegetational community as the dominant vegetational community as determined in (e)1 below;

3. The property has been part of an established ongoing farming, ranching or silviculture operation as defined at N.J.A.C. 7:7A-1.4 within the two years before the transition area waiver application is submitted; and

4. The proposed project will include the planting of native trees and shrubs in the reduced 100 foot transition area pursuant to a plan approved by the Department. The planting shall achieve no less than an 85 percent area coverage in the entire 100 foot transition area and ensure no less than 85 percent survival of the plants for no less than three years.

(e) If the project, activities and/or property do not result in a substantial impact as determined in (c) above, the Department shall determine the transition area width based on the slope and dominant vegetational community type of the transition area and the development intensity of the proposed project, as described below at (e) 1 to 3, as indices of impact on a freshwater wetland of exceptional resource value, using the matrix below.

Figure 2 - Matrix

1. The dominant vegetational community in a transition area is the plant community which covers the most surface area of the transition area contained within the subject property. Vegetational communities are classified as herbaceous, scrub-shrub, or forested.

i. An herbaceous vegetational community is characterized by the presence of annual and perennial plant species or bare ground.

ii. A scrub-shrub vegetational community is characterized by shrub and herbaceous plant species with an average height equal to or less than 20 feet. A forested area with little or no herbaceous or shrub layer (understory) shall be considered a scrub-shrub vegetational community for the purposes of this chapter.

iii. A forested vegetational community is characterized by tree species with an average height greater than 20 feet accompanied by a herbaceous or shrub layer.

2. The average slope of the ground in the existing pre-activity standard transition area is measured as the arithmetic mean of slope measurements of the transition area taken every 200 feet along the outside transition area boundary. Slope shall be measured as the change in elevation of the ground from the freshwater wetlands boundary to the outside transition area boundary over the standard transition area width established in N.J.A.C. 7:7A-6.1.

3. The development intensity of the proposed project is the percentage of the surface area of the property, measured on a horizontal scale, which will be covered by impervious surfaces at the completion of the proposed project. For the purposes of this paragraph, "property" means the municipal tax lot or lots upon which any part of the proposed project will occur. Impervious surfaces are areas which prevent the infiltration and percolation of water into the soil. Impervious cover includes, but is not limited to, pavement, rooftops, sidewalks, driveways, tennis courts and swimming pools. The area used to calculate development intensity shall exclude freshwater wetlands, transition areas, and State open waters. The sum of the square footage of freshwater wetlands, transition areas, and State open waters on the property is subtracted from the square footage of the entire property. The resulting number is divided into the square footage of all impervious cover which will result on the property upon completion of the proposed project. This quotient is multiplied by 100 percent to obtain the percentage of impervious cover, also known as the development intensity, which can be expressed mathematically as:

DI = IC/(PA-(FW + TA + SOW)) 100%, where:

i. DI is the development intensity of the project expressed as a percentage;

ii. IC is the square footage of impervious cover which will exist on the entire subject property or properties which are affected by the proposed project, at the completion of the proposed project, including pre-existing impervious cover.

iii. PA is the square footage of the property or properties on which the proposed project or activity will occur;

iv. FW is the square footage of freshwater wetlands present on the subject property;

v. TA is the square footage of the transition area based on the standard transition area width established at N.J.A.C. 7:7A-6.1; and

vi. SOW is the square footage of State open waters on the subject property.]

(Agency note: The provisions below are proposed for relocation with clarifications at N.J.A.C. 7:7A-6.5.)

[(f) An extraordinary hardship to the applicant will be considered to exist when:

1. The subject property is not susceptible to a reasonable use as is presently developed as authorized by the provisions of the Act and this chapter and this limitation results from unique and extreme circumstances peculiar to the subject property which:

i. Do not apply to or affect other property in the local region; and

ii. Relate to or arise out of the subject property, rather than the personal situation of the applicant, and are not the result of any action or inaction by the applicant or the owner or the owner's predecessors in title.

2. For single family residential lots which are unbuildable due to the presence of transition areas, the Department may grant a transition area reduction waiver to reduce the transition area to a minimum of 75 feet based on hardship if the following conditions are met:

i. The lot was subdivided prior to July 1, 1988 and was owned by the applicant since that time;

ii. The applicant has not received a waiver for a reduction of a transition area based on this hardship criteria for the past five years;

iii. The applicant shall demonstrate that adjacent properties cannot be purchased for fair market value to create a buildable lot;

iv. The applicant shall demonstrate that the subject property was offered for sale at fair market value to adjacent landowners and that the offer was refused;

v. The subject parcel is not contiguous with an adjacent improved parcel which was owned by the applicant on July 1, 1988; and

vi. The applicant shall demonstrate that the subject property was offered for sale at fair market value to interested public or private conservation organizations and that the offer was refused. The Department will provide applicants with a listing of conservation organizations upon request.]

(Agency Note: The substance of the provision below is proposed for recodification at N.J.A.C. 7:7A-6.1(g).)

[(g) If the applicant is unable to demonstrate that an activity will have no substantial impact on the adjacent wetland by satisfying the criteria at (c) above or at N.J.A.C. 7:7A-7.3, N.J.A.C. 7:7A-7.4(e), or 7.5, an applicant may demonstrate no substantial impact through the use of scientific documentation. This documentation may include but is not limited to, nutrient or sediment transport models, buffer models such as "The Wetlands Buffer Delineation Method," prepared by Rogers, Golden and Halpern, Inc., the "Buffer Delineation Model for New Jersey Pinelands Wetlands," prepared by Charles T. Roman and Ralph E. Good, or wildlife habitat suitability studies. If the applicant elects to use a buffer model, the following shall be addressed as they relate to the adjacent wetlands: sediment, nutrient, and pollutant transport and removal, impacts on sensitive species, and potential impacts to surface water quality.

7:7A-7.3 Intermediate resource value freshwater wetlands: standards for transition area width reduction

(a) This section addresses standards for overall width reduction of transition areas adjacent to intermediate resource value wetlands. A transition area adjacent to a freshwater wetland of intermediate resource value shall be 50 feet wide except pursuant to a transition area waiver approved by the Department. Except pursuant to a

Department-approved transition area averaging plan issued pursuant to N.J.A.C. 7:7A-7.5, a transition area permit for access to an authorized activity granted by the Department pursuant to N.J.A.C. 7:7A-7.1(f), or a special activity permit pursuant to N.J.A.C. 7:7A-7.4, a transition area adjacent to a freshwater wetlands of intermediate resource value shall not be reduced to less than 25 feet wide.

(b) The Department shall grant a transition area waiver to reduce a transition area adjacent to a freshwater wetland of intermediate resource value from the standard transition area width only if:

1. The proposed activity would have no substantial impact, as determined pursuant to (c) and (d) below, on the adjacent freshwater wetland; or

2. The waiver is necessary to avoid a substantial hardship to the applicant, as defined in (e) below.

(c) For the purposes of this subchapter, a substantial impact shall be deemed to exist on a freshwater wetland of intermediate resource value if one or more of the following is true, unless the applicant demonstrates otherwise to the Department's satisfaction pursuant to N.J.A.C. 7:7A-7.2(g):

1. The freshwater wetland is a critical habitat for fauna or flora, as determined by the Department. Critical habitat for fauna are areas which serve an essential role in maintaining commercially and recreationally important wildlife, particularly for wintering, breeding, spawning and migrating activities. Critical habitat for flora are areas supporting rare or unique plant species or uncommon vegetational communities in New Jersey;

2. The freshwater wetland is located adjacent to a component of either the Federal or State Wild and Scenic River System designated pursuant to 16 U.S.C. § 1271 et seq. or N.J.S.A. 13:8-45 et seq.; or adjacent to a waterway officially designated by Congress or the State Legislature as a "study river" for possible inclusion in either system, while the river is in an official study status;

3. Any soils in the transition area which are classified as acid soils as defined at N.J.A.C. 7:13-5.10 will be disturbed by the proposed activity;

4. The property is located adjacent to a local, county, State or Federal park, wildlife refuge, sanctuary, management area, or area listed on the New Jersey Register of Natural Areas; or

5. The proposed activity or project includes one or more of the operations or activities at N.J.A.C. 7:7A-7.2(c)6.

(d) If the project, activities and/or property do not meet any of the criteria in (c) above, the Department shall determine the transition area width reduction from that of the standard transition area width based on the slope and dominant vegetational community type of the transition area and the development intensity of the proposed project, as described at N.J.A.C. 7:7A-7.2(e)1 through 3, as indices of the impact on a freshwater wetland of intermediate resource value, using the criteria below:

1. A transition area waiver reducing the transition area width to 25 feet shall be granted if all of the following are true:

i. The dominant vegetational community type, as described in N.J.A.C. 7:7A-7.2(e)1, of the standard transition area is a forested vegetational community;

ii. The slope of the standard transition area, as determined pursuant to N.J.A.C. 7:7A-7.2(e)2, is less than or equal to one percent.

iii. The development intensity of the project, as determined N.J.A.C. 7:7A-7.2(e)3, is less than 20 percent.

2. A transition area waiver reducing the transition area width to 35 feet shall be granted if all of the following are true;

i. The dominant vegetational community type, as described at N.J.A.C. 7:7A-7.2(e)1, of the standard transition area is a forested vegetational community;

ii. The slope of the standard transition area, as determined pursuant N.J.A.C. 7:7A-7.2(e)2, is less than or equal to three percent; and

iii. The developmental intensity of the project, as determined pursuant to N.J.A.C. 7:7A-7.2(e)3, is less than 40 percent.

3. A transition area waiver reducing the transition area width to 35 feet shall be granted if all of the following are true:

i. The dominant vegetational community type, as described at N.J.A.C. 7:7A-7.2(e)1, of the standard transition area is scrub-shrub or herbaceous vegetational community;

ii. The slope of the standard transition area, as determined pursuant to N.J.A.C. 7:7A-7.2(e)2, is less than or equal to one percent; and

iii. The development intensity of the project, as determined pursuant to N.J.A.C. 7:7A-7.2(e)3, is less than 20 percent.

4. A substantial impact on the freshwater wetland shall be deemed to exist, and a transition area waiver shall not be granted pursuant to this section, if the conditions in (d)1, 2 or 3 above are not met.]

(Agency note: The following provision is proposed for recodification at N.J.A.C. 7:7A-6.5, with minor clarifying changes.)

[(e) A substantial hardship to the applicant shall be considered to exist when:

1. The subject property is not susceptible to a reasonable use as authorized by the provisions of the Act and this chapter and this limitation results from unique circumstances peculiar to the subject property which:

i. Do not apply to or affect other property in the immediate vicinity; and

ii. Relate to or arise out of the subject property, rather than the personal situation of the applicant, and are not the result of any action or inaction by the applicant or the owner or the owner's predecessors in title.

2. For single family residential lots which are unbuildable due to the presence of transition areas, the Department may grant a transition area reduction waiver to reduce the transition area to a minimum of 25 feet based on hardship if the following conditions are met:

i. The lot was subdivided prior to July 1, 1988 and was owned by the applicant since that time;

ii. The applicant has not received a waiver for a reduction of a transition area based on this hardship criteria for the past five years;

iii. The applicant shall demonstrate that adjacent properties cannot be purchased to create a buildable lot for fair market value;

iv. The applicant shall demonstrate that the subject property was offered for sale at fair market value to adjacent landowners and that the offer was refused;

v. The subject parcel is not contiguous with an adjacent improved parcel which was owned by the applicant on July 1, 1988; and

vi. The applicant shall demonstrate that the subject property was offered for sale at fair market value to interested public or private conservation organizations and that the

offer was refused. The Department will provide applicants with a listing of conservation organizations upon request.

7:7A-7.4 Special activities: Standards for granting transition area waivers

(a) The Department will issue transition area waivers for certain special activities meeting the criteria in this section. Waivers under this section are not subject to the criteria in N.J.A.C. 7:7A-7.2, 7.3 or 7.5. The Department will issue a transition area waiver to reduce or partially eliminate the standard transition area to allow for the special activities listed below at (a)1 through 3, provided the applicable conditions for each activity set forth below at (b), (c), (d), (e) and (f) are met; provided the project is designed to minimize impacts to the freshwater wetland and transition area; and provided the transition area continues to serve the purposes set out at N.J.A.C. 7:7A-6.1(a) and (b). Reductions or partial eliminations authorized under this section shall not require compensation pursuant to N.J.A.C. 7:7A-7.5. Except pursuant to a transition area waiver for access to an authorized activity issued by the Department pursuant to N.J.A.C. 7:7A-7.1(f), a transition area adjacent to freshwater wetlands of exceptional resource value shall not be reduced to less than 75 feet wide unless the applicant demonstrates, to the satisfaction of the Department, that if the activity was instead proposed in the exceptional resource value wetland it would meet the standards for granting a freshwater wetlands waiver. The special activities are:

1. Stormwater management facilities as defined at (b) below;
2. Linear development as defined at N.J.A.C. 7:7A-1.4;
3. Activities performed in the transition area which are permitted under specific Statewide general permits listed in (e) below; and
4. Activities performed in the transition area which can be defined as redevelopment as specified in (f) below.

(b) If the proposed activity is the construction of a stormwater management facility, the Department will approve a transition area waiver for the reduction or partial elimination of a transition area if there is no feasible alternative onsite location for the facility.

1. For the purposes of this paragraph, "stormwater management facility" means a facility which receives, stores, conveys or discharges stormwater runoff and is designed in accordance with all applicable local, county and state regulations. These facilities may include retention and detention basins and infiltration structures; grassed swales; filter fabric; rip-rap channels and/or stormwater outfalls.
2. An alternative onsite location shall not be considered infeasible merely because it would require one or more of the following:
   i. Relocating part or all of the stormwater management facility outside of the transition area and into the upland;
   ii. Modifying the type of stormwater management facility;
   iii. Redesigning the layout, size, scope or configuration of the buildings, roads or other aspects of the project in order to accommodate the stormwater management facility; or
   iv. Reducing the scope or density of the project generating the stormwater.
3. An alternative onsite location shall be considered feasible if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of stormwater management goals.

(c) If the proposed activity is the construction of a linear development as defined at N.J.A.C. 7:7A-1.4, the Department will approve a further transition area waiver for the reduction or partial elimination of transition area if there is no feasible alternative location for the linear development.

1. An alternative location shall be considered feasible when the proposed linear development can be located outside of the transition area by:

i. Modifying the route of the linear development to avoid or reduce impacts to freshwater wetlands and transition areas; or

ii. Reducing the width of the linear development.

2. An alternative shall be feasible if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of the overall project purposes.

3. An alternative shall not be excluded from consideration merely because it includes or requires an area not owned by the applicant which could reasonably have been or be obtained or used to fulfill the basic purpose of the proposed activity.

(d) An alternative onsite location, as described in (b) above, or an alternative location, as described in (c) above, may be considered infeasible if its use for the project would cause other significant adverse environmental consequences.]

(Agency note: The provision below is proposed for deletion because each general permit covered in the provision being deleted will now include its own transition area provisions.)

[(e) No substantial impact will be deemed to exist on a freshwater wetland, and a transition area waiver will be granted for the reduction or partial elimination of transition area in order to conduct activities in the transition area which are covered by the Statewide general permits at N.J.A.C. 7:7A-9.2(a)2, 3, 4, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, and 25.

1. With the exceptions listed below at (e)1i through iii, all limitations and conditions contained in the description of Statewide general permit activities at N.J.A.C. 7:7A-9.2(a) will also apply to those activities when authorized by a permit pursuant to this subsection. For example, where the Statewide general permit at N.J.A.C. 7:7A-9.2(a)10, minor road crossings, is limited to 0.25 acres of wetland or open water disturbance, the special activity waiver for this activity will be limited to 0.25 acres of transition area disturbance. The following exceptions to this provision will apply:

i. For a special activity transition area waiver authorizing activities listed in Statewide general permit number 10, the 200 cubic yard fill limitation does not apply;

ii. For a special activity transition area waiver authorizing construction of stormwater structures that include a swale designed for water quality as listed in Statewide general permit number 11, the limitation at N.J.A.C. 7:7A-9.2(a)11vii, concerning backfill, does not apply; and

iii. For a special activity transition area waiver authorizing activities listed in Statewide general permit number 16, the 10 cubic yard fill limitation does not apply.

2. The limits at N.J.A.C. 7:7A-9.4 on the use of multiple Statewide general permits in freshwater wetlands also apply to the use in transition areas of multiple special activity waivers issued under this subsection. For example, pursuant to N.J.A.C. 7:7A-9.4(d), an approval under the Statewide general permit at N.J.A.C. 7:7A-9.2(a)8 will be authorized

only once for a single property. Likewise, only one special activity waiver for the activity covered by that Statewide general permit shall be approved in a transition area.

3. The authorization of the special activity waiver for general permit activities in transition areas listed under this subsection does not eliminate the possibility that activities in freshwater wetlands or State open waters may be authorized under Statewide general permits. However, these waivers shall not be used to double the impact of a specific activity by combining the allowed wetland and transition area impacts. For example, one minor road crossing shall not exceed 0.25 acres of disturbance or 100 linear feet regardless of whether the crossing is entirely in wetlands and open waters, entirely in the transition area, or traverses both. The 0.25 acre limitation does not include the transition area that is necessary for access to a wetland crossing. For example the Department shall not approve an application that combines a minor road crossing (Statewide general permit number 10) in the wetlands with a minor road crossing in the transition area (Special activity waiver number 10) which results in a minor road crossing designed to cross 100 feet of wetlands and open waters and then parallels the wetland for an additional 100 feet through the transition area.

(f) A special activity waiver may be granted for the reduction or partial elimination of a transition area in order to allow redevelopment, as defined at N.J.A.C. 7:7A-1.4, of a transition area, if the following conditions are met:

1. The applicant must demonstrate to the satisfaction of the Department that the proposed activity will not result in substantial impact to the adjacent freshwater wetland;

2. The area of proposed activity must be covered by pavements or impervious surfaces legally existing in the transition area prior to July 1, 1989, or permitted under the Act. This does not include expansion of impervious surfaces or any additional disturbance of the transition area; and

3. Where practicable, a portion of the developed transition area adjacent to the wetland shall be revegetated and restricted pursuant to N.J.A.C. 7:7A-7.1(g).

(g) A person shall not commence a prohibited activity in a transition area pursuant to (e) above prior to obtaining a transition area waiver from the Department pursuant to the Act and this chapter. The limitations of N.J.A.C. 7:7A-7.2(c) and 7.3(c) do not apply to transition area waivers granted under (e) above.

7:7A-7.5 Transition area waiver, averaging plans: Standards for modifying the shape of a transition area

(a) A transition area averaging plan, a type of transition area waiver, is a plan to modify the overall shape of the transition area without reducing the total square footage of the transition area. A transition area averaging plan may be approved for activities adjacent to either an intermediate or exceptional resource value freshwater wetlands. An example of a transition area averaging plan is shown in N.J.A.C. 7:7A-7 Appendix A, which is incorporated by reference in this subchapter.

(b) Subject to the limitations contained in this subsection and to the limitations of (c) below, an applicant may change the shape of a transition area consistent with a Department approved transition area averaging plan. Portions of the required transition area width may be reduced provided that the reduction in width is compensated, on a

square footage basis, by the expansion of another portion of the same transition area on property owned or legally controlled by the applicant, and provided that the resulting transition area continues to serve the purposes of a transition area set forth in N.J.A.C. 7:7A-6.1(a) and (b).

1. The Department shall not approve any transition area averaging plan for exceptional resource value wetlands if any of the following site conditions exist because the Department has determined that the resultant transition area will no longer serve the purposes of a transition area set forth in N.J.A.C. 7:7A-6.1(a) and (b):

i. The slope of the existing, pre-activity transition area where the reduction is proposed is greater than 25 percent;

ii. The freshwater wetland adjacent to the transition area is a breeding or nesting habitat for "threatened or endangered species", as defined at N.J.A.C. 7:7A-1.4; or

iii. The transition area averaging plan proposes to:

(1) Compensate for the reduction of the transition area by increasing the width of any portion of the transition area to more than 50 percent of the standard transition area width;

(2) Reduce the transition area in order to place or construct a new septic system which discharges onsite; or

(3) Reduce the transition area to place or construct an outfall structure that is discharging or will discharge unfiltered or otherwise untreated stormwater into the adjacent wetlands.

2. For an exceptional resource-value-wetland, in the case where an averaging plan is applied for in conjunction with a transition area reduction, regardless of the reduction width approved, the averaging plan shall be calculated on a minimum 100 foot width; or

3. In no case shall the width of any part of a transition area adjacent to a freshwater wetland of exceptional resource value be reduced to less than 75 feet except pursuant to N.J.A.C. 7:7A-7.1(f) (transition area waivers for access to authorized activities), or N.J.A.C. 7:7A-7.2(a) (standards for width reduction) unless the applicant demonstrates, to the satisfaction of the Department, that if the activity was instead proposed in the exceptional resource value wetland it would meet the standards for granting a freshwater wetlands permit.

4. The Department shall not approve any transition area averaging plan for intermediate resource value wetlands if the following site conditions exist because the Department has determined that the resultant transition area will no longer serve the purposes of a transition area set forth in N.J.A.C. 7:7A-6.1(a) and (b):

i. The slope of the existing, pre-activity transition area where the reduction is proposed is greater than 25 percent;

ii. The transition area averaging plan proposes to:

(1) Reduce any portion of the transition area to less than 10 feet:

(2) Reduce the transition area to less than 25 feet in areas of critical habitat;

(3) Reduce the transition area to 10 feet wide for a continuous distance of 100 linear feet or more along the freshwater wetlands boundary;

(4) Compensate for the reduction of the transition area by increasing the width of any portion of the transition area to more than 50 percent of the standard transition area width;

(5) Reduce the transition area to place or construct a new septic system in the transition area which discharges onsite;

(6) Reduce the transition area to place or construct an outfall structure that is discharging unfiltered or otherwise untreated stormwater into the adjacent wetlands;

(7) Place structures, impervious surfaces or stormwater management facilities as defined at N.J.A.C. 7:7A-7.4 within 20 feet of the freshwater wetlands; or

(8) Reduce the transition area to less than 25 feet within the drainage basins of currently existing or proposed National Wildlife Refuges.

(c) A transition area averaging plan shall be based on each individual freshwater wetland and its associated transition area. Any expansion(s) of a transition area to compensate for a reduction elsewhere shall be located on the same transition area as the reduction, shall be adjacent to the same freshwater wetland where the transition area was reduced, and shall be on property owned or legally controlled by the applicant.]

(Agency note: the application requirements below are proposed for consolidation with other application requirements at proposed N.J.A.C. 7:7A-10.)

[7:7A-7.6 Application contents for transition area waivers

(a) Except for applications for a special activity waiver based on Statewide general permit number 25 for repair or alteration of malfunctioning individual subsurface sewage disposal systems pursuant to N.J.A.C. 7:7A-7.4(e), the application for a transition area waiver shall include the applicable fee for the review and processing of a transition area waiver application specified at N.J.A.C. 7:7A-16 and three copies of the following information. Applicants seeking authorization pursuant to N.J.A.C. 7:7A-7.4(e), shall comply with the notification procedures found at (c)4 below:

1. A completed application form, obtainable at the address at N.J.A.C. 7:7A-1.3, filled out as directed for a transition area waiver in the instructions accompanying the application form;

2. A written description of the location of the proposed activity and property including county, municipality, municipal lot(s), block(s) and street address;

3. A copy or photocopy of a portion of the U.S. Geologic Survey (U.S.G.S.) 7.5 minute quadrangle map (available from the Department's Maps and Publications Office, CN 402, Trenton, NJ 08625) with the property clearly outlined, and a determination of the State Plane Coordinates for the center of the property. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the end-points of those projects which are 1,999 feet or less, and for those projects which are 2,000 feet and longer, additional coordinates at each 1,000 foot interval;

4. A folded preliminary site plan or subdivision map of the property, or folded out-bound survey map of the property if no preliminary site plan or subdivision map exists, clearly identifying all proposed activities on the entire property, all existing structures on the property, and the freshwater wetland boundary as verified through a letter of interpretation;

i. Note: If the freshwater wetlands boundary shown on the site plan or subdivision map has not been verified by a letter of interpretation, the freshwater wetland boundary shall be visibly flagged and/or staked in the field.

5. A detailed written description of the proposed activity or activities, describing the total area to be modified by the entire project, and the total square footage of the transition area potentially affected, either temporarily or permanently.

6. A certified mail return receipt card, white receipt or green card is acceptable, from the U.S. Post Office, showing that a complete copy of the submittal to the Department

requesting a transition area waiver, including all materials required by this subsection, has been submitted to the clerk of each municipality in which the prohibited activity is proposed to take place.

7. A certified mail return receipt card, white receipt or green card is acceptable, from the U.S. Post Office, showing that a written notice has been forwarded to the municipal construction official, the environmental commission, or any other public body with similar responsibilities, planning board of each municipality, and the planning board of each county in which the activity is to occur and all landowners within 200 feet of the subject property. One written notice may be submitted for multiple applications so long as all notification requirements for each separate subsection is met. The written notice shall include, at a minimum, the following information and statement:

i. The name(s) and address(es) of the property owner(s);

ii. The property location by municipal lot(s) and block(s), municipality, county, and street address;

iii. A description of the proposed project and types of activities in the transition area;

iv. A map of the type required by (a)3 above showing the location of the property; and

v. The following statement:

"This letter is to provide you with legal notification that the referenced property owner is applying to the Land Use Regulation Element, Department of Environmental Protection and Energy, for a transition area waiver. The rules governing transition areas are found at N.J.A.C. 7:7A (Freshwater Wetlands Protection Act Rules)."

A transition area waiver, if approved by the Department, will allow certain prohibited activities, as defined in N.J.A.C. 7:7A-6.2, to occur in a transition area. A transition area is an area adjacent to a freshwater wetlands which minimizes adverse environmental impacts on the freshwater wetlands and serves as an integral component of the freshwater wetlands ecosystem. A transition area can extend up to 150 feet from the freshwater wetlands boundary depending on the resource value classification of the freshwater wetlands.

A copy of the application can be viewed at the Municipal Clerk's Office or by appointment at the address below during normal business hours. The Department welcomes comments on the transition area waiver application. Procedures for the Department's review of transition area waiver applications can be found at N.J.A.C. 7:7A-7.7. Written comments should be submitted to the Department within 15 days of receiving notice. Comments will be accepted until the Department makes a decision on the application. Please submit your written comments along with a copy of this letter to:

New Jersey Department of Environmental Protection and Energy
Land Use Regulation Element
Bureau of Regulation
CN 401
Trenton, New Jersey 08625
att: (County in which the property is located) Section Chief

As part of the Department's review of this application, Department personnel may perform a site inspection on your property. This site inspection will involve only that area of your property within 150 feet of the applicant's property line. This site visit will involve a visual inspection and possibly minor soil borings using a 4" diameter hand auger. The inspection will not result in any damage to vegetation or to improvements on your property.

"The Department will notify the environmental commission or any other public body with similar responsibilities, and the planning board and the municipal construction official of each municipality and the planning board of each county in which the activity is to occur of the Department's final decision concerning this transition area waiver application";

vi. If the proposed project involves a linear facility such as a pipeline or road of more than .5 miles, instead of notifying all landowners within 200 feet of the property(ies) lines, the applicant shall give public notice by publication of a display advertisement. The advertisement shall be a minimum of four column inches and be published in at least one newspaper of local circulation and one of regional circulation in the municipality. In addition, notice shall be given to owners of all real property within 200 feet of any above surface structure related to the linear facility, such as pumping stations, treatment plants, power substations, grade separated interchanges or similar structures. This does not include utility support structures or conveyance lines.

8. Written consent by the applicant to allow access to the subject property by representatives or agents of the Department for the purpose of conducting site inspections or surveys of the freshwater wetlands and transition areas thereon; and

9. Any information establishing a claim of hardship as determined pursuant to N.J.A.C. 7:7A-7.2(f) or 7.3(e), if applicable.

(b) If the freshwater wetlands boundary on the property has not been confirmed or delineated by the Department through a letter of interpretation pursuant to N.J.A.C. 7:7A-8 and the property is greater than one acre, the applicant shall also provide as part of the transition area waiver application the information required in N.J.A.C. 7:7A-8.3(a), except for the notice requirements at 8.3(a)8 and 9, and 8.3(b)2, Application for letters of interpretation. For Special Activity Waivers based on Statewide general permits pursuant to N.J.A.C. 7:7A-7.4(e), a wetlands delineation is only required for the area of the proposed activity.

(c) In addition to the information required in (a) and (b) above, the following information shall be submitted depending on the type of transition area waiver(s) requested in the application:

1. To reduce the standard transition area width pursuant to N.J.A.C. 7:7A-7.2 and 7.3 (except pursuant to 7.2(d)):

i. A description of the dominant vegetational community in the standard transition area, as described at N.J.A.C. 7:7A-7.2(e)1;

ii. The slope of the standard transition area, as determined pursuant to N.J.A.C. 7:7A-7.2(e)2; and

iii. The development intensity of the proposed project, as determined pursuant to N.J.A.C. 7:7A-7.2(e)3.

2. To reduce the standard transition area width pursuant to N.J.A.C. 7:7A-7.2(d), a proposal containing:

i. A detailed description of the size and type of the transition area planting project;

ii. A site plan showing the location of the proposed work and a cross-sectional and plan view of the proposed work;

iii. A description of the types of native trees and shrubs to be planted and at what spacing, as well as the type of seeding, fertilization and other stabilization activities;

iv. A monitoring and maintenance plan of the reduced transition area to ensure no less than 85 percent area coverage in the entire 100 foot wide transition area and no less than 85 percent survival of the plants for three years;

v. A schedule from initiation to completion of the planting project including the dates of planting and fertilization (rates and types), dates of monitoring measurements, as well as any other activities;

vi. Existing soil type(s) and soil conditions in the transition area; and

vii. Proof that the standard transition area has been part of an "established ongoing farming, ranching or silviculture operation" as defined at N.J.A.C. 7:7A-1.4 within the two years prior to submittal of the application.

3. For a special activity transition area waiver for the construction of a stormwater management facility or a linear development pursuant to N.J.A.C. 7:7A-7.4:

i. A written alternatives analysis describing the various alternatives considered including a written description and site plan drawings of each possible alternative considered and the reason(s) each alternative is not considered feasible.

4. For a special activity transition area waiver for a general permit activity pursuant to N.J.A.C. 7:7A-7.4(e), except for those based on Statewide general permit number 25 as described below at (c)4ii:

i. All of the information required for determining compliance with the criteria of the specific general permit activity pursuant to N.J.A.C. 7:7A-9.2(a).

ii. A person proposing to engage in activities pursuant to N.J.A.C. 7:7A-7.4(e), based on Statewide general permit number 25, repair or alteration of malfunctioning individual subsurface sewage disposal systems, shall submit written notice containing a description of the proposed activities to the Department at least 30 days prior to commencement of work. This notification shall include a description and plan of the activities and their location including municipality, county, block, and lot; and an approval from the Board of Health or its designated agent for the proposed activities. If the Department fails to notify the applicant within 30 days of receiving the notification, the special activity waiver shall be deemed to have been approved, to the extent that the activity does not violate other statutes or regulations then in effect, and subject to any standard terms and conditions pursuant to N.J.A.C. 7:7A-9.3.

5. For a special activity transition area waiver for redevelopment of a transition area pursuant to N.J.A.C. 7:7A-7.4(f):

i. Plans showing the location and extent of existing impermeable surfaces in relation to transition area; and

ii. Plans showing the location and extent of proposed development and attendant features including, but not limited, to septic systems discharging onsite, and stormwater outfalls and a proposed mechanism to treat stormwater runoff prior to leaving the site.

6. For a transition area averaging plan pursuant to N.J.A.C. 7:7A-7.5, a statement that includes:

i. The total square footage of the standard transition area;

ii. The total square footage of the transition area to be disturbed by the proposed project;

iii. The total square footage proposed for transition area reduction, and proposed for transition area expansion in compensation for the proposed reduction, pursuant to the transition area averaging plan; and

iv. A site plan showing and clearly labeling the standard transition area, the proposed area of reduction of the standard transition area, and the proposed areas adjacent to the standard transition area that will be added to the standard transition area

as square footage compensation for the reduction. The transition area shown on the site plan shall be reproducible in the field.

(d) Applicants shall perform recordkeeping activities for transition area waiver applications according to the requirements at N.J.A.C. 7:7A-11.2.

(e) All transition area waiver applications shall be signed according to the signatory requirements at N.J.A.C. 7:7A-11.3.

(f) All transition area application fees shall be paid according to the requirements set forth for payment of permit fees at N.J.A.C. 7:7A-16.]

(Agency note: the substance of the provisions below has been consolidated with other application review provisions at N.J.A.C. 7:7A-12.)
[7:7A-7.7 Procedure for review of transition area waiver applications

(a) Within 30 days of the receipt of an application for a transition area waiver, the Department shall review the application for completeness and may return all materials contained in a deficient application with a request for additional information, or declare the application complete. If the application does not include the fee specified at N.J.A.C. 7:7A-16, no action shall be taken by the Department under this section, the submittal will not be considered an application, and completeness review will not begin.

(b) If additional information is required of an applicant, the Department shall have 15 days after receipt of the information to request clarification of the submitted additional information. In such cases, the application shall not be considered complete until the clarification is received by the Department. If no clarification of the additional information is necessary, the application shall be considered complete as of the date of receipt of the additional information.

(c) Except as indicated in (d) and (h) below, the Department shall issue or deny a transition area waiver within 90 days of receiving a complete transition area waiver application or within 90 days after receipt of the requested additional information or clarification sufficient for the application to be considered complete.

(d) If the transition area waiver application is submitted together with an individual freshwater wetlands permit application concerning the same property, the Department shall approve or deny the transition area waiver within the time period set forth in N.J.A.C. 7:7A-12 for the approval or denial of the individual freshwater wetlands permit application.

(e) Applications may be cancelled by the Department or withdrawn, amended, or resubmitted by the applicant pursuant to N.J.A.C. 7:7A-7.10.

(f) When a transition area waiver is issued pursuant to this subchapter, the Department shall send copies to all municipal and county agencies which received copies of the transition area waiver application.

(g) The Department will provide notice of application for a transition area waiver, the status of all applications, and the final decision concerning all applications in the DEPE Bulletin, as set forth in N.J.A.C. 7:7A-12.4.

1. Copies of all transition area waiver applications will be available for public review by interested persons at the municipal clerk's office and in the offices of the Department in Trenton (see N.J.A.C. 7:7A-1.3 for address) by appointment during normal business hours.

(h) Within 20 days of publication of the notice of application in the DEPE Bulletin, interested persons may request in writing that the Department hold a public hearing on a particular application. The Department will set a time, place and date for the public hearing after the close of the 20 day hearing request period, and shall so notify the applicant. The Department will hold the public hearing within 60 days from the close of the 20 day period. The hearing shall be in the county wherein the transition area is located whenever practicable. The applicant is responsible for the cost of the hearing.

1. The Department may issue or deny a waiver without a public hearing unless there is a significant degree of public interest in the application. If the Department grants a hearing, the application shall not be considered complete until 15 days after the public hearing.

2. The Department and the applicant shall follow the public hearing procedures for freshwater wetlands permits established N.J.A.C. 7:7A-12.4(d) through (i).

(i) The Department shall establish conditions in transition area waivers as required on a case-by-case basis, to assure compliance with all applicable provisions of this chapter and the Act.]

(Agency note: Provisions below are proposed for consolidation with other hearings and appeal provisions at N.J.A.C. 7:7A-1.7.)
[7:7A-7.8 Hearings and appeal

The applicant or other affected party, if aggrieved by the Department's decision regarding a transition area waiver, may request a hearing on this decision pursuant to N.J.A.C. 7:7A-12.7.]

(Agency note: Provisions below are proposed for consolidation with provisions governing duration of permits at N.J.A.C. 7:7A-13.3, governing modification of permits at N.J.A.C. 7:7A-14, and governing transfer of permits at N.J.A.C. 7:7A-14.2.)
[7:7A-7.9 Duration, effect, modification and transfer of transition area waivers

(a) A transition area waiver issued by the Department shall be effective for a fixed term of five years.

(b) If construction is begun during the valid five year term of the waiver and performed on a continuous basis, the applicant may apply for an extension of the effective date of the waiver.

(c) If construction does not begin in the transition area within the five year term of the waiver, a new waiver application will be required.

(d) The issuance of a transition area waiver does not convey property rights of any sort, or any exclusive privilege.

(e) In the event of rental, lease, sale or other conveyance of the site by the permittee, the waiver shall be continued in force and shall apply to the new tenant, lessee, owner or assignee so long as there is no change in the site, proposed construction or proposed use of the facility, as described in the original application, and as long as a waiver modification pursuant to N.J.A.C. 7:7A-13 has been approved.]

(Agency note: Provisions below are proposed to be consolidated with other provisions concerning cancellation, withdrawal, resubmittal and amendment of applications at N.J.A.C. 7:7A-12.6.)
[7:7A-7.10 Cancellation, withdrawal, resubmission and amendment of applications

(a) Applications may be cancelled by the Department; or withdrawn, amended, or resubmitted by an applicant.

(b) If an application is not complete for final review within 60 days of a request for additional information, the Department shall send a letter canceling the application and stating that the application will be purged from Department files and that a new application will be required to reactivate the Department's review. If the applicant sends the Department a letter documenting good cause for not supplying the requested information within the 60 day period the Department will grant an automatic extension of 30 days. The Department will grant additional 30-day extensions upon receiving a written request for such extension from the applicant.

1. All fees submitted with an application subsequently cancelled shall be non-refundable.

(c) An applicant may withdraw an application at any time in the application review process. All fees submitted with such applications are non-returnable when a significant portion of the review has been completed. In some cases however (see (d) below) the fees may be credited toward future applications.

(d) If an application is cancelled, denied or withdrawn, the applicant may resubmit an application for a revised project on the same site. The resubmitted application will be treated as a new application, although references may be made to the previously submitted application. A new fee will be required unless application is resubmitted within one year of the date of denial or withdrawal, in which case the original permit fee may be credited to the new application.

(f) A waiver application may be amended at the applicant's discretion at any time as part of the waiver review process. Copies of amendments and amended information shall be distributed by the applicant to the same persons to whom copies of the initial application were distributed. All amendments to pending applications shall constitute a new submission and may at the Department's discretion require reinitiation of the entire review process.]

7:7A-6.1 General transition area waiver provisions

(a) This section sets forth the requirements for transition area waivers. The Department issues the following types of transition area waivers:

1. An averaging plan transition area waiver, addressed at N.J.A.C. 7:7A-6.2;
2. A special activity transition area waiver for stormwater management, linear development, redevelopment, or activities eligible for an individual permit, addressed at N.J.A.C. 7:7A-6.3;
3. A matrix type width reduction transition area waiver, addressed at N.J.A.C. 7:7A-6.4;
4. A hardship transition area waiver, addressed at N.J.A.C. 7:7A-6.5;
5. A general permit transition area waiver. If a general permit authorizes disturbance of a transition area, an authorization issued under the general permit constitutes a transition area waiver for the activities covered by the general permit. This waiver is not addressed in this section, but in each general permit in N.J.A.C. 7:7A-5 that covers transition area disturbances; and
6. An access transition area waiver. Each general permit authorization, individual freshwater wetlands permit and mitigation proposal shall automatically include a limited transition area waiver as necessary to allow access to the authorized activity. No fee or application is required for this waiver. However, an access transition area waiver will allow encroachment only:
   i. In that portion of the transition area bordering on that portion of the freshwater wetland in which the authorized activity is to take place; and
   ii. For an activity that the Department determines is necessary to accomplish the permitted activity. An activity not directly required in order to obtain access to the permitted activity shall require a separate transition area waiver.

(b) Some transition area waivers change the shape or size of a transition area, while others do not change the transition area, but allow prohibited activities in the transition area, as follows:

1. A matrix type width reduction transition area waiver reduces the width of a transition area on a site without changing its shape;
2. An averaging plan transition area waiver changes the transition area shape without changing its size; and
3. A special activity transition area waiver, hardship transition area waiver, general permit transition area waiver, and access transition area waiver allow prohibited activities within a transition area. These waivers do not reduce the size or change the shape of the transition area. The waiver merely allows the specified prohibited activities to be performed in the transition area.

(c) Placement of a building or structure immediately adjacent to a transition area inevitably results in prohibited activities occurring in the transition area during construction and use of the building, resulting in a substantial adverse impact on the freshwater wetland. Therefore, the Department shall not issue a transition area matrix type width reduction transition area waiver or averaging plan transition area waiver that will result in the following, unless the requirements of (d) below are met:

1. Construction of a non-residential building or structure within 20 feet of the outside boundary of a transition area; or
2. Placement of a residential development project, as defined at N.J.A.C. 7:7A-1.4, within a transition area or wetland.

(d) To satisfy the requirements of (c) above, the applicant shall demonstrate that:
1. Construction activities will be conducted in such a way that there will be no prohibited activities in the transition area and no regulated activities in a wetland;
2. The structure is designed and will be used in such a way that there will be no prohibited activities in the transition area and no regulated activities in a wetland. To demonstrate this in regard to a single family or duplex dwelling, the applicant shall demonstrate that any transition area or wetland within the area covered by the residential development project will not be owned or controlled by the resident(s) of the dwelling;
3. The transition area and/or wetland is fenced prior to construction of the structure (including site preparation), so as to clearly delineate its boundary and to prevent people from entering and/or disturbing the transition area and/or wetland; and
4. The applicant executes and records a conservation restriction, as defined at N.J.A.C. 7:7A-1.4, which prohibits any disturbance in the transition area.

(e) The Department shall include in a transition area waiver additional conditions as necessary to ensure that an activity does not result in a substantial impact on the adjacent wetlands, and does not impair the purposes and functions of transition areas as set forth in N.J.A.C. 7:7A-2.5.

(f) If a site has more than one freshwater wetland, the Department shall treat each wetland and its associated transition area separately for purposes of transition area waivers. To determine whether a freshwater wetland area is all one wetland or is made up of multiple separate wetlands, the Department shall consider the following factors:
1. The proximity of the wetland areas to each other; and
2. Whether the wetland areas are hydrologically connected.

(g) An applicant whose application does not meet the requirements for any of the transition area waivers listed in (a) above may obtain a transition area waiver through scientifically documenting that a proposed activity will have no substantial impact on the adjacent wetlands. This documentation may include but is not limited to, nutrient or sediment transport models, buffer models such as "The Wetlands Buffer Delineation Method," prepared by Rogers, Golden and Halpern, Inc., the "Buffer Delineation Model for New Jersey Pinelands Wetlands," prepared by Charles T. Roman and Ralph E. Good, or wildlife habitat suitability studies. An application submitted under this subsection shall address the following, as they relate to the adjacent wetlands: sediment, nutrient, and pollutant transport and removal; impacts on sensitive species; and surface water quality impacts.

(h) Each matrix type width reduction transition area waiver and averaging plan transition area waiver shall be conditioned on the recording of a Department-approved conservation restriction, as defined at N.J.A.C. 7:7A-1.4, restricting future activities in the entire transition area. The conservation restriction shall clearly show the boundaries of the transition area as modified from the standard transition area by the waiver. The

conservation restriction shall meet the requirements for protecting mitigation sites from future disturbance, set forth at N.J.A.C. 7:7A-15.14, except that the restriction shall allow later prohibited activities in the transition area, or a later reduction of the transition area, if the applicant demonstrates that:

1. There is a compelling public need for the activity, which is greater than the need to protect the transition area; and
2. The activity has no practicable alternative which would not involve a transition area, or which would involve a transition area but:
   i. Would have less adverse impact on the transition area and adjacent wetland; and
   ii. Would not merely substitute other significant environmental consequences for those attendant on the original proposal.

(i) A transition area waiver allowing the reduction of the transition area adjacent to an exceptional resource value wetland shall be conditioned on a transition area averaging plan which provides an average transition area width of at least 100 feet.

(j) The Department shall not issue an individual transition area waiver under this section and a general permit authorization for the same site, if the combined effect of the individual transition area waiver and general permit authorization would be to expand the general permit activity beyond the limits set forth in the general permit.

7:7A-6.2 Transition area averaging plan waiver

(a) A transition area averaging plan waiver modifies the overall shape of a transition area without reducing its total square footage. The Department may approve a transition area averaging plan waiver for activities adjacent to an intermediate or exceptional resource value freshwater wetlands. A diagram of an example transition area averaging plan is shown in N.J.A.C. 7:7A-6, Appendix A.

(b) The Department shall issue a transition area averaging plan waiver only if the transition area, as modified, will continue to serve the purposes of a transition area set forth in N.J.A.C. 7:7A-2.5. The Department shall presume that the following will result in a transition area that will not serve the purposes set forth in N.J.A.C. 7:7A-2.5, and shall not issue a transition area averaging plan waiver, unless the applicant demonstrates otherwise under N.J.A.C. 7:7A-6.1(g):

1. The portion of the existing, pre-activity transition area that will be reduced has a slope greater than 25 percent, as calculated under N.J.A.C. 7:7A-6.4(g);
2. A new individual subsurface sewage disposal (septic) system that discharges onsite will be placed within the existing, pre-activity transition area;
3. An outfall structure that will discharge unfiltered or untreated stormwater into wetlands will be placed within the existing, pre-activity transition area;
4. A structure, impervious surface, or stormwater management facility, as defined at N.J.A.C. 7:7A-1.4, will be placed within 20 feet of freshwater wetlands;
5. A residential development project, as defined at N.J.A.C. 7:7A-1.4, will be placed within a transition area or freshwater wetlands and the requirements of N.J.A.C. 7:7A-6.1(d) are not met; or
6. The transition area averaging plan proposes to:

i. Reduce any portion of the transition area to less than 10 feet wide:
ii. Reduce a transition area to less than 25 feet wide in an area containing critical habitat for fauna or flora, as defined at N.J.A.C. 7:7A-1.4;
iii. Reduce a transition area to 10 feet wide for a continuous distance of 100 linear feet or more along the freshwater wetlands boundary;
iv. Reduce a transition area to less than 25 feet wide within the watershed of a current or proposed National Wildlife Refuge; or
v. Compensate for a decrease in a transition area by increasing the width of any portion of a transition area adjacent to an intermediate resource value wetland to more than 75 feet.

(c) In addition to the presumptions at (b) above, the Department shall also presume that, for a transition area adjacent to an exceptional resource value wetland, the following will result in a substantial impact on the adjacent freshwater wetlands, and the Department shall not issue a transition area averaging plan waiver unless the applicant demonstrates otherwise under N.J.A.C. 7:7A-6.1(g):

1. The freshwater wetland adjacent to the transition area is a breeding or nesting habitat for a threatened or endangered species;
2. The freshwater wetland adjacent to the transition area discharges directly to a trout production water or a tributary thereof, except that a transition area averaging plan waiver shall not be disallowed under this subsection if:
   i. The freshwater wetlands and transition area remaining adjacent to the trout production water after the averaging is at least 150 feet wide, measured from the top of the bank of the trout production water; or
   ii. The wetland drains to a tributary that is separated from the trout production water by an intervening lake; or
3. The transition area averaging plan proposes to:
   i. Reduce any portion of the transition area to less than 75 feet wide; or
   ii. Compensate for a transition area reduction by increasing the width of any portion of the transition area to more than 225 feet.

(d) Each transition area averaging plan shall be specific to a particular freshwater wetland and its associated transition area. To determine whether a freshwater wetland area is all one wetland or made up of multiple separate wetlands, the Department shall consider the factors listed at N.J.A.C. 7:7A-6.1(f). If an applicant proposes to expand a transition area to compensate for a reduction elsewhere, the expanded portion of the transition area shall:

1. Be an extension of the same transition area that is being reduced, located adjacent to the same freshwater wetlands as the reduced transition area;
2. Be located on the same site, as defined at N.J.A.C. 7:7A-1.4, as the reduction;
3. Be owned in fee simple by, and under the full legal control of, the applicant. For example, the expanded portion of the transition area shall not be subject to a utility easement or other encumbrance; and
3. Have the same ecological characteristics as the reduced portion of the transition area, including the vegetation types. For example, if a forested portion of the transition area is reduced, the expanded portion of the transition area must also be forested.

7:7A-6.3 Special activity transition area waiver

(a) The Department shall issue a transition area waiver for certain special activities meeting the criteria in this section. However, the Department will issue a special activity waiver under this section only if the activities will not result in a substantial impact on the adjacent freshwater wetlands, and the proposed project will minimize impacts to the freshwater wetland and transition area.

(b) The Department shall issue the following types of special activity transition area waivers:

1. A stormwater management transition area waiver under (d) below;
2. A linear development transition area waiver under (e) below;
3. A redevelopment transition area waiver under (f) below; and
4. An individual permit transition area waiver under (g) below.

(c) When considering alternative locations under this section:

1. The Department shall consider an alternative location feasible if it is available and capable of being used after taking into consideration cost, existing technology, and logistics in light of the overall project purpose; and
2. The Department shall consider an alternative location infeasible if its use for the project would cause other, more significant adverse environmental consequences.

(d) The Department shall issue a special activity transition area waiver for stormwater management if there is no feasible alternative onsite location for the stormwater management facility. An alternative onsite location shall not be considered infeasible merely because it would require one or more of the following:

1. Relocating part or all of the facility outside of the transition area and into the upland;
2. Modifying the type of facility;
3. Redesigning the layout, size, scope or configuration of the buildings, roads or other aspects of the project in order to accommodate the facility; or
4. Reducing the scope, size, or density of the project.

(e) The Department shall issue a special activity transition area waiver for linear development, as defined at N.J.A.C. 7:7A-1.4, if there is no feasible alternative location for the linear development. In considering alternative locations, the Department shall consider the factors at (c) above and the following:

1. An alternative location shall be considered feasible when the proposed linear development can be located outside of the transition area by:
   i. Modifying the route of the linear development to avoid or reduce impacts to freshwater wetlands and transition areas; or
   ii. Reducing the width of the linear development; and
2. An alternative shall not be excluded from consideration merely because it includes or requires an area not owned by the applicant which could reasonably have been or be obtained or used to fulfill the basic purpose of the proposed activity.

(f) The Department shall issue a special activity transition area waiver for redevelopment of a significantly disturbed area if all of the following conditions are met:

1. The area of proposed activity is significantly disturbed so that it is not functioning as a transition area at the time of application, for example, the area is covered by an impervious surface such as pavement, or by gravel or paver blocks. For example, a lawn is not considered to be so significantly disturbed that it is not functioning as a transition area;
2. The significant disturbance in the area of proposed activity was legally existing in the transition area prior to July 1, 1989, or has been permitted under this chapter;
3. No additional disturbance is proposed that would expand the disturbed area; and
4. Where practicable, any remaining disturbed portion of the transition area shall be planted with indigenous plants that are beneficial to the wetland, and protected from future development by a conservation restriction that meets the requirements at N.J.A.C. 7:7A-15.14.

(g) The Department shall issue a special activity transition area waiver for an activity if the applicant demonstrates that, if the activity were instead proposed in a freshwater wetland, it would meet the standards for a freshwater wetlands individual permit at N.J.A.C. 7:7A-7.

7:7A-6.4 Matrix type width reduction transition area waiver

(a) This section sets forth the requirements for a matrix type width reduction transition area waiver, or " transition area matrix waiver", for a transition area adjacent to an exceptional or intermediate resource value wetland.

(b) The Department shall issue a transition area matrix waiver only if all of the following criteria are met:

1. If the freshwater wetland is located adjacent to a waterway that meets the following criteria, the activities are approved by the National Park Service:
   i. The waterway is a component of the Federal or State Wild and Scenic River System designated pursuant to 16 U.S.C. §1271 et seq. or N.J.S.A. 13:8-45 et seq.; or
   ii. The waterway is in an official study status for designation by Congress or the State Legislature as a "study river" for possible inclusion in either system described in i above;
2. The proposed activities would not cause the disturbance or exposure of acid producing deposits, as defined at N.J.A.C. 7:7A-1.4;
3. The site is not located adjacent to a local, county, State, or Federal park, wildlife refuge, sanctuary, management area or area listed on the New Jersey Register of Natural Areas; and
4. The application does not include construction or expansion of any of the following:
   i. A mineral extraction and/or processing operation, including mining or processing of construction sand, industrial sand, gravel, ilmenite, glauconite, limestone, or other minerals;

ii. A wastewater treatment or individual subsurface disposal system located within 150 feet of an exceptional resource value wetland or within 50 feet of an intermediate resource value wetland;
iii. A solid waste facility; or
iv. A facility for the storage, processing, or disposal of hazardous substances as defined in the Department's rules governing the prevention and reporting of discharges of hazardous substances at N.J.A.C. 7:1E-1.7.

(c) The only type of exceptional resource value wetland for which a transition area matrix waiver may be issued is a wetland that is located on a tributary to an FW1 water or on a tributary to an FW2 trout production water, and that does not:

1. Contain a present or documented habitat for threatened or endangered species, as defined at N.J.A.C. 7:7A-1.4; or
2. Discharge into FW1 waters or trout production waters.

(d) The Department shall not issue a transition area matrix waiver for a transition area on an intermediate resource value wetland that is a critical habitat for fauna or flora, as defined at N.J.A.C. 7:7A-1.4.

(e) The Department shall determine the width of a transition area using the matrix in Table B or Table C below, as applicable, based on the factors listed at (e)1 through 3 below:

1. The slope of the portion of the transition area contained within the site, as determined under (g) below;
2. The dominant vegetational community in the portion of the transition area contained within the site, as determined under (h) below,; and
3. The development intensity of the proposed project, as determined under (i) below.

Table B
Matrix for determining the width of a transition area (in feet) on an exceptional resource value wetlands

			Development intensity		
		Slope %	**Low** (0-10%)	**Moderate** (>10-40%)	**High** (>40%)
Dominant vegetational	**Herba-ceous**	0-2	100	120	140
		>2	150	150	150
	Scrub/shrub	0-2	75	75	80
		>2-5	95	115	130
		>5	150	150	150

	Forest	0-2	75	75	75
		>2-5	75	75	85
		>5-10	75	85	95
		>10-15	95	105	115
		>15-20	115	125	135
		>20	135	145	150

Table C
Matrix for determining the width of a transition area on an intermediate resource value wetlands

Conditions	**Transition area width**
Forest ✐1% slope < 20% development intensity	25 feet
Scrub/shrub or herbaceous ✐1% slope < 20% development intensity	35 feet
Forest ✐3% slope < 40% development intensity	35 feet

(f) For a transition area on an intermediate resource value wetland, if a site and/or proposed project does not meet one of the three sets of conditions in the matrix in Table C, a transition area matrix waiver is not available.

(g) To determine the slope of the transition area for use in the applicable matrix at (e) above, an applicant shall:

1. Measure the percent change in ground elevation from the outside boundary of the standard transition area to the inner (closest to the wetlands) edge of the area to be disturbed;
2. Repeat the measurement in (g)1 above at representative intervals along the outside transition area boundary, covering all of the transition area proposed to be reduced; and
3. Determine the arithmetic mean of the slope measurements taken under (g)2 above as the average slope for use in the applicable transition area matrix at (e) above.

(h) The dominant vegetational community in a transition area is the plant community which covers the most surface area of the transition area on the site. Transition area vegetational communities are classified as follows:

1. An herbaceous vegetational community is characterized by annual and perennial plant species or bare ground;
2. A scrub-shrub vegetational community is characterized by shrub and herbaceous plant species with an average height equal to or less than 20 feet. For the purposes of this section, a forested area with little or no herbaceous or shrub layer (understory) shall be considered a scrub-shrub vegetational community; and
3. A forested vegetational community is characterized by tree species with an average height greater than 20 feet accompanied by an herbaceous or shrub layer.

(i) To determine the development intensity of a site for use in the applicable matrix at (e) above, an applicant shall:

1. Determine the total area of the site in square feet;
2. Identify all freshwater wetlands, transition areas, or State open waters on the site, and determine the area, in square feet, covered by each;
3. Total the areas identified in (i)2 above;
4. Subtract (i)3 from (i)1. This is the net land area;
5. Determine the total area, in square feet, on the site which will be covered with impervious surfaces, as defined at N.J.A.C. 7:7A-1.4, when the proposed project is completed;
6. Divide the total proposed impervious surface from (i)5 by the net land area from (i)4; and
7. Multiply (i)6 by 100 percent. This is the development intensity of the project, for use in the applicable matrix at (e) above.

7:7A-6.5 Hardship transition area waiver

(a) The Department shall issue a hardship transition area waiver under this section if a site is not susceptible to a reasonable use if developed as authorized by this chapter, and this limitation results from unique circumstances peculiar to the site which:

1. Do not apply to or affect other property in the local region;

2. Relate to or arise out of the site itself, rather than the personal situation of the applicant; and
3. Are not the result of any action or inaction by the applicant, the site owner or the owner's predecessors in title.

(b) The Department shall presume that a hardship under (a) above exists and shall issue a hardship transition area waiver that reduces the transition area in an amount determined under (c) below, provided that the applicant demonstrates that all of the following criteria are met:

1. The presence of transition areas on the site makes it impossible to build a single family dwelling on the site under the other provisions of this chapter;
2. The lot or lots that make up the site were created by a subdivision occurring prior to July 1, 1988;
3. The site has been owned continuously by the applicant since prior to July 1, 1988;
4. The site is not contiguous with an improved property that was owned by the applicant on July 1, 1988;
5. The applicant has not received a hardship transition area waiver based on these hardship criteria at any time during the five years prior to the present application for a hardship transition area waiver;
6. The applicant has unsuccessfully attempted to purchase adjacent properties for fair market value in order to create a developable upland;
7. The applicant has offered the site for sale at fair market value to adjacent property owners and the offer was refused; and
8. The applicant has offered the site for sale at fair market value to interested public and/or private conservation organizations on a list provided by the Department, and the offer was refused.

(c) The amount of transition area reduction authorized under a hardship transition area waiver shall be the minimum amount necessary to construct one single family home and any necessary appurtenances, such as a driveway or septic system. However, the transition area shall not be reduced under this section to less than 75 feet for a transition area adjacent to exceptional resource value wetlands, or 25 feet for a transition area adjacent to intermediate resource value wetlands.

7:7A-6.6 Application for a transition area waiver

An application for a transition area waiver shall include the information required at N.J.A.C. 7:7A-10, Application contents and procedures. The applicant shall follow the application procedures at N.J.A.C. 7:7A-10, and the Department will review the application using the procedures at N.J.A.C. 7:7A-10.

Appendix A
(No change.)

(Agency note: The transition area waiver provisions currently codified at N.J.A.C. 7:7A-7 have been recodified, with clarifying changes, to proposed N.J.A.C. 7:7A-6. The individual permit provisions below at N.J.A.C. 7:7A-7 are recodified, with minor clarifying changes, from existing N.J.A.C. 7:7A-3. Changes from the existing provisions are indicated.)

SUBCHAPTER 7 [3. GENERAL STANDARDS FOR GRANTING] INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

7:7A-7.1 General provisions for individual permits

(a) To be authorized under an individual permit, an activity shall meet the following requirements:

1. All activities that require an individual permit shall meet all of the requirements at N.J.A.C. 7:7A-7.2;
2. In addition to the requirements at N.J.A.C. 7:7A-7.2, a non water-dependent activity, as defined at N.J.A.C. 7:7A-1.4, shall meet the requirements at N.J.A.C. 7:7A-7.3, except if the activity disturbs only State open waters that are not special aquatic sites as defined at N.J.A.C. 7:7A-1.4; and
3. In addition to the requirements at N.J.A.C. 7:7A-7.2 and N.J.A.C. 7:7A-7.3, a non water-dependent activity in an exceptional resource value wetland or trout production water shall meet the requirements at N.J.A.C. 7:7A-7.4.

(b) The Department shall not consider a mitigation proposal in determining whether an individual permit will be issued for a project.

(c) Each individual permit applies to the entire site upon which permitted activities occur. An applicant shall not segment a project or its impacts by applying for general permit authorization for one portion of the project and applying for an individual permit for another portion of the project. Similarly, an applicant shall not segment a project or its impacts by separately applying for individual permits for different portions of the same project.

7:7A-7.2 Standard requirements for all individual permits

(a) This section sets forth requirements that apply to all activities to be covered by an individual permit, including both water-dependent activities, as defined at N.J.A.C. 7:7A-1.4, and non water-dependent activities. Additional individual permit requirements that apply only to non water-dependent activities are found in N.J.A.C. 7:7A-7.3 and 7:7A-7.4.

[7:7A-3.2 Requirements for water-dependent activities]

(b) [(a)] The Department shall issue [a] an individual freshwater wetlands or open water fill permit only if [the proposed project meets the criteria at N.J.A.C. 7:7A-3.1 above and it finds that] the regulated activity [is water-dependent or requires access to freshwater wetlands or State open waters as a central element of its basic function, and has no practicable alternative which would] :

1. Has no practicable alternative which:

[1. Not involve a freshwater wetland or State open water; or
2. Involve a wetland or State open water, but would have a less adverse impact on the aquatic ecosystem;]

i. Would have a less adverse impact on the aquatic ecosystem or would not involve a freshwater wetland or State open water; and

[3. Not] ii. Would not have other significant adverse environmental consequences, that is, it shall not merely substitute other significant environmental consequences for those attendant on the original proposal[.];

(Agency note: the provisions proposed at 2 through 11 below are recodified, with minor changes that do not affect meaning, from existing N.J.A.C. 7:7A-3.5(a)1 through 10. Changes to the existing text are indicated.)

[7:7A-3.5 Standard requirements for all regulated activities in freshwater wetlands and State open waters

(a) In addition to the other requirements set forth in this subchapter, the Department shall issue a permit for a regulated activity only if the activity:]

2. [1.] Will result in [a] the minimum feasible alteration or impairment of the aquatic ecosystem including existing contour, vegetation, fish and wildlife resources, and aquatic circulation of the freshwater wetland and hydrologic patterns of the [watershed] HUC 11 in which the activity is located;
3. [2.] Will not jeopardize present or documented habitat or the continued existence of a local population of a threatened or endangered species [listed pursuant to the "The Endangered and Nongame Species Conservation Act," N.J.S.A. 23:2A-1 et seq., or those identified pursuant to the Endangered Species Act of 1973, 16 U.S.C. §1531 et al.], as defined at N.J.A.C. 7:7A-1.4;
4. [3.] Will not be likely to result in the [likelihood of the] destruction or adverse modification of a habitat which is determined by the Secretary of the United States Department of the Interior or the Secretary of the U.S. Department of Commerce, as appropriate, to be a critical habitat under the ["]Endangered Species Act of 1973["], (] , 16 U.S.C. §1531 et seq.[)];
5. [4.] Will not cause or contribute to a violation of any applicable State water quality standard;
6. [5.] Will not cause or contribute to a violation of any applicable toxic effluent standard or prohibition imposed pursuant to ["New Jersey's] the Water Pollution Control Act["], N.J.S.A. 58:10A-1 et seq.];
7. [6.] Will not violate any requirement imposed by the United States government to protect any marine sanctuary designated pursuant to the ["]Marine Protection, Research and Sanctuaries Act of 1972["] , [(] 33 U.S.C. §§1401 et seq.[)];
8. [7.] Will not cause or contribute to a significant degradation, as defined at 40 C.F.R. 230.10(c), of ground or surface waters;
9. [8. After assumption of the federal program, the project will] Will not adversely affect [properties which are] a property which is listed or [are] is eligible for listing on the National Register of Historic Places. If the permittee, before or during [the course of] authorized work, encounters a probable historic property that has not been listed or determined eligible for listing on the National Register, but which may be eligible for listing in the National Register, the permittee shall immediately notify the Department and proceed as directed by the Department;

10. [9.] Will not violate the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., or implementing rules at N.J.A.C. 7:13;
11. [10.] Is otherwise lawful; [and]
12. [11.] Is in the public interest, as determined by the Department in consideration of the following:
    i. The public interest in preservation of natural resources and the interest of the property owners in reasonable economic development. In determining whether a proposed activity is in the public interest, the Department shall consider, as one source of guidance, the goals, strategies, policy objectives and policies of the New Jersey State Development and Redevelopment Plan, adopted and/or readopted by the State Planning Commission pursuant to the New Jersey State Planning Act, N.J.S.A. 52:18A-196 et seq., and the State Planning Act rules, N.J.A.C. 17:32;
    ii. - vi. (No change.)
    vii. The [ecological value of] functions and values provided by the freshwater wetlands and probable individual and cumulative impacts of the [project] regulated activity on public health and fish and wildlife[. For the purposes of this subsection, "project" shall mean the use and configuration of all buildings, pavements, roadways, storage areas and structures, and the extent of all activities associated with the proposed regulated activity.] ;
13. Will not involve a discharge of dredged material or a discharge of fill material, unless the material is clean, suitable material free from toxic pollutants in toxic amounts, which meets Department standards for use of dredged or fill material; and
14. Is consistent with the applicable approved Water Quality Management Plan (208 Plan) adopted under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., unless the activities are not subject to the Department's Water Quality Management Planning rules at N.J.A.C. 7:15.

(Agency note: the provisions proposed at (c)1 and 2 below are recodified, with minor clarifications that do not affect meaning, from existing N.J.A.C. 7:7A-3.1.)
[7:7A-3.1 Requirements for granting individual freshwater wetland and open water fill permits
(c) [(a) The Department shall issue a freshwater wetlands or open water fill permit only if it finds that there is no practicable alternative to the proposed activity.] The following shall apply to the Department's consideration of whether an alternative is practicable under (b)1 above, or under N.J.A.C. 7:7A 7:7A-7.3(b):

1. An alternative shall be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes[.] ;
2. An alternative shall not be excluded from consideration under this provision merely because it includes or requires an area not owned by the applicant which could reasonably have been or be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity [.] ; and
3. Notwithstanding (c)2 above, the Department shall presume that, if all of the following criteria are met, an alternative located offsite on property not owned by the applicant is not a practicable alternative:
    i. The application is for construction of a single family home that is not part of a larger development;

ii. The activities will disturb no more than 1/8 acre of freshwater wetlands, transition area, and/or State open waters;
iii. The applicant has owned the proposed home site continuously since July 1, 1988 or before; and
iv. The site is not contiguous with a parcel which was owned by the applicant on July 1, 1988;
v. The property has been offered for sale in accordance with the requirements at N.J.A.C. 7:7A-12.7(e)3 and 4; and
vi. The site is served by existing sewers, or by some other wastewater treatment method that is not an individual subsurface sewage disposal (septic) system and does not discharge to the wetlands.

(Agency note: provisions proposed below are recodified, with clarifying changes that do not change their meaning, from existing N.J.A.C. 7:7A-3.3 and 3.4. Changes to the existing rule text are indicated.)
[7:7A-3.3 Requirements for non-water dependent activities]
7:7A-7.3 Additional requirements for a non water-dependent activity in a wetland or special aquatic site

(a) In addition to meeting the requirements of N.J.A.C. 7:7A-7.2, a non water-dependent activity in a freshwater wetland or special aquatic site, as defined in N.J.A.C. 7:7A-1.4, shall meet the requirements of this section. If an activity is water-dependent, as defined at N.J.A.C. 7:7A-1.4, or if it disturbs only a State open water that is not a special aquatic site, this section does not apply to the activity.

[(a) The Department shall issue a freshwater wetlands or open water fill permit for a non water dependent activity only if it finds that the regulated activity has no practicable alternative which would:
1. Not involve a freshwater wetland or State open water; or
2. Involve a freshwater wetland or State open water but would have a less adverse impact on the aquatic ecosystem; and
3. Not have other significant adverse environmental consequences, that is, would not merely substitute other significant environmental consequences for those attendant on the original proposal.]

(b) [For special aquatic sites as defined in N.J.A.C. 7:7A-1.4 and all freshwater wetlands, it] There shall be a rebuttable presumption that there is a practicable alternative to a non water-dependent [regulated] activity in a freshwater wetland or in a special aquatic site, which alternative does not involve a freshwater wetland or [State open water] special aquatic site, and that such an alternative [to any regulated activity] would have less of an impact on the aquatic ecosystem.

(c) In order to rebut the presumption established in (b) above, an applicant [for a freshwater wetlands or open water fill permit] must demonstrate all of the following:
[1. An alternative shall be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

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

(d) In order to rebut the presumption established in (c) above, an applicant for a freshwater wetlands permit must demonstrate all of the following:]

1. That the basic project purpose cannot reasonably be accomplished [utilizing] using one or more other sites in the general region that would avoid[,] or reduce[,] the adverse impact on an aquatic ecosystem;
2. That the basic project purpose cannot reasonably be accomplished if there is a reduction in the size, scope, configuration, or density of the project as proposed;
3. That the basic project purpose cannot reasonably be accomplished by [any] an alternative [designs] design that would avoid [, or result in less,] or reduce the adverse impact on an aquatic ecosystem; [and]
4. That in cases where the applicant has rejected alternatives to the project as proposed due to constraints such as inadequate zoning, infrastructure, or parcel size, the applicant has made reasonable attempts to remove or accommodate such constraints[.] ; and
5. If any portion of the proposed activity will take place in an exceptional resource value wetland or in trout production waters, that the requirements of N.J.A.C. 7:7A-7.4 are met.

(Agency note: provisions proposed below are recodified, with clarifying changes that do not change their meaning, from existing N.J.A.C. 7:7A-3.4. Changes to the existing rule text are indicated.)

7:7A-7.4 [7:7A-3.4] Additional requirements for a non [Non-] water dependent [activities] activity in exceptional resource value [freshwater] wetlands [of exceptional resource value] or [in] trout production waters

(a) [In order to rebut the presumption established for non-water dependent activities (see N.J.A.C. 7:7A-3.3(b)) when the activity will take place] If an applicant proposes a non water-dependent activity in wetlands of exceptional resource value or in trout production waters, [an] the applicant, in addition to complying with [the provisions of N.J.A.C. 7:7A-3.3] all other requirements in this subchapter, shall also demonstrate either:

1. - 2. (No change.)

(Agency note: provisions found in the existing rule at N.J.A.C. 7:7A-3.5 are recodified, with minor changes that do not affect meaning, at proposed N.J.A.C. 7:7A-7.2(b)2.)

(Agency note: The emergency permit provisions below are recodified, with minor clarifying changes, from N.J.A.C. 7:7A-5. Letter of interpretation provisions currently codified at N.J.A.C. 7:7A-8 are recodified, with major organizational changes, at N.J.A.C. 7:7A-3.)

SUBCHAPTER 8 [5.] EMERGENCY PERMITS

7:7A-8.1 [7:7A-5.1] Emergency permits

(a) The Department may issue a temporary emergency freshwater wetlands permit, open water fill permit, or transition area waiver [for a regulated activity] only if:

1. An unacceptable threat to life, severe loss of property, or severe environmental degradation will occur if an emergency permit is not [granted] issued; and
2. The anticipated threat or loss may occur before a permit or waiver can be issued or modified under the procedures otherwise required by [the Act,] this chapter [, and other applicable State laws].

(b) An emergency permit may be approved orally by the Director of the Department's Land Use Regulation Program or issued in writing, except that if it is approved orally, the Department shall issue a written authorization within five days after the oral approval.

(c) [b] The emergency permit shall incorporate, to the greatest extent practicable and feasible but not inconsistent with the emergency situation, the standards and criteria required for non-emergency regulated activities, including mitigation [when required by either N.J.A.C. 7:7A-9 or 13], and shall:

1. Be limited in duration to the time required to complete the authorized emergency activity, not to exceed 90 days; [and]
2. Require mitigation pursuant to N.J.A.C. [7:7A-14] 7:7A-15 of the freshwater wetland[,] and/or State open waters[, or transition area] within this 90 day period, except that if more than 90 days from the issuance of the emergency permit is required to complete [restoration] mitigation, the emergency permit may be extended to complete this [restoration] mitigation only[.] ;
3. Fully describe the work that will be conducted under the emergency permit; and
4. Specify the procedures that the permittee must follow under N.J.A.C. 7:7A-8.2 below to obtain a freshwater wetlands or open water fill permit, or transition area waiver.

[(c) The emergency permit may be issued orally or in writing, except that if it is issued orally, an authorization letter shall be issued within five days thereof.]

(d) - (e) (No change.)

7:7A-8.2 [7:7A-5.2] Obtaining an emergency permit

(a) A person in need of an emergency permit shall inform the [Administrator of the Element by telephone] Department as to the extent of work to be performed, the reason for the emergency, and the location of the project. This information shall include a

written description of the work, plans of the work, and photographs of the site, and shall be presented to the Department in writing [within two days following the telephone request] prior to the issuance of the emergency permit.

(b) [After the State assumes the Federal 404 program, upon receiving the] If the Department receives a request for an emergency permit for a major discharge, the [Administrator] Department will notify the Regional Administrator of Region II of the USEPA [prior to the issuance of] before issuing an emergency permit, and will send a copy of the written permit to the USEPA upon issuance.

(c) If the Director of the Department's Land Use Regulation Program gives oral [verbal] approval [is given by the Administrator] for an emergency permit, the emergency work may be started. The person who received the oral approval shall keep Department staff [shall be kept] informed by telephone [(]at least once per week[)] regarding the situation at the site. The Department will offer guidance and instructions in performing the work.

(d) If the Director of the Department's Land Use Regulation Program does not give [verbal] oral approval [is not given], the Department may issue a written emergency [approval] permit at any time within 15 days [of] after the initial request.

(e) Within 15 days [of the granting of an emergency approval which has been obtained and complied with in accordance with the Department's instructions, a complete freshwater wetlands, open water fill permit, or transition area waiver application with appropriate fees and "as built" drawings shall be submitted] after the Department gives an oral approval under (c) above, the permittee shall submit the following to the Department [for review.] :

1. "As-built" drawings, showing all activities conducted under the emergency permit, including all excavation, grading, structures, and other regulated or prohibited activities;
2. The applicable fee specified at N.J.A.C. 7:7A-11; and
3. Any other information necessary for the Department to ensure compliance with this chapter.

(f) After [public notice and opportunity for comment pursuant to N.J.A.C. 7:7A-12.4 and 12.1(a), and 11.1(a),] following the application review procedures at N.J.A.C. 7:7A-12, the Department shall issue a freshwater wetlands permit, [or] open water fill permit, or [a] transition area waiver [shall be issued by the Department] for the activities covered by the emergency [approval] permit. This permit or waiver may contain conditions, including but not limited to mitigation under N.J.A.C. 7:7A-15, necessary to minimize and/or compensate for any adverse impacts to the freshwater wetlands, State open waters, or transition areas resulting from the activities performed under the emergency permit [or the activity. If required by either N.J.A.C. 7:7A-9 or 13, mitigation shall be provided pursuant to N.J.A.C. 7:7A-14].

(g) Any regulated activities or prohibited activities performed, other than those described to the Department in the request for the emergency permit and approved by the Department under this section, shall constitute a violation that is subject to enforcement action under N.J.A.C. 7:7A-16.

(Agency note: The provisions for general permits, currently codified at Subchapter 9, have been recodified, with changes, at Subchapters 4 and 5. Proposed pre-application conference provisions below are recodified from N.J.A.C. 7:7A-10, with minor clarifying changes.)

SUBCHAPTER 9 [10.] PRE-APPLICATION CONFERENCES

7:7A-9.1 [7:7A-10.1] Purpose

A pre-application conference is [optional, but highly] recommended for any project that is complex or controversial. It allows the Department to inform potential applicants of the various procedures and policies which apply to the freshwater wetlands, open water fill, stream encroachment, and coastal program permitting process. Department staff will candidly discuss the apparent strengths and weaknesses of the proposed permit application at this conference, but [the Department shall in no way commit itself to approval or rejection of a proposed project as a result of these discussions.] all guidance provided at a pre-application conference shall be non-binding on the Department. A Department decision on a project or any aspect of a project is binding only if it is incorporated into a permit obtained in accordance with this chapter.

7:7A-9.2 [7:7A-10.2] Request for a pre-application conference

(a) Potential applicants may request a pre-application conference with the Department. A request for a pre-application conference shall be made in writing and shall include:

1. [a] A project description[,] ;
2. A plan view of the project;
3. [a] A tax lot and block designation of the site[,] ;
4. [the] The location of the project site, including the municipality and county[,] ;
5. [the] A copy of any LOI issued for the site. If no LOI has been issued, the general location of freshwater wetlands, transition areas, and State [regulated] open waters[,] ;
6. [a] A copy of the appropriate United States Soil Conservation Service map(s) locating the project[,] ; and
7. [a] A United States Geological Survey quadrangle map showing the site.

(b) The Department encourages the applicant to obtain a letter of interpretation prior to the pre-application conference.

(c) [(b) The] If a pre-application conference is to be held, the Department shall[,] schedule the pre-application conference within 15 days [of receipt of such] after receiving a request for one [, schedule a pre-application conference]. If a pre-application conference is not scheduled within this deadline, the applicant may apply directly for a permit.

[7:7A-10.3 Discussion of information requirements

The Department shall candidly discuss the level of detail and areas of emphasis which will be necessary to allow the Department to review the application if one is submitted.

7:7A-10.4 Memorandum of record

(a) After the pre-application conference, the Department shall prepare a written memorandum of record summarizing the discussion of the apparent strengths and weaknesses of the proposed project, the apparent sensitivity of the land and water features of the site, and the level of detail and areas of emphasis necessary in the materials that the potential applicant may be required to submit as part of the application.

(b) The memorandum of record shall be mailed to the potential applicant or his or her agent, if designated in writing, and to the municipality, within 30 days after the pre-application conference. If the potential applicant submits an application, a copy of the memorandum of record shall be included with the application, and shall be included in the Department's file on the application.

(c) The memorandum of record shall not be construed as a decision of the Department. The Department is in no way bound by any information or statement recorded in the memorandum of record.]

SUBCHAPTER 10 [11.] APPLICATION CONTENTS AND PROCEDURE

[7:7A-11.1 Application contents for Individual Freshwater Wetlands and Open Water Fill Permits]
(Agency note: Provisions found in the existing rule at N.J.A.C. 7:7A-11.1(a) are proposed to be recodified, with clarifying changes, at N.J.A.C. 7:7A-10.1(m) below.)
[(a) The Element will issue joint permits for projects requiring more than one Element permit whenever possible. It is strongly recommended that an applicant requiring more than one Element permit submit all applications materials simultaneously to facilitate joint permit processing. For example, the submission of all information necessary for both a Freshwater Wetlands permit and a Stream Encroachment permit at the same time will facilitate the issuance of a joint permit.]

(Agency note: the provisions below are proposed for recodification, and consolidation with other application provisions, at proposed N.J.A.C. 7:7A-10.)
[(b) The application for a freshwater wetland permit or open water fill permit shall include 10 copies of the following information:

1. A completed freshwater wetlands permit or open water fill permit application form including the names and addresses of all owners of property adjacent to the property which is the site of the proposed project. All activities which the applicant plans to undertake which are reasonably related to the same project should be included in the same permit application and will be considered simultaneously with the review of the individual permit. Only one application fee will be required to review all regulated activities in freshwater wetlands, State open waters and transition areas associated with the project;

2. A folded preliminary site plan or subdivision map of the proposed regulated activities, or other map of the site if no preliminary site plan or subdivision map exists;

3. A written description of the proposed regulated activity, the total area to be used, filled or modified, the total area of the freshwater wetland or State open waters potentially affected, identification of the watershed in which the project is located, and the relationship of the area affected to the area of the entire freshwater wetland or State open waters complex, for example, one-half acre to be filled of a 15 acre freshwater wetland. In addition, project elements affecting transition areas should be detailed;

4. A description of the source of any fill material and a description of the type, composition and quantity of the material. For dredge projects, submit the information as listed at N.J.A.C. 7:7A-4.3(c)2;

5. A description of alternatives to the proposed activity or discharge, including alternative sites, construction methods, methods of discharge, and reasons for rejecting the alternatives pursuant to N.J.A.C. 7:7A-3, General Standards for Granting Individual Freshwater Wetlands and Open Water Fill Permits;

6. The purpose and intended use of the proposed activity, including whether it is water-dependent; a description of the uses of any structures to be erected; and a schedule for the progress and completion of the proposed activity;

7. A list of the approvals required by other Federal, interstate, State and local agencies for the activity, including all approvals or denials received;

8. A copy or photocopy of a portion of the U.S.G.S. 7.5 minute quadrangle map (available from the Department's Maps and Publications Office, CN 402, Trenton, NJ

08625) showing the location of the property and its general vicinity, indicating and labeling the location of the proposed activity and the property boundaries, and a determination of the State Plane Coordinates for the center of the property. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the end-points of those projects which are 1,999 feet or less, and for those projects which are 2,000 feet and longer, additional coordinates at each 1,000 foot interval;

9. Verification that a complete copy of the application for an Individual permit, including all materials required by this subsection, has been submitted to the clerk of the municipality in which the proposed regulated activity will occur. Verification that a certified mail notice with return receipt requested (white receipt or green card is acceptable) and a copy of the vicinity map in (a)8 above have been forwarded to the environmental commission or any other public body with similar responsibilities, and planning board of the municipality in which the proposed regulated activity will occur; the planning board, environmental commission and county mosquito control agency of the county in which the proposed regulated activity will occur; landowners within 200 feet of the property or properties on which the proposed regulated activity will occur (applicant shall also provide a list of all landowners within 200 feet), and all persons as identified by the Department who requested to be notified of proposed regulated activities (the Department will furnish a list of such persons upon request), which notice may, at the applicant's option, be filed concurrently with notices required pursuant to N.J.S.A. 40:55D-1 et seq. A copy of the notice shall be included in the application to the Department. The notice shall include the following:

i. The name and address of the applicant and, if different, the address or location of the activity or activities regulated by the permit;

ii. The name, address, and telephone number of the applicant or agent to contact for further information;

iii. A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills, and a description of the type, composition and quantity of materials to be discharged;

iv. A plan and elevation drawing showing the general and specific site location (drawings may be 8.5 by 11 inches);

v. Any other information which is necessary to evaluate the likely impact of the proposed activity;

vi. The following statement:

"This letter is to provide you with legal notification that the referenced property owner is applying to the New Jersey Department of Environmental Protection and Energy, Land Use Regulation Element for an Individual Freshwater Wetlands permit."

An Individual permit will allow the property owner to conduct activities in freshwater wetlands or State open waters.

The complete Individual permit application package can be reviewed at either the municipal clerk's office or by appointment at the Land Use Regulation Element office at the address listed below. The Department of Environmental Protection and Energy welcomes comments and any information that you may provide concerning the wetlands or open waters on the referenced parcel. Please submit your written comments within 15 days of receiving this letter. In addition, interested persons may request in writing that the Department hold a public hearing on this application.

Requests shall be made in writing within 30 days after the notice of application in the DEPE Bulletin and shall state the nature of the issues proposed to be raised at the hearing. Both comments and hearing requests should be sent along with a copy of this letter to:

New Jersey Department of Environmental Protection and Energy
Land Use Regulation Element
Bureau of Regulation
CN 401
5 Station Plaza
Trenton, New Jersey 08625
att: (County in which the property is located) Section Chief

As part of the review of this application, Department personnel may perform a site inspection on your property. This site inspection will involve only that area within a maximum of 150 feet from the border of the applicant's property. This site visit will involve a visual inspection and possibly minor soil borings using a 4" diameter hand auger. The inspection will not result in any damage to the vegetation or improvements on your property.

"The Department will notify your municipal environmental commission, planning board and the municipal construction official of the Department's approval or denial of the Individual permit application";

10. Verification that notice of the proposed activity has been published as a display advertisement in an official newspaper used by the municipality, in which the activity is proposed, for legal notice. For projects proposing more than 10 acres of fill, notification shall also be published in a newspaper of regional circulation;

11. A statement detailing any potential adverse environmental effects of the regulated activity and any measures necessary to prevent and/or minimize those effects, and any information necessary for the Department to make the findings pursuant to N.J.A.C. 7:7A-3. Applicants should review N.J.A.C. 7:7A-3 in great detail and provide all the listed information to avoid unnecessary delays in permit processing;

12. A fee as set forth in the fee schedule published by the Department at N.J.A.C. 7:7A-16;

13. A list and brief description of all freshwater wetlands, special aquatic sites as defined at N.J.A.C. 7:7A-1.4, public use areas, wildlife refuges, and public water supply intakes in the affected or adjacent areas that may require special protection or preservation;

14. A list of plants fish, shellfish and/or wildlife in the proposed activity or discharge site which may be dependent on water quality and quantity;

15. Uses of the proposed activity or discharge site which might affect human health and welfare; and

16. A description of technologies or management practices by which the applicant proposes to minimize adverse environmental effects of the activity or discharge. (NOTE: The Department shall upon request provide permit applicants with guidance, either through the application form or on an individual basis, regarding the level of detail of information and documentation required under this subsection. The level of detail shall be reasonably commensurate with the type and size of the proposed project, proximity to critical areas, and degree of environmental degradation.)

(c) The application shall also include 10 copies (including one of reproducible quality mylar copy is not required) of a site plan, on 8 inch by 11 inch paper if appropriate (if larger than 8 ½ inch by 11 inch, all copies shall be folded) indicating the following:

1. All existing structures and related appurtenances on the lot and immediately adjacent lots;
2. Distances and dimensions of areas, structures and lots, including freshwater wetlands, State open waters, transition areas, limits of inundation for the 100 year flood for non-delineated streams or flood hazard area flood for delineated streams (if applicable), mean high water line (if appropriate), upland property, roads and utility lines;
3. A complete delineation of the wetlands boundary(ies) in accordance with the requirements of N.J.A.C. 7:7A-8.3(a) and (b). A letter of interpretation issued by the Department may be submitted to satisfy this requirement;
4. The proposed area which will be used for the activity or discharge;
5. The general site location in relation to development in the region;
6. The scale of the plan and a north arrow; and
7. A title block for each sheet containing the following information:

i. The name of the applicant and the name or the proposed project (if any):
ii. Identification of the proposed activity;
iii. County and municipality;
iv. Lot and block;
v. Number of the sheet and the total number of sheets in set; and
vi. Preparer, and date of the drawing and all revisions.

(d) The application shall also include color photographs of sufficient quality and quantity to show the project site including:

1. Location of known freshwater wetlands and State open waters; and
2. Proposed location of the regulated activity.

(e) If the proposed project involves the discharge of dredged or fill material, the application shall include a cross-sectional view of the proposed project showing the following:

1. Water elevations;
2. Water depths at waterward face of proposed work, or if dredging is proposed, showing dredging grade;
3. Cross-section of fill;
4. Elevation of spoil areas;
5. Location of wetlands; and
6. Delineation of disposal site.

(f) A mitigation plan meeting the requirements of N.J.A.C. 7:7A-14.4 may be submitted with the permit application. The Department requires an approved mitigation plan as a condition precedent to engaging in a regulated activity.]

(Agency note: Recordkeeping provisions proposed for deletion below are recodified, with minor changes, at proposed N.J.A.C. 7:7A-10.1(n).)
[7:7A-11.2 Recordkeeping

Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under N.J.A.C. 7:7A-11.1 for a period of at least three years from the date the application is submitted to the Department.]

(Agency note: the provisions proposed below at N.J.A.C. 7:7A-10.1 through 7:7A-10.11 consolidate and streamline application provisions found in the existing rule at N.J.A.C. 7:7A-7.6 (transition area waiver applications), N.J.A.C. 7:7A-8.3 (LOI applications), N.J.A.C. 7:7A-9.5 (general permit applications), and N.J.A.C. 7:7A-11.1 (individual permit applications).

7:7A-10.1 Basic application information

(a) This subchapter describes the application contents and procedures required for most Department permits, waivers, and authorizations.

(b) This subchapter applies to an application for all of the following:

1. A letter of interpretation;
2. Authorization to act under a general permit, except that the following activities are subject to application requirements in the general permits listed below, and are not subject to any of the application requirements in this subchapter except for the public notice requirements at N.J.A.C. 7:7A-10.9:
   i. The application of herbicides to manage vegetation in a utility line right-of-way under general permit 1;
   ii. The ongoing maintenance of an off-stream stormwater management facility created in uplands under general permit 1;
   iii. The repair or modification of an individual subsurface disposal system (septic system) under general permit 25; and
   iv. Minor stream cleaning performed by a local government agency under general permit 26;
3. A combined flood hazard area permit and general permit authorization;
4. An individual transition area waiver;
5. An individual open water fill permit;
6. An individual freshwater wetlands permit; and
7. A minor modification, major modification, or extension of a permit, including a transition area waiver or general permit authorization.

(c) This subchapter does not apply to the following:

1. An exemption letter. Application requirements for an exemption letter are found at N.J.A.C. 7:7A-2.10; or
2. A mitigation proposal. Application requirements for a mitigation proposal are found at N.J.A.C. 7:7A-15.12.

(d) An application shall be submitted by the owner of the site which is the subject of the application, or by a person who is under contract to buy the site.

(e) An applicant shall include on an application all planned activities which are related to the proposed project.

(f) Failure to provide all required information of which the applicant, its consultants, or agents is aware may result in denial or termination of the permit under N.J.A.C. 7:7A-14.5, and may subject the applicant to penalties for submittal of false information under N.J.A.C. 7:7A-16.9.

(g) For each application, the applicant shall provide all information necessary for the Department to determine if the requirements of this chapter are met. The Department will provide an application checklist setting forth the information required for an administratively complete application. Each application checklist will require different information depending on the type of approval sought.

(h) Application checklists and application forms for Land Use Regulation Program approvals can be downloaded and/or printed from the Land Use Regulation Program website at www.state.nj.us/dep/landuse, or they can be obtained by contacting the Department at the address in N.J.A.C. 7:7A-1.3.

(i) In general, the level of detail and documentation required for an application shall be reasonably commensurate with the size and impact of the proposed project, its proximity to critical areas, and its potential to adversely affect freshwater wetlands, transition areas, and/or State open waters. The Department will, upon request, provide applicants with guidance regarding the appropriate level of detail.

(j) An applicant shall supply each required document in multiple copies as specified in the application checklist. In some cases, the application checklist will also specify the size or material (such as mylar) of a document, and may require the document to be folded for easier handling.

(k) To minimize permit processing time, an applicant should carefully review the application checklist and make sure the application includes all required information. The Department recommends that an applicant assume that the following amounts of time will be needed for Department review of an application:

1. For a letter of interpretation, approximately 105 days;
2. For an authorization under a general permit, approximately 90 days;
3. For a transition area waiver, approximately 120 days; and
4. For an individual permit, approximately 180 days,

(l) If a project requires more than one permit or waiver under this chapter, one application may be submitted for all permits or waivers.

(m)If a project requires approvals from the Land Use Regulation Program under other chapters, the Department encourages, but does not require, the applicant to submit one application for all project approvals. If an application covers more than one Land Use Regulation Program approval, the application shall:

1. Comply with the application requirements of each permit program;
2. Include the application fee required at N.J.A.C. 7:7A-11 for multiple approvals; and
3. Include a comprehensive environmental plan, showing all activities on the site that are regulated by the Land Use Regulation Program.

(n) An applicant shall keep all data used to complete an application, and any information submitted to the Department during the application review process, for three years after the application is submitted to the Department, or for the duration of the permit if one is issued, whichever is longer.

(o) If a project requires mitigation, the applicant shall submit a mitigation proposal complying with the mitigation proposal requirements at N.J.A.C. 7:7A-15 with the application, or alternatively, the applicant shall submit the mitigation proposal later, during the application review process or after a permit is approved. Regardless of when the mitigation proposal is submitted, regulated activities shall not begin on a site for which mitigation is required until the Department approves the mitigation proposal and the mitigation is also begun.

7:7A-10.2 Basic content requirements for all applications

(a) This section includes basic information required for every approval covered by this subchapter (see N.J.A.C. 7:7A-10.1(b)). Each application checklist will require this information and in addition will require information specific to the type of approval sought. The additional information required for each specific approval is set forth below at N.J.A.C. 7:7A-10.3 through 7:7A-10.8.

(b) The application checklist for every application covered by this subchapter shall require the following:

1. An application form, including a certification of truth and accuracy that meets the requirements at N.J.A.C. 7:7A-10.10, completed as directed in the instructions and/or application checklist. The application form will include basic information regarding the site, the applicant, and the activities proposed;
2. Unconditional written consent from the owner of the site, as defined at N.J.A.C. 7:7A-1.4, for Department representatives to enter the site to conduct site inspections;
3. The appropriate fee, set forth at N.J.A.C. 7:7A-11;
4. Visual materials, including but not limited to maps, plans, surveys, diagrams, or photographs showing the site, existing conditions on the site, and any activities proposed on the site;
5. Written narrative information and/or reports describing the site, site conditions, and any planned activities, including schedules for performing regulated or prohibited activities, if appropriate;
6. Documentation that the requirements at N.J.A.C. 7:7A-10.9, Public notice requirements for applications, have been met;
7. Information and/or certifications regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources, or other features on the site that are relevant to determining compliance with the requirements of this chapter. Failure to provide all such information of which the applicant, its consultants, or agents is aware may result in denial or termination of the permit under N.J.A.C. 7:7A-14.5, and may subject the applicant to penalties for submittal of false information under N.J.A.C. 7:7A-16.9;
8. The names and addresses of all consultants, engineers, and other persons providing technical assistance in preparing the application; and
9. Any information necessary to ensure compliance with the Federal rules governing the Department's assumption of the Federal 404 program at 40 CFR 233.30.

(c) In addition to the information required at (b) above, the Department may require any information necessary to clarify information previously submitted, to ensure compliance with State and/or Federal law, or to determine whether an application meets State and/or Federal standards.

(d) Whenever the Department requires a construction plan or other visual depiction of proposed activities, the Department may require that certain information pertinent to the construction work be placed directly on the plan in order to provide notice of Department construction requirements to the workers who will carry out the permitted activities.

7:7A-10.3 Additional application requirements for an LOI

(a) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2 above, an application checklist for an LOI shall require the information specified in this section.

(b) The application checklist for a presence/absence LOI for a portion of a site under N.J.A.C. 7:7A-3.2 shall require information identifying the portion(s) of the site which is the subject of the application.

(c) No additional information is required for an application for a line delineation LOI issued under N.J.A.C. 7:7A-3.3.

(d) The application checklist for a line verification LOI issued under N.J.A.C. 7:7A-3.4 shall require the following:

1. A proposed delineation of all freshwater wetlands, transition areas, and State open waters on the site, or portion thereof, which is the subject of the application. The delineation shall be clearly marked in the field as required by the application checklist;
2. Soil borings and/or other physical indicators of the presence or absence of freshwater wetlands, transition areas, and/or State open waters;
3. Data sheets or other materials that explain and support the delineation; and
4. If the LOI is for a portion of a site, documentation that the site and portion meet the requirements at N.J.A.C. 7:7A-3.4(b)2i through iii, and information identifying the subject portion of the site in accordance with N.J.A.C. 7:7A-3.4(b)2iv.

7:7A-10.4 Additional application requirements for a general permit authorization

(a) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2 above, the application checklist for a general permit authorization shall require:

1. Any information specified as an application requirement in the general permit itself at N.J.A.C. 7:7A-5, if not included in N.J.A.C. 7:7A-10.2 above;
2. A line delineation LOI issued under N.J.A.C. 7:7A-3.3, or a line verification LOI issued under N.J.A.C. 7:7A-3.4, if an LOI of either type has been issued. A presence/absence LOI issued under N.J.A.C. 7:7A-3.2 is not sufficient. If no LOI has been issued, or if only a presence/absence LOI has been issued, the

application checklist shall require all information required for an application for a line delineation LOI or line verification LOI;

3. Information regarding whether other approvals are required for the activities by Federal, interstate, State and local agencies for the activity; information regarding whether any such approvals or denials have been received; and information regarding whether the proposed activities are consistent with the rules, plans, or policies of other Federal, interstate, State and local agencies; and
4. If a site is known or suspected to be contaminated with toxic substances, and if the Department requests it, a laboratory analysis of representative samples of the soil or sediment on the site.

7:7A-10.5 Additional application requirements for an individual transition area waiver

(a) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2 above, an application checklist for an individual transition area waiver, as defined at N.J.A.C. 7:7A-1.4, shall require the following:

1. A line delineation LOI issued under N.J.A.C. 7:7A-3.3, or a line verification LOI issued under N.J.A.C. 7:7A-3.4, if an LOI of either type has been issued. A presence/absence LOI issued under N.J.A.C. 7:7A-3.2 is not sufficient. If no LOI has been issued for the site, or if only a presence/absence LOI has been issued, the application checklist shall require all information required for an application for a line delineation LOI or line verification LOI;
2. Information regarding whether other approvals are required for the activities by Federal, interstate, State and local agencies for the activity; information regarding whether any such approvals or denials have been received; and information regarding whether the proposed activities are consistent with the rules, plans, or policies of other Federal, interstate, State and local agencies; and
3. If a site is known or suspected to be contaminated with toxic substances, and if the Department requests it, a laboratory analysis of representative samples of the soil or sediment on the site.

7:7A-10.6 Additional application requirements for an individual freshwater wetlands or open water fill permit

(a) In addition to the basic information required for all applications in N.J.A.C. 7:7A-10.2, the application checklist for an individual freshwater wetlands or open water fill permit shall require the following information:

1. The basic project purpose of the proposed activity, including whether it is water-dependent, as defined at N.J.A.C. 7:7A-1.4;
2. A line delineation LOI issued under N.J.A.C. 7:7A-3.3, or a line verification LOI issued under N.J.A.C. 7:7A-3.4, if an LOI of either type has been issued. A presence/absence LOI issued under N.J.A.C. 7:7A-3.2 is not sufficient. If no LOI has been issued for the site, or if only a presence/absence LOI has been issued, the application checklist shall require all information required for an application for a line delineation LOI or line verification LOI;
3. Information regarding whether other approvals are required for the activities by Federal, interstate, State and local agencies for the activity; information regarding

whether any such approvals or denials have been received; and information regarding whether the proposed activities are consistent with the rules, plans, or policies of other Federal, interstate, State and local agencies; and

4. If a site is known or suspected to be contaminated with toxic substances, and if the Department requests it, a laboratory analysis of representative samples of the sediment on the site.
5. A copy of the deed and/or other legal documents pertaining to the site;
6. Information regarding special aquatic sites, public lands, critical habitat, and other relevant environmental features of the site; and
7. An alternatives analysis that allows the Department to evaluate whether the requirements of N.J.A.C. 7:7A-7.2 are met, including:
   i. A description of all other alternatives considered and the reasons for rejecting them; and
   ii. A description of onsite alternatives considered in order to minimize impacts on the site.

7:7A-10.7 Additional application requirements for a combined flood hazard area permit and general permit authorization

(a) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a combined freshwater wetlands general permit 2 authorization and flood hazard area permit authorizing an underground utility line shall require both of the following:

1. All information required under N.J.A.C. 7:7A-10.4 for an application for authorization under general permit 2; and
2. Any additional information necessary to demonstrate compliance with N.J.A.C. 7:7A-5.2A.

(b) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a combined freshwater wetlands general permit 10A authorization and flood hazard area permit authorizing a very minor road crossing shall require both of the following:

1. All information required under N.J.A.C. 7:7A-10.4 for an application for authorization under general permit 10A; and
2. Any additional information required under N.J.A.C. 7:13 to demonstrate compliance with the Department's Flood Hazard Area Control Act rules.

(c) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a combined freshwater wetlands general permit 11 authorization and flood hazard area permit shall require both of the following:

1. All information required under N.J.A.C. 7:7A-10.4 for an application for authorization under general permit 11; and
2. Any additional information required under N.J.A.C. 7:13 to demonstrate compliance with the Department's Flood Hazard Area Control Act rules.

(d) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a combined freshwater wetlands general permit 20 authorization and flood hazard area permit shall require both of the following:

1. All information required under N.J.A.C. 7:7A-10.4 for an application for authorization under general permit 20; and
2. Any additional information required under N.J.A.C. 7:13 to demonstrate compliance with the Department's Flood Hazard Area Control Act rules.

(e) The application checklist for a combined general permit 26 authorization and flood hazard area permit shall require either of the following:

1. The basic information required for all applications under N.J.A.C. 7:7A-10.2, and in addition all information required under N.J.A.C. 7:7A-10.4 for an application for authorization under general permit 26; or
2. The information required for approval of a project for cleaning, clearing, or desnagging a channel under the Flood Hazard Area Control Act rules at N.J.A.C. 7:7A-13.

7:7A-10.8 Additional application requirements for a modification or extension

(a) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a modification shall require the applicable information required in this section.

(b) An application checklist for a minor modification shall require the following:

1. For a change in ownership or operational control of a permitted site or activity under N.J.A.C. 7:7A-14.3(c)3:
   i. A certification that no other change in the original permit is necessary; and
   ii. A written agreement, signed by the current and the new permittees, containing a date for transfer of responsibility, coverage, and liability between the current and new permittees; and
2. For a minor modification not covered at (b)1 above, a copy of the permit condition proposed for modification, the proposed modification, and information demonstrating that the modification is a minor modification under N.J.A.C. 7:7A-14.3(c).

(c) An application for a minor modification does not require a fee under N.J.A.C. 7:7A-11, or public notice under N.J.A.C. 7:7A-10.9.

(d) An application checklist for a major modification shall require the same information as an application for a new individual permit, except that the application need only address the portions of the existing permit affected by the proposed modification. Portions of the existing permit that are not affected by the proposed modification are not subject to public notice, public hearing, or other procedures that would apply to a new application.

(e) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a permit extension under N.J.A.C. 7:7A-14.6 shall include information reasonably necessary for the Department to evaluate whether the project or activities will comply with this chapter if extended as proposed.

(f) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for an LOI extension under N.J.A.C. 7:7A-3.6 shall include any information reasonably necessary to determine if the information in the original LOI remains correct.

7:7A-10.9 Public notice requirements for applications

(a) This section sets forth basic public notice requirements for applications. The application checklist for each type of permit, waiver, or general permit authorization will include more detail regarding how to comply with the notice requirements for the approval sought. An applicant shall fulfill the requirements in this section before submitting the application, and the application must include documentation that this section has been complied with.

(b) The public notice requirements in this section apply to the applications listed in N.J.A.C. 7:7A-10.1(b), except that:

1. An application by a county or municipal agency for authorization to act under general permit 15, mosquito control activities, shall be subject only to the notice requirements found in that general permit at N.J.A.C. 7:7A-5.15; and
2. An application for a minor modification under N.J.A.C. 7:7A-14.3 shall not require public notice.

(c) Each notice or application required to be provided under this section shall be sent by certified mail, return receipt requested.

(d) An applicant shall provide a copy of the complete application, as submitted to the Department, to the municipal clerk in each municipality in which the project site is located.

(e) In addition to all other requirements in this section, an applicant shall provide a notice of the application, which meets the requirements in (g) below, to the following:

1. The construction official of each municipality in which the site is located;
2. The municipal environmental commission, or other government agency with similar responsibilities;
3. The municipal planning board of each municipality in which the site is located;
4. The planning board of each county in which the site is located;
5. All owners of land within 200 feet of the proposed disturbance, or of the site. If the proposed project is a linear development greater than one half mile long, the requirement for landowner notice under this paragraph may instead be met by following the procedures in (f) below; and
6. For an individual permit application, a Department-generated list of interested parties in the area, if such a list exists.

(f) If the proposed project is a linear development, as defined at N.J.A.C. 7:7A-1.4, or a trail or boardwalk that is greater than one half mile long, an applicant for a permit other than an individual permit may satisfy the requirement in (e)5 above to notify neighboring landowners by:

1. Sending a notice complying with (g) below to all owners of land within 200 feet of any proposed above surface structure (not including conveyance lines suspended above the ground or small utility support structures such as telephone poles) related to the linear facility, such as a pump station, access road, treatment plant, power substation, grade separated interchange or similar structure; and
2. Publishing a display advertisement. The advertisement shall be:
   i. At least four column inches in size;
   ii. Published in the newspaper of record for each municipality in which the site is located; and
   iii. Published in a newspaper with regional circulation in the region in which the site is located.

(g) The notice of application required under this section may cover applications for more than one project. However, for each project application covered by the notice, the following must be included in the notice of application:
1. A brief description of the proposed project;
2. A map showing the location of the project site; and
3. A copy of a form letter to the neighboring landowners specified in (e)5 above, with all blanks filled in to provide specific information regarding the proposed project. This form letter will be supplied by the Department with the application checklist.

(h) An applicant for an individual permit or for an open water fill permit shall comply with (c) through (g) above, as applicable, and in addition shall:
1. Publish a display advertisement at least four column inches in size in the newspaper of record for each municipality in which the site is located; and
2. If the proposed project involves more than ten acres of fill, publish a display advertisement in a newspaper with regional circulation in the region in which the site is located.

(i) If an applicant amends an application during the application review process, the applicant shall comply with the notice requirements at N.J.A.C. 7:7A-12.6(f).

(j) Upon request, the Department shall provide the applicant with copies of any comments submitted to the Department on the application.

(Agency note: provisions below are recodified from N.J.A.C. 7:7A-11.3 in the existing rule. Changes to the existing text are indicated.)
7:7A-10.10 [7:7A-11.3] Signatories to permit applications and reports

(a) [All] A permit application[s] shall be signed [as follows] by the person or persons specified below:
1. For a corporation, by a principal executive officer of at least the level of vice president;
2. For a partnership or sole proprietorship, by a general partner or the proprietor, respectively;

3. For a municipality, State, Federal, or other public [agency] entity, by either a principal executive officer or ranking elected official; or
4. [By] For an entity not covered at (a) 1 through 3 above, by all individual owners of record.

(b) All reports required by permits and other information requested by the Department shall be signed by a person described in (a) above, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

1. The authorization is made in writing by a person described in (a) above;
2. The authorization specifies either an individual or a position having overall responsibility for the [overall operation] construction and/or completion of the regulated [facility] project or activity, such as the position of [plant manager, operator of a well or a well field, superintendent] contractor, construction site supervisor, or position of equivalent responsibility. A duly authorized representative may, thus, be either a named individual or any individual occupying a named position; and
3. The written authorization is submitted with the application to the Department.

(c) If an authorization under (b) above is no longer accurate because a different individual or position has overall responsibility for the [overall operation of the facility] construction and/or completion of the regulated facility or activity, a new authorization satisfying the requirements of (b) above must be submitted to the Department prior to or together with any reports, information, or applications to be signed by an authorized representative.

(d) If an application, report, survey, environmental impact statement, or other document required under this chapter is prepared for an applicant by a professional such as a consultant, engineer, architect, surveyor, attorney, or scientist; the document shall include the certification required under (e) below, signed by the professional responsible for preparing the document. This certification shall be in addition to the certification signed by the applicant.

(e) Any person signing a document under (a) or (b) above shall make the following certification:

> "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining and preparing the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

(f) Any survey submitted under this chapter shall be performed by a surveyor licensed in New Jersey. In addition, the Department may in some cases require that other documents be submitted, signed, sealed, and/or certified by a person with relevant qualifications such as a license or certification.

(Agency note: provisions below are recodified from N.J.A.C. 7:7A-11.4 in the existing rule. Changes to the existing text are indicated.)

7:7A-10.11 [7:7A-11.4] Confidentiality

(a) Any information submitted to the Department [pursuant to these regulations] under this chapter may be claimed as confidential by the submitter at the time of submittal.

(b) - (c) (No change.)

(Agency note: The fee provisions below are recodified, with clarifying changes, from N.J.A.C. 7:7A-16. Changes from the existing provisions are indicated.)

SUBCHAPTER 11 [16.] FEES

7:7A-11.1 [7:7A-16.1 Payment of fees] General fee provisions

(a) [Except when submitted by an agency of the State, each request for a letter of interpretation, or freshwater wetlands permit application, open water fill permit application, letter of authorization for a Statewide general permit activity, transition area permit application, or request for a letter of exemption shall be accompanied by the appropriate fee as set forth at N.J.A.C. 7:7A-16.2 to 16.6. Except when submitted by an agency of the State, no request, application, or notice will be considered complete, and therefore will not be acted on by the Department, unless accompanied by the appropriate fee.]
Each application submitted to the Department under this chapter shall include a fee, except as provided at (b) below. An application that does not include the fee required under this subchapter shall be considered administratively incomplete, and shall be handled accordingly under N.J.A.C. 7:7A-12.1.

(b) The following applications shall not require an application fee:
1. An application submitted by an agency of the State under N.J.A.C. 7:7A-2.1(b);
2. An application for authorization under general permit 16 or general permit 25, found at N.J.A.C. 7:7A-5.16 and 5.25, respectively;
3. An application for authorization of activities on public land under general permit 17, found at N.J.A.C. 7:7A-5.17; and
4. An application for a minor modification under N.J.A.C. 7:7A-14.3(c).

(c) [(b)] All fees shall be paid by personal check, certified check, attorney check, or money order[. Checks and money orders shall be] , payable to "Treasurer, State of New Jersey" [and submitted with the application].

(d) [(c)] Each check or money order shall be marked to identify the nature of the submittal (for example, freshwater wetlands Individual permit application) for which the fee is paid and the name of the applicant.

[(d) The Department shall assess a single permit fee for a project which requires a permit under this chapter (including individual permits, general permits, and transition area waivers) and one or more of the following permits: CAFRA permit issued pursuant to the Coastal Area Facility Review Act, N.J.S.A. 13:19-1; waterfront development permit issued pursuant to the Waterfront Development Act, N.J.S.A. 12:5-3; coastal wetlands permit issued pursuant to the Wetlands Act of 1970, N.J.S.A. 13:9A-1; or stream encroachment permit pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50. The permit fee for the project is equal to the sum of the following:
1. The single highest permit fee for the above listed permits required for the project; and
2. Seventy-five percent of the sum of the permit fees for all other permits required for the project.]

(e) If proposed activities require approval under this chapter and in addition require one or more other Land Use Regulation Program permits (such as a CAFRA permit, waterfront development permit, coastal wetlands permit, or flood hazard area permit), the application fee shall be the sum of the following:

1. The highest single application fee of all the permits required for the project; and
2. Seventy-five percent of the application fee for each additional approval required.

(f) [(e)] Any fee required under this [subchapter] chapter that is subject to N.J.A.C. 7:1L shall be payable in installments in accordance with N.J.A.C. 7:1L.

(g) An application fee is refundable if the Department returns the application as administratively incomplete under N.J.A.C. 7:7A-12.1(b). An application fee is not refundable once the application has been declared administratively complete under N.J.A.C. 7:7A-12.1. However, if the Department denies an application, or if the applicant withdraws the application under N.J.A.C. 7:7A-12.6, the Department shall credit the fee towards a new application for a revised project on the same site, if the new application is submitted within one year of the denial or withdrawal.

(Agency note: the following provision is recodified, with clarifying changes that do not affect meaning, from existing N.J.A.C. 7:7A-16.2(d), 16.3(c), and 16.5(a)5.)
(h) In some cases, an applicant's act or omission makes it necessary for Department staff to perform more than one site visit during the review of an application. In such a case, the Department shall assess an additional fee of up to one thousand dollars for each additional site visit. No permit, waiver, or letter of interpretation shall be issued until this fee has been paid.

FEE TABLES

Application fees for LOIs (N.J.A.C. 7:7A-3):

Type of LOI	Fee
Presence/absence LOI -- whole site	$100.00
Presence/absence LOI under N.J.A.C. 7:7A-3.2 -- portion of a site or footprint of disturbance	$200.00
Line delineation LOI under N.J.A.C. 7:7A-3.3 – site smaller than one acre	$250.00
Line verification LOI under N.J.A.C. 7:7A-3.4 – site smaller than one acre	$250.00
Line verification LOI under N.J.A.C. 7:7A-3.4 – site one acre or larger	$250.00 plus $35.00 per acre affected[1], up to $50,000.00
LOI extension under N.J.A.C. 7:7A-3.6	$100.00, or 25% of original fee, whichever is greater
LOI (any type) and a transition area waiver, (any type) if the site is one acre or smaller.	$350.00 Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application.
LOI (any type) and a transition area waiver, (any type) if the site is larger than one acre.	$450.00 plus $40.00 per acre affected[2] Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application.
LOI (any type) and a general permit authorization	Sum of applicable LOI and general permit authorization fees
LOI (any type) and an individual permit	Applicable individual permit fee

[1] When these fee tables refer to a cost "per acre ", this means the cost is per acre or fraction thereof. For example, an area of one and one third acres would have the same fee as an area of two acres.
When these fee tables refer to a cost "per 1/10 acre", this means the cost is per tenth of an acre or fraction thereof, such that an area of 0.12 acres would have the same fee as an area of 0.2 acres.
When these fee tables refer to an "acre affected", this means an acre of freshwater wetlands, State open waters, or transition area that will be affected by a regulated or prohibited activity; or in the case of an LOI, an acre of land that will be covered by the LOI.
[2] See note 1 above.

Application fees for general permit authorizations (N.J.A.C. 7:7A-5):

Type of general permit	**Fee**
Any general permit authorization, except: 1. General permit 16 (wildlife management); 2. General permit 25 (septic repair); or 3. General permit 17 (trail/boardwalk) on public land.	$250.00
Authorization under any of the following: 1. General permit 16 (wildlife management); 2. General permit 25 (septic repair); or 3. General permit 17 (trail/boardwalk) on public land.	None
Multiple general permit authorizations for one site	$250.00 plus $100.00 for each additional general permit
General permit authorization extension	$100.00
Combined general permit 2 authorization and flood hazard area permit	$487.50
General permit 10A, 11, or 20 authorization combined with a major flood hazard area permit	$2,187.50
General permit 10A, 11 or 20 combined with a minor flood hazard area permit	$487.50
Combined general permit 26 authorization and flood hazard area permit	$250.00

Application fees for transition area waivers (N.J.A.C. 7:7A-6):

Type of transition area waiver	Fee
Any transition area waiver, if: 1. The entire site is covered by a valid line delineation or line verification LOI; and 2. The site is one acre or smaller.	$100.00
Any transition area waiver, if: 1. The affected portion of the site is covered by a valid line delineation or line verification LOI; and 2. The site is over one acre.	$250.00 plus $20.00 per acre affected[3]
Any transition area waiver, if: 1. The site is not covered by a valid LOI, or has a presence/absence LOI only; and 2. The site is one acre or less.	$350.00 Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application.
Any transition area waiver if: 1. The site is not covered by a valid LOI, or has a presence/absence LOI only; and 2. The site is larger than one acre.	$450.00 plus $40.00 per acre affected[4] Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application.
Multiple transition area waivers (unless all are special activity transition area waivers)	Sum of all fees for all of the applicable transition area waivers
Multiple special activity transition area waivers for a single site	$250.00 plus $100 for each additional special activity waiver
Transition area waiver (any type) and an individual freshwater wetlands or open water fill permit	Either the applicable transition area waiver fee or the individual permit fee, whichever is higher
Transition area waiver (any type) and one or more general permit authorizations	The applicable transition area waiver fee, plus $250.00 for the first general permit authorization, and $100.00 for each additional general permit authorization
Transition area waiver extension	$100.00

[3] See note 1 above.
[4] See note 1 above.

Application fees for exemption letters (N.J.A.C. 7:7A-2.10):

Type of approval	Fee
Exemption letter	$100.00

Application fees for individual permits (N.J.A.C. 7:7A-7):

Type of approval	Fee
Individual freshwater wetlands or open water fill permit	$1,000.00 plus $100.00 per 1/10 acre affected[5]
Individual permit extension	$500.00

Application fees for modifications (N.J.A.C. 7:7A-14):

Type of approval	Fee
Minor modification	None
General permit authorization modification	$100.00
Major modification	25% of the application fee originally charged for the approval that is being modified, or $100.00, whichever is higher.

(Agency note: the substance of the following provisions has been relocated in the fee tables, above.)
[7:7A-16.2 Fees for review of requests for letters of interpretation
(a) If a request is made for a letter of interpretation to determine:

1. Whether freshwater wetlands, State open waters or transition areas are present or absent on a parcel of land or right-of-way, pursuant to N.J.A.C. 7:7A-8.2(a)1, the fee shall be $100.00;
2. Whether freshwater wetlands, State open waters or transition areas are present or absent on a footprint of land, pursuant to N.J.A.C. 7:7A-8.2(a)2, the fee shall be $200.00.

(b) Any request for a letter of interpretation which requires any freshwater wetlands or State open water boundary delineation, or verification of a delineation, shall be accompanied by the following fee:

1. For a parcel of land or right-of-way which is smaller than one acre, pursuant to N.J.A.C. 7:7A-8.2(a)3, the fee shall be $250.00 or
2. For parcel of land or right-of-way, with total acreage of one acre or more, pursuant to N.J.A.C. 7:7A-8.2(a)4, the fee shall be $250.00 plus $35.00 per acre or any fraction thereof, with a total not to exceed $50,000. For example, the fee for line

[5] See note 1 above.

verification of a parcel with a total acreage of 7.2 acres would be $250.00 + (8 acres x $35.00) = $530.00.

(c) For a request for the reissuance of a letter of interpretation pursuant to N.J.A.C. 7:7A-8.7, the fee shall be 25 percent of the original fee or $100.00, whichever is larger.

(d) If in order to review and process a request for a letter of interpretation, more than one inspection by the Department is necessary because of any act or omission of the applicant, the Department may assess an additional fee for each additional visit in an amount not to exceed $1,000. No letter of interpretation shall be issued until this fee has been paid.

7:7A-16.3 Fees for review of individual freshwater wetlands and open water fill permits
(a) The fee for the review and processing of an individual freshwater wetlands and open water fill permit or individual water quality certificate application shall be $1,000 plus $100.00 per one-tenth acre, or any fraction thereof, of freshwater wetlands or State open waters affected by any regulated activities. For a permit requiring both an individual freshwater wetlands and open water fill permit, the fee shall be $1,000 plus $100.00 per one-tenth acre, or any fraction thereof, of freshwater wetlands and State open waters affected by any regulated activities.

(b) For projects that require both an individual freshwater wetlands/open water fill permit and a transition area permit, only one fee for the review and processing of the permit shall be required, the higher of the two fees.

(c) If, in order to review and process a freshwater wetlands permit application, more than one inspection by the Department is necessary because of any act or omission of the applicant, the Department may assess an additional fee for each additional visit in an amount not to exceed $1,000. No permit shall be issued until this fee has been paid.

7:7A-16.4 Fees for review of Statewide general permit authorization applications
(a) The fee for review of a Statewide general permit authorization application pursuant to N.J.A.C. 7:7A-9.4(a) shall be $250.00.

(b) If a proposed project requires more than one type of general permit, the fee shall be $250.00 for the first general permit and $100.00 for each additional general permit.

7:7A-16.5 Fees for review and processing of transition area waiver applications
(a) Each request for a transition area waiver shall be accompanied by the appropriate fee as follows:

1. If a letter of interpretation has been performed on the property by the Department pursuant to N.J.A.C. 7:7A-8 confirming or delineating the freshwater wetlands boundary, the transition area waiver application fee shall be:
   i. For a property or right of way of one acre or less: $100.00;
   ii. For a property or right of way over one acre: $250.00 plus $20.00 per acre, or any fraction thereof, of the standard transition area affected or disturbed by the proposed activity; and
   iii. For review of applications for more than one type of transition area waiver, the fee shall be $250.00 plus $20.00 per acre, or any fraction thereof of the

standard transition area affected or disturbed by the proposed activity, plus $100.00 for each additional special activity waiver.

2. If no letter or interpretation for the property has been prepared by the Department pursuant to N.J.A.C. 7:7A-8 confirming or delineating the freshwater wetlands boundary, the transition area waiver application fee shall be:
   i. For a property or right of way of one acre or less: $350.00;
   ii. For a property or right of way over one acre: $450.00 plus $40.00 per acre, or any fraction thereof, of the total property; and
   iii. For review of applications for more than one type of transition area waiver, the fee shall be $450.00 plus $40.00 per acre, or any fraction thereof of the total property plus $100.00 for each additional special activity waiver.
3. If a letter of interpretation for the property which provides only a determination of the presence or absence of freshwater wetlands has been prepared for a property by the Department pursuant to N.J.A.C. 7:7A-8, the transition area waiver application fee shall be:
   i. For a property or right of way of one acre or less: $350.00; and
   ii. For a property or right of way over one acre: $450.00 plus $40.00 per acre, or any fraction thereof, of the total property.
4. For special activity permits for activities covered by Statewide general permits, the waiver application fee shall be:
   i. For the review of a special activity waiver pursuant to N.J.A.C. 7:7A-7.4(e): $250; and
   ii. If a proposed project requires more than one type of special activity waiver, the fee shall be $250.00 for the first special activity waiver and $100.00 for each additional special activity waiver.
5. If, in order to review and process a transition area waiver application, more than one site inspection by the Department is necessary because of any act or omission of the applicant, the Department may assess an additional fee for each additional visit in an amount not to exceed $1,000. No transition area waiver shall be issued until this additional fee is paid.

7:7A-16.6 Fees for the review and processing of requests for exemption letters

The fee for the review and processing of a request for an exemption letter certifying that a project or activity is exempt from freshwater wetlands or open water fill permit requirements, or from transition area requirements, shall be $100.00.

7:7A-16.7 Fees for the review and processing of requests for permit modifications

Except for minor modifications pursuant to N.J.A.C. 7:7A-13.9 for which no fee will be charged, the fee for the review and processing of a request for permit modification shall be 25 percent of the original fee.]

(Agency note: the substance of the following provision is proposed for recodification at N.J.A.C. 7:7A-11.1(g) above.)

[7:7A-16.8 Fee refunds

All fees submitted with an application that is declared administratively complete shall be non-refundable.]

SUBCHAPTER 12 DEPARTMENT REVIEW OF APPLICATIONS

7:7A-12.1 [Initial Department action for Individual Freshwater Wetlands and Open Water Fill Permits] Completeness review

[(a) Upon receipt of an application, which includes the fee specified in N.J.A.C. 7:7A-16, the Department shall, if appropriate, transmit copies to other reviewing agencies. In addition, the Department will publish notice of the application in the DEPE Bulletin. If the application does not include the appropriate fee, no action will be taken by the Department under this section, and the submittal will not be considered an application, and completeness review will not begin.

(b) Within 30 days of receipt of the application, the Department shall review the application for completeness and may return the application as incomplete, make any necessary requests for more information, or declare the application complete. However, after assumption by the State of the 404 program, this deadline for requesting additional information shall not apply if requests for more information are made by the Department because of comments received from the USEPA.

1. If the application is returned as incomplete a new application will be required;
2. New notices meeting the requirements at N.J.A.C. 7:7A-11.9 will be required if the new application is not filed within 60 days.

(c) If additional information is required of an applicant, the Department shall have 15 days after receipt of that information to request further clarification. In such cases, the application shall not be considered complete until all the additional information is received by the Department.

1. Copies of information submitted in response to deficiency letters shall, at the discretion of the Department, be distributed to the same persons to whom copies of the initial application were distributed and to reviewing agencies who have requested such information or who will require it in order to complete their review.]

(a) Within twenty working days, as defined at N.J.A.C. 7:7A-1.4, after receiving an application, the Department shall review the application as follows:

1. If all items required by the application checklist are included, the Department shall declare the application administratively complete. However, if an included item is clearly deficient, the item shall not be considered to be included and the Department shall declare the application administratively incomplete; and
2. If each application item is adequate to allow the Department to determine if the proposed project complies with this chapter, the Department shall declare the application technically complete.

(b) If the application is not administratively complete under (a)1 above, the Department shall return the application to the applicant with a list of the missing items. The applicant may resubmit the application at any time. If the application is resubmitted within one year, the original application fee will be credited to the fee for the resubmitted application. If the application is not resubmitted, the applicant may obtain a fee refund upon request.

(c) If the application is administratively complete under (a)1 above, the Department shall:

1. Notify the applicant that the application is administratively complete;
2. Transmit a copy of the application to other agencies if required under this chapter. For example, an application for an individual permit or a major discharge must be transmitted to EPA for comment under N.J.A.C. 7:7A-12.2;
3. Publish notice of the application in the DEP Bulletin; and
4. If the application is not technically complete under (a)2 above, request any additional information necessary for technical completeness.

(d) If the Department requests additional information under (c)4 above, the applicant shall provide copies of the additional information to the persons who received a copy of the initial application under N.J.A.C. 7:7A-10.9, and to the reviewing agencies who received a copy under (c)2 above.

(e) If an application is returned for incompleteness under (b) above, the applicant may submit a new application without repeating the public notice requirements of N.J.A.C. 7:7A-10.9 if the new application:

1. Is submitted within 60 days after the date the Department returned the original submittal; and
2. Is sufficiently similar to the original submittal that the original public notice would provide reasonable notice of the characteristics of the new submittal to potential interested parties.

(f) If a person submits an application and does not receive a response from the Department within the deadlines imposed in this subchapter, the person shall not be entitled to assume that the application is approved, except if the application is for authorization of the following activities and complies with the applicable general permit:

1. Maintenance of a stormwater management facility under general permit 1;
2. Application of herbicides to maintain a utility right-of-way under general permit 1;
3. Repair of a malfunctioning individual subsurface sewage disposal system under general permit 25; or
4. Minor stream cleaning activities under general permit 26.

7:7A-12.2 USEPA review

(a) [The] Because the Department has assumed responsibility for the Federal 404 program in most freshwater wetlands and State open waters in New Jersey, the Federal Act requires that [, after assumption by the State of the 404 program,] the USEPA [oversees] oversee the State's administration of the program set forth in this chapter. The procedures in (b) through (j) below explain USEPA's oversight role, and the procedures which the State will follow to facilitate USEPA's oversight. In areas where the Department has assumed the Federal 404 program, the Department's freshwater wetlands or open water fill permit constitutes the permit required under this chapter as well as the Federal 404 permit, unless the permit specifies otherwise.

(b) [Permits for at least the following categories of activities will require USEPA review. Generally, any projects not meeting the criteria listed below will be considered waived from the requirement of EPA review. However, any permits either individually or as a category may be elevated for EPA review:

1. Discharges with reasonable potential for adverse impacts on waters of another state, as provided in N.J.A.C. 7:7A-12.3(d);
2. Major discharges as defined at N.J.A.C. 7:7A-1.4;
3. Discharges into or within critical areas established under State or Federal law including, but not limited to, fish and wildlife sanctuaries or refuges, national and historic monuments, wilderness areas and preserves, national and State parks, components of State and Federal Wild and Scenic River systems, and sites identified or proposed under the National Historic Preservation Act of 1966, 16 U.S.C. §470 et seq.;
4. Proposed Statewide general permits;
5. Discharges known or suspected to contain toxic pollutants in toxic amounts under Section 307(a)(1) of the Federal Act, or hazardous substances in reportable quantities under Section 311 of the Federal Act;
6. Discharges located in proximity of a public water supply; and
7. Discharges with potential for adversely affecting threatened or endangered species, identified pursuant to the Endangered Species Act of 1973, 16 U.S.C. §§1531 et al. and subsequent amendments thereto.]

The Department shall transmit the following items to USEPA for review:

1. Each new proposed draft general permit. In general, an application for authorization to act under an adopted general permit will not require USEPA review, unless the activity proposed under the general permit itself constitutes a major discharge;
2. Each application involving a major discharge, as defined at N.J.A.C. 7:7A-1.4;
3. Any permit application, or category of permit applications, that the Department determines is appropriate for USEPA review;
4. Any permit application that USEPA requests to review;
5. Any additions or changes made to an application listed at 2 through 4 above after the application has been submitted to USEPA, as a result of a contested case proceeding in the Office of Administrative Law; and
6. For informational purposes, an initial decision issued by an administrative law judge in a contested case proceeding which involves an application listed at 2 through 4 above.

(c) [The] For an item that requires USEPA review under (b) above, the Department shall promptly transmit to the Regional Administrator:

1. A complete copy of the [complete permit application received by the Department for which permit review has not been waived under (b) above. The Department shall supply the Regional Administrator with copies of the complete permit applications for which permit review has been waived whenever requested by USEPA] item;
2. [A copy of a draft Statewide general permit whenever the Department intends to propose a general permit;
3.] Notice of every significant action taken by the [State agency] Department related to the consideration of [any] the permit application [for which Federal review has not been waived,] or [of any draft Statewide general permit] other item; and

[4.] 3. A copy of [every permit] any decision [for which review has not been waived] on the application or other item.

(d) If USEPA intends to comment upon, object to, or make recommendations with respect to [a permit application, draft Statewide general permit] an item, or with respect to the [State's] Department's failure to accept the recommendations of an affected state pursuant to N.J.A.C. 7:7A-12.3(d); USEPA may notify the [State] Department of this intent within 30 days of receipt of the permit application or other item. If the [State] Department has been so notified, the permit or other item shall not be issued until after the receipt of such comments or within 90 days of the USEPA's receipt of the application[, draft Statewide general permit] or [State] other item, or the Department response, whichever comes first. The USEPA may notify the [State] Department within 30 days of receipt that there is no comment but that USEPA reserves the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a hearing.

(e) When the Department has received a USEPA objection or requirement for a permit condition [to a permit application or draft Statewide general permit] under this section, the State shall not issue the Federal 404 permit unless the steps required by the USEPA to eliminate the objection have been taken. However, the Department may issue a freshwater wetlands permit. Such a permit shall satisfy only the requirements of the New Jersey Freshwater Wetlands Protection Act and the permit shall not constitute a 404 permit. In such a case, the applicant would be responsible for obtaining any necessary 404 program approvals from the ACOE.

(f) Within 90 days [of receipt by the Department of] after receiving an objection or requirement for a permit condition by the USEPA, the [State] Department or any interested person may request that the USEPA hold a public hearing on the objection or requirement. USEPA shall conduct a public hearing [whenever] if requested by the [state proposing to issue the permit] Department, or if warranted by significant public interest based on requests received.

(g) If USEPA holds a public hearing [is held] under (f) above, USEPA shall, following that hearing, reaffirm, modify or withdraw the objection or requirement for a permit condition[, and] . USEPA shall notify the [Administrator] Department of this decision.

(h) If USEPA holds a public hearing, the Department shall have 30 days after USEPA gives the Department notice of its decision under (g) above to take either of the actions at (i)1 or 2 below. If USEPA does not hold a public hearing, the Department shall have 90 days after receiving USEPA's original objection or requirement for a permit condition to take either of the actions at (i)1 or 2 below.

(i) The Department shall take one of the following actions within the applicable deadline in (g) or (h) above:

1. If the USEPA [withdraws] has withdrawn the objection or requirement for a permit condition, the State may issue the Federal 404 permit[.] ; or
2. If the USEPA [does not withdraw] has not withdrawn the objection or requirement for a permit condition, the Department must [either] do one of the following:

i. Issue [issue] a revised permit satisfying the USEPA's objection or including the required permit condition[, or] ;

ii. Notify [notify] USEPA of its intent to deny the permit [within 30 days of receipt of the USEPA's notification]. If the Department intends to deny the permit it shall notify EPA of this intent within 30 days after receiving USEPA's notification; or

iii. Issue a State freshwater wetlands permit that does not constitute a Federal 404 permit and require the applicant to apply to the appropriate Federal agency for a permit under the Federal 404 program.

[(h) If no public hearing is held under (f) above, the Department shall, within 90 days of receipt of the objection or requirement for a permit condition, either issue the revised permit to satisfy USEPA's objections or notify USEPA of its intent to deny the permit.

(i) In the event that the Department neither satisfies USEPA's objections or requirement for a permit condition nor denies the permit, the Federal 404 permit application will no longer be processed by the Department and shall be transferred to the Army Corps of Engineers for processing.]

(j) No Federal 404 permit shall be issued by the Department in the following circumstances, although the Department may issue a State freshwater wetlands permit that does not constitute a Federal 404 permit:

1. - 3. (No change.)

(k) The Department shall submit an application to the U.S. Fish and Wildlife Service for review if the application is for an individual permit, or for authorization under general permit 2, 4, 6, 7, 10, 11, 13, 15, 18, or 23, and the site is located in a municipality that has documented occurrences of threatened or endangered species, or critical habitat, as defined in the Federal Endangered Species Act, 16 U.S.C. §1531 et seq. If an application is submitted for such review, the time required for a final decision on the application will be extended as necessary to complete the review.

7:7A-12.3 [Soliciting public] Public comment on an application

(a) The Department shall [provide] publish notice in the DEP Bulletin of each administratively complete application [pursuant to N.J.A.C. 7:7A-12.1 for an individual freshwater wetlands or open water fill permit, or transition area waiver, in addition to the applicant's notice requirements in N.J.A.C. 7:7A-11.1(a), in the DEPE Bulletin upon receipt of the application. The public shall have 30 days from publication to submit written comments.] in accordance with N.J.A.C. 7:7A-12.1, except for an application for a minor modification. This notice shall constitute notice of the application to all interested persons except those who must be notified by the applicant under N.J.A.C. 7:7A-10.9.

(b) [Copies] The Department shall make copies of all [freshwater wetlands and open water fill permit applications, and transition area waiver] applications [will be] available for public [scrutiny by interested persons in the municipal clerk's office and] inspection

by appointment in the offices of the Department in Trenton (see N.J.A.C. 7:7A-1.3 for address) during normal business hours.

[(c) The status of all permit applications shall be published in the DEPE Bulletin, and shall constitute notice to all interested persons except those specifically provided with notice in this chapter.]

(c) The applicant shall transmit a copy of each application to the clerk of the municipality in which the project is located in accordance with N.J.A.C. 7:7A-10.9, to be made available for public inspection.

(d) The public shall have 30 days to comment on an application after the Department publishes notice of the application in the DEP Bulletin under (a) above. The Department shall consider all written public comments submitted within this time. The Department may, in its discretion, consider comments submitted after this date.

[(d)] (e) If a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any state(s) other than New Jersey, the Department shall provide an opportunity for such state(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted, the Department shall notify the affected state and the USEPA in writing, prior to permit issuance, of the [State's failure] Department's intent not to accept these recommendations, together with the reasons for so doing. The [Regional Administrator] EPA shall then have the same amount of time provided for applications and draft general permits in N.J.A.C. [7:7A-12.2(d)] 7:7A-12.2 to comment upon, object to, or make recommendations regarding the Department's action.

7:7A-12.4 Hearings on [applications] an application for an individual permit or individual transition area waiver

(a) Within 30 days after [publication of the] a notice of an application for an individual permit or individual transition area waiver is published in the [DEPE] DEP Bulletin, interested persons may request in writing that the Department hold a public hearing on [a particular] the application. Requests shall state the nature of the issues proposed to be raised at the hearing.

(b) The Department may issue or deny [a] an individual permit or individual transition area waiver without a public hearing. However, the Department will hold a public hearing if: [, unless there]

1. There is a significant degree of public interest in the application, as manifested by written requests for a hearing within [20 days after the publication of notice of the permit application in the DEPE Bulletin or unless a] the 30 day hearing request period set forth in (a) above. In considering the degree of public interest, the Department will consider whether the issues raised in the hearing requests are relevant to the application review; [or]
2. A public hearing is requested by USEPA; or
3. The Department determines that the public interest would be served by holding a hearing.

(c) If a hearing is to take place, the Department shall, within [15 days of declaring the application complete or within] 30 days [of publication in the DEPE Bulletin (whichever is later)] after the end of the 30 day hearing request period set forth in (a) above:

1. [, set] Set a date[, place,] and time for the public hearing;
2. Choose a location for the hearing, in the county where the freshwater wetlands, transition areas, and/or State open waters affected by the application are located;
3. Notify [shall so notify] the applicant; and
4. Publish a notice announcing the date, place, and time of the public hearing in the DEP Bulletin.

[, in accordance with the following:

1. The hearing shall be in the county wherein the freshwater wetland or State open waters is located whenever practicable.]

[(d) The Department shall publish a notice announcing the date, place, and time of the public hearing in the DEPE Bulletin.]

(d) A public hearing held under this section shall be a non-adversarial proceeding, conducted solely to provide information to the public and the Department regarding the application under review.

(e) The applicant shall give public notice of the public hearing by doing the following, at least 30 days before the hearing :

1. Sending a completed public hearing notice form, obtained from the Department at the address in N.J.A.C. 7:7A-1.3 or the Land Use Regulation Program website at www.state.nj.us/dep/landuse, to the following:
   i. All persons to whom a complete application must be sent under N.J.A.C. 7:7A-10.9(d);
   ii. All persons to whom a notice of an application must be sent under N.J.A.C. 7:7A-10.9(e); and
   iii. All persons who submitted comments on the application during the hearing request period set forth in (a) above; and
2. Publishing a display advertisement containing the completed hearing notice form, in accordance with N.J.A.C. 7:7A-10.9(h).

[1. This notice shall comply with the notice requirements for applications found at N.J.A.C. 7:7A-11.1(b)7, 9 and 10 using the following format:

"NOTICE OF STATE FRESHWATER WETLANDS INDIVIDUAL PERMIT APPLICATION PUBLIC HEARING

TAKE NOTICE that the New Jersey Department of Environmental Protection and Energy, Land Use Regulation Element, will hold a public hearing on the following permit application submitted under the Freshwater Wetlands Protection Act N.J.S.A. 13:9B-1 et seq.

APPLICANT: Name

FILE NUMBER: Element's file number

PROJECT NAME: Name (if any)

PROJECT DESCRIPTION: Detailed description of the proposed improvements including all construction activities

LOCATION: Block and Lot

MUNICIPALITY: Municipality in which project is located
COUNTY: County in which project is located
PROJECT ADDRESS: Street address of project
The Land Use Regulation Element invites the public to attend the hearing and present written or oral comments on the application.
HEARING DATE & TIME: As assigned by Element
HEARING LOCATION: As assigned by Element
HEARING OFFICER: Your project review officer
DATE OF PREVIOUS HEARING (If one was held):
A copy of the complete application is available for review at the township clerk's office. The Land Use Regulation Element invites the public to submit written comments on the Freshwater Wetlands Individual Permit application within fifteen (15) days of the hearing to:
Your project review officer
Department of Environmental Protection and Energy
Land Use Regulation Element
CN 401/501 E. State St., 5 Station Plaza
Trenton, NJ 08625
DATE OF THIS NOTICE: Date";]

[2. Proof] (f) The applicant shall submit proof that public notice of the hearing has been provided in accordance with this section. This proof of notice shall be submitted to the Department at least three days prior to the public hearing. [In cases where] If proof of publication is unavailable three days prior to the hearing, the applicant may submit a notarized affidavit stating that notice of the hearing has been published, and specifying the date and newspaper in which such notice was published.

[(f)] (g) The Department shall maintain a copy of the hearing transcript and all written comments received. The transcript and written comments shall be made part of the official record on the application and shall be available for public inspection in [its] the Department's Trenton Office. See N.J.A.C. 7:7A-1.3 for address.

[(g)] (h) The applicant shall provide a court reporter, bear the cost of the hearing and provide the Department with a transcript.

[(h)] (i) The presiding official at the non-adversarial public hearing shall have broad discretion with respect to oral and written presentations by interested persons. This discretion shall be exercised to allow every person the opportunity to speak, to reasonably limit the length of individual testimony, and to ensure the maintenance of an orderly forum. At the conclusion of statements by interested persons, the applicant shall be afforded the opportunity to speak on the statements offered by interested persons.

[(i)] (j) Any interested person may submit information and comments[, in writing,] concerning the application. The information and/or comments must be submitted in writing within 15 days after the hearing.

7:7A-12.5 Final decisions

(a) [Until the State assumes the implementation of the Federal Act, the] The Department shall issue or deny a permit or waiver within 180 days of submittal of a complete application, [except as may otherwise be provided by the Federal Act] provided the Department has satisfied all of the requirements in N.J.A.C. 7:7A-12.2.

(b) If the Department issues[,] or denies [or requests modification of] a permit, the Department shall send notice thereof to the applicant.

(c) The Department may issue a permit imposing conditions necessary for compliance with the Freshwater Wetlands Protection Act, this chapter, the Federal Act and the New Jersey Water Pollution Control Act[, N.J.S.A. 58:10A-1 et seq]. Any regulated activities undertaken under the authority of any issued permit , waiver, or general permit authorization shall constitute an acceptance by the applicant of the entire permit including all conditions therein.

(d) Decisions by the Department shall be published in the [DEPE] DEP Bulletin and a copy of every issued individual permit [for] which requires USEPA review [has not been waived] under N.J.A.C. 7:7A-12.2 shall be transmitted to USEPA.

(e) (No change.)

(f) Whenever possible, the Department shall make a final decision on an application for a combined general permit authorization and flood hazard area permit within the deadlines that apply to flood hazard area permits under the Flood Hazard Area Control Act rules at N.J.A.C. 7:13 and the 90-day construction permit rules at N.J.A.C. 7:1C. However, if the Department does not make a final decision on such an application within those deadlines, only the portion of the application that is governed by the substantive standards in N.J.A.C. 7:13 shall be deemed approved. The portion of the application that is governed by the substantive standards in this chapter shall not be deemed approved until the Department issues a written general permit authorization for the regulated and/or prohibited activities.

7:7A-12.6 Cancellation, withdrawal, resubmission and amendment of applications

(a) [Applications may be cancelled by the Department; or withdrawn, amended, or resubmitted by an applicant.] The Department may cancel an application, whether or not the application has been declared administratively complete. An applicant may withdraw, amend, and/or resubmit its application. This section applies to all applications, including an application for a permit as defined at N.J.A.C. 7:7A-1.4, an application for a letter of interpretation, and a request for an exemption letter.

(b) [If an application is not complete for final review within 60 days of a request for additional information] The Department shall cancel an application if the Department requests additional information regarding the application, and the information is not submitted within thirty days after the date of the request. Before canceling an application, the Department shall send the applicant a letter [canceling the application and] stating that the application will be cancelled [purged from Department files and that a new application will be required to reactivate the Department's review]. If, within 15

days of the date of the Department's letter, the applicant [sends the Department] submits the information, or a letter [documenting] providing good cause for [not supplying the requested information within the 60 day period, the Department will grant an automatic extension of 30 days. The Department will grant additional 30-day extension upon receiving a written request for such extension from the applicant.

1. All fees submitted with an application subsequently cancelled shall be non-refundable.] the delay, the Department shall extend the time required for submittal of the information. If the applicant does not submit the information or a letter providing good cause, the Department shall cancel the application.

(c) If the Department cancels an application, the application fee will not be refunded. The Department will purge the cancelled application from its files and a new application, including a new application fee, will be required if the applicant wishes to pursue the project.

(d) [(c)] (d) An applicant may withdraw an application at any time in the application review process. [All fees submitted with such applications are non-returnable when a significant portion of the review has been completed. In some cases however (see (d) below) the fees may be credited toward future applications.] If an application is withdrawn, the application fee will not be refunded. However, if the requirements of (e)2 below are met, the fee may be credited toward a future application.

(e) [(d)] (e) [If an application is cancelled, denied or withdrawn] If the Department cancels an application, or if the applicant withdraws an application, the applicant may resubmit an application for a revised project on the same site. The Department will treat the resubmitted application [will be treated] as a new application[, although references may be made to the previously submitted application. A new fee will be required except for applications that are withdrawn and resubmitted within one year of the withdrawal date.] The fees for the resubmitted application shall be as follows:

1. If the Department cancelled the original application under (b) above, a new fee under N.J.A.C. 7:7A-11 will be required;
2. If the applicant withdrew the original application under (d) above, and resubmits the application within one year of the date of withdrawal, the original application fee will be credited to the new application.

[(e) A permit application may be amended at the applicant's discretion at any time as part of the permit review process. Copies of amendments and amended information shall be distributed by the applicant to the same person to whom copies of the initial application where distributed. All amendments to pending applications shall constitute a new submission and may at the Department's discretion require reinitiation of the entire review process.]

(f) An applicant may choose to amend an application at any time as part of the permit review process. If an applicant amends an application:

1. The applicant shall provide a copy of the new or changed information to the same persons who received a complete copy of the initial application under 7:7A-10.9, Public notice requirements for applications. The information need not be provided to persons who received only a notice of the application, unless the

Department determines that the change will increase the environmental impact of the project; and

2. The amendments shall constitute a new submission and the Department may, at its discretion, require reinitiation of the entire application and review process.

(Agency note: Hearings and appeal provisions have been consolidated at N.J.A.C. 7:7A-1.7.)
[7:7A-12.7 Hearings and appeal of permit decisions

(a) An applicant who receives a final agency action or other affected party may request of the Commissioner an administrative hearing on any decision to issue or deny a permit made by the Department pursuant to the Act and this chapter. When a request for an administrative hearing is filed by an affected party contesting an approved permit, the effective date of the approved permit may be stayed at the discretion of the Commissioner until the matter is resolved.

(b) Such request shall be submitted in writing within 30 days of the DEPE Bulletin publishing date, or the date of receipt of the permit decision, whichever is later. The request shall state in what way the Department has acted improperly in issuing or denying the permit, and what issues will be raised by the requestor should a hearing be held.

(c) The request for a hearing shall be sent to:
Office of Legal Affairs
ATTENTION: Adjudicatory Hearing Requests
Department of Environmental Protection and Energy
401 East State Street
CN 402
Trenton, New Jersey 08625-0402

1. Upon receipt of such a request, the Commissioner may refer the matter to the Office of Administrative Law, which shall assign an administrative law judge to conduct a hearing on the matter in the form of a contested case hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

2. Within 45 days of receipt of the administrative law judge's decision, the Commissioner shall affirm, reject, or modify the decision.

3. The Commissioner's action shall be considered final agency action for the purposes of the Administrative Procedure Act, and shall be subject only to judicial review as provided in the Rules of Court.]

7:7A-12.7 Taking without compensation

(a) In making any of the following, the Department may, upon request of an applicant, consider whether denial of a permit would result in a taking of property without compensation:

1. A decision on an application for an individual permit or transition area waiver (Note: for transition area waivers, there is also a hardship waiver based on takings principles available in some cases under N.J.A.C. 7:7A-6.5);

2. A determination of whether there is a practicable alternative to a project pursuant to N.J.S.A. 13:9B-9(b)(1) and (2), and N.J.A.C. 7:7A-7.2; and/or
3. A determination of whether a project is in the public interest pursuant to N.J.S.A. 13:9B-11 and N.J.A.C. 7:7A-7.2.

(b) An application for an individual permit shall meet all applicable application requirements at N.J.A.C. 7:7A-10, including the requirement at N.J.A.C. 7:7A-10.6 for an alternatives analysis that meets the requirements at N.J.A.C. 7:7A-7.2. While an applicant may choose to also include in the application a takings assertion and information to support that assertion, the Department shall not accept the application as administratively complete if it includes only the takings information and does not include the other required application information, including the alternatives analysis.

(c) An applicant who asserts that the denial of a permit would result in a taking of property without compensation, and who wishes the Department to consider this assertion in making a determination listed in (a) above shall demonstrate that:
1. Denial of the permit would prevent the property owner from realizing a minimum beneficial use of the property as a whole, in accordance with constitutional standards; and
2. The inability to realize a minimum beneficial use under (c)1 above does not result from any action or inaction of the property owner or an entity controlled by the property owner.

(d) For the purposes of this section, the property as a whole is all property that was assembled as one investment or to further one development plan, and may include more than one municipal tax lot. The property as a whole may also include lots that were previously sold or developed, if those lots were part of one investment or development plan.

(e) To obtain consideration of whether the denial of a permit would constitute a taking of property without compensation as part of decision-making under (a) above, the applicant shall submit, at a minimum, the following information, in addition to the application requirements at N.J.A.C. 7:7A-10:
1. Documentation showing when the property as a whole was acquired by the current property owner and for what consideration;
2. Documentation showing the amount, nature, date and reasonableness of any expenditures made to maintain and/or develop the property as a whole;
3. Documentation that the property has been offered for sale, through a letter whose form is provided by the Department, to all owners of property within 200 feet and to the land conservancies, environmental organizations, and government agencies on a list supplied by the Department. The applicant shall submit to the Department any response it receives to the offer for sale within 15 days of the applicant's receipt of the response;
4. The written offer of sale required under (e)3 above shall be sent by certified mail and shall:
   i. Indicate that the offer is open for a period of at least 180 calendar days;
   ii. Include a copy of a fair market value appraisal, performed by a state-licensed appraiser, that assumes that a minimum beneficial use of the property will be allowed;

iii. Include full disclosure of the location on the property of any freshwater wetlands, transition areas, and/or State open waters; and
iv. Indicate that the property owner has applied for an individual freshwater wetlands permit and has asserted that the denial of that application will result in a taking of the property without compensation;

5. A mitigation proposal that complies with N.J.A.C. 7:7A-15, to offset the impacts of the project on freshwater wetlands, transition areas, and/or State open waters;
6. Documentation that the proposed project will cause the least environmental impact possible, while still providing a minimum beneficial use of the property consistent with constitutional standards; and
7. Documentation that the proposed project meets the standards at N.J.S.A. 13:9B-9(b)(3) through (9) and at N.J.A.C. 7:7A-7.2(b)2 through 12.

7:7A-12.8 Resubmittal of a denied application

If the Department denies an application, the applicant may resubmit an application for a revised project on the same site. The Department will treat the resubmitted application as a new application. The resubmitted application shall include a new fee in accordance with N.J.A.C. 7:7A-11.

SUBCHAPTER 13 [PERMIT] CONTENTS OF PERMITS AND WAIVERS

7:7A-13.1 [Conditions applicable] Standard conditions that apply to all permits

(a) The following conditions apply to all [individual and Statewide general freshwater wetlands and open water fill] permits issued under this chapter, including all waivers and general permit authorizations:

1. Duty to comply: The permittee shall comply with all conditions of the permit. Any [permit] noncompliance with a permit, including a waiver or general permit authorization, constitutes a violation of the Freshwater Wetlands Protection Act and this chapter, and is grounds for enforcement action, for [permit] termination, [revocation] termination and reissuance, or modification, or for denial of [a permit renewal application] an extension. In some cases, [permit] noncompliance with a permit or general permit authorization, may also constitute a violation of the Water Pollution Control Act and/or the Federal Act[.];
2. Duty to reapply: If the permittee wishes to continue an activity [regulated] covered by the permit after the expiration date of the permit, the permittee must apply for and obtain a permit extension or a new permit, prior to the permit's expiration[.];
3. Duty to halt or reduce activity: It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit [.] ;
4. Duty to minimize environmental impacts: The permittee shall take all reasonable steps to prevent, minimize or correct any adverse impact on the environment resulting from activities conducted pursuant to the permit, or from noncompliance with the permit. Mitigation consistent with N.J.A.C. [7:7A-14] 7:7A-15 will also be required for freshwater wetlands permits, open water fill permits and [those Statewide] some General permits [described at N.J.A.C. 7:7A-9.2(a).] ;
5. Proper operation and maintenance: The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used [by the permittee] to achieve compliance with the [conditions of the] permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems only when necessary to achieve compliance with the [conditions of the] permit. This provision requires the proper execution of any approved mitigation [plan] proposal designed to mitigate losses caused by the permitted activity. The permittee shall maintain the authorized work areas in good condition and in accordance with the permit;
6. Permit actions: The permit may be modified, [revoked and reissued,] suspended, or terminated for cause. The filing of a request by the permittee for a [permit] modification, [revocation and reissuance, or termination,] or a notification of planned changes or anticipated noncompliance does not stay any condition of a permit [conditions], including a waiver or general permit authorization [.] ;

7. Property rights: The permit does not convey any property rights of any sort, or any exclusive privilege[.] ;
8. Duty to provide information: The permittee shall furnish to the Department within a reasonable time, any information which the Department requests to determine whether cause exists for modifying, [revoking] terminating and reissuing, or terminating the permit, or to determine compliance with the permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by the permit or waiver; [.]
9. Inspection and entry: The permittee shall allow the Department, or an authorized representative, upon the presentation of credentials [and other documents as may be required by law], to:
   i. - iii. (No change.)
   iv. Sample or monitor at reasonable times, for the purposes of assuring [permit] compliance or as otherwise authorized by the Federal Act, by the Freshwater Wetlands Protection Act, or by any rule or order issued pursuant thereto, any substances or parameters at any location[.] ;
10. Monitoring and records requirements are as follows:
   i. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity[.] ;
   ii. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for the permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by [request of the Commissioner] the Department at any time[.] ;
   iii. Records of monitoring information shall include:
      (1) - (5) (No change.)
      (6) The results of such analyses[.] ;
11. Signatory requirement: All applications, reports, or information submitted to the Department shall be signed and certified as required in N.J.A.C. [7:7A-11.3.] 7:7A-10.10; and
12. Reporting requirements are as follows:
   i. Planned changes: The permittee shall give notice to the Department as soon as possible of any planned physical alterations or additions to the permitted project or activity[.] ;
   ii. Anticipated noncompliance: The permittee shall give advance notice to the Department of any planned changes in the permitted project or activity which may result in noncompliance with permit requirements[.] ;
   iii. Transfers: The permit is not transferable to any person except after notice to the Department. The Department may require modification or [revocation] termination and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary [under the Act (see N.J.A.C. 7:7A-13.5)] to comply with N.J.A.C. 7:7A-14.3. In some cases, modification or [revocation] termination and reissuance is mandatory[.] ;
   iv. Monitoring reports: Monitoring results shall be reported at the intervals specified elsewhere in the permit [.] ;
   v. Twelve hour reporting: The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided

orally within 12 hours from the time the permittee becomes aware of the potentially dangerous circumstances. A written submission shall also be provided within five days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and, if the noncompliance has not been corrected, the anticipated length of time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance[.];

vi. Other noncompliance: The permittee shall report all instances of noncompliance not reported pursuant to (a)12 i, iv, and v above, at the time monitoring reports are submitted. The reports shall contain the information listed in (a)12v above[.] ; and

vii. Other information: Where the permittee becomes aware that it failed to submit any relevant facts in [a permit] an application, or submitted incorrect information in [a permit] an application or in any report to the Department, it shall promptly submit such facts or information[.] ; and

13. Duty to mitigate: The permittee shall perform any mitigation required under the permit prior to or concurrently with regulated activities in accordance with N.J.A.C. 7:7A-15.3(a). If a permittee performs permitted activities without performing required mitigation, the acreage of mitigation required shall be increased by 20% each year in accordance with N.J.A.C. 7:7A-15.3(b).

[13.] (b) The permittee need not comply with the conditions of [the] a permit, including a waiver or general permit authorization, to the extent and for the duration that such noncompliance is authorized in an emergency permit approved by the Department under N.J.A.C. 7:7A-8.

(Agency note: the following provision is proposed for recodification, with minor clarifying changes, at N.J.A.C. 7:7A-2.1(f).)
[14. Regulated activities are not conducted under the authority of the permit if they are not specifically identified and authorized in the permit.]

(Agency note: the provision below is proposed for recodification at N.J.A.C. 7:7A-13.1(a)5.)
[15. The permittee shall maintain the authorized work areas in good condition and in accordance with the requirements contained in the permit.]

(Agency note: the following provision is proposed for deletion because it repeats provisions found at N.J.A.C. 7:7A-13.2(b)3 and 4.)
[16. If any applicable water quality standards are revised or modified, or if a toxic effluent standard or prohibition under section 307(a) of the Federal Act is established for a pollutant present in the permittee's discharge and is more stringent than any limitation in the permit, the permit shall be promptly modified, pursuant to N.J.A.C. 7:7A-13.6, to conform to the standard, limitation or prohibition.]

(c) If a permit, including a transition area waiver or general permit authorization, is issued, regulated or prohibited activities are not authorized under the permit, and construction shall not be started, until the Department receives a written acceptance of the all terms and conditions of the permit from the permittee. A permit acceptance form

is available from the Department as part of each application checklist. If a permittee begins regulated or prohibited activities prior to submittal of the written permit acceptance, the permittee shall be deemed to have accepted all terms and conditions of the permit as of the date the activities were begun.

(d) [17.] (d) A copy of the permit, including an authorization or transition area waiver, shall be kept on the site and shall be available for public inspection. All projects authorized by an individual or general permit or transition area waiver [issued pursuant to this chapter] shall be posted with a sign, prominently displayed at the main entrance to the property or work site, at all times from commencement to completion of the permitted activity. The sign shall contain at least the following information:

[i.] 1. The work which is authorized by the Department;

[ii.] 2. The type of permit [applied for or authorizing] that authorized the work, and the Department's file [permit or application] number;

[iii.] 3. A Department phone number for verification; and

[iv.] 4. The location [nearest] on the site at which the permit and plans may be inspected.

(e) A permit, including a waiver or general permit authorization, runs with the land and is binding upon the permittee and the permittee's successors in interest in the land or in any part thereof.

(f) A permit, including a waiver and/or a general permit authorization, issued under this chapter does not relieve a permittee from the obligation to obtain any other permits or approvals required by law.

7:7A-13.2 Establishing permit conditions

(a) In addition to the standard conditions required in all permits under [(]N.J.A.C. 7:7A-13.1[)], the Department shall establish conditions in [permits] a permit, including a waiver or general permit authorization, as required on a case-by-case basis, [under N.J.A.C. 7:7A-13.3 (duration of permits) and N.J.A.C. 7:7A-13.1(a)10 (monitoring).

(b) The Department shall also establish conditions in permits, as required on a case-by-case basis, to provide for and] to assure compliance with all applicable requirements of the Federal Act, the Freshwater Wetlands Protection Act, the Water Pollution Control Act, this chapter and other [appropriate] applicable rules or regulations.

[1.] For the purposes of this subsection, an applicable requirement is a [State] statutory or regulatory requirement which takes effect [prior to] before the Department's final administrative [disposition of] decision on a permit, or [prior to] before the modification or [revocation] termination and reissuance of a permit [, to the extent allowed in N.J.A.C. 7:7A-13.

2. New or reissued permits, and to the extent allowed under N.J.A.C. 7:7A-13.6, modified or revoked and reissued permits, shall incorporate each of the applicable requirements referenced in N.J.A.C. 7:7A-13.1.]

[(c)] (b) In addition to the standard requirements in N.J.A.C. 7:7A-[13.6] 13.1, each permit shall include information meeting the following requirements, when applicable:

1. A specific identification and description of the authorized activity, including:
   i. The name and address of the permittee and the permit application identification number;
   ii. The use or purpose of the regulated activity;
   iii. The type and quantity of the materials to be discharged or used as fill;
   iv. Any structures proposed to be erected;
   v. The location and boundaries of the activity site(s), including a detailed sketch and the name and description of affected freshwater wetlands, State open waters, and transition areas, identification of the [major watershed and subwatershed] HUC 11, as defined at N.J.A.C. 7:7A-1.4; and
   vi. A reference to the specific site plans depicting the approved regulated activity(ies);
2. Provisions ensuring that the regulated activity will be conducted in compliance with the environmental guidelines issued under section 404(b)(1) of the Federal Act (40 C.F.R. Part 230), the Freshwater Wetlands Protection Act, and this chapter, including conditions to ensure that the regulated activity shall be conducted in a manner which minimizes adverse impacts upon the physical, chemical, and biological integrity of the waters of the United States, such as requirements for restoration or mitigation;
3. Any requirements necessary to comply with water quality standards established under applicable Federal or State law. If an applicable water quality standard is promulgated or modified after the permit or waiver is issued, [it] the permit or waiver shall be modified as provided in N.J.A.C. 7:7A-[13.6] 14;
4. Requirements necessary to comply with any applicable toxic effluent standard or prohibition under section 307(a) of the Federal Act or applicable State or local law. If an applicable toxic effluent standard or prohibition is promulgated or modified after the permit or waiver is issued, [it] the permit or waiver shall be modified as provided in N.J.A.C. 7:7A-[13.6] 14;
5. Applicable best management practices (BMPs) as [provided in the memorandum of agreements included in the State application for assumption of the Federal permit program in section 404 of the Federal Act] defined at N.J.A.C. 7:7A-1.4;
6. Any conditions necessary for general permits as required under N.J.A.C. 7:7A-[9.3] 4 or 5;
7. A specific date on which the permit [or waiver] shall automatically expire[, unless previously revoked and reissued or modified or continued,] if the authorized work has not been commenced , unless before the automatic expiration date the permit is terminated and reissued, or modified, or extended; and
8. Reporting of monitoring results. All permits and waivers shall specify:
   i. - iii. (No change.)

(c) The Department may in some cases include a permit condition requiring a preconstruction meeting on the site of permitted activities. Such a condition shall specify how many days prior to construction the permittee must notify the Department so that the preconstruction meeting can be scheduled.

(d) (No change.)

7:7A-13.3 Duration of permits

(a) [Freshwater wetlands and open water fill permits] A permit, including a waiver or general permit authorization, shall be effective for a fixed term not to exceed five years from the date the Department issues the permit. An extension may be available in some cases under N.J.A.C. 7:7A-14.6.

(b) This section does not govern letters of interpretation or exemption letters. Provisions governing the duration and extension of LOIs are found at N.J.A.C. 7:7A-3.6. Provisions governing the duration of exemption letters are found at N.J.A.C. 7:7A-2.10.

7:7A-13.4 Effect of a permit

(a) Compliance with a permit, including a general permit authorization, during its term constitutes compliance, for [purpose of] enforcement purposes, with sections 301, 307, and 403 of the Federal Act, with the Freshwater Wetlands Protection Act, and with this chapter. Because transition areas are not regulated under the Federal Act, compliance with a transition area waiver during its term constitutes compliance, for enforcement purposes, with the Freshwater Wetlands Protection Act and with this chapter. However, a permit may be modified, [revoked] terminated and reissued, suspended, or terminated during its term for cause as set forth in this chapter.

(b) The issuance of a permit, including a waiver or general permit authorization, does not convey property rights of any sort, or any exclusive privilege.

(Agency note: provisions in the existing rule at N.J.A.C. 7:7A-13.5 are relocated at proposed N.J.A.C. 7:7A-14.2.)

(Agency note: the substance of the provisions at N.J.A.C. 7:7A-13.6 through 13.9, proposed for deletion below, is proposed at N.J.A.C. 7:7A-14.1, and 7:7A-14.3 through 7:7A-14.5.)
[7:7A-13.6 Modification or revocation and reissuance of permits
(a) When the Department receives any information (for example, through a site inspection, through submission of information by the permittee as required by a permit, through a request for modification or revocation and reissuance, or through a review of the permit file), the Department may determine whether one or more of the causes for modification or revocation and reissuance listed in N.J.A.C. 7:7A-13.7 and 13.8 exist. If cause exists, the Department may modify or revoke and reissue the permit accordingly, subject to the limitations of (e) below, and may request an updated application, if necessary.

(b) Any permit modification not processed as a minor modification must be made for cause and with the public notice and hearings procedures required for permit applications under N.J.A.C. 7:7A-11.1(a)7, 9 and 10, 12.1(a), 12.3, 12.4, and 12.5.

(c) If cause does not exist under this chapter, the Department shall not modify or revoke and reissue the permit.

(d) If a permit modification satisfies the criteria in N.J.A.C. 7:7A-13.9 for "minor modifications", the permit may be modified without public review.

(e) When a permit is modified, only the conditions subject to modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision, public hearings and comments, and the permit may be reissued for a new term.

(f) No Federal 404 permit shall be modified or revoked and reissued if USEPA objects (see N.J.A.C. 7:7A-12.3).

(g) Any modification except for those issued pursuant to N.J.A.C. 7:7A-13.9(b)4 will be published in the DEPE Bulletin.

(h) Except for minor modifications of permits as described at N.J.A.C. 7:7A-13.9, a fee shall be submitted for modifications according to the requirements set forth for permit fees at N.J.A.C. 7:7A-16.

7:7A-13.7 Causes for modification, but not revocation and reissuance
(a) The following are causes for modification, but not for revocation and reissuance of permits. The following may only be causes for revocation and reissuance as well as modification when the permittee requests or agrees.

1. Material and substantial alterations or additions proposed to the permitted project or activity after permit issuance which justify the application of permit conditions that are different or absent from the existing permit.

2. Permits may be modified during their terms if the Department receives information which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) which would have justified the application of different permit conditions at the time of issuance. (For general permits, see N.J.A.C. 7:7A-9.5.) This cause shall include any information indicating that cumulative effects on the environment are unacceptable.

3. The standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations, or by judicial decision after the permit was issued. Permits may be modified during their terms for this cause only as follows:

i. For promulgation of amended standards or regulations, when:

(1) The permit condition requested to be modified was based on a USEPA or Department approved or promulgated water quality standard; and

(2) The Department or USEPA has revised, withdrawn, or modified that portion of the rule or regulation on which the permit condition was based, or has approved a State action with regard to a water quality standard on which the permit condition was based; and

(3) A permittee requests modification in accordance with this chapter within 90 days after Federal Register or New Jersey Register notice of the action on which the request is based.

ii. For judicial decisions, a court of competent jurisdiction has remanded and stayed USEPA or the Department promulgated standards, if the remand and stay concern that

portion of the standards on which the permit condition was based, and a request is filed by the permittee in accordance with this chapter within 90 days of judicial remand.

7:7A-13.8 Causes for modification or revocation and reissuance
(a) Cause exists to modify or, alternatively, revoke and reissue a permit when:
1. Cause exists for termination under N.J.A.C. 7:7A-15.10 (termination of permits), and the Department determines that modification or revocation and reissuance is more appropriate under the circumstances; or
2. The Department has received notification, as required under N.J.A.C. 7:7A-13.5 of a proposed transfer of the permit and the transfer does not meet the criteria at N.J.A.C. 7:7A-13.9(b)3.

7:7A-13.9 Minor modifications of permits
(a) Upon the consent of the permittee, the Department may modify a permit to make the minor corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of N.J.A.C. 7:7A-13.6. Any permit modification not processed as a minor modification under this section must be made for cause and must follow the modification procedures in N.J.A.C. 7:7A-13.6.

(b) Minor modifications may only:
1. Correct typographical errors;
2. Require more frequent monitoring or reporting by the permittee;
3. Allow for a change in ownership or operational control of a project activity where the Department determines that no other change in the permit is necessary, provided that a written agreement containing a date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Department; and
4. Allow for a change in materials or construction techniques required by another permitting agency provided the change will not result in additional wetland, State open water or transition area impacts from that of the originally approved permit.]

SUBCHAPTER 14 CHANGES TO ISSUED PERMITS OR WAIVERS

7:7A-14.1 General provisions for changing an issued permit

(a) The Department may modify a permit, including a waiver or general permit authorization for cause, or may approve a modification in response to a modification application from the permittee. The Department shall process a modification in accordance with N.J.A.C. 7:7A-14.3.

(b) The Department shall suspend a permit for cause in accordance with N.J.A.C. 7:7A-14.4, or in response to a request from the permittee.

(c) The Department shall terminate a permit for cause in accordance with N.J.A.C. 7:7A-14.5, or in response to a request from the permittee.

(d) The Department may extend a permit in accordance with N.J.A.C. 7:7A-14.6.

(e) Each modification, suspension, or termination that would require EPA review under N.J.A.C. 7:7A-12.2 if it were an application for a new permit shall be transmitted to EPA for review.

(f) The Department shall not modify, suspend, or terminate a Federal 404 permit if USEPA objects under N.J.A.C. 7:7A-12.2.

(g) The Department need not modify, suspend or terminate a permit prior to taking enforcement action under N.J.A.C. 7:7A-16.

(Agency note: the following provision, found in the existing rule at N.J.A.C. 7:7A-13.5, is proposed for deletion, to be replaced by proposed N.J.A.C. 7:7A-14.2, below.)

7:7A-14.2 [7:7A-13.5] Transfer of a [permits] permit

[A permit may be transferred by the permittee to a new owner or operator only if the permit or waiver has been modified or revoked and reissued under N.J.A.C. 7:7A-13.6, or a minor modification made under N.J.A.C. 7:7A-13.9 to identify the new permittee and incorporate such other requirements as may be necessary under the Federal Act, this chapter, or any permit, or order issued pursuant thereto.]

If a permittee wishes to transfer a site to another person, or to transfer operational control of permitted activities to another person, the permittee shall submit an application for a modification, which meets the requirements at N.J.A.C. 7:7A-14.3 below.

7:7A-14.3 Modification of a permit

(a) A modification of a permit, including a transition area waiver or general permit authorization, may be requested by a permittee or, in the cases set forth at (f) below, the Department may modify a permit on its own initiative.

(b) A permittee shall apply for a change to an existing permit through one of the following:

1. A minor modification under (c) below. A minor modification may be made to any permit, including a transition area waiver or general permit authorization;
2. A major modification under (d) below. A major modification may only be made to an individual freshwater wetlands permit, open water fill permit, or transition area waiver; and
3. A general permit authorization modification under (e) below.

(c) The following changes are minor modifications that may be made to any permit, including a general permit authorization or transition area waiver:

1. Correction of a typographical error that does not materially affect the terms of the permit or waiver;
2. An increase in the frequency of monitoring or reporting by the permittee;
3. A change in ownership or operational control of a project, where no other change in the original permit or waiver is necessary. If any other change in the permit is necessary, the change shall be made through a major modification; and
4. A change in materials, construction techniques, or the minor relocation of an activity on a site, if the change is required by another permitting agency. However, this change is not a minor modification if the change would result in additional wetland, State open water or transition area impacts over those of the original permit or waiver.

(d) Any change not listed at (c) above as a minor modification, if affecting a project covered by an individual freshwater wetlands permit, open water fill permit, or transition area waiver, shall constitute a major modification. To obtain approval for a major modification, an applicant shall meet the same substantive and procedural standards that would apply to an application for a new individual permit, except that the application need only address the portions of the permit affected by the proposed modification. Portions of the permit that are not affected by the proposed modification are not subject to public notice, public hearing, Department review, or other procedures that would apply to an application for a new individual permit.

(e) Any change not listed at (c) above as a minor modification, if affecting a project covered by a general permit authorization, shall meet the following requirements:

1. The changed project would continue to be authorized under the same general permit; and
2. The proposed change would not result in a significant change in the scale, use or environmental impact of the project as approved. A change that will result in a reduction in environmental impact shall not constitute a significant change. Examples of significant changes include, but are not limited to, increased clearing, grading, filling or impervious surfaces, a change in stormwater management technique, and movement of the project to a different wetland or location.

(f) The following are causes for which the Department may modify a permit, including a transition area waiver or general permit authorization, on its own initiative:

1. The permittee proposes substantial changes or additions to the permitted activity, and these changes or additions justify conditions that are not in the existing permit or waiver;
2. The Department receives information that was not available at the time the permit was issued (other than revised regulations, guidance, or test methods), which would have justified different conditions at the time of issuance. This includes information indicating that cumulative environmental effects of issued permits are unacceptable;
3. Circumstances relating to the permitted activity have changed since the permit was issued and justify changed conditions;
4. Cause exists for the Department to terminate the permit under N.J.A.C. 7:7A-14.5, but the Department determines that a modification will ensure that the project complies with this chapter;
5. The standards or rules on which the permit was based have been amended, or changed by judicial decision, after the permit was issued; or
6. The ownership or operational control of the site has been transferred to a person other than the permittee, and the permittee has not applied for a minor modification reflecting the transfer as required under N.J.A.C. 7:7A-14.3(c).

(g) An applicant for a modification shall follow the procedures at N.J.A.C. 7:7A-10.8. An application for a modification to a general permit authorization does not require public notice in accordance with N.J.A.C. 7:7A-10.9. An application for a minor modification does not require a fee under N.J.A.C. 7:7A-11, or public notice under N.J.A.C. 7:7A-10.9.

(h) An application for a modification shall be reviewed in accordance with the applicable provisions of N.J.A.C. 7:7A-12, Department review of applications.

7:7A-14.4 Suspension of a permit, waiver, or general permit authorization

(a) When the Department suspends a permit, including a waiver or general permit authorization, any work that is being conducted under the authority of the permit shall stop immediately upon receipt of the notice required under (c) below.

(b) The Department shall suspend a permit if:

1. The Department makes a written determination that immediate suspension would be in the public interest; or
2. Cause exists for the Department to terminate the permit under N.J.A.C. 7:7A-14.5, but the Department determines that suspension is more appropriate.

(c) The Department shall notify the permittee of a suspension in writing. The notice shall:

1. State the reasons for the suspension, including the written determination of public interest, if one was prepared under (b)1 above;
2. Order the permittee to immediately stop the activities that had been authorized under the suspended permit; and

3. Notify the permittee of the right to request a meeting with the Department, or a public hearing, within ten days of the permittee's receipt of the notice.

(d) If the permittee requests a public hearing regarding the suspension, the Department and permittee shall follow the procedures at N.J.A.C. 7:7A-12.4.

(e) The Department shall reinstate, modify or terminate the permit after the hearing or meeting or, if no hearing or meeting is held, within a reasonable amount of time after the notice required under (c) above.

(Agency note: the following section is proposed to be recodified here, with clarifying changes, from N.J.A.C. 7:7A-15.10. Changes from the existing text are indicated.)
7:7A-14.5 [7:7A-15.10] Termination of [permits] a permit

(a) The following are causes for [terminating] the Department to terminate a permit, including a waiver or general permit authorization, during its term, or [for denying] to deny a permit extension [renewal application]:

1. Noncompliance by the permittee with any portion or condition of the permit [or any condition of the permit] , including pursuing land uses other than those authorized by an individual permit. For example, if an individual permit authorizes construction of a 10,000 square foot preschool, construction of a 10,000 square foot retail store on the same footprint would constitute noncompliance with the permit;
2. The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; [or]
3. A Department determination that the issuance of the permit was based on false or inaccurate information; or
4. The permit has unanticipated negative environmental impacts such as, but not limited to, excessive erosion and subsequent siltation, destruction of vegetation not covered by the permit, or die-off of aquatic biota, [etc.] which become apparent during [construction] the performance of the permitted activities.

(b) Prior to a termination, the Department shall furnish written notice to the permittee by certified mail. [The notice shall provide 10 days within which the permittee shall either remedy the violations, or unanticipated negative environmental impacts, offer a plan as to how to bring the permit back into compliance or correct the unanticipated impact, or request a hearing pursuant to (e) below. Within 60 days of Department approval of a plan, the violations or unanticipated impact shall be remedied.] The permittee shall stop all regulated and/or prohibited activities immediately upon receiving the notice. Within ten days after receiving the notice, the permittee shall:

1. Remedy the violation or unanticipated negative environmental impacts;
2. Submit a plan for bringing the activities back into compliance or correcting the unanticipated impacts; or
3. Request a hearing under N.J.A.C. 7:7A-1.7.

(c) If the [requirements of] permittee has not taken one of the actions required at (b) above within 10 days [of the] after receiving the Department's notice, the permit, waiver,

or general permit authorization shall automatically terminate and the permittee shall remedy the unanticipated negative environmental impacts or violations [shall be remedied] . Once the impacts or violations are remedied, the Department may reinstate the permit or require the applicant to apply for a new permit [following the application procedures in this chapter] .

(d) If a permittee submits a plan under (b)2 above, the permittee shall begin implementation of the plan immediately upon the Department's approval of the plan, and shall remedy the violations or unanticipated impact within 60 days.

(e) [(d) Should] If a permit, including a waiver[,] or general permit authorization, is [be] terminated, the permittee shall restore the site to its pre-activity condition to the maximum extent practicable and feasible, or otherwise compensate for any loss in resource value through mitigation [pursuant to] under N.J.A.C. [7:7A-14] 7:7A-15. This restoration or compensation shall be [accomplished] completed within 90 days after the permit is terminated, unless the Department authorizes in writing a longer period of time.

[(e) A request for a hearing under (b) above shall be filed with the Department at the following address:

Office of Legal Affairs
ATTENTION: Adjudicatory Hearing Requests
Department of Environmental Protection and Energy
401 East State Street
CN 402
Trenton, New Jersey 08625-0402]

7:7A-14.6 Permit extensions

(a) This section governs the extension of a permit, including a waiver or a general permit authorization. This section does not apply to LOIs or exemption letters. Provisions governing the duration and extension of LOIs are found at N.J.A.C. 7:7A-3.6. Provisions governing the duration of exemption letters are found at N.J.A.C. 7:7A-2.10.

(b) The Department shall issue one five-year extension of a permit only if:

1. The permittee applies for the extension at least 90 days prior to the expiration of an individual permit or individual transition area waiver, and at least 30 days prior to the expiration of a general permit authorization; and
2. The permittee demonstrates that there has been no significant change in any of the following between the date the permit was issued and the date the application for extension is submitted:
   i. The project and activities that were approved in the original permit;
   ii. The rules governing the site; and
   iii. The conditions on the site, including the wetlands boundary and resource classification.

(c) The Department shall deny a permit extension if the permittee has violated the terms of the original permit, or if any of the other causes for termination at N.J.A.C. 7:7A-14.5 exist.

(d) If the requirements in this section for an extension are not met, the permit shall expire and regulated activities shall stop until a new permit is obtained.

(e) An application for an extension of a permit shall meet the application requirements at N.J.A.C. 7:7A-10, including the public notice requirements at N.J.A.C. 7:7A-10.9.

(Agency note: Enforcement provisions currently located at N.J.A.C. 7:7A-15 are proposed for consolidation with penalty provisions at N.J.A.C. 7:7A-17. The consolidated provisions are located at N.J.A.C. 7:7A-17.)

SUBCHAPTER 15 [14.] MITIGATION

[7:7A-14.1 Mitigation goals
(a) The Department shall require mitigation as a condition of an individual freshwater wetlands or State open water fill permit, and certain Statewide general permits. Mitigation may include restoration, creation, enhancement, or donation of money or land or both to the Mitigation Bank, or to other public or private non-profit conservation organizations. Donations of land to public or private non-profit conservation organizations shall first be approved by the Mitigation Council and the Department in consultation with USEPA.

(b) When an individual freshwater wetlands permit, State open water fill permit or certain Statewide general permits allow the disturbance or loss of wetlands or State open waters, this disturbance or loss shall be compensated for as specified below at N.J.A.C. 7:7A-14.2, unless the applicant can prove, through the use of productivity models or other similar studies, that by restoring or creating a lesser area, there will be a replacement of wetlands or State open water of equal ecological value. In order to demonstrate equal ecological value, the applicant shall survey and provide written documentation regarding, at a minimum, existing soil, vegetation, water quality functions, flood storage capacity, soil erosion and sediment control functions, and wildlife habitat conditions and detail how the proposed mitigation plan will replace the ecological values of the wetland to be lost or disturbed.

(c) Mitigation must be performed prior to or concurrently with permitted activities that will permanently disturb wetlands or State open waters, and immediately after activities that will temporarily disturb wetlands or State open waters. Applicants shall be required to obtain a secured bond, or other surety acceptable to the Department including an irrevocable letter of credit or money in escrow, that shall be sufficient to hire an independent contractor to complete and maintain the proposed mitigation should the applicant default. The performance bond for the construction of the proposed mitigation shall be posted in an amount equal to 115 percent of the estimated cost of construction of the mitigation activity. In addition, a maintenance bond to assure the success of the mitigation shall be posted in an amount equal to 30 percent of the estimated cost of construction. The performance and maintenance bonds will be reviewed annually and shall be adjusted to reflect current economic factors.
1. The performance bond or other surety will be released upon an inspection by the Department confirming completion of construction and planting of the mitigation site. The maintenance bond will be released upon the Department's confirmation that the three-year, post-planting monitoring period has been successfully completed and that no additional maintenance is required in order to meet the specifications of the approved mitigation plan.

(d) The Department shall not consider a mitigation proposal in determining whether a project should be awarded a permit but shall require mitigation as a condition of any permit found to be acceptable under the criteria listed in N.J.A.C. 7:7A-3.

(e) As a condition of every creation or enhancement plan authorized under this subchapter, an applicant shall sign a Department approved conservation easement and register this restriction on the deed for the subject parcel. This restriction will provide that no regulated activities will occur in the created or enhanced wetland area. This restriction shall be memorialized in a deed restriction meeting the Department's requirements and shall run with the land and be binding upon the applicant and the applicant's successors in interest in the premises or any part thereof. The freshwater wetland permit will not become effective until the deed restriction is registered with the county clerk. Any regulated activities undertaken on the site before a copy of the registered restriction is submitted to the Department will be considered in violation of the Act and this chapter.
1. No future development will be permitted on the mitigation site unless the Department finds that the regulated activity has no practicable alternative which would:
i. Not involve a freshwater wetland or State open water; or
ii. Involve a freshwater wetland, or State open water but would have a less adverse impact on the aquatic ecosystem;
iii. Not have other significant adverse environmental consequences, that is it shall not merely substitute other significant environmental consequences for those attendant on the original proposal; and
iv. That there is a compelling public need for the activity greater than the need to protect the mitigation site.
2. To satisfy this condition the applicant shall provide a receipt showing that the restriction has been registered at the county clerk's office.

(f) Except for publicly funded projects, as described at (f)1 below, any mitigation carried out offsite shall be on private property.
1. Mitigation for publicly funded projects may be carried out on public lands provided that these lands were private lands purchased by a public agency expressly for the purpose of performing mitigation.

(g) When loss or disturbance of freshwater wetlands or State open waters results from a violation of the Act, this chapter, or any permit, order or approved mitigation plan issued pursuant thereto, the mitigation portion of the penalty shall be that specified in N.J.A.C. 7:7A-15. The Department may, at its discretion, condition approval of a mitigation plan, or a permit, or both, on the resolution of the violation.

7:7A-14.2 Wetland or State open water mitigation options
(a) The Department distinguishes between four types of mitigation: restoration, creation, enhancement, and contribution. Depending on the circumstances under which wetlands or State open waters are lost or disturbed, different types of mitigation may be required by the Department. The types of mitigation are explained below:
1. Restoration refers to actions performed on the site of a regulated activity, within six months of the regulated activity, in order to reverse or remedy the effects of the activity on the wetland or State open waters, and to restore the site to pre-activity condition.
i. Restoration will be required at a ratio of one acre restored to one acre lost, modified or disturbed. If restoration type actions are performed more than six months after the regulated activity which disturbed the wetland, these actions will no longer be considered restoration, but will be considered creation, and will be governed by the

provisions of (a)2 below. At the Department's discretion, restoration activities may exceed six months in cases where a violation has occurred.
2. Creation refers to actions performed to establish freshwater wetland or State open water characteristics, habitat and functions on upland areas. The creation of freshwater wetlands or State open waters shall be governed by the following provisions:
i. Creation will be required at a ratio of two acres created to one acre lost or disturbed unless the applicant demonstrates equal ecological value pursuant to N.J.A.C. 7:7A-14.1(b). Where the Department permits mitigation on less than a 2:1 basis, frequent monitoring will be required by the permittee. In such cases, the Department will require additional mitigation or further remedial action if a net loss of equal ecological value occurs during the three-year monitoring period. Under no circumstances shall the mitigation area be smaller than the disturbed area. Creation of wetlands from other existing climax habitats is discouraged.
ii. Creation shall not be permitted on a site that retains wetlands characteristics. Rather such a site is only eligible for enhancement activities pursuant to (a)3 below.
iii. In addition to the wetlands created in the ratio required, the mitigation site shall include the appropriate transition area. The transition area width will be that which is required for the resource value classification of the closest adjacent wetland areas and will be a minimum of 50 feet.
3. Enhancement refers to actions performed to improve the characteristics, habitat and functions of an existing, degraded wetland such that the enhanced wetland will have resource values and functions similar to an undisturbed wetland. The ratio of enhanced wetlands to wetlands disturbed or modified will be determined based on the documented assessment of the loss of ecological value of the wetlands disturbed or modified.
4. Contribution refers to the donation of money or land to the Mitigation Bank or to other public or private non-profit conservation organizations as approved by the Mitigation Council and the Department in consultation with EPA. Donations shall only be considered if the Department in consultation with USEPA determines that other forms of mitigation are not feasible onsite or offsite in the same watershed. For the purposes of this subsection only, feasible shall include a determination of whether other types of mitigation would be as ecologically beneficial as the donation.
i. If money is donated, the donation shall be equivalent to the lesser of the following costs:
(1) Purchasing and enhancing existing degraded freshwater wetlands, resulting in preservation of freshwater wetlands of equal ecological value to those which are being lost; or
(2) Purchase of property and the cost of creation of freshwater wetlands of equal ecological value to those which are being lost.
ii. If the Department determines that land donation is appropriate, as part or all of a contribution, only land which has been determined by the Mitigation Council to have the potential to be a valuable component of the freshwater wetlands ecosystem will be acceptable to satisfy the mitigation requirement.

7:7A-14.3 Location of mitigation sites
(a) All mitigation projects shall be carried out onsite to the maximum extent practicable.
1. For the purposes of this subsection, the term practicable shall mean that all efforts have been exhausted after taking into consideration cost, existing technology, and logistics in light of the overall project purposes.

(b) If onsite mitigation is found to be impracticable, the mitigation shall be carried out within the same watershed to the maximum extent practicable.

(c) If the Department determines that mitigation onsite or in the same watershed is not feasible or less ecologically beneficial, the Department may approve mitigation in a different watershed.

7:7A-14.4 Wetland mitigation proposal requirements

(a) A proposal for mitigation shall include the following information, as appropriate:

1. A description of the size and type of mitigation project proposed, including a transition area, a description of the freshwater wetlands which are being lost or disturbed and how the proposal satisfies the requirement for creation of wetlands of equal ecological value within the same watershed;
2. The names and addresses of current and proposed owner(s) of the mitigation project site;
3. The language of a proposed conservation easement or deed restriction which provides for the maintenance of the mitigation site as a natural area in perpetuity;
4. A monitoring and maintenance plan to ensure 85 percent survival and 85 percent areal coverage of the mitigation plantings for at least three years after planting;
5. A description of the existing and proposed vegetation on the mitigation site including scientific names. Spacing of all plantings must be shown along with the stock type, that is, bare root, potted, seed, and source of the plant material;
6. A description of the existing and proposed hydrology of the site including the elevation of adjacent surface water and the depth to the seasonal high water table;
7. Existing soil types and proposed soil characteristics;
8. A schedule from initiation to completion of the project including dates of excavation, planting, fertilizing (rates and type), etc.;
9. A metes and bounds description of the proposed mitigation site, which will form the basis for the deed restriction;
10. Five folded copies of a site plan for the mitigation project which includes:

i. Project location within the region and in relation to adjacent development;
ii. The lot and block number of the project location;
iii. Existing and proposed elevations and grades of the project shown in one foot intervals; and
iv. Plan views and cross sectional views; and

11. A copy or photocopy of a portion of the U.S.G.S. 7.5 minute quadrangle map (available from the Department's Maps and Publications Office, CN 402, Trenton, NJ 08625) showing the location of the property and its general vicinity, indicating and labeling the location of the proposed mitigation and the property boundaries, and a determination of the State Plane Coordinates for the center of the property. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the end-points of those projects which are 1999 feet or less, and for those projects which are 2000 feet and longer, additional coordinates at each 1000 foot interval.

7:7A-14.5 Acceptability of wetlands mitigation proposals

(a) Wetlands and State open water mitigation proposals shall be reviewed by the Department for acceptability. The Department will base the acceptability determination upon the following criteria:

1. Location of the mitigation site as described under N.J.A.C. 7:7A-14.3 and in relation to adjacent development;
2. Size of the proposed mitigation project as described under this subchapter;
3. Suitability of the selected vegetative species to survive in the proposed environment;
4. Suitability of the monitoring program and maintenance to ensure 85 percent survival and 85 percent areal coverage of the mitigation plantings for at least three years following planting;
5. Suitability of the proposed substrate (soil) to support the selected vegetative species;
6. Success of other mitigation projects within the area;
7. Proposed elevations and hydrology;
8. Ability of the site to support wildlife; and
9. Any other relevant consideration.

(b) When a mitigation plan is submitted subsequent to the permit decision, within 30 days of the receipt of the submission, the Department shall review the submission for completeness and make any necessary requests for additional information, or declare the submission complete. Within 60 days of accepting a submission as complete, the Department shall issue a decision on the acceptability of a proposed mitigation plan unless extended by consent of the permittee.

7:7A-14.6 Wetlands Mitigation Council

(a) The Wetlands Mitigation Council shall have oversight of the creation and implementation of the Wetlands Mitigation Bank. The Wetlands Mitigation Bank will serve all programs within the Land Use Regulation Element for which wetlands and open water mitigation is required as a condition of a permit. The Council duties and functions shall include:

1. Accepting donations of money or land when the Department has determined donation to be an acceptable form of mitigation for a permit or a violation;
2. Determining if land to be donated has the potential to be a valuable component of the wetlands or surface water ecosystem;
3. Disbursement of funds from the Wetlands Mitigation Bank to finance mitigation projects;
4. Purchasing land to provide areas for restoration of degraded freshwater wetlands and to preserve wetlands, and surface waters and transition areas determined to be of critical importance; and
5. Reviewing and approving the establishment of private mitigation banks.

(b) The Council may transfer any funds or lands restricted by deed, easement or other appropriate means to mitigation and freshwater wetlands conservation purposes, to a State or Federal conservation agency that consents to the transfer, to expand or provide for:

1. Freshwater wetlands preserves;
2. Transition areas around existing freshwater wetlands to preserve freshwater wetland quality;

3. Future mitigation sites for freshwater wetlands restoration; or
4. Research to determine more successful mitigation techniques.

(c) Under no circumstances will the resources of the Mitigation Bank be used to aid permittees or violators in locating mitigation sites required of them because of their permit or violation.]

7:7A-15.1 Mitigation definitions

In addition to the terms defined at N.J.A.C. 7:7A-1.4, the following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

"Charitable conservancy" means a corporation or trust that meets the definition of a charitable conservancy at N.J.S.A. 13:8B-2, and amendments thereto. As of {effective date of these rules}, N.J.S.A. 13:8B-2 defines a charitable conservancy as a corporation or trust whose purposes include the acquisition and preservation of land or water areas or of a particular land or water area, or either thereof, in a natural, scenic or open condition, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and which has received tax exemption under section 501(c) of the 1954 Internal Revenue Code.

"Council" means the Wetlands Mitigation Council.

"Creation" means the establishment of freshwater wetland or State open water characteristics and functions in uplands.

"Credit purchase" means the purchase of credits in a mitigation bank, as defined below, as a substitute for performance of restoration, creation, enhancement, or upland preservation by the purchaser. Each credit counts for a certain acreage amount of restoration, creation, or enhancement. Once a credit is applied to satisfy a mitigation obligation under this subchapter, it is exhausted and may not be sold or used again.

"Degraded" means, in regard to a wetland or State open water, substantially impaired in its ability to provide the values and functions enumerated at N.J.S.A. 13:9B-2. A degraded wetland is usually characterized by sparse or absent vegetation, or by a predominance (over 85%) of a noxious or invasive type of vegetation. For mitigation purposes only, the Department may deem an active agriculture field that is devoid of wetland vegetation, but which would otherwise meet the definition of a wetland, a degraded wetland.

“Enhancement” means the improvement of the ability of an existing, degraded wetland or State open water to support natural aquatic life, through substantial alterations to the soils, vegetation and/or hydrology. Improvement of a wetland or water that is not degraded does not constitute enhancement. Conversion of a State open water to a wetland does not by itself constitute enhancement, although the Department may approve a mitigation proposal that includes this in some cases as part of a larger mitigation project. The addition of human-made habitat improvement devices such as duck boxes does not constitute enhancement.

"In-kind mitigation" means mitigation that provides similar values and functions as the area disturbed, including similar wildlife habitat, similar vegetative species coverage

and density, equivalent flood water storage capacity, and equivalency of other relevant values or functions. In the case of a mitigation bank, this is accomplished through the purchase of credits in a bank at which similar values and functions have been established.

“Land donation” means performing mitigation through giving land that has been determined acceptable for donation by the Wetlands Mitigation Council.

"Mitigation" means activities carried out in accordance with N.J.A.C. 7:7A-15 in order to compensate for the loss or disturbance of freshwater wetlands or State open waters.

"Mitigation area" means the portion of a site, right-of-way, or piece of property upon which mitigation is proposed or performed. If a mitigation area includes a wetland, a transition area is included as part of the mitigation area in accordance with N.J.A.C. 7:7A-15.8(b).

"Mitigation bank" means an operation in which wetlands, uplands and/or other aquatic resources are restored, created, enhanced, or preserved by a mitigation bank operator, for the purpose of providing compensatory mitigation for disturbances to freshwater wetlands and/or State open waters.

"Mitigation bank service area" means a geographic area within which a mitigation bank's credits may be used to compensate for a disturbance.

"Mitigation bank site" means the portion of a site, right-of-way, or piece of property upon which a mitigation bank is proposed or created.

“Monetary contribution” means giving money to the Wetlands Mitigation Fund.

"Out-of-kind mitigation" means mitigation that is not in-kind mitigation.

“Restoration” means:

1. The reestablishment of wetland and/or State open water characteristics and functions in an area that was once a freshwater wetlands and/or State open water but is no longer. For example, an area that has been drained and farmed could be restored to its original condition by blocking or removing drainage devices and replanting with appropriate wetlands plants; or
2. The reversal of a temporary disturbance and the reestablishment of the functions and values of the freshwater wetlands and/or State open water that was temporarily disturbed.

“Upland preservation” means the permanent protection of transition areas or other uplands from disturbance or development, through transfer of the property to a charitable conservancy as defined in this section, and the execution of legal instruments to prevent development, such as a conservation restriction.

"Watershed Management Area" means an aggregation of HUC 11s, as defined at N.J.A.C. 7:7A-1.4, designated by the Department as a watershed management area and shown on the map entitled "New Jersey's Watersheds, Watershed Management Areas, and Water Regions," dated April 2000, as amended and supplemented. The map of watershed management areas may be obtained from the Department's Division of Watershed Management at (609) 984-0058, or may be viewed on the internet at http://www.state.nj.us/dep/gis.

"Wetlands Mitigation Council" or "Council" means the body established under N.J.S.A. 13:9B-14 to perform the functions enumerated at N.J.S.A. 13:9B-15. The Wetlands Mitigation Council administers the Wetlands Mitigation Fund.

"Wetlands Mitigation Fund" means the repository for monetary contributions made for mitigation purposes, established at N.J.S.A. 13:9B-14a as the "Wetlands Mitigation Bank."

7:7A-15.2 General mitigation requirements

(a) The Department shall not consider a mitigation proposal in determining whether to approve a permit for a project.

(b) The Department may require mitigation in accordance with this chapter in order to compensate for impacts to a freshwater wetland and/or State open water resulting from the following:

1. Regulated activities authorized under an individual or general freshwater wetlands or open water fill permit; and
2. Certain violations of the Freshwater Wetlands Protection Act and/or this chapter.

(c) Mitigation shall, at a minimum, fully compensate for the loss of ecological value caused by a disturbance, by replacing any freshwater wetlands and/or State open waters values and functions lost or disturbed with equal values and functions. To do this, mitigation shall meet all of the following criteria:

1. The mitigation alternative and the location of the mitigation shall comply with N.J.A.C. 7:7A-15.5 or 7:7A-15.6, whichever applies;
2. If the mitigation is restoration, creation, or enhancement:
   i. The acreage amount of mitigation shall be that required under N.J.A.C. 7:7A-15.8; and
   ii. The mitigation shall be in-kind mitigation, as defined at N.J.A.C. 7:7A-15.1, unless the Department determines that, because of special circumstances, out-of-kind mitigation would be more likely to provide equal functions and values;
3. If the mitigation is credit purchase, the credits purchased shall be appropriate to the type of disturbance and the purchase shall comply with this chapter and the Council's authorization of the mitigation bank. For example, if credits were awarded by the Council for use as mitigation for disturbances of wetlands within a certain service area, the credits shall not be considered appropriate as mitigation for a disturbance outside of the service area. The amount of credits shall be determined under N.J.A.C. 7:7A-15.8(f);
4. If the mitigation is uplands preservation, the mitigation shall meet the requirements of N.J.A.C. 7:7A-15.9;
5. If the mitigation is a monetary contribution, the amount of the monetary contribution shall be approved by the Council; and
6. If the mitigation is land donation, the land to be donated shall be approved by the Council.

(d) To be approved under this subchapter, mitigation must have a high probability of long term success. At a minimum, this requires the following:

1. Adequate financial and other resources must be dedicated to the project;

2. The project must be designed to take advantage of and work within the existing conditions in the proposed mitigation area to the extent possible;
3. The hydrology in and around the mitigation area must be adequate to support wetland conditions year round and indefinitely into the future;
4. The soils (and hydrology) in the mitigation area must be adequate to support wetland conditions; and
5. The responsibility for long term maintenance of the mitigation area must be clearly assigned to an entity that has the resources to ensure long term maintenance of the mitigation area. For upland preservation or land donation, a maintenance fund shall be created in accordance with N.J.A.C. 7:7A-15.17(c) or 7:7A-15.19(c), respectively.

(e) Mitigation under this subchapter requires prior Department approval. In addition, if the mitigation will be through a monetary contribution or a land donation, the amount of money or the particular parcel of land must also be approved by the Wetlands Mitigation Council.

(f) All correspondence with the Department and/or the Mitigation Council, including requests for application forms and checklists, and applications for Council approval or funding, shall be addressed to:

Mitigation Staff
NJDEP Land Use Regulation Program
P.O. Box 439
Trenton, New Jersey, 08625
(609) 984-0194
lurweb@dep.state.nj.us

(g) When the Department requires mitigation, the permit, approval or enforcement document under which the mitigation is required shall authorize any regulated or prohibited activities, as defined at N.J.A.C. 7:7A-1.4, necessary to accomplish the mitigation. When mitigation is required for a disturbance that is not subject to a Department-issued permit, for example, when mitigation is required by the ACOE, the mitigation itself must be authorized through a permit or enforcement document issued by the Department under this chapter. In some cases, mitigation also involves activities that require approval through one or more other Land Use Regulation Program permits, such as a flood hazard area, CAFRA, or Waterfront Development permit; or through other State or Federal permits. In such a case, mitigation shall not begin without these approvals.

(h) If a mitigation requirement arises from a violation rather than a permit, the Department shall determine the mitigation alternative required on a case-by case basis, taking into consideration the size and severity of the violation and the functions and values provided by the proposed mitigation. A mitigation proposal submitted as part of a settlement of an enforcement action shall provide for mitigation that is at least as ecologically valuable as mitigation that would be required under this chapter as a result of a permit. This may include an increase in mitigation to compensate for the time lapse between the disturbance and the completion of mitigation, such as that required at N.J.A.C. 7:7A-15.3(b).

(i) A mitigation area shall be permanently protected from future development in accordance with N.J.A.C. 7:7A-15.14.

(j) If mitigation is performed through uplands preservation or land donation, the mitigator shall transfer all rights in the mitigation area to a government agency or charitable conservancy in accordance with N.J.A.C. 7:7A-15.17(c) or N.J.A.C. 7:7A-15.19(c), respectively. A mitigation banker shall also transfer a mitigation bank to a government agency or charitable conservancy after the bank is successfully completed, in accordance with N.J.A.C. 7:7A-15.23(i).

(k) Upon approval by the Department, a permittee may aggregate the mitigation for multiple disturbances, so as to perform mitigation for more than one disturbance with a single mitigation project. Such an aggregated mitigation project shall be used only as mitigation for disturbances performed by the permittee, unless the permittee obtains Council approval of the project as a mitigation bank under this subchapter.

(l) An activity that is required in order to satisfy Federal, State, or local government requirements, other than those imposed under this chapter, shall not qualify as mitigation under this subchapter. For example, if land is required by a county to be preserved as open space, the Department shall only approve the parcel for a land donation if the applicant also performs wetlands restoration or enhancement in accordance with this subchapter.

7:7A-15.3 Timing of mitigation

(a) Mitigation shall be performed within the applicable time period below:

1. Mitigation for a disturbance authorized by a permit, other than a temporary disturbance, as defined at N.J.A.C. 7:7A-1.4, shall be performed prior to or concurrently with the permitted activity, and shall be continued to completion according to the schedule in the approved mitigation proposal;
2. Mitigation for a temporary disturbance authorized by a permit shall be started immediately following completion of the activity that caused the disturbance, and shall be continued to completion within six months after the end of the activity that caused the disturbance; and
3. Mitigation required as part of an enforcement action shall be performed in accordance with a schedule in the enforcement document.

(b) If a permittee fails to perform mitigation within the applicable time period in (a) above, the acreage of mitigation required shall be increased by 20% each year after the date mitigation was to begin. This will compensate for the absence of the functions and values that were to be provided by the mitigation project during the delay. For example, a permit may authorize a disturbance, and require 10 acres of creation to compensate for that disturbance. If the disturbance is begun on January 1, 2001, but the mitigation is not performed prior to or concurrently with the disturbance and continued according to the approved schedule as required under (a)1 above, the acreage of creation required increases to 12 acres on January 1, 2002, in order to compensate for the absence of wetlands functions and values from the ecosystem during the time between the disturbance and the creation.

(c) In order to ensure compliance with (a) above, if mitigation is required for a publicly funded project, all work necessary to complete the mitigation shall be included in the contract awarded for the project.

7:7A-15.4 Property suitable for mitigation

(a) Any offsite restoration, creation, enhancement, land donation, or upland preservation shall be carried out on private property, except that a government agency, as defined at N.J.A.C. 7:7A-1.4, may create, restore, or enhance on public land in accordance with this subchapter, as mitigation for a project funded solely with public monies, if the land was not acquired with Green Acres funding, as defined at N.J.A.C. 7:36-2.1, and either of the following criteria is met:

1. The land is obtained or held by the government agency for mitigation; or
2. The land is obtained by the government agency by default or operation of law, through a tax lien or other similar circumstance.

(b) An improvement to a public facility which is intended for human use, such as a ball field, nature trail, or boardwalk, does not constitute mitigation.

(c) A person seeking property for a mitigation project under this subchapter shall review the applicable watershed management area plan, if any, approved by the Department under the Water Quality Management Planning Act, N.J.S.A. 58:11A-1 et seq., and implementing rules at N.J.A.C. 7:15 to determine if suitable properties are listed, and shall also review the applicable county mitigation inventory, if any, prepared in accordance with N.J.S.A. 13:9C-1 et seq.

(d) The Department shall not approve mitigation through creation, restoration, or enhancement in an area that is already highly ecologically valuable, for example if the area contains a mature, well developed, ecologically desirable natural community; a State open water that supports fish; a forested habitat; or significant cultural or historic resources.

(e) The Department shall approve mitigation through creation, restoration, or enhancement only on property that is owned in fee simple and under the full legal control of the person responsible for performing the mitigation.

(f) The Department shall require a habitat assessment if the Department deems such an assessment necessary to determine if an area is suitable for mitigation through enhancement. Any habitat assessment shall be performed in accordance with a scientific protocol approved by the Department.

(g) The Department shall not approve mitigation that would jeopardize present or documented habitat for, or the continued existence of, a local population of a threatened or endangered species.

7:7A-15.5 Mitigation for a smaller disturbance

(a) This section governs, for a smaller disturbance, the mitigation alternative required and the location of mitigation in relation to the disturbance. (See Figure 4 below for an illustration of the information in this section.) However, if a smaller disturbance is a temporary disturbance, as defined at N.J.A.C. 7:7A-1.4, it is governed by N.J.A.C. 7:7A-15.7. The acreage amount of mitigation required for both smaller and larger disturbances is determined under N.J.A.C. 7:7A-15.8.

(b) A smaller disturbance is:

1. A disturbance of 1.5 acres or less of freshwater wetlands or State open water; or
2. A disturbance affecting only ordinary resource value wetlands.

(c) The Department presumes that onsite mitigation for a smaller disturbance is not feasible. Therefore, mitigation for a smaller disturbance shall be performed through credit purchase in accordance with (d) below, unless the applicant demonstrates under (e) below that one of the following will be more environmentally beneficial:

1. Onsite restoration, creation or enhancement; or
2. Offsite restoration, creation, enhancement, or upland preservation, which is performed in the same HUC 11, as defined at N.J.A.C. 7:7A-1.4, as the disturbance, or performed in an adjacent HUC 11 within the same watershed management area as the disturbance.

(d) Mitigation through credit purchase shall be performed as follows:

1. Through the purchase of credits from either of the following:
   i. A mitigation bank located in the same HUC 11 as the disturbance; or
   ii. A mitigation bank approved by the Wetlands Mitigation Council prior to January 1, 1999, which includes the disturbance site in its bank service area. The service area for each mitigation bank is set forth in the Wetlands Mitigation Council approval for the bank;
2. If no credits are available from a bank listed in (d)1 above, through the purchase of credits from a mitigation bank located in a HUC 11 that is both adjacent to the HUC 11 in which the disturbance is located and within the same watershed management area, as defined at N.J.A.C. 7:7A-15.1, as the disturbance;
3. If no credits are available from a bank listed in (d)1 or 2 above, through the purchase of credits from a mitigation bank located anywhere in the same watershed management area as the disturbance; or
4. If no credits are available from a mitigation bank located in (d)1, 2, or 3 above, through the purchase of credits from a mitigation bank which includes the disturbance site in its bank service area.

(e) In determining if onsite or offsite mitigation for a smaller disturbance would be environmentally beneficial for the purposes of (c) above, the Department will consider the following factors and any other relevant factors specific to the site or project:

1. Size. Generally, the larger a mitigation area, the greater its potential environmental benefit. A mitigation area that is associated with a large existing wetland complex is more likely to be environmentally beneficial for the purpose of (c) above;

2. Location in relation to other preserved open space. A mitigation area adjacent to public land or other preserved areas is more likely to be environmentally beneficial;
3. Habitat value. A mitigation area that will provide valuable habitat for critical wildlife species or threatened or endangered species is more likely to be environmentally beneficial; and
4. Interaction with nearby resources. A mitigation project is more likely to be environmentally beneficial if it complements existing nearby resources. For example, a mitigation project that adds riparian wetlands habitat adjacent to an existing stream enhances the environmental value of both the riparian area and the stream.

(f) If credit purchase under (d) above is not feasible, and onsite or offsite mitigation under (c) above is not feasible, mitigation shall be performed through a monetary contribution or, if the Department determines that no other mitigation alternative is practicable or feasible, mitigation shall be performed through a land donation approved by the Wetlands Mitigation Council.

Figure 4: Flow Chart Illustrating Mitigation Alternatives For A Smaller Disturbance

7:7A-15.6 Mitigation for a larger disturbance

(a) This section governs, for a larger disturbance, the mitigation alternative required and the location of mitigation in relation to the disturbance. (See Figure 5 below for an illustration of the information in this section.) However, if a larger disturbance is a temporary disturbance, as defined at N.J.A.C. 7:7A-1.4, it is governed by N.J.A.C. 7:7A-15.7. The acreage amount of mitigation, regardless of the size of the disturbance, is determined under N.J.A.C. 7:7A-15.8.

(b) A larger disturbance is a disturbance not listed at N.J.A.C. 7:7A-15.5(b).

(c) Mitigation for a larger disturbance shall be performed through restoration, creation, or enhancement, carried out on the site of the disturbance to the maximum extent feasible. Onsite mitigation shall not be performed through upland preservation.

(d) If onsite restoration, creation, or enhancement is not feasible, mitigation shall be performed through any of the following, at the applicant's option:

1. The purchase of credits from a mitigation bank located in the same HUC 11 as the disturbance or in an adjacent HUC 11 within the same watershed management area;
2. The purchase of credits from a mitigation bank approved by the Wetlands Mitigation Council prior to January 1, 1999, which includes the disturbance site in its bank service area; or
3. Offsite restoration, creation, enhancement, or upland preservation, in the same HUC 11 as the disturbance or in an adjacent HUC 11 within the same watershed management area as the disturbance.

(e) If mitigation under (d) above is not feasible, mitigation shall be performed through either of the following, at the applicant's option:

1. The purchase of credits from a mitigation bank which includes the disturbance site in its bank service area; or
2. Restoration, creation, enhancement, or upland preservation in the same watershed management area as the disturbance.

(f) If mitigation is not feasible under (c), (d) or (e) above, mitigation shall be performed through a monetary contribution or, if the Department determines that no other mitigation alternative is not practicable or feasible, through a land donation approved by the Wetlands Mitigation Council.

Figure 5: Flow Chart Illustrating Mitigation Alternatives For A Larger Disturbance

7:7A-15.7 Mitigation for a temporary disturbance

(a) Mitigation for a temporary disturbance, as defined at N.J.A.C. 7:7A-1.4, shall be performed as follows:

1. For a disturbance of non-forested freshwater wetlands or of State open waters, restoration of the area temporarily disturbed; or
2. For a disturbance of forested freshwater wetlands, either:
   i. Restoration of the area temporarily disturbed to a forested wetland; or
   ii. Restoration of the area temporarily disturbed to a non-forested wetland, and in addition, one acre of mitigation in accordance with this subchapter for each acre of disturbance.

(b) The transition area for a temporary disturbance shall be as follows:

1. If the mitigation is restoration performed on the site of the disturbance, the transition area shall be that which was required for the wetland prior to the temporary disturbance; and
2. If additional mitigation is performed under (a)2ii above, the width of the transition area on the mitigation area shall be the width required at N.J.A.C. 7:7A-15.8(b)1 or 3, as applicable.

7:7A-15.8 Amount of mitigation required

(a) This section governs the amount of mitigation required, depending on the mitigation alternative selected under N.J.A.C. 7:7A-15.5 or 7:7A-15.6, except that this section does not address the amount of a monetary contribution or the size of a land donation. The amount of a monetary contribution or the size of a land donation is not determined by the Department, but instead must be approved by the Wetlands Mitigation Council in accordance with N.J.A.C. 7:7A-15.21 or 7:7A-15.22.

(b) A mitigation area involving restoration or creation shall include a transition area. The transition area shall not be counted in calculating the acreage of mitigation required. For example, if a person must create one acre of wetlands, the mitigation area shall include one acre of created wetlands and in addition a transition area around the created wetlands. The width of the transition area around a wetland resulting from mitigation shall be:

1. If the mitigation area includes or will include exceptional resource value wetlands, the transition area shall be 150 feet wide;
2. If mitigation is restoration under N.J.A.C. 7:7A-15.7(b)1 of an area temporarily disturbed, the transition area shall be that which was required for the wetland prior to the temporary disturbance; and
3. For all mitigation not listed at 1 or 2 above, the transition area shall be 50 feet wide.

(c) If restoration is the mitigation alternative, the Department shall require the following amount of mitigation unless the applicant demonstrates under (j) below that a smaller area will provide equal functions and values:

1. For a disturbance authorized by a permit, other than a temporary disturbance, as defined at N.J.A.C. 7:7A-1.4, restoration of two acres of freshwater wetlands and/or State open waters for each acre disturbed, with the addition of any transition area required under (b) above; and
2. For a temporary disturbance authorized by a permit, the amount of restoration required at N.J.A.C. 7:7A-15.7(a).

(d) If creation is the mitigation alternative, the Department shall require creation of two acres of freshwater wetlands and/or State open waters for each acre disturbed, with the addition of any transition area required under (b) above, unless the applicant demonstrates under (j) below that a smaller area will provide equal functions and values.

(e) If enhancement is the mitigation alternative, the Department shall evaluate the wetlands values and functions lost as a result of the disturbance and determine on a case-by-case basis the amount of enhancement required to ensure that the mitigation area results in wetlands of equal functions and values to those lost.

(f) If credit purchase is the mitigation alternative, the Department shall evaluate the wetlands values and functions lost as a result of the disturbance and determine on a case-by-case basis the number of credits required to ensure that the mitigation results in wetlands of equal functions and values to those lost.

(g) If upland preservation is the mitigation alternative, the acreage of upland preserved shall be determined under N.J.A.C. 7:7A-15.9(c).

(h) If monetary contribution is the mitigation alternative, the contribution shall be equal to the lesser of the following costs:
1. The cost of purchasing and enhancing existing degraded freshwater wetlands, resulting in the preservation of freshwater wetlands of equal functions and values to those which are being lost; or
2. The cost of purchasing property and creating freshwater wetlands of equal functions and values to those which are being lost.

(i) If land donation is the mitigation alternative, the Wetlands Mitigation Council shall determine on a case-by-case basis whether the acreage of land specified in the mitigation proposal will result in a mitigation area large enough to be a valuable component of the freshwater wetlands ecosystem. In making this determination, the Council shall consult the sources, and consider the conditions, referenced in (j) below and in N.J.A.C. 7:7A-15.22(b).

(j) A person shall carry out the full acreage amount of mitigation required under this section, unless the person demonstrates, through use of productivity models or other similar studies, that a smaller mitigation area will result in a mitigation area sufficient to comply with this section. However, under no circumstances shall a mitigation area be smaller than the disturbed area. To demonstrate that a smaller mitigation area will be sufficient to provide equal functions and values to those lost, the person shall provide current scientific literature concerning wetlands, aquatic resources, and mitigation; as well as information regarding the conditions on the site of the disturbance and on the

proposed mitigation site, including soil, vegetation, any existing contamination or other degradation, water quality functions, flood storage capacity, soil erosion and sediment control, wildlife habitat, and any other relevant data.

(k) If a mitigation requirement arises from a violation, the Department shall determine the amount of mitigation required on a case-by case basis, taking into consideration the size and severity of the violation and the functions and values provided by the proposed mitigation. A mitigation proposal submitted as part of a settlement of an enforcement action shall require mitigation that provides functions and values at least equal to those that would be required under this chapter as a result of a permit. This may include an increase in mitigation to compensate for the time lapse between the disturbance and the completion of mitigation, such as that required at N.J.A.C. 7:7A-15.3(b).

7:7A-15.9 Requirements for upland preservation

(a) The Department shall approve mitigation through preservation of uplands only if the uplands meet the requirements in this section.

(b) Preserved uplands shall be valuable for the protection of a freshwater wetlands ecosystem. Factors the Department will consider in evaluating an area for upland preservation include, but are not limited to:

1. The size and configuration of the uplands in relation to freshwater wetlands and/or State open waters, and the effect the preservation of these uplands would have on the wetlands or waters;
2. The diversity of the ecological communities on the entire site;
3. Whether the uplands to be preserved are located in the same HUC 11 as the disturbance;
4. Whether the uplands to be preserved are adjacent to a freshwater wetland that:
   i. Contains exceptional resource value wetlands;
   ii. Contains critical habitat for flora or fauna, as defined at N.J.A.C. 7:7A-1.4;
   iii. Contains wetlands or waters draining to trout maintenance waters, as defined at N.J.A.C. 7:9B, or into public drinking water sources;
   iv. Is adjacent to public lands containing wetland preserves, such as Federal wildlife refuges, State wildlife management areas, State parks or forests, State, County or local wetland preservation areas, or wetland preservation areas held by non-profit conservation organizations;
   v. Has unique aspects or characteristics that contribute to its ecological value, such as an unusual or regionally rare type of wetland;
5. The relationship of the proposed uplands to existing and planned development;
6. Whether the uplands have been designated for preservation in a watershed management area plan approved by the Department under the Water Quality Management Planning Act, N.J.S.A. 58:11A-1 et seq., and implementing rules at N.J.A.C. 7:15; and
7. Whether the site contains solid or hazardous waste, or contains water or soil pollution. Uplands that contain waste or pollution shall not be considered valuable for the protection of a freshwater wetlands ecosystem.

(c) The amount of uplands preserved shall be sufficient to ensure that the functions and values resulting from the preservation of the uplands will fully compensate for the loss of functions and values caused by the disturbance, in accordance with N.J.A.C. 7:7A-15.2(c). In determining if an upland preservation proposal will fully compensate for a disturbance, the Department shall consult the sources, and consider the conditions, referenced in N.J.A.C. 7:7A-15.8(j). At a minimum, the uplands preserved shall be:

1. At least five acres in size, and significantly larger than the area that would be required for any other mitigation alternative, to compensate for the fact that uplands preservation, unlike other mitigation alternatives, does not replace the wetland values and functions destroyed by a disturbance; and
2. If adjacent to a wetland, the uplands preserved shall include the standard transition area required for the wetlands under N.J.A.C. 7:7A-2.5, plus an additional area at least 150 feet wide, measured from the outer edge of the transition area.

(d) If mitigation is performed through upland preservation, the mitigator shall transfer the mitigation area in fee simple to a government agency or charitable conservancy, as defined at N.J.A.C. 7:7A-1.4, in accordance with N.J.A.C. 7:7A-15.17(c).

7:7A-15.10 Conceptual review of a mitigation area

(a) The Department strongly recommends that an applicant obtain the Department's conceptual review of any land being considered as a potential mitigation area, prior to submittal of a mitigation proposal involving restoration, creation, enhancement, uplands preservation, or land donation.

(b) An applicant may request a conceptual review at any time prior to submittal of a mitigation proposal. However, the Department strongly recommends that an applicant obtain a Department conceptual review before buying the land for a mitigation area.

(c) To obtain the Department's conceptual review of a mitigation area, the applicant shall submit a written request, including:

1. A brief description of the area and the mitigation project being considered;
2. A map showing Department staff how to find the mitigation area;
3. A USGS quad showing the mitigation area;
4. A county soil survey showing the soils in the mitigation area; and
5. Unconditional written consent from the owner of the proposed mitigation area allowing Department representatives to enter the property and inspect the mitigation area.

(d) Upon receipt of a complete request for a conceptual review, the Department may schedule a site inspection. At a site inspection, Department staff will candidly discuss the apparent strengths and weaknesses of the proposed mitigation area, but all guidance provided shall be non-binding on the Department. A Department decision on a proposed mitigation area or mitigation proposal is binding only if it is incorporated into an approval obtained in accordance with this subchapter. A conceptual review does not grant any property or other rights, and does not authorize mitigation activities.

7:7A-15.11 Basic requirements for all mitigation proposals

(a) A mitigation proposal shall be submitted within the applicable time period below:

1. For mitigation required by an individual permit, the mitigation proposal shall be submitted at least 90 days prior to the start of activities authorized by the permit. Activities authorized by the permit shall not begin until the mitigation proposal is approved and the mitigation has begun;
2. For mitigation required by a general permit authorization, the mitigation proposal shall be submitted concurrently with the application for the general permit authorization; and
3. For mitigation requirements arising from a violation, the mitigation proposal shall be submitted by the deadline set forth in the Department's enforcement document.

(b) The mitigation proposal shall provide all information necessary for the Department to determine if the requirements of this subchapter are met. The information required for each mitigation alternative is set forth in a mitigation proposal checklist, provided by the Department. To obtain the mitigation proposal checklist for a particular mitigation alternative, contact the Department at the address in N.J.A.C. 7:7A-15.2(f).

(c) In order to demonstrate that a mitigation alternative is not feasible under this subchapter, an applicant must provide to the Department a list of at least six potential areas upon which the mitigation alternative might be performed. Each of these potential areas shall:

1. Be located at a practical elevation suitable for a wetland or State open water;
2. Have an adequate water supply;
3. Be large enough for the mitigation proposed;
4. Be available for purchase; and
5. Not contain hazardous contamination.

(d) A mitigation proposal submitted as part of a settlement of an enforcement action shall provide for mitigation that is at least as ecologically valuable as mitigation that would be required under this chapter as a result of a permit. This may include an increase in the amount of mitigation to compensate for the time that has elapsed between the disturbance and the completion of mitigation, such as that required at N.J.A.C. 7:7A-15.3(b).

(e) A mitigation proposal shall include as many copies of each item as required by the checklist.

7:7A-15.12 Contents of a mitigation proposal

(a) The application checklist for every mitigation proposal shall require the information listed at (b)1 through 8 below. In addition, each mitigation proposal will also require information specific to the mitigation alternative proposed, listed at (c) through (g) below.

(b) The application checklist for every mitigation proposal shall require the following:

1. Basic information regarding the applicant, the disturbance for which the mitigation is required, and the permit or other item which is the source of the mitigation requirement;
2. Information to enable the Department to determine the loss of functions and values caused by the disturbance for which the mitigation is required, including scientific information such as scientific literature, models or other studies concerning wetlands, soils, vegetation, hydrology, wildlife habitat and any other factors relevant to the functions and values of the site of the disturbance for which mitigation is required; previous Department approvals or correspondence regarding the disturbance; maps, photographs; soil or vegetation samples; delineations and/or other visual materials relating to the site of the disturbance;
3. Information demonstrating that the proposed mitigation alternative complies with N.J.A.C. 7:7A-15.5 or 15.6, as applicable, including information on the feasibility or practicability of other mitigation alternatives;
4. The names and addresses of all consultants, engineers, and other persons providing technical assistance in preparing the mitigation proposal;
5. Any letters, contracts, agreements, conservation restrictions, or other draft or executed documents necessary to ensure compliance with this subchapter;
6. Any information necessary to ensure compliance with the Federal rules governing the Department's assumption of the Federal 404 program at 40 CFR 233.30; and
7. A certification of truth and accuracy.

(c) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to purchase credits shall require information demonstrating that credit purchase is acceptable under N.J.A.C. 7:7A-15.5 or 15.6, and any information necessary for the Department to determine the mitigation bank from which appropriate credits must be purchased under N.J.A.C. 7:7A-15.5 or 15.6.

(d) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to restore, create, or enhance wetlands; to preserve uplands; or to donate land; shall also require the following information:

1. Basic information regarding the proposed mitigation area, including but not limited to its location and size, ownership, and any legal or other restrictions on the property;
2. Unconditional written consent from the owner of the proposed mitigation area, as defined at N.J.A.C. 7:7A-15.1, for Department representatives to enter the proposed mitigation area to conduct inspections;
3. Visual materials, including but not limited to maps, plans, surveys, diagrams, or photographs showing the proposed mitigation area, existing conditions and features on the proposed mitigation area;
4. Written narrative information and/or reports describing the proposed mitigation area, existing conditions and features on the proposed mitigation area, and the mitigation alternative proposed;
5. Information and/or certifications regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources, or other features on the proposed mitigation area that are relevant to determining

compliance with this chapter. Failure to provide all such information of which the applicant, its consultants, or agents is aware may result in denial or termination of the permit under N.J.A.C. 7:7A-14.5, and may subject the applicant to penalties for submittal of false information under N.J.A.C. 7:7A-16.9;

6. Information regarding whether the proposed mitigation activities, including any restriction or transfer of the mitigation area, require approval by other Federal, interstate, State and local agencies, and information on any approvals or denials received;
7. Information regarding relevant features of other properties in the vicinity of the mitigation area, such as whether they are publicly owned, contain preserved open space, contain significant natural resources, etc.;
8. Scientific information, including scientific literature, models or other studies concerning wetlands, soils, vegetation, hydrology, wildlife habitat, and any other factors relevant to the functions and values of the proposed mitigation area and mitigation activities;
9. Information to enable the Department to determine the functions and values of the proposed mitigation area, and its potential to be a successful mitigation area, including narrative information, maps, photographs, soil or vegetation samples, delineations and/or other visual materials, describing and/or showing the mitigation area;
10. All past correspondence between the Department and the applicant or permittee, and/or the owner(s) of the proposed mitigation area, regarding the mitigation activities and the mitigation area;
11. Schedules describing in detail the sequence of mitigation activities and estimated dates for completion for each mitigation activity. For example, this might include approximate dates for completing each legal transaction involved in a land donation, or this might include site preparation and planting dates for a wetlands creation project;
12. Estimates of costs involved in performing the mitigation, and in maintaining the mitigation area after construction and/or transfer is completed;
13. Draft documents for protection and transfer of the mitigation area after successful completion of mitigation, in accordance with N.J.A.C. 7:7A-15.14, 7:7A-15.17(c) and 7:7A-15.19(c); and
14. A No Further Action letter covering the proposed mitigation area, obtained from the Department's Site Remediation Program in accordance with N.J.A.C. 7:26C.

(e) In addition to the basic information required for all mitigation proposals under (b) above, and the information required at (c) above, an application checklist for a proposal to restore, create, or enhance wetlands shall require the following information:

1. Visual materials, including but not limited to maps, plans, surveys, diagrams, or photographs showing all mitigation activities proposed;
2. Written narrative information and/or reports describing in detail all mitigation activities proposed;
3. A description of post-construction activities, including but not limited to schedules for monitoring, maintenance, and reporting;
4. Contingency measures that will be followed if the mitigation project fails or shows indications of failing;
5. A letter of credit or other financial assurance meeting the requirements of N.J.A.C. 7:7A-15.13; and

6. A certification that the proposed mitigation will not adversely affect properties which are listed or are eligible for listing on the National Register of Historic Places. If the mitigator, before or during approved mitigation, encounters an historic property on the mitigation site that may be eligible for listing in the National Register, the mitigator shall immediately notify the Department and proceed as directed by the Department.

(f) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to make a monetary contribution shall require the following:

1. Information demonstrating to the Department that a monetary contribution is acceptable under N.J.A.C. 7:7A-15.5 or 15.6; and
2. Cost estimates, appraisals, and other information necessary to demonstrate compliance with the requirements for monetary contribution at N.J.A.C. 7:7A-15.21.

(g) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to make a land donation shall require the following:

1. Information demonstrating to the Department that a land donation is acceptable under N.J.A.C. 7:7A-15.5 or 15.6; and
2. All information necessary to demonstrate to the Wetlands Mitigation Council that the parcel of land proposed for donation meets the requirements for land donation at N.J.A.C. 7:7A-15.22.

7:7A-15.13 Financial assurance for a proposal to restore, create, or enhance wetlands

(a) The Department shall approve a proposal for restoration, creation, or enhancement only if the mitigator or mitigation bank operator provides a letter of credit or other financial assurance that meets the requirements of this section, except for a government agency, as defined at N.J.A.C. 7:7A-1.4; or an entity that is exempt from this requirement under Federal law.

(b) A letter of credit or other financial assurance under this section shall be obtained from a firm licensed to do business in New Jersey.

(c) The letter of credit or other financial assurance shall be in an amount sufficient for the Department to hire an independent contractor to complete and maintain the mitigation project or mitigation bank should the mitigator default. At a minimum, the financial assurance shall be in the following amounts:

1. A construction assurance, equal to one hundred and fifteen percent of the estimated cost of completing the creation, restoration, or enhancement; and
2. A maintenance assurance to assure the success of the mitigation through the completion of the monitoring period, equal to thirty percent of the estimated cost of completing the creation, restoration, or enhancement.

(d) The Department will review the financial assurance annually and the mitigator shall adjust the financial assurance to reflect current economic factors, as direct by the Department.

(e) The Department shall require additional financial assurance if additional construction and/or monitoring is required under N.J.A.C. 7:7A-15.23(h).

(f) The portion of the financial assurance required under (c)1 above will be released upon the Department's determination that the construction and planting phase of the mitigation project or mitigation bank has been successfully completed in accordance with the approved mitigation proposal.

(g) The portion of the financial assurance required under (c)2 above will be released upon the Department's declaration that a mitigation project is successful under N.J.A.C. 7:7A-15.16(e), or upon the successful completion of a mitigation bank in accordance with N.J.A.C. 7:7A-15.23(h), as applicable.

7:7A-15.14 Protecting a mitigation area from future development

(a) Every mitigation area, whether onsite or offsite, shall be permanently protected from any future development through one or more binding conservation restrictions, as defined at N.J.A.C. 7:7A-1.4, except if the mitigation is restoration of a temporary disturbance on the site of the disturbance.

(b) The conservation restriction(s) shall require that the mitigation area be permanently preserved in its natural state, and shall prohibit any future regulated or prohibited activities as described at N.J.A.C. 7:7A-2.3 and N.J.A.C. 7:7A-6.2.

(c) The conservation restriction shall run with the land and shall be binding upon the mitigator, the landowner, and their successors in interest in the land or any part of the land on which the mitigation area is located. To ensure that notice of the restriction is provided to all present and future interested parties, the mitigator shall do all of the following:

1. Record the conservation restriction(s) at the county clerk's office;
2. Ensure that a copy of the conservation restriction is provided to the municipal clerk with a request that it be placed in the property file for the land containing the mitigation area;
3. Insert into the conservation restriction the following:
    i. A requirement that each owner of the land notify the county and/or municipality of the conservation restriction whenever any application for a local approval involving the land is submitted;
    ii. A requirement that each owner of the land notify the Department at least 30 days prior to any transfer of fee simple title or possessory interest in the land containing the mitigation area; and
    iii. A requirement that each owner of the land insert notice of the conservation restriction into any subsequent deed or other legal instrument by which the owner divests either the fee simple title or possessory interest in the land.

(d) A conservation restriction for preserved uplands or for donated land shall be enforceable by the Department, by a government agency, or by a charitable conservancy whose trustees have no other interest in the land.

(e) If the mitigation area is donated land or a mitigation bank, the conservation restriction(s) shall require approval by both the Department and the Wetlands Mitigation Council.

(f) The conservation restriction(s) shall describe and include all regulated features, including all wetlands and all transition areas.

(g) A conservation restriction shall include a survey and a metes and bounds description of the entire mitigation area, including any transition area required to be included under this subchapter.

7:7A-15.15 Department review of a mitigation proposal

(a) The Department shall, within thirty days after receiving a mitigation proposal, review the proposal for completeness and:

1. Request any necessary additional information; or
2. Declare the mitigation proposal complete.

(b) If a mitigation proposal is intended to compensate for a major discharge, as defined at N.J.A.C. 7:7A-1.4, the Department shall consult with USEPA prior to determining whether to approve the proposal.

(c) The Department will approve a mitigation proposal only if it meets all of the applicable requirements of this subchapter.

7:7A-15.16 Requirements that apply after the Department approves restoration, creation, or enhancement

(a) After the Department approves mitigation through restoration, creation, or enhancement, the mitigator shall execute and record a conservation restriction covering the mitigation area. The conservation restriction shall meet the requirements of N.J.A.C. 7:7A-15.14, and shall be executed and filed for recording prior to the start of mitigation activities.

(b) Within 30 days after construction and planting of a restoration, creation, or enhancement project is completed, the mitigator shall submit a construction completion report to the Department. The Department may require a different schedule for submittal of the construction completion report if it determines that a different schedule would be more effective for assessing the progress and success of the mitigation. The construction completion report shall include:

1. An as-built plan of the completed mitigation area, showing grading, plantings (species, densities, etc.), and any structures included in the approved mitigation proposal;

2. Photographs of the completed mitigation;
3. An explanation for any deviation from the approved mitigation proposal;
4. Any other information necessary for the Department to determine if the mitigation is successful under (d) below.

(c) In addition to the construction completion report required under (b) above, the mitigator shall submit to the Department an annual post-planting monitoring report each year for five years after the completion of planting and construction, or for a different time period if specified in the approved mitigation proposal. The Department may at any time modify the frequency and/or duration of reporting required. The post-planting monitoring report shall be submitted by November 15 of each year, and shall include:

1. An executive summary;
2. A complete listing of the requirements and goals of the approved mitigation proposal; and
3. A detailed explanation of the ways in which the mitigation has or has not achieved progress towards those goals. If the mitigation has not achieved progress, the report shall also include a list of remedial actions necessary to do so.

(d) At the end of the post-planting monitoring period for a restoration, creation, or enhancement project, the mitigator shall demonstrate to the Department that the mitigation project is successful. To do so, the mitigator shall demonstrate that the mitigation satisfies all requirements of this subchapter, all requirements of the approved mitigation proposal, and any applicable permit conditions. At a minimum, the mitigator shall demonstrate that:

1. The post-planting monitoring period required by the approved mitigation proposal has been successfully completed and the monitoring data show that:
   i. The vegetation in the mitigation area meets the requirements for the types of species, area of coverage, and survival rate, as set forth in the approved mitigation proposal;
   ii. The soils in the mitigation area meet the requirements in the approved mitigation proposal; and
   iii. The hydrologic regime in the mitigation area meets the requirements in the approved mitigation proposal, and will continue to do so; and
2. The areas designated for freshwater wetlands, transition areas, and/or State open waters in the approved mitigation proposal are in fact freshwater wetlands, transition areas, or State open waters as defined at N.J.A.C. 7:7A-1.4; and
3. The mitigation meets all applicable requirements of this subchapter, including:
   i. Any requirements at N.J.A.C. 7:7A-15.2 that apply;
   ii. The requirements for the amount of mitigation under N.J.A.C. 7:7A-15.8; and
   iii. All restrictions, agreements, and other legal documents required by this subchapter have been executed.

(e) If the mitigator makes the demonstrations required for a restoration, creation, or enhancement project at (d) above, the Department shall issue a declaration that the mitigation is successful.

(f) If the mitigator does not make the demonstrations required at (d) above, the mitigator shall perform additional mitigation or other remedial action as directed by the

Department, and shall monitor and report on the mitigation or action as directed by the Department.

7:7A-15.17 Requirements that apply after the Department approves credit purchase or uplands preservation

(a) After the Department determines under N.J.A.C. 7:7A-15.5 or 7:7A-15.6 that mitigation through credit purchase or uplands preservation is the appropriate mitigation alternative, the mitigator shall prepare and execute all documents necessary to ensure that the mitigation will be carried out as approved by the Department.

(b) The Department shall declare mitigation through credit purchase or uplands preservation successful upon:

1. A demonstration that the completed mitigation satisfies all applicable permit conditions, requirements of this subchapter, and requirements of the approved mitigation proposal; and
2. Submittal to the Department of documents demonstrating that the credit purchase or uplands preservation has occurred as required. Examples of such documents include, but are not limited to:
   i. For credit purchase, written certifications from the mitigator and from the mitigation bank operator, stating that the credits were purchased; and
   ii. For uplands preservation, a conservation restriction, documentation that the property has been transferred and a maintenance fund established in accordance with (c) below, and that the transfer and restriction have been recorded with the county or other appropriate agency.

(c) No later than 60 days after the Department declares mitigation through uplands preservation successful under (b) above, a mitigator shall:

1. Transfer the mitigation area in fee simple to a government agency or a charitable conservancy, as defined at N.J.A.C. 7:7A-1.4. The agency or conservancy shall first be determined suitable for this responsibility by the Department, and shall agree to preserve the mitigation area as a natural area in perpetuity; and
2. Provide the government agency or charitable conservancy with a maintenance fund for maintenance and supervision of the mitigation area. The amount of the maintenance fund shall be determined by agreement between the mitigator and the agency or conservancy.

7:7A-15.18 Requirements that apply after the Department approves mitigation through a monetary contribution

(a) After the Department determines under N.J.A.C. 7:7A-15.5 or 7:7A-15.6 that monetary contribution is the appropriate mitigation alternative, the mitigator shall apply to the Wetlands Mitigation Council for approval of the amount of the monetary contribution under the standards at N.J.A.C. 7:7A-15.21.

(b) The Department shall declare mitigation through a monetary contribution successful upon a demonstration that:

1. The Wetlands Mitigation Council has approved the amount of the monetary contribution; and
2. The monetary contribution has been completed in accordance with the Council resolution approving the contribution, all applicable permit conditions, requirements of this subchapter, and requirements of the approved mitigation proposal.

7:7A-15.19 Requirements that apply after the Department approves mitigation through a land donation

(a) After the Department determines under N.J.A.C. 7:7A-15.5 or 7:7A-15.6 that land donation is the appropriate mitigation alternative, the mitigator shall apply to the Wetlands Mitigation Council for approval of the particular parcel of land to be donated under the standards at N.J.A.C. 7:7A-15.22.

(b) The Department shall declare mitigation through a land donation successful upon a demonstration that:
1. The Wetlands Mitigation Council has approved the parcel to be donated; and
2. The land donation has been completed in accordance with the Council resolution approving the contribution, all applicable permit conditions, requirements of this subchapter, and requirements of the approved mitigation proposal.

(c) Within 60 days after the Department declares mitigation through land donation successful under (b) above, a mitigator shall:
1. Transfer the mitigation area in fee simple to a government agency or a charitable conservancy, as defined at N.J.A.C. 7:7A-1.4. The agency or conservancy shall first be determined suitable for the responsibility by the Department, and shall agree to preserve the mitigation area as a natural area in perpetuity;
2. Provide the government agency or charitable conservancy with a maintenance fund for maintenance and supervision of the mitigation area. The amount of the maintenance fund shall be determined by agreement between the mitigator and the agency or conservancy; and
3. Ensure that the transfer and restriction are recorded with the county or other appropriate agency.

7:7A-15.20 Wetlands Mitigation Council

(a) The Wetlands Mitigation Council's duties and functions include:
1. Reviewing the following:
   i. Proposed monetary contributions,
   ii. Proposed land donations,
   iii. Mitigation bank proposals; and
   iv. Proposed county mitigation inventories;
2. Advising the Department on mitigation issues;
3. Buying land in order to conduct mitigation, or to preserve wetlands, transition areas, uplands, and/or State open waters;

4. Contracting with a charitable conservancy or appropriate agency to carry out its responsibilities;
5. Conducting research on mitigation;
6. Enhancing or restoring wetlands on public lands; and
7. Disbursing funds from the Wetlands Mitigation Fund to finance the activities listed at (a)3, 4, 5, and 6 above. To request funding for a mitigation project, contact the Council through the mitigation staff at the address in N.J.A.C. 7:7A-15.2(f).

(b) If the Council transfers funds or land, the Council shall first execute and record a conservation restriction or other legally binding document that meets all applicable requirements at N.J.A.C. 7:7A-15.14, and that ensures that the funds or land will be used only for mitigation and freshwater wetlands conservation.

(c) Council meetings are open to the public. A schedule of Council meetings can be obtained by contacting Council staff at the address in N.J.A.C. 7:7A-15.2(f).

(d) The Wetlands Mitigation Fund shall not be used to aid a permittee or violator in locating a mitigation area required as a condition of a permit, or required in order to resolve a violation.

(e) The Council may contract with a government agency, nonprofit organization, or other appropriate agency to carry out its responsibilities under this chapter. Any such contract shall be subject to review and approval by the USEPA.

7:7A-15.21 Council review of a proposed monetary contribution

(a) For mitigation through a monetary contribution, the mitigator shall first obtain the Department's authorization under N.J.A.C. 7:7A-15.5 or 7:7A-15.6 to use monetary contribution as the mitigation alternative. The mitigator shall then obtain approval from the Wetlands Mitigation Council for the amount of the monetary contribution.

(b) The Wetlands Mitigation Council shall approve the amount of a monetary contribution only if the contribution is equal to the lesser of the following:

1. The cost of buying and enhancing existing degraded freshwater wetlands and/or State open waters, resulting in an area that will provide equal functions and values to that disturbed; or
2. The cost of buying uplands and creating freshwater wetlands, and/or State open waters, resulting in an area that will provide equal functions and values to that disturbed.

(c) In determining the costs at (b)1 and 2 above, the Council may consider cost estimates submitted by the applicant and the Department, information obtained from experts in the field of mitigation (including Council members), and any other information available to the Council.

7:7A-15.22 Council review of a proposed land donation

(a) For mitigation through a land donation, the mitigator shall first obtain the Department's authorization under N.J.A.C. 7:7A-15.5 or 7:7A-15.6 to use land donation as the mitigation alternative. The mitigator shall then obtain approval from the Wetlands Mitigation Council for the particular parcel of land to be donated.

(b) The Council shall approve the proposed parcel of land to be donated only if the applicant demonstrates that the land has the potential to be a valuable component of a wetland or surface water ecosystem. The Council will evaluate each parcel to determine its potential on a case by case basis, taking into consideration the following:

1. The parcel shall be at least five acres in size, or shall be immediately adjacent to a protected natural area such as a State wildlife management area;
2. The parcel shall not be adversely affected by solid waste; hazardous waste; or air, water, or soil pollution;
3. A functional comparison between the impacted wetland system and the wetland system proposed for donation; and
4. The parcel shall meet at least one, and preferably many, of the following criteria:
   i. Contains exceptional resource value wetlands;
   ii. Contains critical habitat for flora or fauna, as defined at N.J.A.C. 7:7A-1.4;
   iii. Contains wetlands or waters draining to FW1 or category one waters, as defined at N.J.A.C. 7:9B, or into public drinking water sources;
   iv. Contains wetlands or waters that connect one public open space or significant natural resource to another public open space or significant natural resource. For example, a parcel containing a stream that runs through two wildlife preserves that are not adjacent;
   v. Is adjacent to public lands containing wetland preserves, such as a Federal wildlife refuge, a State wildlife management area, a State park or forest, or a State, County or local wetland preservation area; or wetland preservation areas held by a charitable conservancy; or
   vi. Has unique aspects or characteristics that contribute to its ecological value, such as an unusual or regionally rare type of wetland.

(c) The Council shall approve the proposed parcel of land to be donated only if the amount of land to be donated is sufficient to ensure that the functions and values provided by the donated land will fully compensate for the loss of functions and values caused by the disturbance, in accordance with N.J.A.C. 7:7A-15.2(c).

(d) If a proposed parcel to be donated is also being donated or otherwise restricted in order to satisfy requirements of another government agency, the Council shall not approve the donation unless the applicant also enhances or restores wetlands on the parcel. For example, if land is required by a county to be preserved as open space, the Council shall only approve the parcel for a land donation if the applicant also performs wetlands restoration or enhancement in accordance with this subchapter. If restoration or enhancement cannot be performed on the parcel, the Council shall not accept the parcel as a land donation.

7:7A-15.23 Mitigation banks

(a) A mitigation bank requires approval by the Wetlands Mitigation Council prior to the sale of any mitigation credits. A mitigation bank may be approved by the Council prior to its construction, or after the bank is partially or completely constructed.

(b) If creation of a mitigation bank involves regulated activities as described at N.J.A.C. 7:7A-2.2, or prohibited activities as described at N.J.A.C. 7:7A-2.6, the bank operator shall also obtain from the Department a freshwater wetlands permit, open water fill permit, and/or transition area waiver, authorizing the regulated or prohibited activities.

(c) Once the Council has approved a mitigation bank, the bank operator shall carry out all requirements of the resolution approving the bank, regardless of whether or when credits are sold.

(d) The Council shall determine how many mitigation credits each mitigation bank operator may sell, based on the increase in wetland values and functions created as a result of the proposed mitigation bank, as well as how the increase in functions and values will interact with the regional wetland and aquatic resources. The Council will evaluate each mitigation bank to determine its functions and values on a case by case basis, considering the following factors:

1. The functions and values provided by the bank site at the time the mitigation bank proposal is submitted, including but not limited to existing soil, vegetation, water quality functions, flood storage capacity, soil erosion and sediment control functions, and wildlife habitat functions;
2. Whether the proposed mitigation activities will result in an increase in functions and values over the existing value of the mitigation bank site;
3. The likelihood of long-term success of the proposed mitigation activities in creating functions and values similar to an undisturbed wetland and/or State open water;
4. The amount of wetlands, transition area, and State open waters on the proposed bank site;
5. The potential for the completed mitigation site to be a valuable component of the aquatic ecosystem;
6. The size and scope of the bank;
7. The types of resource losses that have occurred in the area;
8. The similarity or dissimilarity of the bank to other existing aquatic and wetland resources in the area;
9. Available scientific literature regarding credit ratios; and
10. The Department's and other government agencies' experience with mitigation and mitigation banks.

(e) The Council shall include in the resolution approving the bank a schedule under which a bank operator may sell credits. The schedule shall be as set forth at 1 through 6 below. The Council shall adjust the amount of credits within the ranges at 2 through 6 below to reflect the degree of progress the bank has shown toward meeting the goals and performance standards in the approved mitigation proposal:

1. Ten percent of the credits shall be released upon completion of both of the following:
   i. Signing of the Council resolution approving the bank; and

ii. Compliance with all pre-release credit sale conditions in the resolution approving the bank, such as securing all construction permits, posting financial assurance, and completing the conservation restriction and the agreement providing for transfer of the bank site at completion;

2. Up to twenty percent of the credits shall be released upon successful establishment of the approved hydrologic regime, so that this regime will remain over time under normal hydrologic conditions;
3. Up to ten percent of the credits shall be released upon completion of planting as required in the resolution approving the bank;
4. Up to twenty percent of the credits shall be released when monitoring indicates that the performance standards in the resolution approving the bank have been met for an entire one-year period;
5. Up to fifteen percent of the credits shall be released when monitoring indicates that the performance standards in the resolution approving the bank have been met for three consecutive years; and
6. Up to twenty-five percent of the credits shall be released when monitoring in accordance with the resolution approving the bank indicates that the performance standards in the resolution have been met for five consecutive years.

(f) The mitigation bank operator shall execute and record a conservation restriction on the mitigation bank site prior to the sale of any credits. The conservation restriction shall meet the requirements for protecting mitigation sites from future disturbance, set forth at N.J.A.C. 7:7A-15.14.

(g) The mitigation bank operator shall monitor the bank during and after construction, in order to ensure its success. The bank operator shall submit progress reports to the Council at least annually during and after construction, and more often if required by the resolution approving the bank.

(h) If the bank falls more than one year behind the schedule for completion specified in the resolution approving the bank, the Council may amend the resolution approving the bank, and may require remedial action to ensure the successful completion of the bank. The Council may reduce the number of credits that may be sold based on the approved remedial action, in order to reflect the change in wetlands values and functions that will result from the changes to the bank.

(i) Upon completion of the monitoring period and all other requirements in the resolution approving the bank, the mitigation bank operator shall:

1. Demonstrate that the bank is successful, using the criteria for successful restoration, creation, or enhancement at N.J.A.C. 7:7A-15.16, or for successful upland preservation at N.J.A.C. 7:7A-15.17, as applicable; and
2. Transfer the mitigation bank site in fee simple to a government agency or charitable conservancy;
3. Provide the government agency or charitable conservancy to which the mitigation bank site is transferred with a maintenance fund. The maintenance fund shall support maintenance activities such as trash removal, maintenance of natural features, monitoring the site to ensure its upkeep, maintenance of water control structures, fences, or safety features, and any other activities necessary to

ensure the site complies with this chapter and all applicable law. The amount of the maintenance fund shall be determined between the bank operator and the agency or conservancy to which the mitigation bank site is transferred; and

4. Ensure that the transfer, and the conservation restriction required under (h) above, are recorded with the county or other appropriate agency.

(j) A mitigation bank approval shall be valid for five years, or until any Department permit required to conduct the bank activities expires. The Council shall approve a single one year extension only if the mitigation bank operator demonstrates that:

1. If extended, the bank will produce the increase in functions and values upon which the original mitigation bank approval was based;
2. Bank construction was begun prior to expiration of the mitigation bank approval;
3. Bank construction has continued uninterrupted in accordance with the resolution approving the bank;
4. All permits required for the construction of the bank are valid; and
5. No significant changes in the conditions on the mitigation bank site, as defined at N.J.A.C. 7:7A-15.1, have occurred.

(k) If a bank approval expires and is not extended under (j) above, the Council shall determine whether the amount of mitigation completed at the bank site is commensurate with the number of credits already sold. If the Council determines that the amount of mitigation completed is not commensurate with the number of credits already sold, the banker shall be considered in default and the Council shall assert its rights to the financial assurance provided under this subchapter.

7:7A-15.24 Application for Wetlands Mitigation Council approval of a monetary contribution or land donation

(a) an application for a proposal to make a monetary contribution or a land donation shall include the information required by the checklist described at N.J.A.C. 7:7A-15.12(f) or (g), respectively. The application checklist may be obtained from the Council staff at the address in N.J.A.C. 7:7A-15.2(f).

(b) An application for approval of a monetary contribution or land donation shall first be submitted to Council staff at the address in N.J.A.C. 7:7A-15.2(f). Council staff shall notify the applicant of any additional information required to make the application complete and of the schedule for Council meetings. The applicant shall then submit ten copies of the complete application to the Council staff. These copies shall be submitted at least 30 days before the Council meeting at which the application will be discussed.

(c) Each Council approval shall incorporate conditions as necessary to ensure that the requirements of this chapter are met.

7:7A-15.25 Application for Wetlands Mitigation Council approval of a mitigation bank

(a) The Department recommends that a prospective mitigation bank operator obtain conceptual review of a proposed mitigation bank before investing in buying land or

preparing a detailed mitigation bank proposal. Through a conceptual review, Council staff will candidly discuss the apparent strengths and weaknesses of the proposed mitigation bank, but all guidance provided shall be non-binding on the Department. A Council decision on a proposed mitigation bank is binding only if it is incorporated into an approval obtained in accordance with this subchapter. A conceptual review does not grant any property or other rights, and does not authorize mitigation activities or sale of credits. To obtain conceptual review of a proposed mitigation bank, an applicant shall submit the following to the Council:

1. Information on the location, size, and environmental characteristics of the proposed mitigation bank site;
2. Information on previous uses of the site, including possible contamination and/or historic or archaeological resources;
3. The proposed mitigation alternative(s), for example, creation, restoration, and/or enhancement;
4. Whether the credits generated by the bank will be used solely by the mitigation bank operator, or will be available for use by others;
5. Maps, photographs, diagrams, delineations and/or other visual materials necessary for the Council to generally evaluate the proposed mitigation bank;
6. The names and addresses of all owner(s) of the mitigation bank site, and any proposed owner(s), as of the date the request for conceptual review is submitted; and
7. Unconditional written consent from the owner of the proposed mitigation bank site, allowing Council and Department representatives to enter the property and inspect the site.

(b) To obtain final Council approval of a proposed mitigation bank, an applicant shall submit the information required by the application checklist, available from Council staff at the address in N.J.A.C. 7:7A15.2(f). The checklist will require the following types of information:

1. A letter of interpretation covering the entire proposed mitigation bank site, issued by the Department under N.J.A.C. 7:7A-3;
2. All past correspondence between the mitigation bank operator and the Department and/or the Council regarding the proposed mitigation bank site, including any correspondence regarding conceptual review under (a) above;
3. A functional assessment of the bank site prior to construction, and proposed site conditions after construction. The assessment shall include a discussion of how the proposed bank will interact with regional wetland and aquatic resources;
4. Information on the following items, sufficient for the Council to determine if the mitigation bank is consistent with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, published jointly by EPA and other Federal agencies in the November 28, 1995 Federal Register:
   - i. Mitigation bank goals and objectives;
   - i. Ownership of mitigation bank lands;
   - ii. Mitigation bank size, and classes of wetlands, transition areas, uplands, and/or other aquatic resources included in the mitigation bank;
   - iii. Description of baseline conditions on the mitigation bank site, including natural features and parameters, as well as pollutants, contamination, historic or cultural resources, and other relevant features;

iv. The service area within which the mitigation bank credits may be used to compensate for a disturbance;
v. Types of wetlands, transition areas, and/or State open waters for which credits from the bank could serve as suitable compensation;
vi. Method for determining credits and debits;
vii. Accounting procedures;
viii. Performance standards to enable the Council to determine when credits may be released under N.J.A.C. 7:7A-15.23(e);
ix. Performance standards to enable the Council to determine if and when the mitigation bank is successful;
x. Reporting protocols and a monitoring plan;
xi. Contingency and remedial actions that will be taken in case the bank fails, and who is responsible for each. For example, alternative sites, grading plans, or hydrologic manipulations;
xii. Financial assurances meeting the requirements of N.J.A.C. 7:7A-15.13;
xiii. Proposed compensation ratios, that is, the number of credits the bank operator proposes to generate and sell, based on the type and amount of mitigation performed at the bank;
xiv. Provisions for long-term management and maintenance of the mitigation bank site; and

5. Site plans, cost estimates and schedules for construction, completion, and transfer of the mitigation bank;
6. Draft legal instruments necessary to meet the requirements of this chapter, including a conservation restriction, financial assurance, property transfer, or agreement with a charitable conservancy to maintain the site; and
7. Identification of the persons who will construct, operate (debit and credit) and maintain the mitigation bank and mitigation bank site.

(c) An application for approval of a mitigation bank shall be submitted to Council staff at the address in N.J.A.C. 7:7A-15.2(f). Council staff shall notify the applicant of any additional information required to make the application complete and of the schedule for Council meetings. The applicant shall then submit ten copies of the complete application to the Council staff. These copies shall be submitted at least 60 days before the Council meeting at which the application will be discussed.

(d) Each Council approval shall incorporate conditions as necessary to ensure that the requirements of this chapter are met.

(Agency note: Fee provisions currently located at N.J.A.C. 7:7A-16 are proposed for relocation at N.J.A.C. 7:7A-11. The enforcement provisions below are a consolidation, with clarifying changes, of provisions currently located at N.J.A.C. 7:7A-15 and N.J.A.C. 7:7A-17. Changes from the existing provisions are indicated.)

SUBCHAPTER 16 [15] ENFORCEMENT

7:7A-16.1 [7:7A-15.1] General provisions

(a) For the purposes of this subchapter (N.J.A.C. 7:7A-16), the term "applicable law and/or condition" means one or more applicable provisions or conditions of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; the New Jersey Water Pollution Control Act, N.J.S.A. 5:10A-1 et seq.; and/or any permit, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto.

(b) The burden of proof and degrees of knowledge or intent required to establish a violation of the Freshwater Wetlands Protection Act or of any permit, order, rule or regulation promulgated pursuant thereto shall be no greater than the burden of proof or degree of knowledge or intent which USEPA must meet in establishing a violation of the Federal Act or implementing regulations.

(c) If the Department finds that a person is or has been violating any applicable law and/or condition, the Department may take one or more of the following actions:

1. Issue an administrative order under N.J.A.C. 7:7A-16.3;
2. Bring a civil action under N.J.A.C. 7:7A-16.4;
3. Assess a civil administrative penalty under N.J.A.C. 7:7A-16.5 through 7:7A-16.12;
4. Bring an action for a civil penalty under N.J.A.C. 7:7A-16.13; and/or
5. Bring a criminal action under N.J.A.C. 7:7A-16.14.

(Agency note: the substance of the provision below is found in the existing rules at N.J.A.C. 7:7A-15.5(a), 7:7A-15.6(a), 7:7A-17.1(c), 7:7A-17.3(b), 7:7A-17.4(b), 7:7A-17.5(b), and 7:7A-17.6(c).)

(d) For all violations under this subchapter, each day during which each violation continues shall constitute an additional, separate, and distinct violation for which a separate penalty may be assessed.

(Agency note: the substance of the provision below is found in the existing rules at N.J.A.C. 7:7A-15.5(a), 7:7A-15.6(a) and 7:7A-17.1(b).)

(e) Each violation of any applicable law and/or condition shall constitute an additional, separate, and distinct violation for which a separate penalty may be assessed.

(Agency note: this new provision is derived from the Freshwater Wetlands Protection Act at N.J.S.A. 13:9B-21a.)

(f) The Department's pursuit of any of the remedies available under this subchapter shall not preclude the Department's pursuit of any of the other remedies for the same or another violation. Compliance with any Department enforcement order, including payment of a penalty, shall not preclude the Department from pursuing any of the other remedies available under this subchapter in connection with the violation for which the order was issued.

7:7A-16.2 [7:7A-15.2] USEPA review

The Department shall make available without restriction any information obtained or used in the implementation of the Freshwater Wetlands Protection Act, the Water Pollution Control Act, and/or this chapter, to USEPA upon request.

7:7A-16.3 [7:7A-15.3] Administrative order

(a) Whenever, on the basis of available information, the Department finds a person in violation of any [provision of the Act, or of any permit, order, rule or regulation issued pursuant thereto] applicable law and/or condition, the Department may issue an order:

1. Specifying [the] each provision [or provisions] of the [Act, rule, regulation, permit or order] applicable law and/or condition which has been, or is being violated;
2. - 5. (No change.)

7:7A-16.4 [7:7A-15.4] Civil action

(a) Whenever, on the basis of available information, the Department finds a person in violation of any [provision of the Act, or of any rule or regulation adopted, or permit or order issued, pursuant to the Act] applicable law and/or condition, the Department [is authorized to] may institute a civil action in Superior Court for appropriate relief. Such relief may include, singly or in combination:

1. - 4. (No change.)
5. A requirement that the violator restore or rehabilitate the site of the violation to the maximum extent practicable [and feasible] , as defined in N.J.A.C. 7:7A-1.4. If the violator does not do so, the [State] Department may take corrective action, and will assess the violator pursuant to this chapter.

7:7A-16.5 [7:7A-15.5] Civil administrative penalty

(a) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Freshwater Wetlands Protection Act, or of any [rule or regulation adopted, or permit or order issued pursuant to the Act,] permit, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto, the Department [is authorized to] may assess a civil administrative penalty of [not] no more than $10,000 for each violation. The amount of the civil administrative penalty for a violation of the Freshwater Wetlands Protection Act shall be determined under

N.J.A.C. 7:7A-16.8 through 7:7A-16.12. [Each day during which each violation continues shall constitute an additional, separate, and distinct offense. Specific penalty amounts, and procedures for their assessment and for adjudicatory hearings on penalties assessed, can be found at N.J.A.C. 7:7A-17.

1. Any amount assessed under this section shall fall within the ranges established by N.J.A.C. 7:7A-17.]

(Agency note: this new provision clarifies the penalties that apply for violations relating to State open waters. These penalties apply because the Department's authority to regulate State open waters derives from the Water Pollution Control Act, N.J.S.A. 58:10A, rather than the FWPA.)

(b) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Water Pollution Control Act, or of any permit, approval, waiver, order, exemption, or rule promulgated or approved pursuant thereto, the Department may assess a civil administrative penalty of no more than $50,000 for each violation. The amount of the civil administrative penalty for a violation of the Water Pollution Control Act shall be determined under the Department's rules implementing the enforcement provisions of that law at N.J.A.C. 7:14-8.

(Agency note: the substance of this provision is found in the existing rule at N.J.A.C. 7:7A-17.1(e), and additional text is proposed to be added to clarify standards that apply to settlements involving State open waters.)

(c) The Department may, in its discretion, settle a civil administrative penalty assessed under this subchapter, in accordance with N.J.A.C. 7:7A-16.6(c). However, if the Department settles a penalty for a violation of the Water Pollution Control Act, the settlement is subject to N.J.A.C. 7:14-8.

(Agency note: the provisions below, found in the existing rules at N.J.A.C. 7:7A-15.5(a)2 and 3, are proposed for deletion, because they are redundant with proposed N.J.A.C. 7:7A-16.6 and 7:7A-16.7.)

[2. No assessment shall be levied pursuant to this section until after the party has been notified by certified mail or personal service pursuant to N.J.A.C. 7:7A-17.8.

3. The ordered party shall have 20 days from receipt of the notice within which to deliver to the Department a written request for a hearing in accordance with N.J.A.C. 7:7A-17.9. Such hearing shall be conducted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.]

(Agency note: the provision below, found in the existing rules at N.J.A.C. 7:7A-15.5(a)4, is proposed for deletion, because it is redundant with proposed N.J.A.C. 7:7A-16.1(f).)

[4. The authority to levy an administrative order is in addition to all other enforcement powers. The payment of any assessment shall not be deemed to affect the availability of any other enforcement powers in connection with the violation for which the assessment is levied.]

(Agency note: the provision below, found in the existing rules at N.J.A.C. 7:7A-15.5(a)5, is proposed for deletion, because it is redundant with proposed N.J.A.C. 7:7A-16.6(c).)
[5. Any civil administrative penalty assessed under this section may be compromised by the Department upon the posting of a performance bond by the violator, or upon such terms and conditions as the Department may establish by regulation.]

(Agency note: provisions in the existing rule at N.J.A.C. 7:7A-15.6 and 7:7A-15.7 are proposed to be recodified, with clarifying changes, at N.J.A.C. 7:7A-16.13 and 7:7A-16.14.)

(Agency note: provisions in the existing rule at N.J.A.C. 7:7A-15.8 and 7:7A-15.9 are proposed to be recodified, with clarifying changes, at N.J.A.C. 7:7A-16.16 and 7:7A-16.17.)

(Agency note: provisions found in the existing rule at N.J.A.C. 7:7A-15.10 are proposed to be recodified, with clarifying changes, at N.J.A.C. 7:7A-14.5, Termination of [permits] a permit.)

(Agency note: provisions found in the existing rule at N.J.A.C. 7:7A-15.11 are proposed to be recodified, with clarifying changes, at N.J.A.C. 7:7A-16.18, [7:7A-15.11] Public participation.)

(Agency note: the following section is recodified, with clarifying changes, from N.J.A.C. 7:7A-17.8. Changes to the existing rule text are indicated.)
7:7A-16.6 [7:7A-17.8 Procedures for assessment of civil administrative penalties under the Act] Assessment, settlement and payment of a civil administrative penalty

(a) To assess a civil administrative penalty [under the Act], the Department shall notify the violator by certified mail (return receipt requested) or by personal service. This notice of civil administrative penalty assessment shall:

1. Identify [the] each section of the [Act, rule, mitigation plan, permit or administrative order] applicable law and/or condition violated;
2. Concisely state the facts alleged to constitute the violation;
3. Specify the amount of the civil administrative penalty [to be imposed]; and
4. Advise the violator of the right to request an adjudicatory hearing [pursuant to the procedures in] under N.J.A.C. [7:7A-17.9] 7:7A-16.7.

(b) [Payment of a civil administrative penalty is due upon receipt by the violator of the Department's Final Order in a contested case, or when a Notice of Civil Administrative Penalty Assessment becomes a Final Order,] The violator shall pay a civil administrative penalty immediately upon receipt of the Department's final order in a contested case, or as soon as a notice of civil administrative penalty assessment becomes a final order as follows:

1. If no hearing is requested [pursuant to] under N.J.A.C. 7:7A-16.7, a notice of civil administrative penalty assessment becomes a final order on the 21st day

[following receipt of] after the violator receives the notice of civil administrative penalty assessment [by the violator];

2. If the Department denies [the] a hearing request under N.J.A.C. 7:7A-16.7(c) or (d), a notice of civil administrative penalty assessment becomes a final order upon the violator's receipt [by the violator of notice of such] of the denial; or
3. If the Department grants a hearing [conducts an adjudicatory hearing, upon receipt by the violator of a final order of a contested case] , a notice of civil administrative penalty assessment becomes a final order upon the violator's receipt of a final order in the contested case.

(c) The Department may, in its discretion, settle any civil administrative penalty assessed under this subchapter, based on an evaluation of the factors at 1 through 4 below. As provided at N.J.A.C. 7:7A-16.5(c), this subsection does not apply to penalties assessed for violations of the Water Pollution Control Act:

1. Mitigating or extenuating circumstances not previously considered in the assessment of penalties;
2. The violator's timely implementation of measures leading to compliance, which measures were not previously considered in the assessment of penalties, including measures to clean up, reverse or repair environmental damage caused by the violation, or to remove the violation;
3. The violator's full payment of a specified part of a civil administrative penalty, if payment is made within a time period established by the Department in an administrative order, and if the violator waives the right to request an adjudicatory hearing on the civil administrative penalty; or
4. Any other terms or conditions acceptable to the Department.

(Agency note: the following section is recodified, with clarifying changes, from N.J.A.C. 7:7A-17.9. Changes from the existing text are indicated.)

7:7A-16.7 [7:7A-17.9 Procedures to request an adjudicatory hearing to contest an Administrative Order and/or a Notice of Civil Administrative Penalty Assessment; procedures for conducting adjudicatory hearings] Appeal of an administrative order and/or notice of civil administrative penalty assessment

(a) [To] A violator may request an adjudicatory hearing to contest an administrative order, and/or a notice of civil administrative penalty assessment issued [pursuant to the Act,] under this chapter. To request an adjudicatory hearing, the violator shall submit the following information in writing to the Department [, addressed to the Office of Legal Affairs, ATTENTION: Adjudicatory Hearing Requests, Department of Environmental Protection and Energy, CN 402, Trenton, New Jersey 08625-0402] at the address in (b) below:

1. The name, address, and telephone number of the violator and its authorized representative;
2. The violator's defenses to each of the findings of fact in the administrative order and/or notice of civil administrative penalty assessment, stated in short and plain terms;

3. An admission or denial of each of the findings of fact. If the violator is without knowledge or information sufficient to form a belief as to the truth of a finding, the violator shall [so] state this and this shall have the effect of a denial. A denial shall fairly meet the substance of the findings denied. When the violator intends in good faith to deny only a part or a qualification of a finding, the violator shall specify so much of it as is true and material and deny only the remainder. The violator may not generally deny all the findings but shall make all denials as specific denials of designated findings. For each finding the violator denies, the violator shall allege the fact or facts as the violator believes it or them to be;
4. - 6. (No change.)

(b) A request for an adjudicatory hearing under this subchapter shall be addressed to:
Office of Legal Affairs
ATTENTION: Adjudicatory Hearing Requests
Department of Environmental Protection
P.O. Box 402
Trenton, New Jersey 08625-402

(c) [(b)] If the Department does not receive the hearing request within 20 days after [receipt by] the violator receives the notice of civil administrative penalty assessment and/or the administrative order [being challenged] which is being contested, the Department shall deny the hearing request.

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

(e) [(d) If it grants the request, the Department shall file the request for a hearing with the Office of Administrative Law. The hearing shall be held before an administrative law judge and] 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.

(Agency note: the following section is relocated, with clarifying changes, from N.J.A.C. 7:7A-17.2. Changes to the existing rule text are indicated.)
7:7A-16.8 [7:7A-17.2] Civil administrative penalty [determination] amount

[(a) Except for those violations set forth in N.J.A.C. 7:7A-17.4 through 17.6, the Department may assess a civil administrative penalty for violations described in this section using three factors: conduct of violator, acreage of impact, and the resource value classification of impacted wetland. Point values are assigned to the three ranges within each factor, as described below. For each violation, the total number of points are determined and the total is used at (c) below to determine penalty amount per day.]

(a) When the Department assesses a civil administrative penalty, the Department shall use the procedures in this section to determine the amount of the penalty if the violation pertains to wetlands and transition areas, except if the violation is listed at N.J.A.C.

7:7A-16.9, 7:7A-16.10, or 7:7A-16.11, in which case the penalty amount shall be determined under whichever of those sections applies.

(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.

[(b) The following is a description of the factors to be used in penalty determination and the point values assigned to them:]
(c) The Department shall use the three factors described below to determine the amount of a 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 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 [determined] 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 three 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 [other] conduct not identified in (c)1i or ii above and is assigned one point.
2. The acreage of wetlands impacted [by the violation] factor shall be [determined] assigned points as follows:
   i. [An impact to greater] A violation impacting more than three acres of wetlands is assigned three points;
   ii. [An impact to] A violation impacting one to three acres of wetlands is assigned two points; and
   iii. [An impact to] A violation impacting less than one acre of wetlands is assigned one point[.] ; and
3. The resource value classification factor shall be [determined] assigned points as follows:
   i. [An impact to] A violation impacting exceptional resource classification wetlands is assigned three points;
   ii. [An impact to] A violation impacting intermediate resource classification wetlands is assigned two points; and
   iii. [An impact to] A violation impacting ordinary resource classification wetlands is assigned one point.

[(c) The total points from the above factors shall be used to determine the penalty assessment per day according to the following table:]
(d) The Department shall sum the total points assigned according to the three factors in (c) above, and shall determine the penalty amount per day using the following table:

Table D
Penalty points table

Total Points	Penalty Amount Per Day
9	$10,000.00
8	9,000.00
7	7,500.00
6	6,000.00
5	4,500.00
4	3,000.00
3	1,500.00

(Agency note: the following section is proposed for recodification, with clarifying changes, from N.J.A.C. 7:7A-17.4. Changes to the existing rule text are indicated.)
7:7A-16.9 [7:7A-17.4] Civil administrative penalty amount for submitting inaccurate or false information

[(a) The Department may assess a civil administrative penalty pursuant to this section against each violator who submits inaccurate information or who makes a false statement, representation, or certification in any application, record, or other document required to be submitted or maintained, under the Act or any rule, administrative order, permit, mitigation plan, or waiver issued pursuant thereto.]

(a) When the Department assesses a civil administrative penalty for submittal of inaccurate information or submittal of a false statement, representation, or certification in an application, record, or other document required to be submitted or maintained under the Freshwater Wetlands Protection Act or under a permit, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto, the Department shall use the procedures in this section to determine the amount of the civil administrative penalty.

(b) If a violation described in this section pertains to State open waters, the Department shall not determine the amount of the civil administrative penalty under this section, 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) [(b)] Each day, from the day that a violator [knew or had reason to know that it submitted] submits inaccurate or false information to the Department [until] , to the day [of receipt by] the Department [of] receives a written correction [by] from the violator, shall be an additional, separate, and distinct violation.

[(c) The Department shall determine the amount of the civil administrative penalty for violations described in this section based on the conduct of the violator as follows:

1. For each intentional, deliberate, purposeful, knowing, or willful act or omission by the violator, the civil administrative penalty shall be in an amount of not more than $10,000 nor less than $8,000 for violations described in N.J.A.C. 7:7A-15; and

2. For each other violation, the penalty shall be in the amount of $1,000.]

(d) The daily civil administrative penalty for each intentional, deliberate, purposeful, knowing, or willful act or omission under this section shall be assessed at the midpoint between $10,000 and $8,000 unless adjusted under (f) below.

(e) The daily civil administrative penalty for each violation under this section that is not listed in (d) above shall be assessed at the midpoint between $1,000 and $0 unless adjusted under (f) below.

(f) For a violation under this section, the Department may adjust the civil administrative penalty amount from the midpoint within the range listed in (d) or (e) above, based on the following factors:

1. The violator's compliance history;
2. The nature, timing and effectiveness of measures the violator takes to mitigate the effects of the violation;
3. The nature, timing and effectiveness of measures the violator takes to prevent future similar violations;
4. Any unusual or extraordinary costs or impacts directly or indirectly imposed on the public or the environment as a result of the violation; and/or
5. Other specific circumstances of the violator or violation.

(Agency note: the following section is proposed for recodification, with clarifying changes, from N.J.A.C. 7:7A-17.5. Changes to the existing rule text are indicated.)

7:7A-16.10 [7:7A-17.5] Civil administrative penalty amount for failure to allow entry and inspection

(a) [The Department may assess a civil administrative penalty pursuant to this section against each violator] When the Department assesses a civil administrative penalty under the FWPA against a person who refuses, inhibits or prohibits immediate lawful entry and inspection of any premises, building or place by any authorized Department representative, the Department shall use the procedures in this section to determine the amount of the civil administrative penalty. The amount of a civil administrative penalty for refusal of entry and inspection under the WPCA shall be determined under N.J.A.C. 7:14-8.7.

(b) Each day that a [violator] person refuses, inhibits or prohibits immediate lawful entry and inspection shall be an additional, separate, and distinct violation.

(c) [The Department shall determine the amount of the civil administrative penalty for violations described in this section as follows:] The daily civil administrative penalty for a violation under this section shall be assessed at the midpoint of the following ranges, except as adjusted under (d) below:

1. For refusing, inhibiting or prohibiting immediate lawful entry and inspection of any premises, building or place for which the Department has issued an administrative order, freshwater wetlands permit, transition area waiver, approved mitigation [plan] proposal or general permit authorization [notification exists for the property in question under the Act] , the civil administrative penalty shall be no more than $10,000 nor less than $7,000; and
2. For any other refusal, inhibition or prohibition of immediate lawful entry and inspection, the civil administrative penalty shall be [in an amount not] no more than $7,000 nor less than $1,500.

(d) The Department may adjust the daily civil administrative penalty amount, within the applicable range at (c) above, based on the following factors:

1. The violator's compliance history;
2. The nature, timing and effectiveness of measures the violator takes to remedy the effects of the violation;
3. The nature, timing and effectiveness of measures the violator takes to prevent future similar violations;
4. Any unusual or extraordinary costs or impacts directly or indirectly imposed on the public or the environment as a result of the violation; and/or
5. Other specific circumstances of the violator or violation.

(Agency note: the following section is recodified, with clarifying changes, from N.J.A.C. 7:7A-17.6. Changes to the existing rule text are indicated.)

7:7A-16.11 [7:7A-17.6] Civil administrative penalty for failure to pay a civil administrative penalty [assessed under the Act]

(a) The Department may assess a civil administrative penalty [pursuant to] under this section against each violator who fails to pay a civil administrative penalty when due [pursuant to the Act] under this chapter.

(b) The [Department shall assess a civil administrative penalty pursuant to this section in an amount] daily civil administrative penalty amount assessed under this section shall be equal to the unpaid civil administrative penalty [up to a] , but shall not exceed the maximum [of $10,000 per violation] allowed at N.J.A.C. 7:7A-16.5(a) and (b).

(c) Each day that a civil administrative penalty assessed under this subchapter is not paid after it is due shall constitute an additional, separate and distinct violation.

(Agency note: the following section is relocated, with clarifying changes, from N.J.A.C. 7:7A-17.7. Changes to the existing rule text are indicated.)

7:7A-16.12 [7:7A-17.7] Economic benefit factor

(a) The Department may [, in addition to any other] add to a civil administrative penalty assessed [pursuant to] under this subchapter [, include as a civil administrative penalty] the amount of economic benefit [(] in dollars [) which] that the violator has realized as the result of not complying, or by delaying compliance with [the requirements of the Act or any rule, permit, mitigation plan, waiver or administrative order issued pursuant thereto] , an applicable law and/or condition.

(b) The Department may use the economic benefit factor to increase a civil administrative penalty to an amount no greater than the maximum allowed at N.J.A.C. 7:7A-16.5(a) and (b).

(c) If the total economic benefit was derived from more than one violation, the Department may apportion the total economic benefit amount [may be apportioned] among the violations from which it was derived, so as to increase each civil administrative penalty [assessment] to an amount no greater than [$10,000 per violation] the maximum allowed at N.J.A.C. 7:7A-16.5(a) and (b).

(Agency note: the following section is proposed for recodification here from N.J.A.C. 7:7A-15.6. Changes to the existing rule text are indicated.)
7:7A-16.13 [7:7A-15.6] Civil penalty

(a) Each person who [violates the Act or this chapter, or an administrative order or a court order issued pursuant to the Act, and who fails to pay a civil administrative assessment in full pursuant to N.J.A.C. 7:7A-15.5,] does any of the following shall be subject, upon the order of a court, to a civil penalty [not to exceed $10,000 per day of such violation. Each day during which the violation continues shall constitute an additional, separate, and distinct offense.] :

1. Violates the Freshwater Wetlands Protection Act, the Water Pollution Control Act, or this chapter;
2. Violates an administrative order or a court order issued pursuant to the Freshwater Wetlands Protection Act, the Water Pollution Control Act, or this chapter; or
3. Fails to pay in full a civil administrative penalty assessed under this chapter.

(b) A civil penalty imposed under this section shall not exceed the maximum allowed at N.J.A.C. 7:7A-16.5(a) and (b).

(c) [(b) Any] A civil penalty imposed [pursuant to] under this section may be collected, with costs, in a summary proceeding pursuant to the Penalty Enforcement Law, N.J.S.A. 2A:58-1 et seq. The Superior Court shall have jurisdiction to enforce the penalty enforcement law in conjunction with the Freshwater Wetlands Protection Act, the Water Pollution Control Act, and this chapter.

(Agency note: the following section is proposed for recodification, with clarifying changes, from N.J.A.C. 7:7A-15.7. Changes to the existing rule text are indicated.)
7:7A-16.14 [7:7A-15.7] Criminal action

(a) The Department, upon petition to the Attorney General, may bring a criminal action in court for certain violations of the Freshwater Wetlands Protection Act, or of a permit, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto.

(b) If a violation described in this section pertains to State open waters, the criminal penalty shall not be governed by this section, but shall be governed by the Water Pollution Control Act at N.J.S.A. 58:10A-10(f).

(c) [(a)] A person who willfully or negligently violates the Freshwater Wetlands Protection Act, or [any regulation or order issued pursuant thereto] any permit, approval, waiver, order, exemption, or rule promulgated or approved pursuant thereto, shall be guilty, upon conviction, of a crime of the fourth degree and shall be subject to a fine of [not] no less than $2,500 nor more than $25,000 per day of violation.

(d) [(b)] A second offense under this [subsection] section shall subject the violator to a fine of [not] no less than $5,000 nor more than $50,000 per day of violation.

(e) [(c)] A person [who knowingly] shall, upon conviction, be subject to a fine of no more than $10,000 if the person:

1. Knowingly makes a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under the Freshwater Wetlands Protection Act, or under [any permit, order or rule issued pursuant to the Act,] a permit, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto; or [who falsifies]
2. Falsifies, tampers with or knowingly renders inaccurate, any monitoring device or method required to be maintained [pursuant to] under the Freshwater Wetlands Protection Act, or [any order or rule issued pursuant thereto, shall, upon conviction, be subject to a fine of not more than $10,000] a permit, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto.

(Agency note: the following section is new, and does not appear in the existing rule. The section is consistent with the New Jersey Clean Water Enforcement Act, N.J.S.A. 58:10A-10(g), and N.J.S.A. 13:1K-1 et seq.)
7:7A-16.15 Forfeiture of conveyances

All conveyances used or intended for use in the purposeful or knowing discharge into State open waters of any pollutant or toxic pollutant, in violation of the Water Pollution Control Act, are subject to forfeiture to the State under N.J.S.A. 58:10A-10(g)

and N.J.S.A. 13:1K-1 et seq. A hearing will be held prior to any forfeiture under this section. For the purposes of this section, the term "conveyance" means an aircraft, vessel, vehicle, or other equipment or container.

(Agency note: the following section is proposed for recodification here from N.J.A.C. 7:7A-15.8. Changes to the existing rule text are indicated.)
7:7A-16.16 [7:7A-15.8] Notice of violation recorded on deed to property

[In addition to the penalties prescribed in this subchapter, a notice of violation of the Act shall be recorded on the deed of the property wherein the violation occurred, on order of the Department, by the clerk or register of deeds and mortgages of the county wherein the affected property is located and with the clerk of the Superior Court and shall remain attached thereto until such time as the violation has been remedied and the Department orders the notice of violation removed.]

(a) On order of the Commissioner:

1. The clerk or register of deeds and mortgages of the county containing the property upon which the violation occurred shall record a notice of violation of the Freshwater Wetlands Protection Act on the deed of the property; and/or
2. The clerk of the Superior Court shall record a notice of violation of the Freshwater Wetlands Protection Act.

(b) The notice of violation shall remain attached to the property deed and shall remain recorded at the Superior Court until the violation has been remedied and the Commissioner has ordered the clerk to remove the notice of violation.

(Agency note: the following section is proposed for recodification here from N.J.A.C. 7:7A-15.9. Changes to the existing rule text are indicated.)
7:7A-16.17 [7:7A-15.9] "After the fact" permit

(a) The Department may issue an "after the fact" permit for [the] a regulated or prohibited activity that has already occurred and that does not meet the standards for approval in this chapter only [when] if all of the following are true:

1. The Department has determined that the restoration [or rehabilitation] of the site to its pre-violation condition would increase the harm to [the] a freshwater [wetlands] wetland, transition area, and/or State open [waters] water, or its ecology; [or the regulated activity meets the standards for permit approval pursuant to the Act or the Federal Act;]
2. [Assessment against the violator for costs or damages enumerated in N.J.A.C. 7:7A-15.4 has been made and collected] The Department has assessed and collected the costs or damages enumerated in N.J.A.C. 7:7A-16.4 from the violator;

3. The [creation or enhancement of] Department has required the violator to create or restore freshwater wetlands or State open waters at another [site] location [has been required of the violator];
4. An opportunity has been afforded for public hearing and comment; and
5. The reasons for the issuance of the "after the fact" permit are published in the [DEPE] DEP Bulletin and in a newspaper of general circulation in the geographic area of the violation.

(b) The issuance of an "after the fact" permit or waiver under this section shall not limit the Department's ability to pursue any other enforcement action for the violation that is the subject of the "after the fact" permit or waiver.

(c) [(b)] Any person violating an "after the fact" permit issued [pursuant to] under this section shall be subject to [the provisions of] enforcement under this chapter.

(Agency note: existing N.J.A.C. 7:7A-15.10, termination of permits, is recodified at proposed N.J.A.C. 7:7A-14.5.)

(Agency note: the following section is proposed for recodification here from existing N.J.A.C. 7:7A-15.11. Changes to the existing rule text are indicated.)
7:7A-16.18 [7:7A-15.11] Public participation

(a) [The State shall] To provide for public participation in the [State] Department's enforcement process [by providing assurance that the State agency or enforcement authority will] , the Department shall:
1. Investigate and provide responses to all citizen complaints submitted [pursuant to State] under Department procedures;
2. Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and
3. Publish notice of any proposed settlement of a Department enforcement action in the DEP Bulletin and provide at least 30 days for public comment on [any proposed settlement of a State enforcement action in the DEPE Bulletin.] the settlement.

(Agency note: Fee provisions currently codified at N.J.A.C. 7:7A-16 are proposed for recodification, with clarifying changes, at N.J.A.C. 7:7A-11.)
[Subchapter 16. Fees]

(Agency note: provisions found in the existing rule at N.J.A.C. 7:7A-17.1 are proposed for deletion, because they are redundant with portions of proposed N.J.A.C. 7:7A-16.1, 7:7A-16.5, and 7:7A-16.6.)
[Subchapter 17. Civil Administrative Penalties and Requests for Adjudicatory Hearings

7:7A-17.1 General penalty provisions
(a) This subchapter shall apply only to violations of the Act and this chapter which involve freshwater wetlands and transition areas. This subchapter shall not apply to

regulated activities in State open waters. The penalty procedures and amounts for State open water fill violations are set by N.J.A.C. 7:14-8. This subchapter shall also govern the procedures for requesting an adjudicatory hearing on a notice of civil administrative penalty assessment or an administrative order.

(b) Each violation of any provision of the Act or any rule, administrative order, approved mitigation plan, waiver or permit issued pursuant thereto, shall constitute an additional, separate, and distinct violation for which a separate penalty may be assessed.

(c) Each day during which such violation exists and/or continues shall constitute an additional, separate, and distinct violation for which a separate civil administrative penalty may be assessed. A violation shall be considered to continue as long as it is not rectified, remedied, repaired, or removed, to the satisfaction of the Department. For example, each day that an obstruction, structure, piling, fill or discharge placed or constructed in violation of the Act remains in place shall constitute an additional, separate, and distinct violation. Also for example, for destruction, dredging, or removal of freshwater wetlands components such as soil or vegetation, each day between the destruction or removal and the replacement, restoration, or remediation to the satisfaction of the Department shall constitute an additional, separate, and distinct violation.

1. For the purposes of calculating the duration of any violation, the first day of the violation shall be the day which is the earliest point in time that the Department can establish that the violation occurred, had occurred, or was occurring.

2. The last day of the violation shall be as follows:

i. The day upon which a complete application for a permit or waiver to pursue the activity is submitted to the Department;

ii. The day upon which a complete restoration plan is submitted to the Department (in the case of an unpermittable activity); or

iii. The first day upon which a good faith effort was made to comply with the Department's requirements. If such a good faith effort is shown, the Department may, in its sole discretion, consider the first day of such efforts to be the last day of the violation.

3. To demonstrate a good faith effort, the violator shall show that all regulated and prohibited activity has been halted, shall promptly submit any information required by the Department, shall promptly remedy all deficiencies in any application or other materials submitted to the Department, and shall otherwise promptly comply with all Department requirements.

4. For the purposes of penalty assessment, the number of days required by the Department to render a decision and give notice of such decision on a submitted permit application or restoration proposal shall be excluded from the per day penalty calculation.

(d) In addition to the civil administrative penalties assessed under this subchapter, restoration and/or mitigation may be required pursuant to N.J.A.C. 7:7A-14 and 15.

(e) The Department may in its discretion settle any civil administrative penalty assessed under this chapter.]

(Agency note: provisions found in the existing rule at N.J.A.C. 7:7A-17.2 are proposed for recodification, with clarifying changes, at N.J.A.C. 7:7A-16.8, Civil administrative penalty amount.)

(Agency note: provisions found in the existing rule at N.J.A.C. 7:7A-17.3 are proposed for deletion because they are redundant with proposed N.J.A.C. 7:7A-16.5 and 7:7A-16.1(d).)

[7:7A-17.3 Civil administrative penalty for engaging in regulated activities without approval
(a) The Department may assess a civil administrative penalty in accordance with the provisions of this section against each violator who engages in a regulated activity in a freshwater wetland without a freshwater wetlands permit or engages in a prohibited activity in a transition area without a transition area waiver.

(b) For each violation under this section, the Department may assess a penalty of up to $10,000. Each day, from the day the prohibited activity begins to the day its effects are rectified, remedied, repaired, or removed to the satisfaction of the Department, shall constitute an additional, separate, and distinct violation.]

(Agency note: provisions found in the existing rule at N.J.A.C. 7:7A-17.4 through 7:7A-17.7 are proposed to be recodified, with clarifying changes, at N.J.A.C. 7:7A-16.9 through 7:7A-16.12.)

(Agency note: provisions found in the existing rule at N.J.A.C. 7:7A-17.8 are proposed to be recodified, with clarifying changes, at N.J.A.C. 7:7A-16.6, Assessment, settlement and payment of a civil administrative penalty.)

(Agency note: provisions found in the existing rule at N.J.A.C. 7:7A-17.9 are proposed to be recodified, with clarifying changes, at N.J.A.C. 7:7A-16.7, Appeal of an administrative order and/or a notice of civil administrative penalty assessment.)

Appendix 1: Obligate and facultative fauna species found in vernal habitats

Obligate Species	**Facultative Species**
Marbled Salamander	Snapping Turtle
Tremblay's Salamander *	Eastern Mud Turtle
Blue-spotted Salamander *	Spotted Turtle
Jefferson's Salamander	Eastern Painted Turtle
Silvery Salamander	Red-spotted Newt
Eastern Tiger Salamander *	Eastern Spadefoot Toad
Long-tailed Salamander **	American Toad
Wood Frog	Fowler's Toad
Spotted Salamander	Pine Barrens Treefrog *
	Northern Gray Treefrog
	Southern Gray Treefrog *
	Upland Chorus Frog
	Northern Cricket Frog
	New Jersey Chorus Frog
	Green Frog
	Southern Leopard Frog
	Four-toed Salamander
	Northern Spring Peeper

* Listed as a New Jersey state endangered species
** Listed as a New Jersey state threatened species

Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Statement addressing the requirements of Executive Order 27 (1994) (p. 273), permit the public to understand accurately and plainly the purpose and expected consequences of this proposed readoption with amendments, I hereby authorize this proposal.

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Date

_____
ROBERT C. SHINN, JR.
Commissioner