SUMMARY OF PUBLIC COMMENTS AND AGENCY RESPONSES ON THE READOPTION WITH AMENDMENTS OF THE FRESHWATER WETLANDS PROTECTION ACT RULES, N.J.A.C. 7:7A
September 4, 2001

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The following persons timely submitted written comments and/or made oral comments at one of the public hearings:

1. Christine Altomari; Stony Brook-Millstone Watershed Association
2. Mary Arnold

3. Annette Barbaccia; The Pinelands Commission
4. Stephen T. Boswell, Ph.D, P.E.; Boswell Engineering
5. Perry S. Boynton; GPU Energy
6. Robin Callaghan; Tosco Refining Company, L.P.
7. Thomas D. Carver; New Jersey Aviation Association
8. Martin S. Chomsky, M.P.H.; Monmouth County Mosquito Extermination Commission
9. Kevin Coakley, Esq.; Connell Foley LLP
10. Susan E. Collins
11. Marie Curtis; New Jersey Environmental Lobby
12. Emile DeVito, Ph.D.; New Jersey Conservation Foundation
13. Anthony DiLodovico; Schoor DePalma
14. John Ehardt
15. Abigail Fair; Association of New Jersey Environmental Commissions
16. Ella Filippone, Ph.D; Passaic River Coalition
17. Robert Friant
18. Theodore A. Giannechini, P.E., P.L.S., P.P.; Monmouth County Board of Chosen Freeholders
19. Eric Gleason, U.S. Wetlands
20. Amy Greene; Amy Greene Environmental Consultants, Inc.
21. Penelope A. Griber; D. W. Smith & Associates
22. Michael Gross, Esq.; City of Linden
23. W. Dennis Keck; New Jersey Department of Transportation
24. Craig A. Kunz, P.E.; Geologic Services Corporation
25. Stephen P. Kunz, Certified Senior Ecologist, Professional Wetland Scientist; Schmid & Company Inc., Consulting Ecologists
26. Laura Kushner, D.D.S., and Elliot Rosenstein, M.D.
27. William B. Leavens III
28. Theodore Matthews; New Jersey Department of Transportation Division of Aeronautics and Freight Systems
29. Mike McGuinness; National Association of Industrial and Office Properties (NAIOP), New Jersey Chapter
30. Martin E. Mengel, P.G./C.P.G; Buckeye Pipe Line Company
31. Richard K. Mogensen
32. William Neil; New Jersey Audubon Society
33. Jane Nogaki; New Jersey Environmental Federation
34. Patrick O'Keefe; New Jersey Builders Association
35. Sam Race; New Jersey State Soil Conservation Committee
36. Whitney Sale
37. Pat Sayles
38. Roxane Shinn; Cooper River Watershed Association
39. William M. Simmons; Monmouth County Board of Health
40. Dr. Jim Sinclair, P.E.; New Jersey Business and Industry Association
41. Stanley Skeba
42. Robert Sokolove
43. Walter M. Smith, Jr.; Township of Wycoff
44. Julia Somers; Great Swamp Watershed Association
45. Hannah B. Suthers
46. Sheryl Telford; DuPont Engineering
47. Jeff Tittel; New Jersey Sierra Club
48. Dennis M. Toft; Federal Business Centers
49. James J. Truncer; Monmouth County Board of Recreation Commissioners

50. Mark R. Witmer
51. Nancy Wittenberg; New Jersey Builders Association
52. Jeffrey E. Wright, P.E.; Burlington County Board of Chosen Freeholders
53. Nicholas J. Wunner, P.E., P.L.S., P.P.; Wunner Engineering Associates and the New Jersey Society of Professional Land Surveyors
54. Jeffrey A. Zenn; Sokol, Behot & Fiorenzo

The timely submitted comments and the Department's responses are summarized below. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above. The general comments are presented first, followed by comments on three issues that affect several portions of the rules. These are followed by comments relating to each section of the proposal.

General comments:

1. COMMENT: We recognize the amount of work that has been invested in these proposed rules, and the several strengthening provisions incorporated, and we recognize that the Department was motivated by a desire to streamline the rule and make them more cohesive. However, we would like to emphasize that the rules can better protect New Jersey's wetlands and the many benefits they provide us, than as proposed in their present form. (44)
RESPONSE: The Department believes that the rules adopted herein are an improvement over the previous rules, and do strengthen wetlands protection. However, there is always room for improvement, and the Department welcomes specific suggestions as to how to improve the rules.

2. COMMENT: Wetlands are at the heart of water resource protection. They are especially important to the Department's watershed management initiative to clean up New Jersey's rivers and streams. Wetlands provide stream base flow, prevent flooding, filter out pollutants, provide habitat, open space and educational opportunities. They are critical in the chain of life. New Jersey has steadily lost wetland acreage. It is, therefore, extremely important that the Department strengthen protection, not weaken it. Because of their critical role, this wetland proposal unfortunately is not adequate. It takes several steps backward. It weakens instead of strengthens wetlands protection. (2, 15, 32, 44)
RESPONSE: The Department does not agree that the rules weaken wetlands protection. There are many ways in which the rules strengthen protection (for example, the prohibition against use of general permit 6 in vernal habitats, the presumption of wetlands hydrology for drained farmed wetlands, and the new definition of "residential development project"). In addition, the simplification and clarification of the rules will better focus the Department's limited resources so that wetlands protection will be more efficient and therefore wetlands will be provided with more protection in the long run.

3. COMMENT: Given New Jersey's Historic wetlands losses, ecological and water quality decline, loss of habitat and exacerbated flooding, we believe that the current wetlands regulations must be strengthened. In addition, given the effort to restore, improve and maintain the State's waters through the watershed effort, we feel it is especially important for the regulatory program to be driven by a policy

and provisions that recognizes the landscape value of wetlands in the watershed. (2, 12, 33)
RESPONSE: The Department agrees that strong wetlands protection is essential in New Jersey, and believes that the rules adopted herein strengthen wetlands protection in many ways, as stated in the response to comment 2 above.

4. COMMENT: We need to do more to look at secondary impacts. Numbers show that wetland losses are increasing and developments cause secondary impacts that are destroying wetlands. Secondary impacts may arise in the context of a simple road crossing, where the channel flow from one side of the wetland to another does not go through and so the wetland on one side of the road ends up drying out. Secondary impacts may be caused by the dumping of road salts and silt and construction projects and traffic and pollution, which flood out or silt over wetlands. Wetland losses also happen from secondary impacts where there is development, and a wetland 50 or 100 feet away dries out because the hydrology in the area changes. An instance of this is around quarries where wetlands are on properties adjacent to the site, and the quarrying changes the hydrology and the wetlands dry out. We need to look at the secondary impacts during the subdivision phase, and other permitting phases. (47)

5. COMMENT: The Department should expand the basis of wetland regulatory jurisdiction to clarify the scope of and control currently unregulated activities that occur outside wetland or transition area, but that cause adverse impacts. Examples include water allocation permits and direct discharges to wetlands. (2, 12, 33)
RESPONSE to comments 4 and 5: When the Department authorizes a road crossing in wetlands, whether through an individual or general permit, the applicant is required to install cross drains or other devices to ensure that the crossing does not interfere with the hydrology on either side of the crossing (see N.J.A.C. 7:7A-5.10A(d)2). The FWPA addresses the issue of road salt and silt through the protection of transition areas, which act to filter stormwater on its way into the wetland. Regarding development, quarrying or other activities on one site which result in draining of wetlands on another site, the FWPA clearly regulates only activities that occur in a wetland or transition area. However, one of the activities regulated is "drainage or disturbance of the water level or water table." Therefore, the drainage of a wetland on a site due to development or quarrying on another site could be a regulated activity, if it could be concluded that the development or quarry was in fact the activity that caused the drainage. The Department has historically addressed this on a case-by-case basis, if consistent with its regulatory authority. In response to recent concerns raised by the public regarding the effects of municipal wells on wetlands, LUR is working with the Department's Bureau of Water Supply Allocation to coordinate issuance of water supply allocation permits and freshwater wetlands permits, and to devise an appropriate process for considering wetlands impacts in relation to water supply allocation permits.

6. COMMENT: The Department should use data on cumulative impacts for additional regulatory protections in especially sensitive watersheds, such as Planning Area 5 (Environmentally Sensitive Planning Area) under the State Plan, the Passaic River and Raritan basins or the New Jersey Highlands. (2, 12, 32, 33, 47)

RESPONSE: It is unclear to what data the commenter refers and how it relates to wetland protection. If the commenters have data regarding sensitive watersheds, the Department would be interested in reviewing it, to ascertain whether regulatory changes are appropriate.

7. COMMENT: Former Governor Kean and former New Jersey Legislator Maureen Ogden were quoted recently in the Star Ledger concerning the State's loss of wetlands. Both of these estimable public servants reckoned that our loss of wetlands subverted the intent of the State law and was unconscionable. This is the Department's opportunity to shore up this program and live up to the commitments made when the State assumed responsibility for wetlands. (2)
RESPONSE: The statements referred to were based on data showing large wetland losses in New Jersey. However, these data do not accurately reflect the existing freshwater wetlands program, for several reasons. For example, many of the losses occurred before the Department freshwater wetlands program took effect. Further, many of the losses occurred under exemptions mandated by the Legislature, which continued to allow disturbances previously authorized by a local government until March 1994. Finally, there may have been distortion caused by the scale and amount of detail used in interpreting the data (for example, if a square acre plot had only a portion covered by wetland, the entire "square" was listed as wetland). Thus, these data are not an accurate representation of the Department's current freshwater wetlands program, or of the current rate of wetlands disturbance in New Jersey, which has been significantly reduced since the Department assumed the Federal 404 program. Since July of 1995, approximately 170 acres of wetlands have been lost per year, which represents less than one tenth of one percent (.017 percent) of New Jersey's one million acres of wetlands. Further, in that same period, the Department required approximately 114 acres per year of wetlands mitigation.

8. COMMENT: The commenter is very disturbed by these proposed rules. In the late 1980s, President Bush made "no net loss" of wetlands a policy of this State and of this nation. The EPA is now talking about going above no net loss to the creation of 100,000 acres of additional wetlands by the year 2005. However, in these rules, instead of tightening them, there are new permit categories added that will destroy more wetlands. (47)
RESPONSE: The commenter is correct that the State of New Jersey has adopted a goal of no net loss of wetlands, although this is not mandated by the FWPA. However, the Department’s wetlands regulatory program is not intended to be the State’s sole vehicle for meeting the goal of no net loss of New Jersey wetlands. It is intended to preserve the State’s freshwater wetlands from unnecessary or undesirable alteration or disturbance by the systematic review of activities in and around wetlands. See N.J.S.A. 13:9B-2. The Department is pursuing the goal of no net loss through various avenues, including partnerships with other agencies and the development of programs under its strategic plan. In addition, the recently enacted open space initiative (Garden State Preservation Trust Act, P.L. 1999, c. 152, N.J.S.A. 13:8C-1 to 13:8C-42) is expected to increase wetlands acreage through the acquisition of wetlands that have been drained or disturbed (primarily through farming), but which will revert to wetland conditions if left alone.

9. COMMENT: We need to do more throughout this rule to strengthen it. We need to get rid of these new loopholes, but more importantly we need to protect these wetlands for future generations, because New Jersey is the most industrialized state, the most populated state and it is losing wetlands and open space at a high rate and impacting water quality. (47)
RESPONSE: The Department believes that the readopted rules include many provisions that strengthen the freshwater wetlands program. First, there are provisions which directly increase protection, such as the prohibition on use of general permit 6 in vernal habitats, the definition of "residential development project," and the presumption of wetlands hydrology for farmed wetlands that have been subject to drainage. Second, there are process improvements that will better focus the Department's resources on significant environmental impacts, such as the consolidation of freshwater wetlands and transition area disturbances under one general permit approval, new general permits, and more flexible requirements for road crossings and bank stabilizations.

10. COMMENT: The Cooper River is one of the lower Delaware River's and New Jersey's most polluted rivers. Non-point sources contribute most of the pollution. Wetlands have been largely destroyed or impaired as a result of unplanned sprawl development and inadequate wetland and water quality protection. The absolute protection of the Cooper River Watershed's remaining wetlands are an environmental as well as a public safety and health priority. The restoration of all suitable remaining wetland sites is essential if we are to make any further progress towards improving Cooper River water quality and achieving national standards. Wetlands are critical to protecting water quality and their protection is critical to the watershed management effort. It is therefore extremely important that the Department strengthen wetland protection, not weaken it. This proposal weakens protections in several areas. (38)
RESPONSE: The Cooper River has some impairments but recent biological monitoring indicates improvement. The river's chemical impairments are primarily from phosphorus. Because the point source discharges on the river have been connected to the regional facility in Camden, the source of these pollutants is thought to be primarily from runoff and other nonpoint sources. The Department is addressing these impairments through the development and implementation of a watershed management plan under the auspices of the Department's Division of Watershed Management. It is very likely that riparian restoration and retrofitting stormwater management will be among the strategies included in this plan. Wetlands preservation or restoration along waterways would enhance these efforts, but it is not the most feasible way to address the Cooper River's problems because the area is so heavily developed. As discussed in the response to comment 9 above, the Department believes that the adopted rules do not weaken wetlands protection, and in fact strengthen wetlands protection in many ways

11. COMMENT: Protection of wetlands should be a top priority in New Jersey. The proposed rules should be rewritten. Wetlands protection is vital to the habitat of our beautiful State. These revisions would allow new general permits that would weaken protection of wetlands by expediting review. One commenter stated that in the Pinelands, even with all the rain this year, former ponds are drying up, devastating to everything dependent on them. (10, 36, 37, 45, 50)
RESPONSE: The Department does not believe that the expedited review provided under general permits will weaken protection of wetlands. One of the

activities (septic system repair) has historically been subject to expedited review, and this is appropriate due to the possible groundwater impacts of failing to repair malfunctioning septic systems. The Department has not adopted the proposed expedited review for utility right-of-way spraying under general permit 1, as discussed in the response to comments 224 and 225. The expedited review for stormwater basin maintenance under general permit 1 is appropriate in light of the water quality benefits of well maintained basins. General permit 26, for minor channel or stream cleaning, is limited so that the Department does not anticipate that the expedited review will significantly increase the number of projects approved. Further, since these activities have minimal impacts, the time saved by Department staff in application review time can then be devoted to projects with more than minimal impacts, thus improving environmental protection over all. The Department is aware that some data indicate a drop in water levels in some areas within the Pinelands. However, there is no evidence that the freshwater wetlands permit program is related to this.

12. COMMENT: We deeply appreciate the Department's efforts to protect our environment. Despite these efforts, valuable wetlands are still being lost. Current regulation are not doing enough to control this. The Department needs stronger regulations that will allow it to create standards and demand compliance. In the long run, every person will benefit when we maintain the greenness, the vitality and the biodiversity of this great State. Not only does this mean curbing sprawl but also maintaining the health standards that would be degraded with improper growth, such as but not limited to aquifer purity, the food chain, and flood control. (14, 26)
RESPONSE: As discussed in the response to comment 9 above, the Department believes that the adopted rules are very protective. In fact, the Department's freshwater wetlands program is one of the strongest, if not the strongest, in the nation. It is not clear in what way the commenters believe that the rules are not sufficiently strong.

13. COMMENT: The Passaic Basin is one of the most flood prone basins in the country, where a massive flood is just one rainfall away. Because of the loss of wetlands in that basin, where over 99% of the permits are issued, special rules were established dealing specifically with activities in the Passaic basin. Now we have the same problem in the Raritan Basin. If we are not careful, 10 years from now the Raritan Basin is going to be just like the Passaic. We have to start looking at what happened there with Hurricane Floyd and the impact it has had on Bound Brook, because wetlands are the best natural way to prevent flooding and protect water quality. We need to strengthen our rules, not add more loopholes and more general permits. (47)

14. COMMENT: Freshwater wetlands play two essential functions in the watersheds in which they occur that are especially critical in the Passaic River Basin above Little Falls. (1) They reduce the damaging effects of flooding. (2) They reduce the impacts of excessive loading of nitrogen and phosphorus on waters below the wetlands. The Passaic River Basin, particularly above Little Falls, is highly susceptible to flooding, and the damages from flooding, which have amounted to billions of dollars, have become progressively worse as development of the Central Basin and the Highlands portion of the basin has occurred. Furthermore, the Department has selected the Passaic River Basin as its highest priority for the

development of watershed protection plans, and this priority is based primarily on concerns about excessive loading of nitrogen and phosphorus. The proposed revisions to the Freshwater Wetlands Protection Act Rules do nothing to stop, or even slow, the rapid destruction of natural wetlands in the basin that is occurring under the existing rules. (16)
RESPONSE to comments 13 and 14: The Department believes that the rules adopted herein do, in fact, significantly limit the destruction of natural wetlands in the Passaic River Basin, within the limits set forth in the FWPA. In addition to the stringent protections that apply throughout New Jersey, the Passaic River Basin is subject to special protection because of its status as an EPA priority wetland. The Department has one of the strongest freshwater wetlands protection programs in the country. However, the Department is bound by the FWPA to permit wetlands disturbance if certain requirements are met. Further, the Legislature has directed the Department to address flooding concerns primarily through the Flood Hazard Area Control Act rules (N.J.A.C. 7:13), rather than the FWPA rules. The Flood Hazard Area Control Act rules also include special protections and more stringent limits on fill that apply in the Passaic River Basin. Finally, as the commenter notes, the Department is addressing the problems in the Passaic River Basin holistically through the development of watershed protection plans which will strengthen and coordinate the watershed protection efforts of the Department and local entities.

15. COMMENT: We recommend that, in the Passaic River Basin above Little Falls, bioengineering techniques should be used to ameliorate damaging effects of destroying wetlands of ordinary resource value. At present no transition areas and little mitigation are required for the destruction of wetlands of "ordinary resource value." There are many such wetlands in the Passaic River Basin which still have functional utility. Often the functionality of these wetlands, such as erosion control, nutrient control, and storm water storage, could be retained by using bioengineering, "Stormceptors," and other techniques that mimic natural processes. The permitting process should encourage the retention of natural functions of a wetlands ecosystem, regardless of how degraded it is. (16)
RESPONSE: As discussed in the response to comment 14 above, the rules provide a great deal of protection to wetlands in the Passaic River Basin, and encourage the retention of natural functions of the wetlands ecosystem whenever possible within the FWPA mandate. The commenter suggests that the Department require bioengineering techniques and "stormceptors." Bioengineering is a technique used to stabilize stream banks to prevent erosion, which is required under general permit 20 (for bank stabilization) to be used unless the applicant demonstrates that they cannot be used. The other techniques the commenter mentions relate to stormwater management. The Department requires stormwater management measures for any project that results in one quarter acre or more of impervious surface, whether the project disturbs ordinary resource wetlands or other types.

16. COMMENT: The summary of the rules fails to inform the public just what the track record of losses has been. Two Department documents, one issued in the summer of 1996 and the other in February 1999, show cumulative losses from the system of general permits of about 1,000 acres. But the rules do not refer to either of these compilations nor do the environmental analyses that accompany the six new proposed general permits. (15, 32)

RESPONSE: The commenters have not identified the Department documents to which they refer. However, the Department does prepare annual reports to EPA summarizing (among other things) the number of acres disturbed under general permits. These reports show that impacts under all general permits, combined, averaged 130 acres per year from July of 1995 to July of 1999. (This figure does not reflect wetlands added to the inventory of State wetlands through mitigation.) The commenter's figure of 1000 acres of disturbance over the twelve years during which the freshwater wetlands program has been in effect is not significantly inconsistent with this average. Given that 130 acres represents less than one tenth of one percent (.013 percent) of the State's one million acres of wetlands, and that the 1,560 acres of wetlands lost over the life of the freshwater wetlands program represents less than one percent (.16 percent) of total wetlands, the Department believes that the freshwater wetlands program is successfully limiting wetlands disturbance in New Jersey. The EPA reports mentioned above, which include more detail regarding acreage of impact under each general permit, are available to the public upon request from the Department.

17. COMMENT: With the continuing improvement of the water resources of the State of New Jersey, the regulations should reflect such improvements and regulations should respond to the need to avoid slippage. (16)
RESPONSE: The rules adopted herein incorporate and support water quality improvements through the classification system for freshwater wetlands. The resource classification of a wetland is based partially on water quality, in that if a wetland meets certain water quality standards, it will be classified as having exceptional resource value. Exceptional resource value wetlands trigger larger transition areas and other heightened protections.

18. COMMENT: If a permit is requested on land that is contiguous to State-owned land (especially where a buyout has occurred), notification should be made to the person within the Department handling the buyout. Consideration should be made to purchase such land instead of allowing development. If a permit is issued, the file should contain a statement from the person within the Department responsible for buyout as to why a permit should be issued and as to why the State did not purchase such land. (16)
RESPONSE: The Department does not believe that the commenter's suggestion would have a significant environmental benefit. The Department's program for buying properties in flood prone areas has a limited budget, applies only to properties located in a floodway, and is completely voluntary on the part of the property owner. While it may be possible for an applicant with a property in the floodway to obtain a freshwater wetlands permit, it is unlikely that development of such a property would be authorized under the Department's Flood Hazard Area Control Act rules. Thus, the approval or denial of a freshwater wetlands permit is not likely to be the deciding factor in whether the property is developable, or in whether the property owner will choose to apply for a buyout.

19. COMMENT: We support the Department's efforts to streamline and clarify the Freshwater Wetlands Protection Act Rules and make them more cohesive. We believe that the recodification in general, the elimination of legalese, and other such changes proposed by the Department will make it easier for the regulated community to understand and follow these rules and for this the Department should be commended. (3, 5, 18, 25, 29)

RESPONSE: The Department appreciates this comment in support of the rules.

20. COMMENT: The new rules state that the language is changing to make the rules more readable and logical for users, but we did not have much of a problem with the original version, which everyone was familiar with. The exhaustive language for the new rules and the overall length of the text place them out of reach for the average interested citizen. (32)

21. COMMENT: We object to the mechanics of the rule proposal. This total reorganization is making review extremely difficult. With very little notice, the Department scheduled five meetings to discuss these lengthy rules. Not many non-profit environmental organizations were able to attend and voice their concerns on the issues. Furthermore, this proposal comes on top of another massive rule proposal that is totally interdependent with it because it is the watershed water resource program. The comments are due on that proposal on the same date as the wetlands proposal comments are due, so it makes it very difficult for commenters, especially nonprofits, to deal with both of these rule proposals adequately. (15)
RESPONSE to comments 20 and 21: The Department understands that the reorganization of the rules may prove confusing for those who were familiar with the previous rules. However, the Department believes that the reorganized rules are much less confusing and more logically organized, and the Department trusts that this will result in a better understanding of the rules by the regulated community over the long term. By holding the five public meetings, and providing an extensive and detailed summary to guide readers through the wetlands proposal, the Department attempted to minimize the potential difficulties for commenters of the coincident comment periods for the wetlands and watershed rule proposals.

22. COMMENT: The rule summary explains that the proposal substantially reorganizes the rules for easier reading. This is a laudable goal and the Department is to be commended. Some of the changes made do help with the flow of the rule. Unfortunately the overall end result is still a complicated proposal which is difficult to follow. There are too many cross-references and convoluted sentences to allow for easy reading. (34)
RESPONSE: The Department agrees that the rules are complicated. This is the unavoidable result of a detailed and complex enabling statute, and the Department's attempts to address the many different kinds of activities regulated in a way that fairly balances the interests of the environment and the parties involved. The Department has tried to minimize the length and complexity of the rules by removing some extraneous detail, such as the application checklists and the form letters for notifying neighbors of applications; and by removing long lists or moving them into appendices.

23. COMMENT: We object to the lack of outreach on the proposal of the new general permits. Under the law the Department is to perform environmental assessments and provide opportunity for public hearing. The environmental assessments were performed, but only one line in the entire 400 page proposal mentioned that they were available upon request. The assessments seem to be merely assertions, rather than in depth assessments of the impacts from these permits.

No information is provided concerning past loss or why the general permits will cause minimal impact as claimed. (15)
RESPONSE: The Department acknowledges that under the FWPA environmental assessments must support each general permit, and that opportunity for public hearing on each general permit is also required. Two public hearings were held to solicit comment on the rules, including the proposed general permits and the environmental assessments, and as the commenter notes, the assessments were available upon request. Regarding past losses, the Department prepares an annual report to EPA summarizing the number of acres disturbed under each general permit. The data show that impacts under all general permits combined averaged 130 acres per year (this figure does not reflect wetlands added to the State's wetlands inventory through mitigation) from 1994 to 1999, which represents less than one tenth of one percent (.013 percent) of the State's total wetlands. These EPA reports, which have more detail regarding acreage of impact under each general permit, are available to the public upon request from the Department. The commenter is correct that the Department did not include figures regarding past acreage of general permit-authorized disturbance in the environmental assessments. Because general permits differ so widely in the impacts of the activities authorized, an acre of wetlands disturbance under one general permit is likely to have a very different environmental impact than an acre of disturbance under another. This is especially true for the many general permits that authorize disturbances resulting in an overall environmental benefit (for example, general permits for hazardous waste cleanups, landfill closures, and septic system repairs). Thus, the Department does not believe that the acreage of disturbance under a general permit is an accurate indicator of environmental impact.

24. COMMENT: We appreciate the amount of work that went into rewriting the rules even though we do not necessarily agree with the results. (15)
RESPONSE: The Department appreciates this comment in support of the rule writing effort.

25. COMMENT: While we recognize the need for this proposal, and the laudable intent of the effort, we have some serious concerns about some of these changes. There is vague language in some areas that could result in widely varied interpretation. Such phrases as minimum necessary disturbance are not easily defined and are thus open to abuse. Specific measurable areas will be preferable as exists in other parts of the proposal. (11)
RESPONSE: The Department agrees that, when possible, a numerical or "bright line" standard should be used provide predictability and efficiency. However, because these rules cover so many varied sites, activities, and applicants, there are times when a numerical standard will be unfair to certain types of applicants, or will fail to adequately protect the environment. In these cases, the rules must include a more flexible measure.

26. COMMENT: We need to do more to protect our reservoirs. Trout streams get more protection than our major reservoirs. When a trout production stream flows into a reservoir it loses "exceptional resource value" protection. Developments going in next to tributaries of reservoirs impact on the reservoir, whereas there are trout streams that do not drain reservoirs and they get better protection. These rules should tighten that exemption up to make sure that our reservoirs are

exceptional resource value, to protect the water quality for people in New Jersey. (47)
RESPONSE: The Department agrees that protection of reservoirs is important. However, the freshwater wetlands program is not the Department's primary avenue for the protection of surface waters. The Department can regulate open waters under the FWPA only when the discharge of dredged or fill material into the open water is proposed. The FWPA sets forth the types of wetlands that are classified as exceptional resource value wetlands, and the Department cannot change the statutory definition to include reservoirs.

27. COMMENT: In light of recent Department rulemakings please advise as to whether the proposal includes, either implicitly or explicitly, any statements intended to serve as notice of changes in Department policy for other regulatory programs. (51)
RESPONSE: These rules are intended to provide standards for the issuance of freshwater wetlands permits under the FWPA. While the Department strives to coordinate related programs, these rules govern only the freshwater wetlands program, and do not implicitly or explicitly change Department policy for other programs.

28. COMMENT: We support the addition of General Permits, particularly the General Permit to aid in redevelopment of previously disturbed sites. We also support the Department's efforts to encourage increased use of mitigation banks for smaller disturbances. (29)
RESPONSE: The Department appreciates this comment in support of the rules.

29. COMMENT: In several instances the rules weaken the existing program by deferring to actions taken by other sections of Department or other agencies. For instance, general permit 1 is issued if the pesticide permit is granted by the pesticide control program for spraying rights-of-way, and this with a 30-day default provision; for general permit 20, stream bank stabilization, the amount of riprap allowed in wetlands is determined by the Soil Erosion Sediment Control Standards; General permit 11 will be issued for an outfall structure issued under the NJPDES program. General permit 9 for airport sight lines depends on DOT standards. Wetlands are so critical to water resources in the State that regulation should revolve around wetlands permits, not other programs. (15)
RESPONSE: The Department does not believe that the rules "weaken the existing program by deferring to actions taken by other sections of the Department or other agencies." As discussed in the responses to comments 224 and 225, the Department has not adopted the right-of-way spraying provisions of general permit 1. Regarding the other provisions mentioned by the commenter, the Department has carefully chosen the instances where standards or permits from other agencies or units will be incorporated as part of the review of an application for a project under the readopted rules. In no case does the Land Use Regulation Program (LUR) authorize a project based solely on approval of the project by another agency or Department unit. In all cases, additional limits apply; and in all cases an application must be submitted for review by LUR to ensure compliance with all limits. For instance, the commenter points to general permit 11 for an outfall covered by a NJPDES permit. In addition to the requirement for a NJPDES permit, the applicant must limit the amount of disturbance under N.J.A.C. 7:7A-5.11(c), minimize damage caused by excavation under N.J.A.C.

7:7A-5.11(g), and comply with the requirements in the Standards for Soil Erosion and Sediment control. Finally, all of the general provisions that apply to all general permits (found at N.J.A.C. 7:7A-4.3) apply; including limits that protect wild and scenic rivers, threatened or endangered species habitat, and historic or cultural resources. Further, a reference to the rules of another agency is not always a complete deferral to that agency. For example, an applicant for authorization under general permit 11 must comply with the requirements in the Standards for Soil Erosion and Sediment control. However, the general permit provides additional stringency by applying the specifications and requirements in the Standards to ALL projects authorized under general permit 11, even those projects that would be exempted from the Standards by the agency that implements them (the Soil Conservation Districts in the New Jersey Department of Agriculture). In many cases, the rules require approval from another agency as part of a LUR approval because that other agency has been given the legal authority by the Legislature to be the lead agency that regulates that aspect of the project. By deferring to that agency in their sphere of authority, the Department is merely acknowledging this existing legal reality, and is not changing the universe of standards that apply to a given project.

30. COMMENT: On the whole, the revisions to the wetland rules seem driven by the regulated parties' needs and the Department's desire to keep its staff cost and size down. (12, 32)
RESPONSE: The Department has a responsibility to the citizens to try to accomplish its environmental mission in the most efficient way possible. The readopted rules therefore do include measures that will make the implementation of the freshwater wetlands program more efficient, but wetlands protection remains the paramount objective.

31. COMMENT: We see once again a proposal that has some good points and laudable intention, but which has some troublesome aspects as well. We see a generally looser enforcement policy, and a great deal of discretion accorded to the Department. We do not see that as the intent of the law. (11)
RESPONSE: It is not clear in what way the commenter believes that the adopted rules loosen enforcement policy or increase the Department's discretion. The readopted rules contain very few substantive changes to the provisions regarding enforcement.

32. COMMENT: Here is an example of a problem that the Department should make an effort to prevent: A large property was classified as exceptional resource value, with over 90% wetlands. The township did not buy the property because it believed it would be protected by the freshwater wetlands laws. Then a builder got a new letter of interpretation in 1999, and the Department redelineated the property to about 30% wetlands. This has happened to other properties as well. Why is the Department reclassifying property? This happened during drought years and drought temporarily destroys vegetation. (14, 26)
RESPONSE: The term of a letter of interpretation (LOI) is 5 years. At the end of that time, an application can be submitted for an extension, and the Department must review the extension application based on site conditions at that time. If conditions on the site have changed in such a way as to affect the wetlands boundary, the new LOI must reflect the changed conditions. Further, the science of wetland delineation evolves and with it the accuracy of delineations improve.

This sometimes results in a change in a delineation, which may increase or decrease the amount of wetlands identified on a site. The Department is aware of the effects of drought on the extent of wetlands, and takes this into consideration when delineating wetlands.

33. COMMENT: The Department must work with the environmental groups to craft a meaningful, understandable, and enforceable Freshwater Wetlands Protection Act. The Department has to be perceived as the partner, not the adversary, of the people of this State who demand protection from the ravages of overbuilding and overpopulating our wetland areas. Sometimes it may be necessary to decline an application entirely. Permits should not be granted just because an expensive engineer or lawyer was found to navigate through the loopholes. Please close the loopholes! (14, 26)
RESPONSE: The Department has solicited input from environmental groups as well as others in crafting the readopted rules. Many excellent suggestions were received from these groups and have been incorporated into the rules. The Department agrees that sometimes applications must be denied. However, Department staff routinely inform an applicant prior to denial if a permit will be denied. Rather than issuing a denial and requiring a new application, the Department allows the application to be amended under N.J.A.C. 7:7A-12.6. In most cases, applicants choose to reduce the size of the project or the amount of wetlands disturbed in order to bring the project within the permit requirements, resulting in eventual issuance of a permit. Thus, a small number of denials does not reflect laxity on the Department's part, but the willingness of most applicants to change their projects to bring them into compliance with the rules. The commenter refers to "loopholes" but does not explain further. While the rules do include provisions that allow some development, the Department believes that the rules reflect the intent of the FWPA and strike an appropriate balance between environmental protection and the rights of property owners.

Issue comments:

Residential development project:

34. COMMENT: The definition of residential development project imposes an additional 20-foot buffer on residential units. The stated purpose for this change is to address situations where residences are built adjacent to transition areas or wetlands, which is consistent with the Freshwater Wetland Protection Act (the Act). The stated concern is to address situations where homeowners claim to discover after the purchase that they cannot perform certain activities on these lands. It is not within the purview of the Department to resolve hypothetical conflicts between a buyer and seller. To the extent such disputes arise, there are various consumer protection remedies in place. The Legislature was very attentive to the issues of buffers when the FWPA was before it and, as the legislative history clearly demonstrates, the Department's authority is explicitly defined and limited by the provisions addressing transition areas. (34)

35. COMMENT: N.J.A.C. 7:7A-6.1(c)1, which would allow the Department to regulate activities in an additional 20 feet of upland beyond the outside edge of the transition area, is adding a buffer to a buffer and is beyond the jurisdictional limits

established in the FWPA. The construction of a building obviously will entail some disturbance around the building itself, but this distance will vary depending on the adjacent slope, construction practices utilized, and other factors. (21, 25, 29)
RESPONSE to comments 34 and 35: The provision does not authorize the Department to regulate an additional area of upland outside of the transition area. Rather, the provision acknowledges the reality that a building generally cannot be built and used without significant disturbance in an area at least 20 feet wide surrounding the building. This is based on thousands of field inspections by Department permitting and enforcement staff, who have observed the activities of construction personnel and those of people who live in and use buildings placed adjacent to regulated areas. Typically, Department staff observe damaging activities during construction, including grading, removal of native vegetation, and planting the transition area immediately surrounding the building with lawn. The problem is especially severe with residential construction. After construction of a home adjacent to a regulated area is complete, few home owners can use such a house without performing regulated activities in its backyard. Again, this is based on the observations of Department staff during thousands of field inspections. It has been the Department's experience that regulated activities are inevitable in an area at least 20 feet wide. Although most projects disturb more than this, the 20 foot limit was set as a conservative number. The definition of "residential development project" at N.J.A.C. 7:7A-1.4 has been clarified on adoption to indicate that the 20 foot area will be measured from the foundation of a house. As noted in the summary of the proposal at 32 NJR 2704, backyard impacts to wetlands and transition areas are usually related to the placement of impervious surfaces adjacent to regulated areas. It is the building foundation that creates an impervious surface, not a deck. This change will more accurately focus this definition on the problems it was intended to address.

36. COMMENT: The additional 20 foot buffer required adjacent to transition areas appears to strengthen the rule, but we need predictive data as to the degree of strengthening in order to evaluate the overall improvement to wetlands protection. (2, 12, 33)
RESPONSE: While the Department cannot predict the exact acreage that will be affected by the rule change, the Department is confident that the provision will better protect wetlands and transition areas, because it will reduce the amount of unauthorized disturbance that currently results from construction and use of buildings immediately adjacent to regulated areas.

37. COMMENT: It is not necessary to call out a residential development project at N.J.A.C. 7:7A-2.2(a)7 as a regulated activity since the activities for this project would be included in N.J.A.C. 7:7A-2.2(a)1 through 6. Similarly, it is not necessary to call out a residential development project as a regulated activity in transition areas at N.J.A.C. 7:7A-2.6(a)6 since the activities for this project would be included in N.J.A.C. 7:7A-2.6(a)1 through 5. Construction of a residential project should not be any different than construction of any type of building. It is up to the site engineer to provide the appropriate grading for the site conditions and not be restricted to a 20-foot area around the building. (20)
RESPONSE: The Department agrees that construction of a residential project should comply with the rules just as all other projects must. The Department has extensive experience in administering and enforcing the rules, and it has been the

Department's experience that implementing the rules' requirements in regard to residential projects presents unique and complex problems, described in the proposal summary at 32 NJR 2704. Therefore, the rules are being changed to address these problems in a way that realistically accounts for the actual conditions that Department staff have observed on construction sites and in residential areas where houses are placed immediately adjacent to regulated areas. A site engineer is not restricted to grading within 20 feet of the building. However, grading is a regulated activity (see N.J.A.C. 7:7A-2.6(a)1) that may not be performed in a transition area without a transition area waiver. Therefore, if grading will extend more than 20 feet from the structure, the structure must be placed farther than 20 feet away from the transition area, or a transition area waiver must be obtained.

38. COMMENT: N.J.A.C. 7:7A-6.1(c) is not necessary. The Department can avoid such encroachments into the transition area by requiring that the limits of disturbance associated with project construction be clearly shown on the site plan drawings and on the ground at construction sites. (25)
RESPONSE: The Department disagrees that encroachments into the transition area can be prevented by requiring more accurate construction plans. Despite current requirements that grading be shown on plans submitted with applications, the Department's experience has been that applications routinely omit grading information. Further, even when the plans are accurate, construction personnel on the site often ignore the plans and perform grading and disturbance well beyond the areas shown on the plans.

39. COMMENT: N.J.A.C. 7:7A-6.1(c) seems to imply that you cannot use a Transition Area Averaging Plan for a residential project. The definition of a residential development project already allows an extra 20 feet around the building. This rule is overly restrictive and will greatly inhibit development, particularly on existing individual lots which are generally owned by individuals. The same comment applies to N.J.A.C. 7:7A-6.2(b)5. (20)
RESPONSE: It is not clear why the commenter believes this provision prevents use of an averaging plan for a residential project. While the provision does set limits and conditions on the use of averaging plans and matrix waivers, it does not prohibit use of averaging plans or matrix waivers for residential development. While this particular provision may inhibit some development, the Department believes that these rules, taken as a whole, provide adequate options for development, and appropriately balance environmental and development interests, in accordance with the FWPA.

40. COMMENT: N.J.A.C. 7:7A-6.1(c) prohibits transition area width reductions or waivers unless construction is kept 20 feet away from the transition area boundaries. The stated rationale is to address the inevitable occurrence of prohibited activities in the transition area during construction and use of the building. The Freshwater Wetlands Protection Act addresses the construction issue. At N.J.S.A. 13:9B-17, temporary disturbances resulting from, and necessary for, normal construction activities on land adjacent to the transition area are exempt from the prohibition on activities in transition areas. Thus, this provision is inconsistent with the Freshwater Wetlands Protection Act. The Department notes in the rule summary that it has encountered problems where homes are built adjacent to a transition area and the homebuyer was not made

aware of this situation. If this is the issue being addressed, this is not the way to do it. Addressing future use issues by subjecting all applicants to a new, additional buffer is both inconsistent with the legislation and the legislative history. Any action taken in violation of a Department rule, including this one should be addressed by taking appropriate enforcement action. It is not acceptable to assume all applicants will violate the FWPA and rules at some point in the future and therefore add a new regulatory requirement in anticipation. If it is the determination of the Department that the transition areas established by the FWPA are insufficient to protect the wetlands, then the Department should propose amendments to the FWPA. (34)
RESPONSE: The commenter is correct that the FWPA does not regulate "minor and temporary disturbances of the transition area resulting from, and necessary for, normal construction activities on land adjacent to the transition area…" N.J.S.A. 13:9B-17a. However, it has been the Department's experience that the types of activities that occur in a transition area when a building is constructed directly adjacent to the transition area are not "minor and temporary." Typically, Department staff observe damaging activities during construction, including grading, removal of native vegetation, and planting the transition area immediately surrounding the building with lawn. These are not "minor and temporary disturbances… resulting from, and necessary for, normal construction…" Thus, they do not fall into the category of unregulated activities to which the commenter refers. Regarding use of the transition area by occupants after construction is complete, again the Department's experience has been that few home owners can use a house without performing regulated activities in its backyard, even when they have been made aware that the area is strictly regulated. This is not an assumption regarding future actions by the regulated public, as the commenter suggests. Rather, this is a realistic description of the current behavior of the regulated public, based on thousands of field inspections by Department permitting and enforcement staff, who have observed the activities of construction personnel and those of residents of homes placed adjacent to regulated areas. Thus, the provision is necessary to realistically address an existing problem in a practical way. A legislative amendment is not necessary, as the Department is not expanding the transition area, but is merely recognizing that construction and use of a house of necessity will disturb a larger area than the footprint of the house itself.

41. COMMENT: The 20 foot setback from transition areas is a positive step. There are problems when houses are built right up to the transition area. This results in cutting into the transition area and putting up swing sets and no one wants to tell a family that they cannot put a swing set there. During the pre-proposal stakeholder process on these rules we thought the width was going to be 50 feet. Twenty feet is better than nothing, but we would rather see 50 feet. (47)
RESPONSE: The Department appreciates this comment in support of the rules. The Department believes that twenty feet is a reasonable and conservative estimate of the area which will be disturbed during construction and use of a building.

42. COMMENT: N.J.A.C. 7:7A-6.1(d)1 states that “no prohibited activities” can occur in the transition area. The applicant should be permitted to apply for a waiver for such activities. (20)

RESPONSE: The Department agrees that regulated activities may occur in a transition area or wetland on a site containing a residential development project, if a permit or transition area waiver is obtained for these activities. The rules have been clarified on adoption at N.J.A.C. 7:7A-6.1(d)1 and 2 to indicate this.

43. COMMENT: The provision at N.J.A.C. 7:7A-6.1(d)2 that "..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," should be removed from the regulations. The Department has no authority to dictate ownership rights of private property. This provision is clearly unconstitutional. (20)
RESPONSE: This provision is not intended to dictate private property ownership, or to cause any change in ownership. Instead, it is intended to state a circumstance where it will not be presumed that the placement or use of a building or a structure immediately adjacent to a transition area will inevitably result in regulated activities in the transition area, namely the circumstance where the transition area abuts a residential building site, but the building site and transition area are owned or controlled by different persons. In such a circumstance, construction or use of the residence will be much less likely to result in disturbance of the adjacent transition area, because the owner of the residential site is less likely to disturb an area they do not own or control.

44. COMMENT: Under N.J.A.C. 7:7A-6.1(d)3, fencing the wetland or transition area should be limited to the construction phase of the project. The property owner has the right to access the remaining wetland or transition area on the property. Although "prohibited" and "regulated" activities should not take place within the remaining wetland or transition area, the FWPA rules clearly define activities within wetlands and transition areas that area not "prohibited" and thus are not subject to review and approval by the Department. It is not appropriate to require fences or easements that would restrict these allowed uses. (20)
RESPONSE: Under the FWPA (see N.J.S.A. 13:9B-18b) and N.J.A.C. 7:7A-6.2(b), the Department may approve an averaging plan only if the remaining transition area will continue to serve the functions of a transition area. The Department's experience has been that, when homes are placed in close proximity to a regulated area, homeowners will encroach on the regulated area and perform regulated activities such as clearing of vegetation, placement of fill to level the area, construction of pools, and planting of lawns. These encroachments prevent the transition area from functioning to protect the wetland as required under the FWPA. In some cases these violations are unintentional, caused by confusion over the boundaries of the regulated area, or over the types of activities that are regulated. The Department's experience has been that fencing is an effective way to alert homeowners to the regulated area and to prevent encroachment and damage to the transition area. Therefore, this provision is necessary to ensure that the averaged transition area will continue to serve the functions of a transition area.

45. COMMENT: N.J.A.C. 7:7A-6.1(d)3 requires erection of fencing prior to construction to prevent entrance and/or disturbance of the transition area and/or wetlands. Is this to be permanent fencing or does the Department anticipate removal after construction? (34)

RESPONSE: The fencing must be erected prior to construction and the area must remain fenced permanently. Fencing during construction is necessary in order to prevent regulated construction activities from spilling over into the transition area and/or wetland during construction. The fencing must remain permanently for the reasons set forth in the response to comment 44 above. The rules at N.J.A.C. 7:7A-6.1(d)3 have been clarified on adoption to indicate that the fencing must be permanent.

46. COMMENT: At N.J.A.C. 7:7A-6.1(d)4, strike “disturbance” and replace it with “prohibited or regulated.” The reasoning for this comment is that the FWPA rules clearly define activities within wetlands and transition areas that may be disturbances but that are not “prohibited” and thus are not subject to review and approval by the Department. (20)
RESPONSE: The Department agrees and has made the suggested change.

47. COMMENT: N.J.A.C. 7:7A-6.1(d) establishes criteria which must be met to obtain relief from the 20 foot buffer on the buffer required at 6.1(c). These criteria must all be met, severely restricting the possibility of compliance. To allow flexibility, the Department should require that any one of the criteria be met. This is more than adequate to provide protection from incidental activities in the transition areas. (34)
RESPONSE: The suggested change has not been made. The Department's experience indicates that all of these conditions are necessary to ensure compliance.

48. COMMENT: N.J.A.C. 7:7A-6.2(b)5 states the prohibition on obtaining a transition area waiver if the waiver would result in a residential development project being placed within a transition area or a freshwater wetlands. Why is this prohibition applicable to residential projects only? (34)
RESPONSE: These limits do not apply only to residential projects. The basic provisions are found at N.J.A.C. 7:7A-6.1(c) and (d). These provisions address both residential and non-residential developments. The provision cited by the commenter is intended to refer the reader to these provisions, and has been clarified on adoption accordingly. Note that the provision is recodified on adoption at N.J.A.C. 7:7A-6.2(b)4.

Presumption of hydrology for farmed wetlands:

49. COMMENT: N.J.A.C. 7:7A-2.8(b)5: The requirement to rebut the presumption of wetland hydrology is onerous. If the drainage structures are removed and the area is shown to not be wetland, considerable expense would be incurred to put back the drainage structures. (20)
RESPONSE: If a person does not want to remove drainage structures, the structures can be blocked or otherwise disabled. However, if the area is found to be upland, it is not clear why drainage structures would need to be put back.

50. COMMENT: N.J.A.C. 7:7A-2.8(b)5 provides that if a farm field is tile drained, it is still considered wetlands unless the drains are removed and within one year wetlands hydrology does not appear. This is contrary to Army Corps of Engineers interpretation and should be changed to be consistent. (34)

RESPONSE: Presumably, the commenter is referring to the policy of the U.S. Army Corps of Engineers (ACOE) to label certain wetlands previously drained for farming as "prior converted cropland," and to exempt that land from regulation. The Department does not recognize the concept of prior converted cropland. This is one area in which the Department believes that the unique circumstances of New Jersey, including unusually intense development pressure and a rapidly declining amount of land in agricultural use, justify a standard that is different from the standard that applies nationally.

51. COMMENT: The addition of a presumption of wetlands hydrology for drained agricultural wetlands for LOIs is a strong provision, but we need to know how often it will apply before we can fully support it. How many acres of land will be protected by this presumption of wetlands hydrology? (2, 12, 33)
RESPONSE: The Department does not have data on the number of acres of wetlands in agricultural use that are subject to drainage under the exemption and thus cannot estimate the number of acres that will be affected by this provision. However, regardless of the number of acres affected, the presumption is important because it implements the clear language of the farming exemption, which states that minor drainage under the exemption "does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland."

52. COMMENT: N.J.A.C. 7:7A-2.8(b)5. We strongly oppose the Department's creation of a rebuttable presumption that a drained farmed field has wetlands hydrology. In determining whether a wetlands exists on a site, the Department is compelled by statute to apply the Federal Manual and definitions. The presumption is not authorized under the Federal Manual nor is the requirement that drainage structures be removed or completely disabled for a year in order to establish the character of a site. Each site should be judged on its own merits based upon existing conditions. We have the same comment on N.J.A.C. 7:7A-3.1(d). (29)
RESPONSE: Minor drainage is permitted for agricultural purposes under the FWPA and the Federal 404 program. However, it would be inappropriate for the Department to allow such drainage to continue when a property is converted to non-agricultural uses such as housing or office park development after farming activities stop. Therefore, to appropriately assess the site conditions under the 1989 Federal manual, the drainage structures placed for agricultural purposes must be disabled or removed. The Department believes that the rule is consistent with the portions of the Federal Manual which describe the delineation method for wetlands that have been disturbed by prior human activities such as farming.

53. COMMENT: N.J.A.C. 7:7A-2.8(b)5, and 3.1(d): There is no legal authority for the Department to require that historic drainage structures in a farm field be blocked or removed for purposes of determining whether the field constitutes a wetland. The FWPA contemplates that delineations will be done on properties as they exist at the time of the delineation; there is no requirement expressed or implied that engineering activities are required to change an area from its historic use prior to determining whether it constitutes a wetland. The rebuttable presumption created by these rules and the requirements that drainage structures be blocked or removed should be eliminated. (48)

RESPONSE: The Department disagrees. The rule does not require that drainage structures be removed or disabled. An applicant may instead choose to assume wetlands hydrology for delineation purposes. This is intended to carry out the longstanding and explicit limit on the farming exemption, found in the former rules at N.J.A.C. 7:7A-2.7(b)1i(5) and in the adopted rules at N.J.A.C. 7:7A-2.8(c)1v. This limit states that the farming exemption *"does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland."*

54. COMMENT: It may not be physically possible in many circumstances to remove or completely disable long-existing drainage structures in farm areas. (29, 48)
RESPONSE: If it is impossible to remove or disable drainage structures, the applicant can choose to accept a presumption that the area has wetlands hydrology for delineation purposes.

55. COMMENT: N.J.A.C. 7:7A-3.1(d). The Federal Manual criteria and indicators of wetland hydrology for inland freshwater wetlands are weak at best. It is well established in the relevant literature that hydric soils will retain their gray and mottled appearance for centuries after wetland hydrology has been removed. The Department needs to provide specific guidance on what it requires or is willing to accept in documenting that wetland hydrology has been effectively removed in areas that continue to have hydrophytic vegetation and soils that appear to be hydric. (25)
RESPONSE: As with most aspects of wetlands science, applying the Federal Manual requires the exercise of judgment based on education and experience. In the past, the Department has also accepted the use of monitoring wells to establish whether wetland hydrology is present or not. It has also been the Department's experience that though soil colors may maintain a gray and mottled appearance, herbaceous and shrub vegetation changes quickly in drained wetlands. The Federal Manual is the method required by the FWPA for wetland identification and delineation, and the Department does not believe it is necessary or appropriate for the Department to provide supplemental guidance to the Manual.

56. COMMENT: We applaud the presumption that already farmed wetlands will return to wetland hydrology when the farming stops. The timing there is excellent. (11)
RESPONSE: The Department appreciates this comment in support of the rule.

57. COMMENT: At N.J.A.C. 7:7A-3.1(d), it is unclear what evidence the Department will accept that "all" drainage structures have been removed or that <u>any</u> drainage structures have been effectively "disabled." (25)
RESPONSE: Acceptable evidence of removal or disabling of drainage structures will vary depending on the site and the circumstances. Such evidence could include photographs, direct observation by Department staff during a site inspection, and/or a certified statement that all drainage structures have been removed or disabled.

58. COMMENT: At N.J.A.C. 7:7A-3.1(d), if drained wetlands are to be considered only within the context of agricultural fields, that should be made clear. However, there are other situations where drainage of wetlands has resulted from non-farming practices, such as the long-term efforts of a highway department or

municipal engineering department to improve roadside or areawide stormwater drainage problems. How are these situations to be addressed? Is the Department suggesting that these drainage improvements should be removed or disabled? (25)
RESPONSE: The rules have been clarified upon adoption at N.J.A.C. 7:7A-3.1(d) to indicate that the presumption of wetlands hydrology applies only to farmed wetlands.

59. COMMENT: At N.J.A.C. 7:7A-3.1(d), what does the Department define as a "year of normal rainfall"? Is it a year when precipitation has been within 10% (5%, 1%) of the long-term average for the preceding 12-month (6-month, 3-month) period? For each/most of the preceding 12 (6, 3) months? Also, why should one have to wait a year if the current year happens to be an abnormally wet year and one can demonstrate that a questionable area lacks wetland hydrology. (25)
RESPONSE: The provision has been revised on adoption to refer to a "normal rainfall year" and a definition of "normal rainfall year" has been added to the rule at N.J.A.C. 7:7A-1.4. A normal rainfall year is a 12 month period in which the precipitation is within 10% of the average annual precipitation for a thirty year period determined by the World Meteorological Organization. The reason an applicant must wait a year is that the Department must be able to verify the blockage or disabling of drainage structures before sampling begins.

Section-specific comments:

(Note: if a section of the rules is not included below, this indicates that the Department received no comments regarding that section of the proposed rules.)

SUBCHAPTER 1 GENERAL INFORMATION

7:7A-1.4 Definitions

60. COMMENT: The definition of "conservation restriction," which will be used to determine if a preservation technique is sufficient to qualify for mitigation, should be broadened so as to encourage preservation. The beginning of the definition appropriately states a broad objective: "a restriction ... appropriate to retaining land or water areas in predominantly in their natural ... condition ... or for outdoor recreation or park use…." However, the seven qualifiers that follow would significantly limit the land or waters available for such a restriction. For example, restrictions must blindly limit the construction or placing of buildings, roads, signs or "other structures" regardless of their design to facilitate greater recreational or public enjoyment use value. Similarly, a restriction is required to forbid the removal or destruction of trees, shrubs or other vegetation. Maintenance of such is often necessary to accomplish recreational objectives. The greater the conditions that are imposed in a conservation restriction, the more difficult it is to police the restrictions. The restrictions to be required should be determined not prescriptively, but by examining the objectives for the property and the best method of accomplishing those objectives. (46)
RESPONSE: The Department disagrees that the definition of "conservation restriction" is unduly limited. The proposed definition is based very closely on the definition of this term in the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-2, and the limits included in the

definition are found in that statute, and also reflect the Department's current practice in regard to such restrictions. These limits have so far proved effective in meeting the protection goals of the rules. The commenter's example of a structure provided for recreational use is not an appropriate use of a wetland preserved under a conservation restriction. A conservation restriction is not intended to facilitate use of land for public recreation, but is intended to preserve the land in its natural state so that it will provide the valuable ecological functions that the Legislature intended to protect. Passive use of the land in its natural state, for example as a location for bird watching, is appropriate, but the construction of structures to facilitate recreation is not the intended use of these lands.

61. COMMENT: The proposed definition of conservation restriction requires that the deed be restricted to forbid or limit any removal or destruction or trees, shrubs, or other vegetation, along with the excavation, dredging or removal of loam, peat, gravel, soil, rock, or other mineral substance. These restrictions could impact sound ecological management of the site if some adjustments are needed in order to maintain it as a wetland, and it would make it difficult to perform repairs if problems develop. We appreciate the need to protect a mitigation site from future development, but more flexible language is needed so that the site can be maintained as designed, or so that improvements can be done without having to modify property deeds. (23)
RESPONSE: The Department is confident that the definition will not prevent sound ecological management of a site in order to maintain it as a wetland. See in particular item 5, which allows surface use " … for purposes permitting the land or water area to remain predominantly in its natural condition;" and item 6, which prohibits "[a]ctivities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or fish and wildlife habitat preservation."

62. COMMENT: The definition of "contiguous" includes lands which directly abut or are separated by a roadway or other right of way. The definition is inconsistent with the common meaning of that term. Webster's Collegiate Dictionary (10th Edition) defines contiguous as meaning " "being in actual contact with" and "touching along a boundary or at a point." Properties which are separated by a public road or other right of way and whose boundaries do not touch are not contiguous. Similarly, including property which is part of the same subdivision as of July 1, 1988, in the definition is simply incorrect. The Department already has the authority under its existing regulations to regulate such properties because they were part of a common subdivision as of that date, and not because they are or were contiguous (which they are not unless they share a common boundary). (34)
RESPONSE: This definition of "contiguous" reflects the Department's current and longstanding practice in interpreting this term, and is also consistent with the use of the term in the Department's Coastal Permit Program Rules. Because many limits in the rule are calculated on a per site basis, a person who controls a large area but can define it as several small sites would unfairly be able to increase their allowable amount of disturbance. The definition of contiguous prevents this.

63. COMMENT: The definitions state "...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...." "Contiguous" is defined in

the American Heritage Dictionary as "...sharing an edge or boundary; touching..." Is the definition meant to include only created right-of-ways associated with subdivisions which bisect property and create separate lots? Is the definition meant to include all roads? How can properties separated by roads or waterways be termed "contiguous"? While they may be adjacent or nearby, they do not touch each other's boundary. Under the definition of "site", it states that "...the legal boundary of a property or right-of-way shall be the boundary as it existed on July 1, 1988...." Do access roads created before that date separate property so that properties with a road in between are not contiguous? There will be confusion in the interpretation of this definition unless it is clarified. (21)
RESPONSE: This definition reflects the Department's existing interpretation of this term. In general, if the properties are separated by a general access roadway or other right-of-way, they are considered contiguous. However, because sites vary widely, the definition leaves some flexibility. Regarding the definition of "site," the date upon which the road was created does not affect the determination of whether contiguous properties are one site. The date in the definition relates to the "legal boundary" of a property, irrespective of whether the legal boundary is coextensive with a road.

64. COMMENT: Regarding the definition of "degraded," the example provided of the unvegetated wetland on the shore of a water-filled gravel pit is not appropriate. If a water-filled area is unvegetated, then it would be a State open water and not wetland. A better example would be a farmed wetland. It would be helpful to include a list of noxious or invasive vegetation, including reed canary grass, common reed, purple loosestrife, broad-leaved cattail, multiflora rose, etc. (20)

65. COMMENT: We recommend that the Department return to the definition of "degraded" found in the old rules under "flora," at N.J.A.C. 7:7A-1.4. The proposed definition includes a wetland area characterized by "a predominance (over 85%) of a noxious or invasive type of vegetation." This throws open a potential universe that will widen with time as invasives of one type or another spread throughout the State. It could pave the way for weakening provisions in the regulations in future years. Even though the damage from the phrase would appear to be limited at N.J.A.C. 7:7A-5.27, general permit 27, because of the conditions at subsection (b), the Department should explain the magnitude of acreage expected to be lost under this proposal. We can find no limit on it in the mitigation section at N.J.A.C. 7:7A-15, under which all Phragmites or Purple Loosestrife marshes, to give just two of the more prominent plant instances, would be suitable candidates for mitigation restoration proposals. We call the Department's attention to the NJ Opinion piece: PHRAGMITES: A Dissenting Opinion, which appears in the Winter Issue of NJ Audubon magazine. (32)

66. COMMENT: We are very concerned about the definition of the degraded wetland and the mitigation chapter based on invasive plant species. It is a biological reality that soon every wetland in New Jersey outside of the Pine Barrens will be overrun with invasive species. And once this happens, then all of these Wetlands will fit this definition of somehow being degraded. But when those Wetlands are taken over by invasive species, they often retain most or all of their functions of flood storage and water purification, and those impacts by invasive plants have very little to do with retaining those functions. Any definition anywhere in the rules which gives any type of credence to having a Wetland filled with invasive species

somehow being defined as degraded is a blueprint for disaster in our courts. This will be misused by applicants' attorneys and misinterpreted by the legal system, as history teaches us from past abuses of scientific language in the New Jersey Pinelands. (12, 33)

67. COMMENT: Regarding degraded wetlands, there is nothing in the State Freshwater Protection Act that sets up a tiered system of watershed protection in the State to encourage protecting some wetlands while allowing others to be incrementally degraded and or destroyed. The Clean Water Act requires the Department of Environmental Protection to clean up New Jersey's rivers. Restored wetlands and riparian buffers are essential components of improving water quality, especially where adjacent land use makes non-point sources the major source of pollution. The proposed regulations appear to encourage and expedite wetland filling to encourage redevelopment in urban areas without accounting for the quality of water or the need to further improve water quality in the developed watersheds. These areas may in fact be the most in need of retaining their wetlands and can least afford to have them destroyed. These regulations diminish the mitigation site possibilities within a severely impaired watershed, such as the Cooper River in Camden County. The existing regulation defines this term primarily for the purpose of establishing appropriate mitigation. The proposed definition changes the criteria, apparently for the purpose of relating it to general permit 27. We strongly object to the section of the definition that refers to predominance (over 85%) of noxious or invasive vegetation. If the goal is to improve water quality and protection wetlands, invasive species must NOT qualify urban/ suburban wetlands for issuance of general permits. (38)

68. COMMENT: The existing regulation defines "degraded wetlands" primarily for the purpose of establishing appropriate mitigation. The proposed definition changes the criteria, apparently for the purpose of relating it to general permit 27. We strongly object to the section of the definition that refers to predominance (over 85%) of noxious or invasive vegetation. Almost all of the Hackensack Meadowlands are characterized by Phragmites. This invasive species should not qualify this extremely important area for issuance of general permits. (15)
RESPONSE to comments 64 through 68: The Department proposed a new definition of "degraded" largely to ameliorate problems encountered in recent years in the mitigation program. However, it is clear that the definition has caused more confusion than is justified by the improvement it may provide in the mitigation program. Therefore, the Department has not adopted the proposed definition of "degraded" and will continue to use the definition of "degraded wetland" in the existing rules.

69. COMMENT: More clarity is needed in the definition of "ditch." A ditch is defined as a "linear topographic depression with bed and banks of human construction…." That such a depression may be non-linear should not exclude it from consideration, as the shape should not be a necessary condition of its regulatory status. Also, it is unclear whether the bank and bed must be made from materials of human construction, or whether the bank and bed themselves must result from human construction activity. The latter is better. In addition, the surrounding habitat type (i.e., uplands, wetlands) should be irrelevant, since ditches may have

been constructed long ago and the adjacent land may have reverted to wetlands over time. (46)
RESPONSE: It appears that the commenter infers that the term “linear” necessarily means “straight.” A ditch may curve or bend and still be linear, and if it is not a linear feature it would more likely be classified as a pond or lake. A ditch could have earthen bed and banks that were dug out by humans, and does not necessarily have to have bed and banks of human made materials such as concrete. However, a ditch must have been created by humans. A stream that has been modified by humans is not a ditch. The surrounding land is relevant because ditches are provided less protection under the FWPA than certain other wetlands. However, the Department believes that the Legislature provided less protection to ditches because of their small size and generally degraded condition and consequently lower environmental value. Allowing disturbance of a ditch within a larger wetland would have a much greater effect than the Legislature intended, because it would affect more wetlands than the ditch itself. Further, it is extremely unlikely that uplands surrounding a ditch would "revert" over time to wetlands. Any ditch created in uplands would increase drainage of the upland area, therefore decreasing the possibility that the upland could turn into wetlands.

70. COMMENT: The definition of ditch excludes land which is located within a wetlands. Why are ditches in wetlands not ditches? (34)
RESPONSE: The term "ditch" is used primarily in the provisions classifying a freshwater wetland as of ordinary resource value, and in general permit 7, which allows filling of ditches and swales. In both these contexts, it is the Department's belief that the Legislature intended to cover a linear drainage feature that was originally dug in an upland area, but that had taken on wetland characteristics over time. The Department does not believe that the Legislature intended to assign ordinary resource value to portion of a wetland solely because humans have at some point in the past dug a linear drainage feature through that portion of the wetland. Similarly, the Department does not believe the Legislature intended to allow filling of a portion of a larger wetland because humans have previously dug a linear drainage feature through that wetland.

71. COMMENT: The designation of EPA priority wetlands should be subject to the Administrative Rule Making process. In the absence of adoption of EPA priority wetlands through this process, these designations are invalid. (34)
RESPONSE: EPA published a list of EPA priority wetlands for New Jersey in May 1989, based on criteria adopted by Congress (see 16 U.S.C. '3921). Thereafter, on May 7, 1990, the Department published a Notice of Opportunity for Public Comment on Department Recommendations to EPA Regarding the EPA Priority Wetlands List, at 22 NJR 1387(c). In August 1992 and January 1994, the Department provided those comments to EPA, and in March 1994, EPA published a revised list of EPA priority wetlands. Thus, the EPA priority wetlands list for New Jersey was developed based on Federal law and on criteria set by Congress, as well as on an opportunity for public notice and comment afforded by the Department. The Department believes that the current list derived through this process is legally valid. The Department does anticipate reviewing the priority wetlands list with the EPA, and updating it as appropriate, and will provide an opportunity for comment if any changes are deemed necessary.

72. COMMENT: The use of the agricultural general permits will be greatly limited if the definition of "farmed wetland" is not modified to be consistent with the definition of "established, ongoing farm operation." We recommend that this definition be modified to reflect the rotational fallow state of land as part of active agricultural use. (35)
RESPONSE: The definition has been clarified on adoption to indicate that an area that lies fallow as part of a rotational cycle is still considered to be in "active agricultural use" unless the area lies fallow for more than five years. This is consistent with the use of the term by the Natural Resources Conservation Service (NRCS) in the U.S. Department of Agriculture.

73. COMMENT: We suggest that the definition of "farmed wetland" be modified as follows: after “cropped” insert "or pasture or hayland." The second sentence can then be deleted. (20)
RESPONSE: The Department believes that the definition is sufficiently clear as written.

74. COMMENT: The definition of farmed wetlands should be modified to include prior converted croplands. (34)
RESPONSE: The Department has not made the suggested change. Prior converted cropland is a term that relates to whether a wetland is regulated. The Department must, under the FWPA, regulate all areas that are determined under the 1989 Federal manual to be freshwater wetlands, regardless of whether they meet the criteria in the Federal 404 program for prior converted cropland. Thus, there is no need for the term "prior converted cropland."

75. COMMENT: The term 1989 is omitted from the new definition for the standard for identifying and delineating Wetlands, and could this mean that a different definition such as the 1987 Federal manual could potentially apply in New Jersey? If so, thousands of acres of wetlands would be lost in an instant. (12)
RESPONSE: As part of the rulemaking through which the cranberry general permit was adopted (see 31 N.J.R 2964(a)), a new definition of “Federal manual" was added to the freshwater wetlands rules. This new definition has been in the rules since October 1999, and applies to the whole freshwater wetlands chapter (N.J.A.C. 7:7A). (The definition did not appear in the proposed readoption because, under State rulemaking procedures, definitions that are not being changed in a rule proposal are omitted from the proposal.) As required by the FWPA, this definition of Federal Manual specifies the 1989 Manual only. However, the public has expressed some confusion over this issue, and therefore the Department has, in accordance with the commenter's suggestion, added “1989” to the term “Federal Manual” throughout the rules on adoption, in order to reduce confusion. Note that this change in the term requires that it be relocated at the beginning of the definitions section.

76. COMMENT: Regarding the definition of “freshwater wetland,” tidally influenced wetlands which have not been included on a promulgated map pursuant to the Wetlands Act of 1970 should be excluded from this definition. Tidal wetlands and freshwater wetlands are not comparable systems. The findings and declarations contained in the FWPA acknowledge the State’s previous efforts to protect coastal wetlands, but not inland waterways and freshwater wetlands. Since it is the intent of the FWPA to protect freshwater wetlands, the FWPA rules may not

allow the Department to assert jurisdiction to include tidally-influenced wetlands. Regulated activities in unmapped tidal wetlands will in some manner fall under the jurisdiction of some State or Federal regulation, be it CAFRA, Waterfront Development, Pinelands Comprehensive Management Plan, or Section 404. (20)
RESPONSE: This provision is not new. Contrary to the commenter's assertion, there are large wetland areas that are tidally influenced but that are not protected under CAFRA or other legislation, for example, tidal wetlands north of Raritan Bay. As required by the FWPA, the freshwater wetlands program does not apply to "areas regulated as a coastal wetland pursuant to the Coastal Wetlands Act of 1970." (See N.J.S.A. 13:9B-4c.)

77. COMMENT: I suggest either amending the definition of "isolated wetland" or adding a new definition for "de minimis isolated wetland" which would be: *Any isolated wetland that is less than 400 square feet in area is considered to be de minimis and is not subject to regulation.* This would formalize a practice that I have encountered over the years on the part of some of the Land Use Regulation Program field staff. Tiny, isolated wetlands generally have minimal value. As a practical matter, the time it takes to flag and document them in the field, and then have them surveyed, is disproportionate to any functions or values that they provide. Because the same is true of tiny, isolated upland areas within wetlands (*i.e*., they are not worth the time or effort to delineate separately), there will be virtually no net change in overall wetland acreage identified or impacted. (25)
RESPONSE: The FWPA requires the Department to regulate all freshwater wetlands that are not specifically exempted. There is no FWPA exemption for small isolated wetlands. Even small wetlands can provide some functions such as flood control, water purification and wildlife habitat (for example, vernal habitats), and cumulatively their loss can be substantial.

78. COMMENT: Under the Freshwater Wetlands Protection Act, the hydrologic connection in areas considered "isolated" wetlands should be revisited, especially as it relates to groundwater and ultimately stream flow. (16)
RESPONSE: It appears that the commenter is suggesting that the Department should determine that a wetland is not isolated if it has a groundwater connection to another water. The term "isolated wetlands" is used in only two contexts – general permit 6 and in classifying certain wetlands as ordinary. Presumably, the commenter's goal is to limit impacts under general permit 6. However, the FWPA specifically states that general permit 6 applies to wetlands that are not part of a *surface water* tributary system. Thus, general permit 6 cannot be limited by changing the definition of "isolated wetlands" to exclude wetlands connected to other waters by groundwater alone. Note that the Department has proposed amendments to general permit 6 elsewhere in this issue of the New Jersey Register, which narrow the general permit somewhat.

79. COMMENT: The proposed definition of "isolated wetlands" removes references to State open waters and yet it is possible to find isolated State open waters (e.g., manmade farm ponds). We suggest that the definition be left to include the State open waters. The Department should not eliminate isolated open waters by stating that wetlands that drain to an isolated water are not eligible for general permit 6. The definition of isolated waters and wetlands should be preserved in order to be consistent with both the FWPA and the 404 program regulations which

consider isolated wetlands as not part of a tributary system, that is, as not draining to a stream or river. (20)
RESPONSE: The Department agrees that it is possible to find isolated State open waters. However, including State open waters in the definition of the term "isolated wetlands" is unnecessary. General permit 6 as adopted states that it authorizes "activities in freshwater wetlands, transition areas adjacent to those wetlands, and/or State open waters, if the freshwater wetlands *and/or State open waters* are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream." (It should be noted, however, that general permit 6 does not authorize disturbance of a State open water that is larger than one acre.) It is not necessary to include State open waters in the definition of "isolated" to ensure that State open waters are covered under general permit 6.

80. COMMENT: We believe that the definition of "major discharge" needs to be clarified to reflect that the activities are subject to consultation with USEPA pursuant to the 1993 Memorandum of Agreement between USEPA and the Department. In particular, we note that a draft general permit is not in itself a discharge and including it without clarification in the definition of "major discharge" is confusing. (29)
RESPONSE: The Department has made the suggested clarification upon adoption.

81. COMMENT: The definition of "major discharge" has been so broadened as to include many circumstances which would not ordinarily be considered to be major environmental events, and as such may capture more than was intended. The previous definition was meant to capture significant events; e.g., events that would have impacts such as "a significant adverse effect on a freshwater wetlands"; or "significant reductions in the ecological, commercial or recreational values of more than five acres of a ... wetlands." The proposed definition considerably expands the potential events which could constitute an "major discharge", and includes any discharge "known or suspected" to include a hazardous substance (identified in accordance with CERCLA, TSCA, or RCRA). These lists are broad and were created for various purposes, not the least of which are to further broad regulatory jurisdiction (e.g., CERCLA 101(14) contains a broad list of hazardous substance lists designed to be inclusive as possible under the remedial objectives of the statute). However, while the discharge may connote the propriety of regulatory intervention, it does not automatically equate to a risk, nor automatically an event worthy of significant regulatory intervention. By characterizing any discharge as a "major discharge", the wetlands rules misuse the hazardous substance lists and risk diluting the regulatory effect of the rules. (46)
RESPONSE: The sole purpose of the term “major discharge” is to identify the class of applications or activities which will routinely be referred to EPA for review prior to the Department’s final decision on the application or activity. Thus, the new definition does not have any effect on the Department’s jurisdiction. The list of activities included in the definition of the term “major discharge” is taken directly from the Department’s memorandum of agreement (MOA) with EPA, which forms part of the basis for the Department’s assumption of the Federal 404 program. Since this is already part of the Department’s MOA and is consistent with Federal regulations on this subject, the Department is already legally bound to refer these applications and activities to EPA.

82. COMMENT: For the definition of “Major discharge”, could “reasonable potential” be clearly defined or quantified? (18)
RESPONSE: As mentioned above, the definition of "major discharge" was developed in conjunction with EPA, is found in an MOA between the Department and EPA, and reflects applicable Federal regulations. The term "reasonable potential" is intended to provide some flexibility and discretion to the Department, in order to ensure that appropriate applications are transmitted to EPA for review. Therefore, the Department does not believe that it would be appropriate to try to more specifically define the term.

83. COMMENT: The definition of "palustrine emergent" is really only for emergent wetlands. If it is important for the wetland to also be palustrine, then the definition must also specify that the wetland is nontidal. A definition should be added for Palustrine scrub/shrub wetlands and dredging of these wetlands should be permitted under N.J.A.C. 7:7A-5.13, General Permit 13 - Lake dredging. (20)
RESPONSE: The definition is derived from the "Classification of Wetlands and Deepwater Habitats of the United States," published by the U.S. Fish and Wildlife Service (USFWS). The commenter is correct that the definition as written could include some tidal wetlands. However, as noted in the response to comment 76, some tidal or tidally influenced wetlands are subject to regulation under the FWPA. As to the suggestion that palustrine scrub/shrub wetlands should be covered under general permit 13, this general permit is intended to allow maintenance of a lake, pond, or reservoir. Given the amount of time needed for scrub/shrub wetlands to develop, a well maintained lake should not develop scrub/shrub wetlands. If it has, an individual permit review is necessary to determine whether the wetland is providing functions and values that merit protection.

84. COMMENT: The definition of "part of a surface water tributary system" uses the term "adjacent." Due to the Army Corps’ specific usage of the term “adjacent,” it is recommended that a separate definition for “adjacent” be proposed. (20)
RESPONSE: The purpose of adding the phrase regarding adjacent wetlands was to clarify that wetlands that border on surface waters drain to those waters and thus are connected and part of the tributary system. The definition is necessarily flexible, in order to take into account the wide variety of sites and conditions in the State. Note that amendments which narrow general permit 6, in which this term is used, are proposed elsewhere in this issue of the New Jersey Register.

85. COMMENT: The definition of permit includes transition area waivers. Waivers have never been included as permits before. What is the significance of this change? (34)
RESPONSE: The change is intended solely to allow for a short and simple phrase to describe the approvals available under the rules. By defining a waiver as a type of permit, the rule can now use the term "permit" rather than "permit or waiver." Although this will consolidate approvals, it will not affect the total acreage allowed under a combined general permit and special activity waiver. As stated in the former rules at N.J.A.C. 7:7A-7.4(e)3: "… these waivers shall not be used to double the impact of a specific activity by combining the allowed wetland and transition area impacts." Thus, the former rules limited the total impact arising from a combination of a general permit and a special activity transition

area waiver to the total impact allowed under that general permit. The rules as adopted continue this limit, and will make it easier to ensure compliance with this provision, by putting all impacts under one approval. Of course, as under the former rules, the transition area waiver for disturbance necessary for access to a general permit activity is not counted in the total impact.

86. COMMENT: The definition of "redevelopment" now refers to "other significantly disturbed area". What is meant by this? It would be helpful to include an example. (20)
RESPONSE: The term "redevelopment" is used in two places: in general permit 27 authorizing redevelopment, and in N.J.A.C. 7:7A-6.3 concerning a transition area waiver for redevelopment. Both provisions provide further detail and specificity regarding the meaning of the term "significantly disturbed" as it is used in each context. Therefore, examples in the definition of "redevelopment" are not necessary.

87. COMMENT: The definition of "significant adverse impact" is helpful and should not be deleted unless a replacement is proposed. (20)
RESPONSE: The term is being deleted because it is no longer used in the rules. It was used previously only in the definition of the term "major discharge." Since that definition no longer uses the term, there is no need for the definition.

88. COMMENT: This definition of "site" should not automatically include contiguous parcels. There may be cases, particularly for obtaining an LOI, when an applicant would not want to consider all contiguous parcels in an application. If the Department has included contiguous land parcels in this definition for the purpose of avoiding segregation of projects, then it would be more appropriate to address this in the appropriate section of the rules, rather than in the definition of site. (20)
RESPONSE: The definition of "site" contains the substance of the longstanding definition of the term "onsite." The example cited by the commenter should not be a problem because the rules contain special provisions to allow for LOIs on a portion of a site.

89. COMMENT: The definition of "site" needs further clarification. We support the definition in that it makes clear that properties acquired after July 1, 1988, could each be a separate site and that a new owner of a site acquired after July 1, 1988, will not be limited in their ability to use general permits by virtue of regulated activities undertaken by a prior owner on an adjacent property. We note, however, that the legal boundary of a property may not always be set forth in the Deed for the property. We recommend that the words "or other legally binding document setting forth a boundary" be inserted after the phrase "deeds for the property". This would be more reflective of commercial recording practices. (29)
RESPONSE: The commenter appears to have misunderstood the definition. As stated in the proposal summary at 32 N.J.R. 2701: "The substance of the proposed definition [of site] is found in the former definition of 'onsite'." The Department did not intend to change the substance of what constitutes a site. The definition as proposed did clarify that if a property owner acquires a contiguous lot after July 1, 1988 but does not formally merge the two lots, the new lot will still be added to the total area that constitutes the site. Thus, all properties that were part of a single site as of July 1, 1988, and any contiguous lots that were acquired and/or merged with the original property, remain part of the same

site. This clarification was intended to address a situation in which two different property owners each bought a lot contiguous to their property, and one formally merged the two lots while the other did not. Under the previous definition of "onsite," it was not clear that the Department would treat the two new lots in the same way, that is, as part of the site. However, the intended clarification has apparently caused some confusion. Therefore, the definition has been further clarified upon adoption to address this confusion. The commenter's suggested addition to the definition, clarifying that documents other than deeds may sometimes set forth the boundaries of a property, has also been incorporated into the rules on adoption.

90. COMMENT: Regarding the definition of Soil Conservation District, it would be appropriate to add the phrase "established pursuant to N.J.S.A. 4:24-1 et seq." to the definition of soil conservation districts. (35)
RESPONSE: The suggested change has been made upon adoption.

91. COMMENT: We support in general the Department's proposed clarification of the definition of "State open waters". In addition, however, we suggest that cooling ponds excavated on dry land be added to the list of excluded waters. (29)
RESPONSE: The Department appreciates this comment in support of the rule, but does not believe a clarification is necessary. A cooling pond excavated in uplands would be excluded from the definition of "State open water" under item 3 in the adopted definition of "State open waters." Item 3 includes: 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. Although cooling ponds are not specifically listed, they are "ponds created by excavating and/or diking dry land to collect and retain water" and are used for purposes that are similar to the examples listed in item 3 and thus would not be considered State open waters.

92. COMMENT: The definition of "stormwater management facility" at existing N.J.A.C. 7:7A-7.4(b) provides much better clarity and should be continued. (15)
RESPONSE: The Department agrees that the existing definition is clearer than the proposed definition, and has therefore not adopted the proposed new definition. Instead, the existing definition (found in the previous rules at N.J.A.C. 7:7A 7.4(b)) has been recodified on adoption in the definitions section at N.J.A.C. 7:7A-1.4.

93. COMMENT: Regarding the definition of "swale," what is meant by "surrounded by uplands"? The definition does not seem to allow the possibility for a swale to discharge to a wetland. Swales almost always discharge to something, usually a wetland or a State open water. Just because a swale discharges to wetland does not mean it is an undulation in the wetland boundary. (20)
RESPONSE: The definition has been clarified on adoption to indicate that it is surrounded by uplands <u>except where runoff flows out of it</u>.

94. COMMENT: The Pinelands Commission designates endangered and threatened species for the Pinelands in accordance with the Pinelands Protection Act (N.J.S.A. 13:18A-1 et seq.). These species are important components of the Pinelands ecosystem and as such are subject to the Commission's standards aimed at preserving, protecting and enhancing the diversity of Pinelands plant

and animal communities. We therefore request that the definitions of "Endangered" and "Threatened" species be expanded to include any species designated as endangered or threatened species by the Pinelands Commission in the Pinelands Comprehensive Management Plan (CMP). (3)
RESPONSE: The Department agrees that Pinelands Commission-designated threatened or endangered species are important. However, the FWPA specifically defines "threatened or endangered species" for the purposes of the resource value classification of a wetland (see N.J.S.A. 13:9B-7d) by reference to the State and Federal endangered species laws. Therefore, for classification purposes, the Department cannot add Pinelands species to the definition of "threatened or endangered."

95. COMMENT: Under the definition of "utility line," there needs to be further clarification or additional language. Electrical energy is transmitted via conductors over towers and poles (steel or wood), thus the word "pole" should be included in addition to tower. The word "conduit" should also be included as underground wires are placed in conduits similar to oil or gas being transported through a pipeline. (5)
RESPONSE: The terms "pole" and "conduit" have been added on adoption for clarification as suggested.

96. COMMENT: The definition of "vernal habitat" would suggest that applicants will be required to monitor all isolated wetlands or waters for a minimum of one year prior to submitting an LOI application and to provide documentation that at least one of the four criteria is not met in order to demonstrate that the isolated area is not a vernal habitat. Is that what is intended? Has the Department mapped vernal habitats? Does it plan to do so? Lacking documentation to the contrary, will all isolated wetlands/waters, mapped or unmapped, be presumed by the Department to be vernal habitats? If so, that should be clearly stated. (25)
RESPONSE: The Department is currently developing a list of certified vernal habitats, which is expected to be completed on or before September 4, 2001. The Department is also developing a detailed protocol setting forth the method it uses to certify vernal habitats. If a general permit 6 application is submitted for activities in an area on the list of certified vernal habitats, the Department will deny authorization for activities unless the applicant can demonstrate that the area is no longer suitable for use by a vernal habitat species. If the area is not a certified vernal habitat at the time of the application, but the Department receives evidence that, if confirmed, would be sufficient to certify a vernal habitat on the site, the final decision on the application will be delayed until the Department can determine whether the evidence of a vernal habitat on the site can be verified. If the evidence is verified, the area will constitute a certified vernal habitat and the general permit 6 authorization will be denied. The list of certified vernal habitats will be updated on an ongoing basis as the Department receives more data on vernal habitats around the State. This system will fairly balance the burden of identifying vernal habitats between the Department and the applicant. The Department anticipates making the vernal habitat certification protocol available on the Land Use Regulation Program website at www.state.nj.us/dep/landuse by September 4, 2001.

97. COMMENT: In defining a vernal habitat, what special credentials, if any, or level of field investigation will be required to convince the Department that none of the

obligate or facultative species listed in Appendix 1 is found in the pool? This should be stated. (25)
RESPONSE: The Department does not anticipate requiring a demonstration that no vernal habitat species are found in an area that may be a vernal habitat. If the area is not on the Department's list of certified vernal habitats, and the Department does not receive evidence that the area is a vernal habitat, the Department will presume that the area is not a vernal habitat. If an area is a certified vernal habitat, an applicant may seek to have the area decertified as a vernal habitat, by demonstrating to the Department that the area is no longer suitable for use by vernal habitat species. However, the Department does not plan to accept surveys showing that a vernal habitat species cannot be found as evidence that the area is no longer a vernal habitat. Instead, the applicant must present evidence that the area is no longer suitable for use by vernal habitat species. For example, if record-breaking flooding has eroded the land and changed the topography so that the area no longer maintains ponded water for at least two continuous months between March and September (see item 3 in the definition of "vernal habitat"), the area would no longer be suitable for use by vernal habitat species, and the Department would rescind its certification as a vernal habitat. The preference for evidence regarding habitat suitability over surveys reflects the fact that surveys tend to be unreliable in establishing the presence or absence of vernal habitat species. A survey captures only a "snapshot" of conditions over a short time period, and does not reflect long term conditions. Populations of vernal habitat species fluctuate and may not be present in some years. Vernal habitat species are small, mobile and shy, and may move around in and adjacent to the vernal habitat depending on weather conditions and breeding habits. A survey that does not find members of a vernal habitat species does not necessarily indicate that the vernal habitat species does not continue to use the area. Further, surveys are expensive and time-consuming, and surveys for vernal habitat species can only be performed during a short period each year. Therefore, the Department believes that evidence regarding the continuing suitability of the habitat is a more scientifically valid and more practical way of determining whether an area that was previously certified as vernal habitat should be decertified.

98. COMMENT: In defining a vernal habitat, what does the Department define as a "normal rainfall year"? Is it one in which precipitation has been within 10% (5%, 1%) of the long-term average for the preceding 12-month (6-month, 3-month) period? For each/most of the preceding 12 (6, 3) months? The term "normal rainfall year" should be defined. (25)
RESPONSE: A definition of "normal rainfall year" has been added to the rule on adoption at N.J.A.C. 7:7A-1.4. A normal rainfall year is one in which the precipitation is within 10% of the average precipitation for a thirty year period determined by the World Meteorological Organization. This is similar to the definition used by the Natural Resources Conservation Service.

99. COMMENT: In defining a vernal habitat, if an area "dries up at some time during the year," can it be any year or must this also be a "normal rainfall year"? This should be made clear. As written, the process for determining a vernal habitat is not sufficient to guide applicants or their consultants in supplying necessary information to the Department. (25)

RESPONSE: The Department has clarified the definition to indicate that a vernal habitat must dry up at some time during a normal rainfall year.

100. COMMENT: Regarding the definition of “vernal habitat” (referenced in 7:7A-5.6(c)5), Eastern painted turtle and snapping turtle should not be included as facultative species found in vernal habitats. The presence of these two species does not indicate vernal habitat. They are more commonly found in areas of permanent water where fish are present and amphibians, particularly salamanders, are more rare. The presence of amphibians, salamanders in particular, is much more indicative. Spring peepers should be removed from the facultative list as they are also not restricted in habitat to vernal pools, they may breed in wet meadow and even corners of farm fields. Slimy salamander could be added as a facultative species. (20)
RESPONSE: The Department's vernal habitat species list is closely modeled on the list used in Massachusetts, which reflects Massachusetts' ten years of experience regulating vernal habitats. While the Department agrees that Eastern painted turtle and snapping turtle are not restricted to vernal habitats, both turtle species have been found to use vernal ponded habitats for foraging on a seasonal basis. Because these species feed on the eggs, young, and breeding adults of other vernal habitat species, their presence indicates active breeding populations of these other species. The Massachusetts Division of Fish and Game found sufficient evidence of vernal pool use by these reptile species to include them on the Massachusetts list of facultative vernal pool species, for the purposes of the Massachusetts vernal pool habitat protection program. Maine and Connecticut also identify these species as facultative vernal pool species. Regarding spring peepers, while it is true that this species will be found across a wide spectrum of wetland habitat types, they are also know to breed in vernal pools. One study in Connecticut found significant use of vernal pools for breeding by this species. Spring peepers are also included on the Massachusetts, Maine and Connecticut lists of facultative vernal pool species. Slimy salamanders are known to occur on moist wooded hillsides and rocky, ravine slopes, but are not known to breed in vernal habitats. For the reasons discussed above, the Department has not made the commenter's suggested changes. However, some changes have been made to Appendix 1 on adoption to ensure that it reflects the most current research on the species which use vernal habitats. The Long-tailed Salamander has been moved on adoption from the list of obligate species to the list of facultative species, to better reflect the species use of and reliance on vernal habitats. Tremblay's salamander and silvery salamander have been removed from the list of obligate species because they are no longer recognized as separate species but in fact are hybrids within the Jefferson salamander species. A new species recently identified, the Jefferson x blue-spotted salamander, has been added to the list of obligate species. This species is a cross between the Jefferson salamander and the blue-spotted salamander, two species already listed as obligate species. The eastern spadefoot toad has also been added to the list of obligate species. This species is on the Massachusetts vernal habitat list, but was omitted from the Department's proposal. The finally, wood turtle has been added to the list of facultative species, based on recent studies in Massachusetts which have shown wood turtles to use vernal habitats on a seasonal basis.

7:7A-1.6 Other statutes and regulations

101. COMMENT: N.J.A.C. 7:7A-1.6(b): The rule proposal states that the Freshwater Wetlands Protection Act shall "supersede any law or ordinance enacted by any municipality, county, or political subdivision thereof, regulating freshwater wetlands or freshwater wetlands transition areas." This is somewhat misleading considering provisions at N.J.S.A. 13:9B-6 which state that "Activities in areas under the jurisdiction of the Pinelands Commission pursuant to P.L. 1979, c.111 (C.13:18A-1 et seq.) shall not require a freshwater wetlands permit, or be subject to transition area requirements established in this act, except that the discharge of dredged or fill material shall require a permit issued under the provisions of the Federal Act, or under an individual and general permit program administered by the State under the provisions of the Federal Act and applicable State laws, provided that the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetlands areas within its jurisdiction." The Pinelands Commission has adopted standards for the protection of wetlands which are generally more stringent than those adopted by the Department pursuant to the Freshwater Wetlands Protection Act. Presently, 51 of the 53 Pinelands municipalities have incorporated these standards into their land use ordinances and have received certification that the ordinances are consistent with the CMP. The statement proposed at N.J.A.C. 7:7A-1.6(b) could be interpreted as applying to these municipalities which could raise a substantial amount of confusion for the Pinelands municipalities and the regulated community. We therefore request the following amendment to proposed 7:7A-1.6(b): Except those lands within the Pinelands Area, [T]the Freshwater Wetlands Protection Act, on and subsequent to July 1, 1998, shall supersede any law or ordinance enacted by any municipality, county, or political subdivision thereof, regulating freshwater wetlands or freshwater wetlands transition areas." We suggest that this language be tracked in the second sentence of this section instead of using the phrase "With the exception of political subdivisions under the jurisdiction of the Pinelands Commission..." This will serve to prevent any confusion regarding those municipalities which are not entirely within the Pinelands Area. (3)
RESPONSE: The Department agrees that the Freshwater Wetlands Protection Act allows the Pinelands Commission to provide for more stringent regulation of activities in and around freshwater wetland areas within the jurisdiction of the Pinelands Commission. Accordingly, the Department has modified the cited provision on adoption to include the statutory language at N.J.S.A. 13:9B-6.

7:7A-1.7 Hearings and appeals

102. COMMENT: In the contents of the program, the rules place appeals at the very beginning of the proposal. This placement gives appeals and hearings unnecessary emphasis before the rules define the regulations that can be appealed. (15)
RESPONSE: The provisions for hearings and appeals are placed at the beginning of the chapter solely because they fit under the category of "general provisions." The Department does not believe that the placement of these provisions gives unnecessary emphasis to appeals.

103. COMMENT: N.J.A.C. 7:7A-1.7(e): We oppose offering dispute resolution as an option to an appeal. The law quite clearly makes no provision for dispute resolution and this undercuts the appeal process whereby the judiciary should establish whether dispute resolution is appropriate. The process is moved further from the public arena, or the judicial branch of government and placed in a private setting. While assignment to the office of dispute resolution by the Department may be appropriate in some cases, it should not be arbitrarily imposed by a Department that may be a party to the dispute. That offer should be left in the hands of the court, not the Department. (11, 12, 15)

104. COMMENT: We oppose the alternative of mediation to the normal appeals process, and believe that legal questions should be dealt with in a legal context. No information regarding issues such as: who will serve as mediators, the format of the mediation, whether it would be binding, and whether it involves the surrender of legal rights, is spelled out in the proposal. If mediation were freely chosen by both sides, local watershed groups and municipal residents should be fully informed and given the opportunity to participate. The provision leaves too many unanswered questions. (44)
RESPONSE to comments 103 and 104: The Department has an Office of Alternative Dispute Resolution, which may mediate disputes that would otherwise be referred to the Office of Administrative Law as contested cases. The Administrative Procedure Act rules do not require all disputes to be referred to an Administrative Law Judge, nor do they preclude amicable resolution of disputes, and such resolutions are often less costly and time-consuming than more formal adjudicatory proceedings. The Office of Alternative Dispute Resolution does not engage in mediation unless both sides agree to it, and can also include third party objectors in the discussions if all sides agree. In addition, the adopted rules include N.J.A.C. 7:7A-1.7(h), which requires public notice of an intent to settle if the settlement would result in approval of a regulated activity, a 30-day comment period on the proposed settlement, and notice of any final settlement in the DEP Bulletin. The Department believes that this public notice and comment requirement allows for appropriate public participation prior to the finalization of any settlement reached through mediation.

105. COMMENT: N.J.A.C. 7:7A-1.7(f): We take strong issue with there being an automatic stay of the operation of a permit or transition area waiver upon submittal of a hearing request to the Department. If the permittee requests a hearing to challenge a particular condition in a permit, but is willing to comply with all the other conditions in a permit, those conditions should remain in full force and effect and the permittee should be allowed to proceed with the regulated activity at risk. Including the automatic stay provisions has a chilling effect on a permittee's ability to exercise their due process right to a hearing. (29)

106. COMMENT: Under N.J.A.C. 7:7A-1.7(f) as proposed, when a request for a hearing is received, the operation of a permit will automatically be stayed. This could be used to delay the start of many projects for what may only be frivolous reasons. A third party challenging the issuance of a permit should have the burden of showing that a stay is necessary. We suggest that the reverse of the proposal be implemented, that is, if a request for a hearing is received, the permit will remain in effect unless the Department decides otherwise for good cause. (23, 29)

RESPONSE to comments 105 and 106: As indicated in the proposal summary at 32 N.J.R. 2702, the automatic stay provision was intended to apply to a permittee who requests a hearing on a permit issued to them. The provision has been clarified on adoption to indicate that the proposed automatic stay applies only where the hearing requester is the permittee. (Also note that if a permittee begins construction, the permittee is deemed to have accepted all terms and conditions of the permit under N.J.A.C. 7:7A-13.1(c).) Any other hearing requester must request and show good cause for a stay.

107. COMMENT: Environmental organizations should have "standing" within the Department to appeal decisions on wetland permits. (16)
RESPONSE: The Administrative Procedure Act, at N.J.S.A. 52:14B-3.3, states that "Except as otherwise required by Federal law or by a statute that specifically allows a third party to appeal a permit decision, a State agency shall not promulgate any rule or regulation that would allow a third party to appeal a permit decision." Thus, environmental organizations, like all other persons, have a right to a third party hearing only if that right is granted by a statute, or is based on constitutional grounds.

SUBCHAPTER 2 APPLICABILITY

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

108. COMMENT: N.J.A.C. 7:7A-2.1(d): We are concerned that the Department will use the provision applying the Freshwater Wetland Protection Act Rules to the issuance of water quality certifications as a basis to obtain jurisdiction when it would otherwise not be applicable. The regulation should indicate that the rules will not apply in any area where the Department is not authorized to regulate under the Freshwater Wetlands Protection Act. (29)
RESPONSE: The Department does not believe that this will lead to regulation where it is not authorized. A water quality certificate (WQC) is a Federal requirement under Section 401 of the Clean Water Act (33 U.S. C. '1341), and is triggered when a Federal permit is sought from a Federal agency. N.J.A.C. 7:7A-2.1 simply provides the standards used in such instances. The Department has added language on adoption to the definition of "water quality certificate," indicating that a WQC is required only for activities that require a Federal permit. N.J.A.C. 7:7A-2.1(d) has been clarified on adoption to indicate that a freshwater wetlands permit constitutes the WQC only for an activity that is covered by the FWPA rules.

109. COMMENT: N.J.A.C. 7:7A-2.1(d): A wetlands permit constitutes a water quality certificate, according to practice and the rules. The definition of Water Quality Certificate merely refers to the Water Pollution control standards. The Department has not established water quality standards for wetlands. These standards are needed to make this certificate meaningful. In the meantime, a certificate should only be issued if the project meets Best Management Practice standards of the Department as spelled out in the BMP manual. We strongly object to the certificate being issued automatically with each permit. (15)
RESPONSE: On adoption, N.J.A.C. 7:7A-2.1(d) has been clarified to indicate that the WQC issued under the freshwater wetlands rules covers only activities governed by this chapter. This will avoid confusion, since other Department rules

govern the issuance of WQCs for other types of activities. The Department has several BMP manuals for different activities. It is not clear to which of these manuals the commenter refers. Because the Department does not yet have separate rules governing WQCs, there is little benefit to requiring a separate WQC when a permit is issued.

110. COMMENT: Include the EPA guidance for water quality standards for wetlands as a logical follow up on those proposed earlier by the Department (possibly in 1996), but never adopted. (2, 12, 33)
RESPONSE: The commenter is apparently referring to EPA regulations at 40 CFR '230.1, commonly referred to as the "404(b)1 guidelines." The Department's freshwater wetlands rules are already very similar to these standards. Numerical discharge standards for wetlands have not yet been developed by EPA or the Department. It is unclear to what earlier Department proposal the commenter refers.

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

111. COMMENT: Under N.J.A.C. 7:7A-2.2(a)2i, a new regulated activity is "Adding or impounding a sufficient quantity of stormwater to modify existing vegetation, values or functions of a wetland". The result of this could be a requirement to prove that vegetation will not change over time. This could be difficult to prove. If a stormwater discharge has met the Soil Conservation Service (SCS) requirements and the pretreatment requirements of the rules, as well as the Department's stream encroachment program criteria, those approvals should suffice to show there is no undue impact. (29)
RESPONSE: This is not a new regulated activity. Rather, it is merely a consolidation of former rule provisions describing the activities regulated under the chapter. Former N.J.A.C. 7:7A-2.3(a)2 listed "drainage or disturbance of the water level or water table" as a regulated activity. Former N.J.A.C. 7:7A-1.4 defined "disturbance of the water level or water table" and that definition included the language of the provision cited by the commenter (N.J.A.C. 7:7A-2.2(a)2i). Since vegetation is affected by a disturbance of the water level or water table, vegetation is one of the factors that the Department will consider in determining if there has been such a drainage or disturbance. The commenter suggests that any stormwater discharge that meets certain standards (SCS requirements, pretreatment requirements of the freshwater wetlands rules, and stream encroachment program requirements) should be considered not to have an "undue impact." Presumably, the commenter is suggesting that such discharges should not be considered to be "drainage or disturbance of the water level or water table" and therefore should not be regulated. However, drainage or disturbance of the water level or water table is a regulated activity because draining or impounding water, especially over a long period of time, can have substantial adverse impacts on a wetland, and can damage or destroy wetland flora and fauna. The standards listed by the commenter indirectly address a few of these adverse impacts, but none of the standards address, for example, the destruction of vegetation that would result from long term inundation of wetlands plants, or the destruction of vegetation that would result from lowering of the water level or water table.

112. COMMENT: We support proposed N.J.A.C. 7:7A-2.2(b), which would regulate discharges in non-delegable State open waters under the Waterfront Development Law where appropriate. Under such circumstances, the rules should clearly indicate that the Waterfront Development permit, and not a Freshwater Wetlands Protection Act permit, shall constitute the water quality certification for such a project. (29)
RESPONSE: This was stated in the proposal, and is stated in the adopted rule, at N.J.A.C. 7:7A-2.1(d), which states that "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." Since activities that require a Waterfront Development Permit would only take place in the Coastal Zone, this provision would apply to these activities.

113. COMMENT: We support the rule at N.J.A.C. 7:7A-2.2(c)1 that allows surveyors to perform their surveys within the wetland without obtaining a permit. This will help the consumer in the future to know exactly where the wetlands lines are located by having them accurately shown on the surveys. (53)
RESPONSE: The Department appreciates this comment in support of the rule.

114. COMMENT: N.J.A.C. 7:7A-2.2(c)3: Regarding non-regulated activities, we strongly support the exemption of guy anchors in regulated wetlands. However, the dimensions need to be increased to reflect current transmission requirements and site specific conditions. Specifically, a guy anchor is typically no more than 12 inches long above ground (not including the 2 foot rod extending to the pole) with the helix size of 15 inches in diameter. The helix and the portion of the 2 inch diameter rod below ground can be 30 feet into the soil depending upon the soil conditions. However, the maximum soil disturbance is still only 15 inches at ground level. (5)
RESPONSE: The Department acknowledges that the dimensions included in the proposed rule would allow placement of a guy anchor that would not serve its intended purpose. The provision has been clarified to indicate that, for a guy anchor to be unregulated, it must disturb an area no more than 15 inches in diameter.

115. COMMENT: N.J.A.C. 7:7A-2.2(c)4 clarifies that the hand trimming of trees and other vegetation that does not alter the character of a wetland is not a regulated activity. We support this clarification, as it helps to decide when a permit will be necessary. (23)
RESPONSE: The Department appreciates this comment in support of the rule.

116. COMMENT: Regarding N.J.A.C. 7:7A-2.2(c)4, the Department has defined that "hand trimming of trees and vegetation that does not alter the character of the wetland" is not regulated. Please clarify whether manual/hand cut trees are required to be removed from wetlands or buffer areas. Is there a distinction between tree-trimming and cutting trees at the base if both activities are done manually? (5)
RESPONSE: The standard for determining whether vegetation must be removed is whether leaving the cut vegetation in the wetland would alter the character of

the wetland. For example, if large quantities of vegetation are trimmed by hand, allowing them to remain in the wetland is likely to alter the character of the wetland and they must be removed. Similarly, the standard for determining whether manual cutting of a tree at its base is a regulated activity is whether such cutting would alter the character of the wetland in which the tree is located. While the cutting of one tree would not usually alter the character of a wetland, as more trees are cut, at some point the character of the wetlands will be altered. However, it is not possible to address every possible scenario in the rules. For more guidance, applicants can contact the Land Use Regulation Program's Jurisdictional Determination (JD) unit at (609) 633-6755.

117. COMMENT: N.J.A.C. 7:7A-2.2(c) does not include installation of fencing as a non-regulated activity. Installation of fencing should be included. The installation of a fence where there is no associated cutting down of trees would have no impact on the wetlands. In some instances homeowners seek to put up fences for safety or game (e.g. deer, bears, etc.) management reasons. These should be allowed. (34)
RESPONSE: As stated on page 2697 of the proposal in the Summary, the possibility of a general permit for fences in wetlands was 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. In addition, the discussion at the public meeting revealed that the environmental impact of a fence will vary widely, depending on the site, the type of wetland, and the type of fence. Thus, the Department determined that deregulating fences would be inappropriate.

7:7A-2.3 Identifying freshwater wetlands

118. COMMENT: The reference to Federal Manual should clarify that it is the 1989 EPA method NJ uses so applicants make no mistake as to which to use. (15)
RESPONSE: The Department agrees that this would clarify the rules, and has made this change throughout the rules.

119. COMMENT: N.J.A.C. 7:7A-2.3(e) should include, not remove, language that states that the Department's maps cannot be used for site-specific information. (15)
RESPONSE: The Department has added a clarifying phrase to this subsection to ensure that the regulated public understands that the maps are for guidance only.

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

120. COMMENT: At N.J.A.C. 7:7A-2.4(d), the definition should read "or an ordinary <u>resource</u> value wetland" consistent with the other resource value definitions. (20)
RESPONSE: The Department agrees and has made this clarifying change.

121. COMMENT: N.J.A.C. 7.7A-2.4(d)4. Detention facilities created in upland areas should not be construed as wetlands. As proposed, the basin will become classified as wetlands and the surrounding property owners may be faced with

burdensome regulations and undue hardship. The Department should explicitly remove detention facilities from the regulation. (46)
RESPONSE: A well maintained detention facility should not develop into a wetland and thus would not be regulated. A detention facility that does not meet the definition of a wetland is not regulated as a State open water, in accordance with the definition of "State open water" at N.J.A.C. 7:7A-1.4. However, if a detention basin has developed wetlands characteristics and meets the FWPA definition of a wetland, the Department is required under the FWPA to regulate it as a wetland. A person who wishes to avoid regulation of a detention facility can do so by ensuring that it is well maintained in accordance with its original design.

122. COMMENT: N.J.A.C. 7:7A-2.4(d)4: Inclusion of detention facilities here implies that they will be regulated like other wetlands. However, detention facilities are excluded in the definition of State open waters. Therefore, it appears that detention facilities will be regulated differently depending upon whether or not they have wetland features. This apparent inconsistency does not seem justifiable. We acknowledge the easing of regulation of these wetlands under the general permit provisions; however, the Department should specifically exclude regulation of wetlands that have formed in off stream detention basins in the definition of freshwater wetlands. (20)
RESPONSE: A detention facility is regulated differently depending on whether it meets the FWPA definition of a wetland. The Department believes that this is appropriate and that it complies with the FWPA. The FWPA does not exempt a wetland from regulation merely because it has formed in a detention basin. However, the Department has historically interpreted the definition of "State open waters" to exclude stormwater basins created in uplands, and has clarified this in the definition of the term at N.J.A.C. 7:7A-1.4, as proposed and adopted. This reflects not only the statutory scheme, but also the relatively greater environmental value of wetlands as compared with open waters. A person who wishes to avoid regulation of a detention facility can do so by ensuring that it is well maintained in accordance with its original design, so that it does not develop the characteristics of a wetland as defined by the FWPA.

123. COMMENT: One clear environmental strengthening in the proposal is the recognition of the importance of vernal ponds, especially for frogs, toads and salamanders. However, they only receive protection under general permit 6, which covers wetlands that are not part of surface water tributaries. We think that the Department has made an excellent case for the presumption that vernal habitats are “exceptional resource value wetlands” under the classification system listed in the law at 13:9B-7(a)2 . Granting them an explicit presumption there would shield them from the issuance of a number of other general permits, which are prohibited for this type of wetland. (32)
RESPONSE: The Department agrees that the prohibition on use of general permit 6 in vernal habitat will strengthen environmental protection, and the Department will consider extending this protection under other general permits. However, the Department cannot classify all vernal habitats as exceptional resource value wetlands. The class of exceptional resource value wetlands is set forth in the FWPA and does not include vernal habitats per se. However, it does include any vernal habitats that are habitats for threatened or endangered species.

124. COMMENT: We recommend that most wetlands in the Passaic River Basin above Little Falls be listed as having exceptional resource value. In order to be classified as a wetland of "exceptional resource value," a wetland must now be adjacent to a stream segment that is classified as "trout production" (TP). None of the wetlands in the Central Basin, and very few of the wetlands in the Highlands portion of the basin are associated with TP streams. Thus, most of the wetlands are classified as of "intermediate value." This means that transition areas are only 25 to 50 feet wide. This width is insufficient to protect wetland functions. Wetlands by their very nature are not conducive to trout production. Therefore, the present water quality classification system is inappropriate and irreparable. We suggest that until a workable system can be devised, the Department declare that all wetlands in the Passaic River Basin above Little Falls are of "exceptional resource value." Such a decision would be fully justified under the public health and safety provisions of the New Jersey Constitution. (16)
RESPONSE: The Department cannot declare all wetlands in the Passaic River Basin above Little Falls to be exceptional resource value, but must base an exceptional resource value classification on the criteria in the Freshwater Wetlands Protection Act. That Act specifies that exceptional resource value freshwater wetlands are wetlands which discharge into FW-1 waters or FW-2 trout production waters and their tributaries, as well as wetlands which are present or documented habitats for threatened and endangered species. The Department notes, however, that freshwater wetlands within the Passaic River Basin that have been designated as priority wetlands by EPA are afforded some greater protections, for example general permits 6 (non-tributary wetlands) and 7 (ditches and swales in headwaters) are not available in EPA priority wetlands.

125. COMMENT: A policy should be established regarding the existence of endangered/threatened species that are not reported by applicants. Such species that exist in wetlands for three seasons of the year should make the wetlands at the site "exceptional." (16)
RESPONSE: The adopted rules include language at N.J.A.C. 7:7A-10.1(f) specifying that an applicant or applicant's agent who fails to report all required information of which the applicant or the agent is aware is subject to penalties. This would include any information pertaining to threatened or endangered species. If there is a threatened or endangered species that exists in a wetland for three seasons, the wetland would be classified as exceptional resource value under N.J.A.C. 7:7A-2.4(b), regardless of whether the applicant reports it.

126. COMMENT: "Ordinary" wetlands in developed areas serving impaired waterways should have a high value characterization as they are in such short supply and perform important biological diversity functions. This is another instance when a mitigation inventory could be valuable. (38)
RESPONSE: The FWPA defines the resource value of a wetland and does not link the classification to whether the wetland serves an impaired waterway. The Department agrees that mitigation inventories are valuable and encourages counties and local groups to inventory wetlands suitable for mitigation.

7:7A-2.6 Prohibited activities in transition areas

127. COMMENT: The use of the words “prohibited activities” for activities in transition areas is misleading and should be replaced with the words “regulated activities". The term "prohibited activities" is confusing since these activities are allowed under the rules via a waiver. (20)
RESPONSE: The Department agrees. The proposal and the former rules follow the language of the FWPA, which labels those activities that are regulated in transition areas as “prohibited activities” and those activities that are regulated in freshwater wetlands as “regulated activities.” However, due to the amount of confusion that this terminology appears to generate, the Department has, on adoption, renamed throughout the rules all activities regulated in either transition areas or freshwater wetlands as “regulated activities.”

128. COMMENT: We strongly object to continuing transition area exemptions. The proposed exemption at N.J.A.C. 7:7A-2.6(c)does not meet the requirements of the FWPA. (15, 38)
RESPONSE: It is unclear why the commenter believes these transition area exemptions do not comply with the FWPA. The exemptions are all based on N.J.S.A. 13:9B-4, which also provides that projects not subject to the jurisdiction of the Army Corps of Engineers, and for which preliminary site or subdivision approvals were obtained prior to the FWPA's effective date shall not require transition areas. The courts have established that for purposes of transition areas, the FWPA became effective on July 1, 1989 (see Appeal of Adoption of N.J.A.C. 7:7A-1.4, 118 N.J. 552 (1990)), and that, unlike wetlands exemptions based on specified municipal land use approvals, transition area exemptions did not automatically terminate when the Department assumed permitting jurisdiction from the Army Corps of Engineers in March 1994 (see In re MCG Associates, 278 N.J. Super 108 (App. Div. 1994)).

129. COMMENT: Regarding N.J.A.C. 7:7A-2.6, Prohibited activities in transition areas, the clarification provided in N.J.A.C. 7:7A-2.2(c)4 should also be included in this section. Hand trimming of trees and vegetation that does not alter the character of a transition area should not be a regulated activity. (23)
RESPONSE: This, as well as many other types of manipulation of vegetation, is already included in the rules as a non-regulated activity as part of normal property maintenance, under N.J.A.C. 7:7A-2.6(b)1i(1) through (7). Because no changes were proposed to these provisions, they did not appear in the proposal.

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

130. COMMENT: N.J.A.C. 7:7A-2.8(c)1: Rice production is not relevant in the State of New Jersey. We recommend that references to the production of rice in New Jersey be deleted. (35)
RESPONSE: The Department is aware that currently there are no rice growing operations in New Jersey. However, the reference to rice is merely provided as an example of a wetland crop, and the Department prefers to track the Federal language when possible.

131. COMMENT: At N.J.A.C. 7:7A-2.8(g)(4), the Department proposes that once residential houses are constructed, the buffer exemption previously applicable is

exhausted. This rule is contrary to an Appellate Division decision which determined that a transition area exemption based on a pre-July 1, 1989 preliminary subdivision approval continued to allow expansion of the home. That decision is attached. The Department should make every effort to conform the rules to the statute and case law. (9)
RESPONSE: In the decision to which the commenter refers, the Appellate Division determined that the transition area exemption also applied to residential construction, including a deck and swimming pool, that were planned at the same time as the single family house, based on the definition of "project" and on the facts of the case. The Department believes that this adopted rule conforms to the referenced decision and to the statute. The transition area exemption applies to a "project" but does not apply to the entire "property" on which an exempt project has already been constructed.

132. COMMENT: The rule providing an exemption for tree removal needs improvement, because it allows a forestry plan to dictate what happens. Foresters are not wetland experts, and under a permit allowing removal of 25% of the trees, 65% may be mature trees. This can result in removing all maples from a forested wetland, thus leaving only saplings in a forested wetland. In some cases, skidders run through transition areas of critical wetlands. The Department should look at tree removal exemptions, because there are abuses and it is better to be left in the Department as part of some other permanent process. (47)
RESPONSE: The exemption for normal harvesting of forest products in accordance with a forest management plan approved by the State Forester is required under the FWPA at N.J.S.A. 13:9B-4b. The State Forester is part of the Department and so the approval of forest management plans is "left in the Department" as suggested by the commenter. It should be noted, however, that approval of forest management plans under the Farmland Assessment Act does not constitute approval for activities in wetland areas. Additional requirements outlined in the State Forestry Service Best Management Practice manual must be identified in order for the plan to be approved. The Land Use Regulation program works with the State Forestry Service to ensure that forest management plans minimize wetland impacts.

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

133. COMMENT: At N.J.A.C. 7:7A-2.9(b), the phone number for the Pinelands Commission should be corrected to (609) 894-7300. (3, 34)
RESPONSE: This correction has been made on adoption. In addition, a typographical error has been corrected in the website address for the Pinelands Commission.

134. COMMENT: We support the rule proposed at N.J.A.C. 7:7A-2.9(c). This will increase the awareness of the Pinelands Commission's responsibilities delegated by the Department with respect to Freshwater Wetlands General Permit authorizations. (3)
RESPONSE: The Department appreciates this comment in support of the rules.

7:7A-2.10 Exemption letters

135. COMMENT: The requirement at N.J.A.C. 7:7A-2.10(b)4 is too open ended and does not provide for predictability in the application process. (20)
RESPONSE: The commenter is apparently responding to the advance copy of the draft proposal, which was posted on the Department's website. The provision referred to was not included in the final proposal. See 32 NJR 2770.

136. COMMENT: We strongly object to the exemption at N.J.A.C. 7:7A-2.10(d) from transition area requirements for projects approved prior to 1988. A letter from a municipal official should not be sufficient to establish that a municipal approval is still valid. Proof of continued validity should be much more specific and require the planning board chair, or the town clerk. (15, 38)
RESPONSE: The rule does not exempt projects approved in transition areas prior to 1988, but those approved prior to July 1, 1989. The Department believes that the provision is sufficiently specific. The letter required must be from a municipal official "with knowledge of and authority over" the approval which forms the basis of the exemption. Further, this letter is one of several requirements which, taken together, will ensure adequate proof of the validity of the municipal approval upon which the exemption is based.

137. COMMENT: Regarding N.J.A.C. 7:7A-2.10 and 4.1, Issuance of exemption letters and authorizations, we have experienced difficulties in using the exemption provisions. We recommend that a common understanding be established among the Land Use Regulation Program, Natural Resources Conservation Service (NRCS) and Soil Conservation District (SCD) staff on the specific exempt practices and the conditions thereof. (35)
RESPONSE: It is not clear what type of "common understanding" the commenter is seeking. The FWPA provides for exemptions and the Department cannot expand the list of exempted activities to include projects approved by NRCS and SCD. However, the Department has and will continue to coordinate with these agencies, and the adopted rules include several provisions intended to reduce redundant reviews. For example, general permit 2 (at N.J.A.C. 7:7A-5.2), rather than specifying how disturbed areas shall be stabilized, requires compliance with the requirements of the appropriate Soil Conservation District.

138. COMMENT: We recommend that the exemptions and authorizations for soil and water conservation practices be combined and that a single authorization be issued for both freshwater wetland and stream encroachment. (35)
RESPONSE: The Department has combined authorizations for selected activities under the two programs through the combined freshwater wetlands general permits and flood hazard area permits contained in the adopted rules at N.J.A.C. 7:7A-4.6. If these combined authorizations prove effective, the Department will consider expanding this concept to other activities.

SUBCHAPTER 3 LETTERS OF INTERPRETATION

7:7A-3.1 Basic LOI information

Note: comments on N.J.A.C. 7:7A-3.1(d) are consolidated above in the summary of comments regarding the presumption of hydrology for farmed wetlands, including comments 49 through 59.

139. COMMENT: N.J.A.C. 7:7A-3.1(e): The exceptional resource value determination is based on the presence of existing habitat or documented habitat that remains suitable for a species. Based on the definition, it does not matter if the species is actually there. The suitability of the habitat can be assessed at any time of the year. Therefore, it seems unreasonable to expect an applicant to wait for a classification when finding a species is not necessary for making the determination. In addition, the need to wait for appropriate seasonal conditions could result in burdensome delays in getting an LOI determination. For example, if an applicant submits an application in August, he may have to wait until the following spring to get the determination. If this provision is left in the rules, then the Department needs to be more specific about when such a wait would be invoked. (20)
RESPONSE: The Department agrees that determining the suitability of a habitat does not necessarily require that the species in question must be found on the site. However, the Department does not agree that in all cases, the suitability of a habitat can be assessed at any time of year, and has replaced the example in the proposed rule with one that better illustrates this point. If a threatened or endangered species is known to have been seen close by a site, there is a potential that the species may use habitat on the project site, and the Department must determine if the habitat on the site is suitable for that species. However, certain aspects of certain habitats are not detectable in certain seasons. One example might be a site adjacent to a property upon which bog turtles have been seen. The Department must determine whether the site contains the undulating topography with hummocks and grassy vegetation that bog turtles require for habitat. Substantial snow cover on such a site would make it impossible for the Department to determine if the necessary vegetation and topography exist. Without this determination, the Department cannot determine if the site contains habitat which remains suitable, and cannot definitively determine the resource classification of the site. In such a case, the Department must wait for the snow to melt in order to make an accurate determination of resource value classification. There may also be other seasonal conditions, which would require the Department to defer a decision on resource value classification. An applicant who prefers not to wait for the resource value classification may accept an exceptional resource value classification, and plan the project to include a 150 foot transition area.

140. COMMENT: N.J.A.C. 7:7A-3.1(e) gives the Department the discretion to withhold a resource classification due to seasonal conditions that prohibit identification of threatened and endangered species during the winter. The paragraph implies that there should be a reasonable expectation that a species could be present, such as "...if there has been a past sighting of a wood turtle in the area and an application is submitted in December when the turtles are hibernating...". This new requirement may be applied in a subjective manner to hold up project design and Planning Board applications. A project's design and conceptual layout cannot be created without the knowledge of where and how wide the buffer will be. The Department gives the applicant the option of accepting a 150 foot buffer or waiting until the right season to obtain an LOI. If a project is designed using a 150 foot

buffer and no threatened and endangered species are identified on the site, the project must be redesigned and re-engineered. On large projects, the impact will be significant. This paragraph will add to the timeframe for obtaining approvals and will create unnecessary delays. (21)
RESPONSE: The Department does not believe that N.J.A.C. 7:7A-3.1(e) will result in the extensive and subjective delays envisioned by the commenter. The provision does not provide the Department with unfettered discretion, but requires that the delay in determining the resource value classification be based on seasonal conditions. Further, the provision has been clarified on adoption to ensure that, in a case where the Department must wait for seasonal conditions to change in order to make a resource value classification, the Department will notify the applicant of the particular seasonal conditions that prohibit the determination of resource value classification.

141. COMMENT: N.J.A.C. 7:7A-3.1(e): When seasonal conditions do not permit an accurate assessment of wetland resource value, the applicant may opt to wait for the formal LOI determination "until the Department can determine the resource value of the wetland". This timeframe should be defined and examples should be identified of potential delay situations. A further clarification should be added at the end of this sentence to say *within a reasonable period of time, or one year, whichever comes first*. Unless specific guidance is provided, applicants may be faced with an unpredictable delay of several years or longer. At minimum, the Department should advise applicants how to recognize situations that may occasion significant delay. (25)
RESPONSE: As discussed in the response to comment 140 above, the Department does not believe that this provision will lead to unreasonable delays. In addition, the provision has been clarified on adoption to provide that the Department will notify the applicant of the particular seasonal conditions that prohibit resource value classification. It is difficult to provide applicants with advance information on what types of situations may cause delay, as these situations vary from species to species and season to season.

142. COMMENT: The clarification of seasonal considerations for endangered species inventories for LOIs to protect threatened and endangered species appears to strengthen the rule, but we need predictive data as to the degree of strengthening in order to evaluate the overall improvement to wetlands protection. How often does the Department feel that this will actually result in the discovery of rare species and therefore exceptional resource value classification? (2, 12, 33)
RESPONSE: The provision is not intended primarily to result in the discovery of rare species, although it may in some cases have that result. The provision is intended primarily to ensure that the Department has adequate time to investigate a site which is near an existing sighting of a threatened or endangered species, in order to ascertain whether the habitat on the site is suitable for the species. The Department believes that ensuring adequate review time will strengthen protection of threatened or endangered species.

143. COMMENT: N.J.A.C. 7:7A-3.1(f): The timeframes listed for issuance of an LOI are inconsistent and appear to be unreasonable. N.J.A.C. 7:7A-3.1(f)1 says that an LOI will be issued within 30 [working?] days of receipt of the application, if it is complete and if no additional information is requested. This is astonishing in light of the fact that the completeness review discussed at N.J.A.C. 7:7A-12.1(a)

allows the Department 20 working days. Further, the rules should clarify whether these are average processing times (i.e. time to approval) or average review time. (6, 25)
RESPONSE: The timeframes set forth at N.J.A.C. 7:7A-3.1(f) are derived from the FWPA, and were found in the former rules at N.J.A.C. 7:7A-8.8. Further information is usually required for an LOI application because of the complexity of wetlands delineation, so the 30 day time frame does not often apply. In addition, the 45 day review period at N.J.A.C. 7:7A-3.1(f)2 runs from the point at which the additional information is received and the application is declared complete. Thus, the actual time between submittal of an application and a final decision varies a great deal depending on the type of additional information needed and the speed with which the applicant provides it.

144. COMMENT: N.J.A.C. 7:7A-3.1(f): The stated 30-day timeframe is in conflict with the timeframe given at N.J.A.C. 7:7A-10.1(k)1, which states that an applicant should allow the Department 105 days to review an LOI application. The time needed by the Department to process a complete application should be made clear. (25)
RESPONSE: As discussed in the response to comment 143 above, further information is usually required for a complete LOI application, so the 30 day time frame is rarely applicable. Further, the day timeframe set forth at N.J.A.C. 7:7A-10.1(k) is an average time from receipt of the application to final Department decision, which has been updated on adoption to reflect the Department's actual experience with applications in 2000. This includes not only the time spent by the Department in reviewing the application, but also the time spent waiting for the applicant to supply requested additional information, time required for site inspections, and other miscellaneous logistical delays. The timeframes provided at N.J.A.C. 7:7A-10.1(k) are intended to provide a realistic timeframe for applicants to use in planning projects. A reference to N.J.A.C. 7:7A-10.1(k) has been added to N.J.A.C. 7:7A-3.1(f) upon adoption to reduce confusion.

145. COMMENT: N.J.A.C. 7:7A-3.1(f): The 30-day timeframe for reviewing a complete LOI application is at odds with the 45-day timeframe associated with reviewing an LOI application where additional information has been requested and received; if anything, these times should be reversed. Once an application has been reviewed sufficiently to determine that additional information is needed to make it complete, it should take less (not more) time to complete the technical review. (25)
RESPONSE: The Department has not made the suggested change because these timeframes are derived from the FWPA at N.J.S.A. 13:9B-8.

146. COMMENT: N.J.A.C. 7:7A-3.1(f): A timetable is listed for LOIs, which states that additional information must be requested of the applicant within 30 days and an LOI must be issued within 45 days of receipt of the information. A review timetable will speed up the process and make receipt of the LOI more predictable. (21)
RESPONSE: The Department appreciates this comment in support of the rules.

147. COMMENT: N.J.A.C. 7:7A-3.1(f)3: We suggest that a not-to-exceed time limit be provided (e.g., 9 months to 1 year) for LOIs so that the determination does not keep getting dragged out by, for example, weather conditions. (20)

RESPONSE: The FWPA requires the Department to issue an LOI based on a determination of the boundary and resource value classification of a wetland, rather than based on the expiration of an imposed time limit. In all cases the Department strives to review and issue LOIs within reasonable time frames, and the Department's current average review times are set forth at N.J.A.C. 7:7A-10.1(k).

148. COMMENT: N.J.A.C. 7:7A-3.1(f): Issuance of LOIs in strict time periods is unrealistic and detrimental to obtaining the best information on delineations and classifications. (15)
RESPONSE: The Department believes that the average review times set forth at N.J.A.C. 7:7A-10.1(k) provide a realistic time frame for the Department to perform accurate and thorough reviews of LOI applications.

149. COMMENT: N.J.A.C. 7:7A-3.1(f)4 – The circumstances under which a site inspection would be conducted should be specified to improve the predictability of the LOI process. (20, 25)
RESPONSE: Regarding site inspections, the Department performs a site inspection for virtually all LOI applications. If no LOI is obtained and an application for regulated activities is submitted, the site inspection is performed before issuance of the final approval for the regulated activities. The rare case in which an inspection might not be performed is when the application is for a presence/absence LOI and the applicant provides clear evidence that the entire site is a regulated area. For example, the Department might not inspect the site if the applicant states that the site is all wetlands and requests an LOI solely for the purposes of a resource value classification. However, even in such cases, the discretion as to whether a site inspection is necessary remains with the Department’s staff.

150. COMMENT: N.J.A.C. 7:7A-3.1(g): It may be beneficial to cite the location within the rules where the “special application requirements” for the footprint of disturbance LOI may be found. (18)
RESPONSE: The Department has added a cross reference to these requirements to address the commenter's concerns. The requirements are described at N.J.A.C. 7:7A-10.3(b) and 10.3(d)4, and are set forth in detail in the LOI application checklist, which will be available on or before September 4, 2001 on the Land Use Regulation Program web site at www.dep.state.nj.us/DEP/landuse.

151. COMMENT: We support N.J.A.C. 7:7A-3.1(h), (i), and (j), under which the Department is requiring delineated wetlands boundaries to be placed on a survey and submitted with the LOI. The rule should state clearly that the survey must be prepared under the supervision of a professional land surveyor licensed in the State of New Jersey. This is important because many delineators try to use hand-held global positioning system (GPS) technology. These units are accurate to only within one meter to ten meters. One can be on the same point and one day get one reading and the next day get a completely different reading. However, the licensed professional land surveyor accurately locates these lines by standard surveying methods or by using the most sophisticated GPS equipment available. (53)

RESPONSE: The requirement that a survey be prepared by a licensed surveyor is found at N.J.A.C. 7:7A-10.10(f). While the Department believes that GPS systems can be useful in certain contexts, this technology is still evolving and the Department will continue to reevaluate it as it does so.

152. COMMENT: We suggest modifying the second sentence of N.J.A.C. 7:7A-3.1(h) to read "the wetland delineation will be verified as part of the permit review process". The Department should state here that the applicant always has the option to apply directly for a permit without obtaining an LOI first. (20)
RESPONSE: The rule already states that an applicant may apply for a permit without first obtaining an LOI. However, the rule has been clarified upon adoption to reflect that, if an LOI is not obtained prior to a permit application being submitted to the Department, the wetland delineation must be performed by the applicant and reviewed by the Department as part of the permit review process. This is consistent with provisions proposed and adopted at N.J.A.C. 7:7A-10.4(a)2, 10.5(a)1, and 10.6(a)2.

153. COMMENT: N.J.A.C. 7:7A-3.1(h) should be clarified to indicate that if an LOI is not obtained, a delineation by the applicant will be required. (15)
RESPONSE: The rule has been clarified upon adoption to indicate that the delineation must be submitted by the applicant for the Department's verification. This is also stated in the application requirements at N.J.A.C. 7:7A-10.4(a)2, 10.5(a)1, and 10.6(a)2.

154. COMMENT: The statement at N.J.A.C. 7:7A-3.1(i) that "the survey shall be submitted" implies that the applicant must wait to do the survey until after the Department has inspected the site. The applicant should have the option of doing the survey either before or after the inspection. Based on our experience, it works out better if the wetland line is surveyed before the Department field inspection to avoid the problem of flags being removed and to identify any survey or mapping errors during the field inspection. (20)
RESPONSE: The Department did not intend to imply that the survey must be performed after line inspection by the Department, but rather that the survey line must be submitted to the Department and approved prior to the issuance of the LOI. This has been clarified upon adoption.

155. COMMENT: N.J.A.C. 7:7A-3.1(i): As with existing practice, a survey of the flagged wetland boundary points is only required after a site inspection confirms the accuracy of the field delineation. The existing language in the prior rules at N.J.A.C. 7:7A-8.3(b)2(I)1, which addresses the accuracy of the proposed delineation, should be continued here. That is, the following statement should be retained: *The boundary should be accurate enough to allow Department personnel to locate the wetland boundary in the field.* The Department should also recommend that a surveyed wetland boundary be supplied with the LOI application, while acknowledging that such a survey is only *required* after the site inspection. (25)

156. COMMENT: N.J.A.C. 7:7A-3.1(i): On many sites it can be difficult to sketch the field-delineated wetland boundaries accurately onto a property drawing. A sketched line presented to the Department (and in the copy of the application provided to the municipal clerk) may be significantly different from what is actually

flagged on the ground and ultimately approved and surveyed. Important discrepancies with soil survey, floodplain, National Wetlands Inventory, or Department freshwater wetland mapping may not be obvious from the sketch. Also, there can be a significant lag time between the time when the wetlands are flagged in the field and the time when the application is submitted, much less inspected by Department staff. Flags can be lost or torn down in the meanwhile, and the lack of a survey record of their original locations can make it difficult to replace them correctly. Also, the field inspection by Department staff will be that much more difficult if they have only a sketch of wetland boundaries to use as a guide, particularly on large sites with many wetlands or complex patterns of wetland boundaries. Finally, if the wetland delineation flagging is done accurately, there should be few if any changes necessary as a result of the Department's field inspection. (25)
RESPONSE to comments 155 and 156: The suggested language is not included in this provision, as it is substantively the same as that found at N.J.A.C. 7:7A-10.3(d)1. The Department has clarified the rule at N.J.A.C. 7:7A-3.1(i) to indicate that the applicant may choose when to submit the survey, as long as the Department has approved the surveyed boundary line prior to the issuance of the LOI.

157. COMMENT: N.J.A.C. 7:7A-3.1(i): A note should be added to this section stating that "*A copy of the approved wetland boundary survey shall be sent to each of the persons who received a copy of the original application*." (25)
RESPONSE: The Department routinely sends a copy of each LOI upon issuance to the clerk of the municipality in which the site is located. In almost all cases (see N.J.A.C. 7:7A-10.9), the clerk is the only person who received a copy of the original application. Other persons generally receive a notice of the application but not the full application. Interested persons may inspect the final LOI by contacting the municipal clerk or the Department.

7:7A-3.2 Presence/absence LOI

158. COMMENT: N.J.A.C. 7:7A-3.2(d): It is proposed that no more than three presence/absence LOIs can be issued for a single site. This arbitrarily discriminates against landowners with large lots. The limitation should be based on a proportion of a site, *e.g.*, no more than 50% (33%, 25%) of a single site may be eligible for a portion presence/absence LOI. (25)
RESPONSE: The Department must keep records of and track all issued LOIs. However, it is much harder for the Department to identify and track a portion of a site than an entire site, because the Department's database catalogs and searches for sites by lot and block. For this reason, the former rules did not allow a presence/absence LOI for portions of a site, but only for the entire site. However, the Department understands that this option is helpful for the public and therefore has included it in the adopted rules. The difficulty for the Department is somewhat reduced when the portions are all roughly the same size, which would not be the case if the Department followed the commenter's suggestion. The Department has tried to strike a balance between providing applicants with more LOI options (the previous rules allowed a presence/absence LOI only for an entire

site), and attempting to keep an accurate account of which portions of a site are covered by previous LOIs. Therefore, the rule is adopted as proposed.

159. COMMENT: N.J.A.C. 7:7A-3.2(d)2: As long as each portion of the site is clearly distinguished in the application, why not allow all portions to be combined into one application to reduce mapping and notification requirements? (20)
RESPONSE: The Department agrees that a presence/absence LOI for more than one portion of a site should be allowed to be submitted under one application in order to reduce administrative efforts and costs. However, a separate $100.00 fee is required for each portion of the site. The Department has changed the rule accordingly.

7:7A-3.4 Line verification LOI

160. COMMENT: N.J.A.C. 7:7A-3.4(b)1: Due to the definition of "site," this rule forces the applicant to delineate all contiguous properties they own, even though they may only have an interest in developing one lot. The definition also precludes having the Department perform the delineation on one of two infill lots (as at N.J.A.C. 7:7A-3.3), for example, when the applicant has a house on one one-acre lot and the next-door one-acre lot is vacant. Perhaps the word "property," or "lot or lots" could be substituted here instead of “site." (20)
RESPONSE: The rule has been clarified at N.J.A.C. 7:7A-3.3(a) and (b), and at 3.4(b)2, to indicate that a municipal tax lot may also be the subject of an LOI.

161. COMMENT: N.J.A.C. 7:7A-3.4(b)2, providing for the issuance of a line verification LOI for a portion of a publicly owned site, is a positive change. As intended, it will ease the burden on public park agencies whose development of public and support facilities often involve only a small portion of a large property. (49)
RESPONSE: The Department appreciates the commenter's support for the rule.

162. COMMENT: There does not seem to be a logical justification for the acreage restrictions in N.J.A.C. 7:7A-3.4(b)2. Since a site (or property) can be any size, why not allow a portion of a site to be of any size? Public parks or State colleges can be very large properties on a single lot. If the public entity is proposing a single project such as an educational building, parking lot or athletic field, it should have the ability to obtain an LOI for the proposed development activity. This rule should also be modified to accommodate the rights-of-way of utility companies and transportation systems. (20)
RESPONSE: The Department has included this provision to prevent a public entity with a very large property from having to delineate the whole property in order to plan a small improvement on a small portion of the property. If a site is smaller than 10 acres, the Department believes that it is not burdensome to require a public entity to delineate the entire site. The Department has, however, deleted the requirement at N.J.A.C. 7:7A-3.4(b)2(iv) that the portion of the site must be “bounded by easily identifiable, permanent landmarks such as roadway or streams," in order to make this option available for more properties. The adopted rule requires only that the portion of the site must be clearly marked in the field and on the plan. Regarding rights of way, utility companies and

transportation entities generally delineate wetlands in their rights of way as part of a permit application rather than obtaining a separate LOI.

163. COMMENT: Under N.J.A.C. 7:7A-3.4(b)2, a line verification for a portion of the site is only permitted if the site is publicly owned. This should be allowed for private sites as well, to accommodate large properties where only a portion of the site is intended for development. In such cases, the property owner, given the $50,000 ceiling on LOI application fees, should be permitted to bring these fees to a reasonable level. (29)
RESPONSE: The Department has included many LOI options, such as LOI presence/absence determinations, in an effort to minimize the cost of complying with the rules. However, the rule provides this exception for public agencies not only because they often own very large properties, but also because these properties are used for the public good, and the expenses of an LOI for a publicly owned property is borne by the taxpayers. While some private persons own large properties, these persons derive personal gain from these properties and therefore the Department believes that they should also bear the expense attendant on complying with the rules.

164. COMMENT: Under N.J.A.C. 7:7A-3.4(b)2, any partial delineation verifications on publicly owned sites must include written acknowledgement that it is a partial delineation. This will help insure that towns will have a record that the whole site does not have an approved delineation. (15)
RESPONSE: The Department agrees. However, this does not need to be included in the rules, since any LOI verification letter from the Department will specifically reference that it is only for a portion of the site.

165. COMMENT: N.J.A.C. 7:7A-3.4(b)2iv: While we can appreciate the Department's need to clearly identify the portion of the site in the field, this provision seems overly restrictive. It is not clear whether the roadways or streams must be located on all sides or only some sides of a portion of a site. In addition, roadways or streams may not always be conveniently located at the boundaries of the project area. We suggest that the Department require the portion to be clearly surveyed or marked in the field as is done with a Footprint of Disturbance. (20)

166. COMMENT: N.J.A.C. 7:7A-3.4(b)2iv: The "portion" of a site must be bounded by permanent, easily identifiable landmarks. Would an iron pin or concrete monument set by a surveyor qualify? (25)
RESPONSE to comments 165 and 166: The Department agrees that the rule as proposed narrowed the instances when this option can be used to almost none. The rule has been modified upon adoption to remove the requirement that the area must be bounded by roadways or streams, and has replaced it with the requirement that the portion be clearly marked in the field and on the plan. An iron pin or concrete monument would be adequate to mark a portion of the site in the field.

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

167. COMMENT: N.J.A.C. 7:7A-3.5(b): Pursuant to the Memorandum of Agreement between the Pinelands Commission and the Department, the Commission is the lead agency within the Pinelands Area to verify the extent of Waters of the United States. N.J.A.C. 7:7A-3.5(b) should be amended to provide notice of this arrangement to the regulated community. (3)
RESPONSE: The Department agrees and has modified the rule to clarify this at N.J.A.C. 7:7A-3.1(k) and 3.5(a). However, it should also be noted that the MOA cited by the commenter provides that in cases of disagreement, the Department and the Pinelands Commission retain authority to independently or jointly establish these boundaries.

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

168. COMMENT: N.J.A.C. 7:7A-3.6(a): We object to the Department's fixing the duration of a wetlands classification to five years. In instances over the past years, threatened and endangered species have been found after an intermediate resource value LOI classification was issued. We do not believe it is appropriate to give applicants assurances that a classification is set in concrete. (15)
RESPONSE: The Department has tried to strike a balance between protecting threatened and endangered species and water quality, and the regulated community's need for resource value classifications upon which they can rely when investing time and money in site selection and planning, consistent with N.J.S.A. 13:9B-8(i). Under N.J.A.C. 7:7A-3.6(a), if threatened and endangered species habitat was disclosed or discovered after the LOI was issued, the Department may correct the resource classification during the five-year term of the LOI, although the Department might not do so in a case where the applicant can demonstrate substantial reliance on the LOI prior to the discovery of the habitat. This provision also applies to other aspects of the LOI, that is, to the delineation of the wetlands on the site. The rule has been clarified on this point.

169. COMMENT: We oppose the 5 year automatic extension for LOI classification at N.J.A.C. 7:7A-3.6(b). In several incidences, the Department has upheld wrong classifications based on the applicant's argument of "substantial reliance." We suggest that a 2-year period would be a more reasonable timeframe in order to allow for reclassification of a wetland if threatened or endangered species are identified. (2, 12, 15, 33)
RESPONSE: The rule does not provide for an automatic extension. An extension is issued if the Department determines that the information upon which the original LOI was based remains valid, which would not be the case if threatened and endangered species habitat was disclosed or discovered after the LOI was issued. In those instances, the Department may correct the resource classification during the initial five-year term of the LOI, unless the applicant can demonstrate substantial reliance on the LOI prior to the discovery of the habitat. In addition, in those instances there would be no basis for extending the LOI beyond five years, as the applicant was on notice that it could rely on the LOI for five years, and not for a period exceeding five years.

170. COMMENT: N.J.A.C. 7:7A-3.6(c) requires that an application for an extension must be submitted prior to the expiration date of the Letter of Interpretation (LOI)

or a new LOI must be obtained. What is the rationale for having to submit for the extension prior to expiration? This is inconsistent with the Municipal Land Use Law and other Department programs where one can apply for an extension even after the expiration date. (34)
RESPONSE: The provision as proposed adds clarity and predictability to the rules. To allow an extension to be requested up to one year after the expiration of the LOI, as is allowed under the MLUL, would effectively change the term of the LOI to six years. Furthermore, the requirement for a new LOI after expiration of the old LOI does not add significantly to the administrative process since the information from the expired LOI can be used for the new LOI provided it remains accurate.

SUBCHAPTER 4 GENERAL PROVISIONS FOR GENERAL PERMITS

171. COMMENT: It is encouraging that the Department recognizes the number of activities with de minimis adverse effects on wetlands associated with utility operations. We are especially pleased that the Department has streamlined the application process to provide an expedited review for herbicide applications. By authorizing a 30-day default issuance, utilities can proceed with a foliar spray activity if the Department does not take action on a vegetative maintenance permit application within 30 days. (5)
RESPONSE: The Department has not adopted the provisions for expedited review of vegetative maintenance under utility lines under general permit 1. Please see the response to comments 224 and 225 for a discussion of this provision.

172. COMMENT: The US Fish and Wildlife Service's New Jersey Field Office called attention in its June 5, 2000 letter, to the fact that some New Jersey general permits are weaker than their Federal counterparts, which have reduced their scope in many cases to one half acre. The now weaker New Jersey general permits are 2, 6, 7, 21, 22, and 27. Because New Jersey is the nation's most densely populated state, with very large historical wetland losses, the rules should be stronger than the national average. (32)
RESPONSE: The Department's freshwater wetlands program is much stronger than the national average. In fact, New Jersey's wetlands protection program is in all likelihood the strongest in the nation. Further, the rules contain provisions at N.J.A.C. 7:7A-4.1(d), 4.2(d), and 13.2(a) that allow the Department in a specific case to require an individual permit or add conditions if necessary to ensure compliance with, among other things, the Federal Act. See the Federal Standards Analysis below for a detailed comparison of the Department's program with the ACOE's program.

173. COMMENT: There are clear attempts to weaken the protection afforded to exceptional resource value wetlands. These wetland systems contain endangered animals and pristine water quality and are some of New Jersey's most treasured natural systems. The new rules allow for new threats such as general permits for utility lines and mosquito control without the alternative analysis required by individual permits. This is unacceptable since what appear to

be small disturbances in these wetlands can have potentially disastrous impacts to endangered species populations. (12)

174. COMMENT: Use of general permits 2 and 15 used to be prohibited in exceptional resource value wetlands. We oppose the deletion of the provision prohibiting use of this permit in exceptional resource value wetlands. Allowing underground utility lines under general permit 2 and general permit 15 in exceptional resource value wetlands is unwarranted. The cautionary language regarding minimizing disturbance at N.J.A.C. 7:7A-4.3 provides no practical guidance and is subjective. (2, 12, 15, 33, 44)
RESPONSE to comments 173 and 174: The Department does not believe that allowing utility lines and mosquito control activities in exceptional resource value wetlands under general permits will weaken protection for these wetlands in any significant way. The Department has found over the years that the bar to underground utility lines and mosquito control activities in exceptional resource value wetlands has not produced meaningful environmental benefits. Under former general permits 2 and 15, an applicant must obtain an individual permit for an underground utility line or a mosquito control activity in an exceptional resource value wetland, even if all other requirements of the applicable general permit are met, including prohibitions against adverse impacts to threatened or endangered species. However, when an individual permit is required for an underground utility line or a mosquito control project, it is often difficult to find a practicable alternative. (See detailed analysis of this issue in the summary of the proposed readoption at 32 N.J.R. 2710 and 2716.) Therefore, the main thrust of the Department's individual permit review for these projects is to minimize impact. However, since general permits are adopted only for minimal impact activities, the Department's individual permit for that activity often contains much the same conditions as the general permit. 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, as well as the other conditions and limits in the general permits.

7:7A-4.1 Department issuance of general permits

175. COMMENT: N.J.A.C. 7:7A-4.1: Issuance of general permit authorizations : We recommend that the authorizations for soil and water conservation practices be combined and that a single authorization be issued for both freshwater wetland and stream encroachment. (35)
RESPONSE: The Department is adopting combined authorizations for selected activities under the two programs through the combined freshwater wetlands general permits and flood hazard area permits under N.J.A.C. 7:7A-5.2A, 5.10C, 5.11A, 20A and 26A. If these combined authorizations prove effective, the Department will consider expanding this concept to other activities.

176. COMMENT: We recommend that the rules be modified to include the policy that once a project is approved and recommended by the Natural Resources Conservation Service (NRCS) and the Soil Conservation District (SCD), it should be a matter of routine authorization for the Land Use Regulation Program. (35)

RESPONSE: Because the Land Use Regulation Program, NRCS, and SCD all operate under different legal authorities which mandate protection against different environmental problems, it is not permissible or appropriate for all three programs to exempt or permit exactly the same activities. These agencies could not do so without either exceeding the limits of their own program or failing to adequately fulfill their legal mandates. For example, the Department is not authorized to withhold a freshwater wetlands permit based on an applicant's failure to meet NRCS standards, and the FWPA would not allow the Department to issue a freshwater wetlands permit that complied with NRCS standards but did not comply with the FWPA. However, the Department does make every effort to coordinate application reviews with both the NRCS and the SCD whenever possible.

177. COMMENT: N.J.A.C. 7:7A-4.1(c) merely cites regulations governing the Department's assumption of the 404 program and deletes the requirements that any new statewide general permit has to meet. The regulations referred to are only three paragraphs; for clarity, they should be included. (15)
RESPONSE: The provisions referred to are found in the former rules at N.J.A.C. 7:7A-9.1(c) and have been restored on adoption as suggested, with minor clarifications that do not affect meaning.

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

178. COMMENT: N.J.A.C. 7:7A-4.2(a): The wording here is very confused. It reads as if one can use a general permit to authorize prohibited activities. The existing wording at N.J.A.C. 7:7A-9.5(a) is much clearer. (15)
RESPONSE: The Department agrees that the statutory term for activities regulated in a transition area – prohibited activities – is confusing. Therefore, throughout the adopted rules, the term “regulated activities” has been substituted for the term “prohibited activities.”

179. COMMENT: N.J.A.C. 7:7A-4.2(b) – The last sentence should be modified to read, “An authorization issued under a general permit that covers activities in a transition area satisfies the requirement for a general permit transition area waiver.” Also please add, “A general permit for activities in freshwater wetlands automatically includes an access transition area waiver.” (20)
RESPONSE: The Department has not added the suggested language because there is no "requirement for a general permit transition area waiver." A general permit transition area waiver is just one of many ways a person can satisfy the requirement for a transition area waiver for regulated activities in a transition area. The commenter’s second suggestion has been incorporated on adoption by adding provisions similar to those at N.J.A.C. 7:7A-6.1(a)6 to new N.J.A.C. 7:7A-4.2(c).

180. COMMENT: N.J.A.C. 7:7A-4.2(b) provides for general permits to cover activities in wetlands and transition area and/or State open waters. Does this mean that the applicable acreage limits for the general permits will now apply to all three categories combined? What is the rationale for this change? (34)
RESPONSE: The commenter is correct – the acreage limits in each general permit apply to wetlands, transition areas, and State open waters combined (excepting transition area disturbances necessary for access under N.J.A.C. 7:7A-4.2(c)). However, this is not a change, as the special activity transition area waivers for general permit activities have historically been limited such that both wetlands and transition area impacts must fall within the general permit impact limits (see former N.J.A.C. 7:7A-7.4(e)). As stated in the proposal summary at 32 NJR 2709: *"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."* The only exceptions to this would be in cases where the general permit does not cover activities in all three areas (see for example, N.J.A.C. 7:7A-5.8(a), which specifies that the general permit does not apply in State open waters); or where the general permit specifies that a limit applies only to one or more of these features (see for example N.J.A.C. 7:7A-5.10A(b)1i, which sets a road crossing length limit of 100 feet of disturbance of freshwater wetlands and State open waters, but does not impose this length limit on disturbance of transition areas).

181. COMMENT: N.J.A.C. 7:7A-4.2(c): This rule indicates that a general permit is usually the only wetlands approval required for activities in freshwater wetlands in New Jersey. We believe that this could be misleading to the regulated community considering the need to obtain an approval for most types of development in wetlands in the Pinelands. We therefore request that this provision be amended as follows: "However, if any activity is located in non-delegable waters, as defined at N.J.A.C. 7:7A-1.4, both a general authorization from the Department and a Federal 404 program approval from the ACOE may be required. In addition, if any activity is located in the Pinelands Area, it must be demonstrated that the application requirements of the Pinelands Comprehensive Management Plan have been satisfied and that the development has been determined by the Pinelands Commission to be consistent with the provisions of the Pinelands Comprehensive Management Plan." (3)
RESPONSE: The Department agrees with the commenter's concerns and has added clarifying language at N.J.A.C. 7:7A-4.2(c), recodified to 4.2(d) on adoption, which is similar to that suggested.

182. COMMENT: N.J.A.C. 7:7A-4.2(c) states that both a general permit authorization from the Department and a Federal 404 program approval from the Army Corps of Engineers may be required for activities located in non-delegable waters. This is unacceptable. The Department needs to develop a coordinated and integrated permit process for obtaining an approval for activities in non-delegable waters which enables the applicant to make only one application submission to the Department to cover both approvals. Pennsylvania has such a program and it works very well. (13, 34)
RESPONSE: The group of waters in which activities require both a State and Federal permit is very small, and the Department works closely with the ACOE to coordinate permitting on projects in these non-delegable waters. Therefore, the Department does not believe the suggested change is necessary.

183. COMMENT: N.J.A.C. 7:7A-4.2(e): It would be appropriate to add here a provision to avoid segmenting permits due to contiguous lots instead of modifying the definition of "site". (20)
RESPONSE: The substantive meaning of the term "site" has not been modified and is the same as in the prior rules. (See the response to comment 88 for more detail on the definition of "site.") The Department believes that the adopted prohibition in this provision regarding segmentation of projects is sufficient.

184. COMMENT: N.J.A.C. 7:7A-4.2(e) specifies that the limit of disturbance in each general permit applies to the entire site. This allows, for example, ten properties each on ten acres to disturb 2.5 acres of wetlands for road crossings but limits a single project on one hundred acres to 0.25 acres of disturbance for road crossings. This is grossly unfair to larger projects. The Department needs to develop criteria that would allow for greater disturbance for larger projects based upon the size of the tract and the percentage of wetlands present. (13, 34)
RESPONSE: The Department disagrees. Such a change would lead to impacts which would not meet the FWPA standard that general permit activities must cause only minimal adverse environmental impacts. Further, it is often easier to relocate activities and eliminate wetlands impacts on a large site than on a small one. Further, the system of setting acreage limits per site is consistent with the Federal 404 program.

185. COMMENT: N.J.A.C. 7:7A-4.2(e) requires that an applicant must submit applications for all general permits at once. This may not be practical for large projects. This provision should be deleted or modified to allow for submittal at different times. (34)
RESPONSE: An applicant may apply for general permits at different times. This has been clarified on adoption at N.J.A.C. 7:7A-4.4(b). N.J.A.C. 7:7A-4.2(e) is meant to ensure that an applicant does not segment a project in order to circumvent general permit disturbance limits, avoid an individual permit, or avoid mitigation requirements.

186. COMMENT: N.J.A.C. 7:7A-4.2(g) – The second sentence should be modified to read, "If a regulated activity in a transition area is not covered by any …". Alternatively, we would suggest that the second sentence be deleted since a "general permit transition area waiver" is just another type of waiver (see 7:7A-6.1). The rules should not imply that a general permit transition area waiver must be applied for preferentially over other types of waivers. (20)
RESPONSE: The Department agrees that the term "prohibited" should be changed to "regulated" and has made this change throughout the adopted rules. Note, however, that this provision has been recodified as N.J.A.C. 7:7A-4.2(h) upon adoption.

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

187. COMMENT: N.J.A.C. 7:7A-4.3(b)12 acknowledges the Soil Erosion and Sediment Control Standards as the overriding determination regarding amounts of rip-rap or other energy dissipating material. This provision should reduce duplicative regulation and interagency conflicts. (34)
RESPONSE: The Department appreciates this comment in support of the rules.

188. COMMENT: N.J.A.C. 7:7A-4.3(b): If activities under General Permit 27 result in a one quarter acre or greater increase in impervious surfaces, the rules should allow stormwater to be directed to other degraded wetlands on the condition that it is demonstrated that the wetlands provide treatment of the runoff without adversely affecting the ecosystem. (40)
RESPONSE: The Department disagrees. Directing untreated stormwater into a degraded wetland will degrade the wetland further. While it may be appropriate in some cases to use a wetland area for stormwater management purposes, the decision to do this must be based on detailed information concerning the project, the site, the region in which the site is located, and the alternatives available. This type of review is appropriately conducted as part of an individual permit application review.

189. COMMENT: N.J.A.C. 7:7A-4.3(b)3: We agree with the assessment of the U.S. Fish and Wildlife Service comments dated June 5, 2000, that the proposed language (i.e., "The activities shall not jeopardize present or documented habitat for, or the continued existence of, a local population of a threatened or endangered species) is weaker than the existing language (i.e., "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") found at N.J.A.C. 7:7A-9.3(b)3. (emphasis added). We note that the Department's rationale is that the proposed language is "rephrased to match the Federal regulatory language on this issue." We think the New Jersey Freshwater Wetlands Protection Act rules should be stronger, where needed, than the Federal law and regulations. (32)
RESPONSE: The Department intended the adopted provision to be more stringent than the former provision, and to prevent confusion. The prior rules contained two different standards for threatened or endangered species, one which applied only to general permits (former N.J.A.C. 7:7A-9.3(b)3) and another which applied to all regulated activities (former N.J.A.C. 7:7A-3.5(a)2). The adopted rules apply one standard to all regulated activities. The Department has clarified the rule on adoption to indicate that impacts on the species itself, as well as on its habitat, are impermissible, and has restored the terms "destroy" and "adversely modify," which are found in the prior rules. However, the adopted rule retains the reference to a "local population" of a species. For the purposes of the Federal Endangered Species Act, "species" means the entire species (e.g., all swamp pink, or all bog turtles). It would be relatively easy for an applicant to show that their single disturbance did not affect the species as a whole, but harder to show that it did not impact the local representatives of that species. Thus, by protecting a local population of threatened or endangered species, the adopted rule improves protection for threatened or endangered species by focusing the impacts on a local level rather than on the "species" as a whole. To continue and build on this improved protection, the Department intends to begin using an improved method of delineating threatened or endangered species habitat, called the landscape project.

190. COMMENT: N.J.A.C. 7:7A-4.3(b)4 removes the prohibition for a general permit in Wild and Scenic Rivers if the National Park Service approves. Limits and criteria should be in place to insure protection of wetlands. For example, criteria could allow limited public access for trails and boardwalks. Protection of wetlands must be the paramount principle. (15)
RESPONSE: Activities within areas designated as wild and scenic rivers constitute major discharges and therefore will receive Federal review under N.J.A.C. 7:7A-12.2. The Department believes that this review, in addition to the specific requirement that the National Park Service approve such a project, will provide adequate protection. Furthermore, applicants must still comply with all conditions and disturbance limits of the particular general permit.

191. COMMENT: N.J.A.C. 7:7A-4.3(b)(6) states that any discharge of dredged or fill material shall comply with all applicable Department rules regarding use of dredged or fill material. Please provide specific references for these applicable rules. (13, 34)
RESPONSE: The Department does not believe that a including a list of specific references in the rule would be useful or appropriate. Depending on the type of dredged material and the site, a variety of different rules will apply. For example, dredging of contaminated sediment from the Passaic River and disposal of the sediment in the Passaic River Basin would likely require a flood hazard area permit, a freshwater wetlands permit, and a waterfront development permit, as well as being subject to rules that apply to handling and disposal of hazardous substances. A person contemplating a particular project on a particular site can

contact the Department for a pre-application conference to assist in compliance with Department requirements.

192. COMMENT: N.J.A.C. 7:7A-4.3(b)(10) establishes a threshold of one-quarter acre of impervious surface for water quality treatment of stormwater. What is the technical and legal basis for the one-quarter acre? The municipal land use law uses one acre as a threshold as does the Delaware and Raritan Canal Commission (DRCC) regulations. All appropriate design manuals and literature base performance criteria on a minimum of one acre. Additionally, the water quality criteria in the Flood Hazard Area Control Act Rules need to be revised to reflect a reference of controls based upon acreage of drainage for areas disturbed. Basins do not function properly in drainage areas less than ten acres. Also, please confirm that the best management practices (BMPs) listed in the Flood Hazard Area Control Act Rules meet the requirements of no degradation in the receiving watercourse. (13)
RESPONSE: Historically, the rules have required treatment for all stormwater generated by a regulated activity. However, the Department has found that most stormwater management practices do not function properly with very small amounts of stormwater, or are too costly in comparison to their environmental benefits. It has been the Department's experience that stormwater treatment measures begin to function properly and justify their cost when they process the amount of stormwater generated by approximately one quarter acre of impervious surface. Therefore, the one quarter acre threshold reflects a balance between the goal of minimizing stormwater impacts, and the recognition of the practical realities of treating very small amounts of stormwater. The DRCC uses the same trigger of ¼ acre of impervious surfaces. Regarding the Municipal Land Use Law, the Department is not aware of any threshold for stormwater management requirements in that statute. Regarding the commenter's request that the Department "confirm that BMPs listed in the Flood Hazard Area Control Act rules meet the requirements of no degradation in the receiving watercourse," it is not clear to what "requirements of no degradation" the commenter refers. The only provision in the rules that refers to degradation of surface waters is found at N.J.A.C. 7:7A-7.2(b)8, which states that a project shall be eligible for an individual permit only if it will not cause or contribute to a significant degradation of ground or surface waters. This provision refers to Federal rules for more detail regarding this standard, and not to the Flood Hazard Area Control Act rules.

193. COMMENT: N.J.A.C. 7:7A-4.3(b)10 requires that where activities will result in one-quarter acre or greater increase in impervious cover, the resulting stormwater must be treated in accordance with the Flood Hazard Area Control rules. What is the technical and legal basis for the one quarter acre threshold? This threshold is so low that the requirement could apply to single-family homes. Without any justification this provision should be deleted. (34)
RESPONSE: Regarding the basis for the threshold, please see the response to comment 192. The Department agrees that in some cases this threshold would require a project involving single family homes to meet the stormwater requirements. However, the Department believes that, if a single family home project involves the creation of this amount of impervious surface, it is appropriate to apply these limits.

194. COMMENT: N.J.A.C. 7:7A-4.3(b)10: We support this provision that requires applicants to comply with stormwater water regulations of the flood hazard regulations. (15)
RESPONSE: The Department appreciates this comment in support of the rules.

195. COMMENT: N.J.A.C. 7:7A-4.3(b)(11): The term environmentally sensitive area needs to be defined. (13, 34)
RESPONSE: The term gives the Department the flexibility necessary to determine which areas may be adversely affected by the disposal of dredged material. Examples of environmentally sensitive areas include threatened or endangered species habitat, mature forested areas, or other areas that would be irreparably harmed by disposal of dredged material.

196. COMMENT: N.J.A.C. 7:7A-4.3(b)12: We appreciate the recognition of the soil erosion and sediment control standards for riprap, bio-engineering and other practices (N.J.A.C. 2:90). However, arbitrary numerical limits are also included along with the reference to the standards. We recommend that no other arbitrary standards be prescribed where the soil erosion and sediment control standards are applicable. (35)
RESPONSE: The commenter is apparently referring to numerical limits found in certain general permits (see for example N.J.A.C. 7:7A-5.10A(d)3 and N.J.A.C. 7:7A-5.20(e)6.) These numerical limits were requested by EPA to ensure that New Jersey's freshwater wetlands program remains as stringent as the Federal 404 program.

197. COMMENT: N.J.A.C. 7:7A-4.3(b)12: The amount of rip-rap required is dependent on the Soil Erosion and Sediment Control Standards. These standards are not in place to protect wetlands. Rip rap should be avoided at all times. The amount should be reviewed on a site by site basis. The amount should be determined by site conditions and should be the minimum needed, which might be less than the minimum that the Soil Erosion and Sediment Control Standards require. (15)
RESPONSE: The amount of rip-rap allowed under the rules is only partially dependent on the Standards for Soil Erosion and Sediment Control (Standards). The basic requirement in the rules is that the amount of rip-rap must be the minimum necessary to prevent erosion. The Standards are used in making this calculation, because the Standards are the law that applies in New Jersey regarding minimum requirements for stabilization of soil. The FWPA rules do not state that any amount of rip-rap that complies with the Standards is sufficient. Rather, it must be the minimum possible amount of rip-rap, while still complying with the Standards. This ensures that the Department will continue to evaluate the amount of rip-rap necessary on a site by site basis. While the Department agrees that rip-rap should be avoided and minimized whenever possible, there are times when erosion caused by an unstable condition can cause more environmental harm than the placement of rip-rap. The Standards for Soil Erosion and Sediment Control are the applicable law, and applicants must comply with the Standards just as they must comply with the freshwater wetlands rules. Therefore, it would be inappropriate for the freshwater wetlands rules to set rip-rap limits that prevent compliance with the Standards for Soil Erosion and Sediment Control.

198. COMMENT: N.J.A.C. 7:7A-4.3(b)(14): Which elements within the Department will determine if a general permit activity is subject to the Department's Water Quality Management Planning Rules? Also, please define the term "activities." (13)
RESPONSE: The FWPA application checklists (which will be available on or before September 4, 2001 on the Land Use Regulation Program web site at www.dep.state.nj.us/DEP/landuse.) will require that each application include a certification that the activities authorized under the general permit are consistent with the Water Quality Management Plan 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. The Land Use Regulation Program and the Department's Division of Watershed Management will coordinate in reviewing these certifications.

199. COMMENT: N.J.A.C. 7:7A-4.3(b): We request that a new condition be added to proposed N.J.A.C. 7:7A-4.3(b) indicating the need to comply with the Pinelands CMP. This will assist the members of the regulated community in understanding the relationship of the Freshwater Wetlands Protection Act rules with the CMP. It will also assist in preventing conflicts with the Pinelands Protection Act, which prohibits any approval by a State agency for construction of any structure or the disturbance of any land within the Pinelands Area unless the approval conforms with the provisions of the CMP. We suggest that the following be added as new item 16 under this section: "<u>If the general permit activities are proposed within an area under the jurisdiction of the Pinelands Commission, the applicant must demonstrate that the application requirements of the Pinelands Comprehensive Management Plan have been satisfied and that the activity has been determined by the Pinelands Commission to be consistent with the Pinelands Comprehensive Management Plan."</u> (3)
RESPONSE: The rule has been clarified at N.J.A.C. 7:7A-4.2(a) to indicate that general permits for activities in freshwater wetlands in the Pinelands are administered by the Pinelands Commission.

200. COMMENT: N.J.A.C. 7:7A-4.3(b)11 allows the Department to require soil testing for a general permit if soil contamination is suspected, which is an improvement that we support. (11)
RESPONSE: The Department appreciates this comment in support of the rules.

201. COMMENT: N.J.A.C. 7:7A-4.3(d): An exclusion should also be provided for the case when limiting work outside of the fishery season might have an adverse impact on endangered or threatened species. For example, an off-season for fish might be the winter hibernating season for wood turtles. (20)
RESPONSE: The Department agrees that the timing restriction should be adjusted as necessary to prevent certain other environmental harms, as well as harms to the fishery resource, such as in the example provided by the commenter. Therefore, N.J.A.C. 7:7A-4.3(d)4 has been clarified to indicate that impacts to the aquatic environment, or to a threatened or endangered species, can also form the basis for an adjustment in the timing restriction.

202. COMMENT: N.J.A.C. 7:7A-4.3(e): As stated in comments on N.J.A.C. 7:7A-4.2(c), the Department needs to establish a unified and coordinated permit process for non-delegable waters. (13)

RESPONSE: The group of waters in which activities require both a State and Federal permit is very small, and the Department works closely to coordinate permitting on projects in these non-delegable waters. Therefore, the Department does not believe such a change is necessary.

203. COMMENT: N.J.A.C. 7:7A-4.3(f)1 through 4: These general permits should not be excused from obtaining an authorization from the Department. The summary material on page 2708 is misleading by implying that the four general permits listed currently do not require prior authorization from the Department when they do. (15)
RESPONSE: All general permit activities, including the activities listed in N.J.A.C. 7:7A-4.3(f), require submittal of an application to the Department, and are authorized only after a waiting period during which the Department can deny authorization or require a more thorough review. Anyone performing these activities also must comply with the specific requirements of the applicable general permit as well as the conditions that apply to all general permits. The Department has allowed three general permit activities without prior written approval for reasons specific to each. (The Department has not adopted the default approval provisions for vegetative maintenance in utility rights-of-way.) These reasons are explained in detail in the summary of each proposed general permit at 32 N.J.R. 2709 and 2710 (general permit 1), 32 N.J.R. 2720 and 2721 (general permits 25 and 26).

7:7A-4.4 Use of multiple general permits

204. COMMENT: N.J.A.C. 7:7A-4.4(a, b): The "one acre" maximum impact allowed for any combination of specific general permits heretofore has been applied to wetland and open water impacts. The proposed rules add transition area impacts to the "one acre" calculation, thereby significantly reducing the number of projects potentially eligible to use general permits. As a result, many small projects with minor impacts that previously would have qualified for some combination of general permits and transition area waivers now will be subject to the more rigorous and time-consuming individual permit process. This will place a greater burden not only on the regulated public, but also on the already limited resources of the Department's Land Use Regulation Program staff. The "one acre" calculation should be based only on wetland and open water impacts as in the existing rules. Alternatively, the maximum impact from all activities on a site to wetlands, waters, and transition areas should be raised to two acres. (25)

205. COMMENT: With respect to the general permits, the language for many has changed so that the total area limit of disturbance includes transition areas as well as wetlands. This will have the effect of reducing the utility of the general permits and making them more restrictive. If the original general permits were determined to have minimal cumulative impact, the disturbance areas should remain the same. This applies to some of the most commonly used general permits, such as 2, 6, 10B, 11, 17, 18, 21 and 25. (29)
RESPONSE to comments 204 and 205: The commenter has misunderstood the impact limits in the former rules. This common confusion has led many people to believe that the former rules allowed an applicant to combine the amount of impact allowed under a general permit with the amount of impact allowed under a

special activity general permit transition area waiver under N.J.A.C. 7:7A-7.4(e), thus doubling the impact of the general permit. This is not the case. As stated in the former rules at N.J.A.C. 7:7A-7.4(e)3: "… these waivers shall not be used to double the impact of a specific activity by combining the allowed wetland and transition area impacts." Thus, the former rules limit the total impact arising from a combination of a general permit and a special activity transition area waiver under N.J.A.C. 7:7A-7.4(e) to the total impact allowed under that general permit. The adopted rules continue this longstanding limit, and will make it easier to ensure compliance with this provision, by putting all impacts under one approval. Of course, as in the former rules, the transition area waiver for disturbance necessary for access to a general permit activity is not counted in the total impact, as clarified on adoption at new N.J.A.C. 7:7A-4.4(a)2iii.

206. COMMENT: N.J.A.C. 7:7A-4.4(a) and (b) limit total combined area of wetlands, State open waters and transition areas disturbed on the site to one acre. Inclusion of transition areas in the one acre disturbance is unacceptable and goes beyond legislative intent. The specific law allows one acre of disturbance of isolated wetlands and ditches and swales. An additional acre of transition area disturbance should also be allowed in all instances. (13, 34)
RESPONSE: The "specific law" to which the commenter seems to be alluding is N.J.S.A. 13:9B-23b, which forms the basis for general permits 6 and 7. As suggested by the commenter, the rules allow one acre of disturbance of isolated wetlands and ditches and swales. However, the Department disagrees that an additional acre of transition area disturbance should also be allowed. As discussed in the response to comments 204 and 205 above, this would be a significant expansion over the former rules.

207. COMMENT: N.J.A.C. 7:7A-4.4(c)2 – This rule should specifically exclude impacts to transition areas under an “access transition area waiver". (20)
RESPONSE: The commenter appears to be commenting on N.J.A.C. 7:7A-4.4(a)2 rather than 4.4(c)2. The Department agrees and has clarified the provision. In addition, a new provision has been added at N.J.A.C. 7:7A-4.2(c) to clarify that impact limits for general permit disturbances in transition areas do not include the area necessary to access the general permit activity in the wetland.

208. COMMENT: N.J.A.C. 7:7A-4.4(c)2 – The placement of structures such as preformed piers or pilings should also be excluded from the area calculation of impacts in State open waters. Only placement of fill in open waters is regulated under the Act, not placement of structures. (20)
RESPONSE: The commenter appears to be addressing N.J.A.C. 7:7A-4.4(a)2 rather than 4.4(c)2. The Department disagrees that a clarification is necessary. The provision limits disturbance "under general permits." Thus, if an activity is not regulated, it is not performed under the authority of the general permit and is not included in the calculation of total impacts. Further, while the commenter is correct in stating that the placement of fill is regulated in State open waters, the commenter is incorrect in stating that the placement of structures is not regulated in State open waters. The definition of fill at N.J.A.C. 7:7A-1.4 includes "...concrete, pavement, or solid material of any kind…" Therefore, most structures constitute fill and thus are regulated in State open waters. Pilings are a specific type of structure, most of which are exempt from regulation as provided at N.J.A.C. 7:7A-2.2(c)5.

209. COMMENT: N.J.A.C. 7:7A-4.4(c)2: In the past, it has been unclear whether the cumulative limits for general permit authorizations apply to activities on military installations and State parks and forests which are comprised of significant land holdings. We would ask that the Department clarify this matter in the rules. (3) RESPONSE: The adopted rules include two provisions intended to address the special situation of large tracts of publicly owned land. These provisions are found at N.J.A.C. 7:7A-3.4(b)2 (special LOI options), and at N.J.A.C. 7:7A-5.17(b) (higher acreage limit for trail or boardwalk on publicly owned site). Other than these provisions, military installations and State parks and forests are not eligible for exemptions or exceptions under the rules. These areas must therefore comply with all requirements of N.J.A.C. 7:7A, including disturbance limits.

SUBCHAPTER 5 ADOPTED GENERAL PERMITS

General comments on general permits

210. COMMENT: All general permits that include references to transition areas should be modified to clarify that the impacts to transition areas for access to the wetland are not included in the acreage limitations. (20)
RESPONSE: The Department has clarified this point at N.J.A.C. 7:7A-4.2(c) and 4.4(a)2iii.

211. COMMENT: We need to strengthen these rules, not to add additional general permits. (47)
RESPONSE: Though six new general permits have been added, the Department does not believe that they weaken the rules. First, several of the new general permits cover activities that provide an overall benefit for the environment, such as closing landfills, animal waste management activities in farmed wetlands, and spring developments in farmed wetlands. Second, many applicants are likely to reduce the impact of covered activities in order to be eligible for the general permit, with the result that the final disturbance allowed may actually be less than would have been allowed if an individual permit had been required for the activity. Finally, general permit 27 for redevelopment is intended to concentrate development in previously developed areas, thus relieving development pressure on pristine wetlands. Therefore, the Department does not believe that the addition of the general permits weakens environmental protection in any respect. (Note that the Department has proposed amendments to general permits 6 and 27 elsewhere in this issue of the New Jersey Register, which narrow the general permits somewhat.)

212. COMMENT: General permits do away with the alternative analysis, which is very troubling. There seems to be movement towards expediency and administrative efficiency and away from a very cautious and tenacious defense of a very troubled resource because of our State's special history. (32)
RESPONSE: The Department has included some changes in the adopted rules that are intended to improve the efficiency of the freshwater wetlands program. However, the Department does not agree that the Department's efforts at efficiency are accompanied by a move away from a strong defense of wetlands. Further, by improving the efficiency of the wetlands program, the Department frees staff time to focus on projects with greater potential for adverse environmental impacts, and may increase compliance by making the application process less onerous for the regulated public.

213. COMMENT: N.J.S.A. 13:9B-23(c) requires that new general permits be issued only after the Department makes a determination “that the activities will cause only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment, will cause only minor impacts on freshwater wetlands.” The rule proposal shows that there are enormous potential impacts associated with a number of the proposed general permits, especially general permit 5 for landfill closures, general permit 9 for airport sight line clearing, general permit 18 for dam repair (and now removal), and general permit 27 for redevelopment of previously disturbed areas. It is

unacceptable to put forth these permits without any sense of potential scope of impacts, as called for by law and regulation. The Department argues that there are no meaningful alternatives to landfill closures, safety-required sight line clearings at airports, and mosquito spraying, so general permits are appropriate. We believe these activities deserve individual, not general, permits. (32)
RESPONSE: The commenter refers to four general permits with potential impacts – general permits 5 (landfill closures), 9 (airport clearing), 18 (dam repair and removal), and 27 (redevelopment). Please see the response to comment 253 for data regarding the impacts of general permit 5 for landfill closures. Please see the response to comment 288 for data regarding the impacts of general permit 9 for airport clearing. Please see the response to comment 352 for data regarding the impacts of general permit 18 for dam repair and removal. Please see the response to comment 402 for data regarding the impacts of general permit 27 for redevelopment. Regarding the availability of alternatives to certain general permit activities, the Department has a responsibility to administer the freshwater wetlands program as efficiently as possible. When an activity is required for public health and safety (such as landfill closures, airport sight line clearing, and mosquito management), it would be irresponsible of the Department to require additional review that would delay needed health and safety measures, and is not necessary to ensure that the activity is pursued with minimal impacts. This is especially true when an activity will remedy an existing environmental problem, such as leaking landfills or livestock trampling of streams.

214. COMMENT: Of the six new proposed general permits, we strongly oppose four and are neutral or skeptical about the other two. The Department has seen its wetlands review staff shrink from 65 to 47 since 1992, which might create an incentive to establish general permits. (32)
RESPONSE: It is true that the Department strives to accomplish as much as possible within the limits of its resources, including the number of staff available. This is entirely appropriate, as the Department has a responsibility to the citizens to try to accomplish its environmental mission in the most efficient way possible. However, while the readopted rules include measures that will make the implementation of the freshwater wetlands program more efficient, the Department has not sacrificed environmental protection in the name of efficiency.

215. COMMENT: We wish to strongly emphasize that not all wetlands are created equal, and do not lend themselves to uniform treatment. We urge the Department to recognize the fact that general permits should be rarely permitted, or deleted in subwatersheds of headwaters (such as those in the Great Swamp watershed) which contribute to a national wildlife refuge. (44)
RESPONSE: While the Department agrees that it is important to provide protection to specially designated areas such as national wildlife refuges, the standard for adoption of a general permit is minimal impact. The Department does not believe that a blanket prohibition against use of general permits in the headwaters contributing to a national wildlife refuge is necessary to ensure minimal impact, because these minimal impact activities are not likely to negatively impact the wildlife refuge downstream. If a proposed general permit activity may cause adverse impacts on a refuge, the Department can add special conditions to the general permit authorization, or can require an individual permit for the activity, in accordance with N.J.A.C. 7:7A-4.1(c), (d), and (e); 4.2(d); and 13.2(a).

216. COMMENT: Many of the general permits use the vague term “minimum necessary disturbance” without establishing any limits or criteria for judging compliance. (15, 38)
RESPONSE: Most general permits that include limits based on a minimum also include a limit on the total acreage disturbed under the general permit. Thus, the requirement of minimum disturbance applies to one or more of the activities authorized under the general permit. For example, general permit 10B limits total disturbance under the general permit to one quarter acre, but also includes a requirement that riprap be the minimum necessary to prevent erosion (see N.J.A.C. 7:7A-5.10B(c)3). The more specific limit on riprap is intended to encourage applicants to minimize the amount of the one quarter acre disturbance that is accounted for by riprap. Thus, while the term may seem vague, it is used within the context of a limited amount of disturbance.

217. COMMENT: Two permits are considered approved if the Department does not respond to an application within 30 days. They are general permit 1 for pesticide spraying, and storm water maintenance, and general permit 26 for stream cleaning. The proposal would allow applicants to take action under four permits without written authorization by the Department. Those permits are for herbicide application, for off stream storm water management, maintenance, repair of malfunctioning septic systems, minor stream cleaning activities. It is not hard to foresee that these permits would constantly move to the bottom of the pile, and eventually might cease receiving any review at all. (15)
RESPONSE: The freshwater wetlands program provides for default issuance of only a selected few permits. The Department has not adopted the default issuance provisions for vegetative maintenance in utility rights-of-way. The Department anticipates that the remaining default issuance permits will receive priority review, because of the need to ensure compliance within the default issuance deadline.

218. COMMENT: We need the Department to clarify that a waiver of the transition area for access is not included in any calculation of disturbance. (13)
RESPONSE: This has been clarified in the adopted rules at N.J.A.C. 7:7A-6.1(a)6. In addition, the Department has also added a similar clarification to N.J.A.C. 7:7A-4.2(b).

219. COMMENT: Both the current and new general permits should be strictly limited to de minimis activities. Although we recognize the Department's intention to relate the wetlands program to other State programs, we oppose having the wetlands rules take a back seat to other programs that do not have a wetlands protection mission. (2, 33)
RESPONSE: The adopted general permits, as required by the FWPA, cover only activities that will have a minimal environmental impact. While some of the limits in some of the general permits do require compliance with other laws, these other laws do not take precedence over wetlands concerns, and each activity is still reviewed by the Department to ensure that it complies with all of the limits in the general permit.

220. COMMENT: Three commenters suggested requiring mitigation for more general permits. Another suggested that for all general permits, there should be a

requirement for mitigation, in order to strengthen these rules and help stem losses. (2, 12, 33, 47)
RESPONSE: The Department has required mitigation in some general permits in order to allow necessary activities while ensuring minimal impacts. However, in general the Department believes that it is better to try to limit general permits to those activities which can meet the minimal impact standard without the need for mitigation. Further, N.J.A.C. 7:7A-4.1(c), (d), and (e); 4.2(d); and 13.2(a) allow the Department to add special conditions to a general permit authorization if necessary to ensure minimal impacts. Mitigation could be such a special condition.

221. COMMENT: Incorporate watershed impairments and flooding concerns into the Department's review process of general permits, particularly if wetland loss or mitigation is proposed in impaired areas. Every effort has to be focused on restoring those waterways and wetlands retention or enhancement is an important part of improving water quality. (2, 12, 33)
RESPONSE: Although one of the beneficial functions of wetlands listed in the FWPA is flooding protection, the FWPA does not provide for the Department to focus primarily on flooding concerns in reviewing permit applications. Instead, the Department administers a permitting program specifically targeted at flooding concerns, under the authority of the Flood Hazard Area Control Act. As for watershed impairments, the freshwater wetlands program protects watersheds by protecting wetlands. It is unlikely that something with a minimal impact on a wetland will have a major impact on the watershed in which the wetland is located. In addition, the Department has a program in the Division of Watershed Management which is in the process of addressing watershed concerns in a comprehensive way. As this process develops, LUR staff will coordinate with the Division of Watershed Management in order to ensure that the policies of both units reflect the goals of freshwater wetlands and watershed protection.

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

222. COMMENT: N.J.A.C. 7:7A-5.1(d): The Department is encouraging the planting of wet-tolerant species in detention basins. These basins will then become regulated areas. Maintenance of such basins, built in uplands, will now be subject to public notice requirements and an authorization process whereby the Department may require further application materials. This should not be required for maintenance of an upland, man-made off-stream facility. (29)
RESPONSE: Even if planted with wet-tolerant species, a well maintained detention facility should not develop into a wetland and thus would not be regulated. A detention facility that does not meet the definition of a wetland is not regulated as a State open water, in accordance with the definition of "State open water" at N.J.A.C. 7:7A-1.4. However, if a detention basin has developed wetlands characteristics and meets the FWPA definition of a wetland, the Department is required under the FWPA to regulate it as a wetland. A person who wishes to avoid regulation of a detention facility can do so by ensuring that it is well maintained in accordance with its original design.

223. COMMENT: N.J.A.C. 7:7A-5.1(d)4: The inclusion of the “mowing of vegetation” in an off-stream stormwater management facility created in an uplands as an activity triggering the need to obtain a general permit 1 is unnecessarily burdensome in consideration of any positive environmental outcome that might result. The $250 application fee borders on being punitive, as this rule change could trigger a significant increase in the number of annual applications. Counties own many off-stream drainage basins and vegetated swales that require regular maintenance. The number of these structures is, of course, expected to increase. Further, counties have not necessarily performed wetlands delineations on any of these structures to factually ascertain that they have become wetlands. It is requested that the mowing activity be removed from the proposed rule change. (52)
RESPONSE: This is not a rule change. See general permit 1 in the former rules at N.J.A.C. 7:7A-9.2(a)1, which specifically states that it authorizes maintenance of a stormwater management facility. As discussed above in the response to comment 222, a properly maintained basin will not develop wetlands characteristics and therefore maintenance will not be a regulated activity.

224. COMMENT: N.J.A.C. 7:7A-5.1(e)2: We strongly object to the 30-day default provision for pesticide spraying and stormwater maintenance. In the case of pesticide spraying, the pesticide program does not have the authority to protect wetlands. In the case of stormwater maintenance, there is no need to expedite. Maintenance is an ongoing, regularly scheduled activity, not an emergency situation. (15)

225. COMMENT: We oppose general permit 1 and the proposed 30-day default issuance. Typically, the only vegetation that needs to be controlled in rights-of-way (ROWs) is trees, which can be controlled mechanically. Older ROWs frequently become refuges for threatened and endangered plant and animal species that would be adversely impacted by indiscriminate spraying. We urge the use of an Integrated Pest Management approach as a reasonable way to deal with utility concerns, not general permits. (2, 12, 33, 47)
RESPONSE to comments 224 and 225: Because of the high level of commenter concern with this provision, and in order to more thoroughly assess the impacts of this activity, the Department has not adopted the expedited issuance process for pesticide spraying under general permit 1. Corresponding changes have been made on adoption at N.J.A.C. 7:7A-4.3(f), 10.1(b)2i, and 12.1(f), to delete references to the expedited issuance process proposed for this activity under general permit 1.

226. COMMENT: While we are very pleased by the Department's initiative to streamline the application process for herbicide spraying in utility line rights-of-way under general permit 1, we request clarification on a number of issues. Regarding the public notice requirements under N.J.A.C. 7:7A-10.9, if the herbicide treatment is considered a linear activity encompassing anywhere from ½ to 75 miles in right-of-way length, we assume that the activity will continue to qualify for a published display advertisement in lieu of sending out adjacent property owner notices. In general only a very small amount of the right-of-way is considered wetlands and then only the vegetation which may have the likelihood of growing into the conductors is treated. It is onerous enough having to notify four municipal groups within one municipality multiplied by the number of

municipalities crossed. To notify landowners within two hundred feet of any right-of-way over a ½ to 75 mile stretch would be overwhelming. (5)
RESPONSE: Maintenance of a right-of-way under a utility line is considered maintenance of a linear development and thus would be eligible for the special notice requirements for linear development found at N.J.A.C. 7:7A-10.9(f). Further, if the maintenance involves only spraying, it would not involve construction or maintenance of an above ground structure. Therefore, pursuant to N.J.A.C. 7:7A-10.9(f)1, notice to neighboring property owners would not be required.

227. COMMENT: N.J.A.C. 7:7A-5.1(d): Why does the Department regulate detention basins or other stormwater management facilities as wetlands? The Department has stated that detention basins built in uplands are not State open waters. The basins are specifically built and approved as stormwater management basins and should be regulated as such and not as wetlands. Operation and maintenance of detention basins and other stormwater management facilities is critical to the proper control of stormwater management and impeding such a process by requiring a permit either once or every five years is contrary to the intent of getting the operation and maintenance performed. Operation and maintenance should be a condition of the original approval for the basin and should be allowed as per that approval and not need any other approval. If the Department regulates stormwater management facilities as wetlands and requires a general permit 1 we do not understand why such an authorization would be subject to public notice since it should be required that these basins be maintained. (13, 34)
RESPONSE: The FWPA does not exclude detention basins from the definition of a wetland. Therefore, if a detention basin has developed wetlands characteristics and meets the FWPA definition of a wetland, the Department is required under the FWPA to regulate it as a wetland. However, a detention facility that does not meet the definition of a wetland is not regulated as a State open water, in accordance with the definition of "State open water" at N.J.A.C. 7:7A-1.4. A well maintained detention facility should not develop into a wetland and thus would not be regulated. Therefore, a person who wishes to avoid regulation of a detention facility can do so by ensuring that it is well maintained in accordance with its original design.

228. COMMENT: The rules also require that we submit a copy of the permit authorizing the original construction. What if it is not available? Do we not do the operation and maintenance? (13)
RESPONSE: The provision referred to is found at N.J.A.C. 7:7A-5.1(d)2. The provision requires "the permit, <u>if any</u>, authorizing the original construction." (emphasis added.) Therefore, if no such permit exists, or if it cannot be located, it will not be required.

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

229. COMMENT: An application for maintenance of existing pipelines in wetlands under proposed general permit 2 requires a letter of interpretation and public notice. In lieu of requiring a permit, we request that the Department establish authorization for maintenance of lawfully existing utilities by rule. The Department

could require 30 days notice of all proposed activities. The protection for wetlands would not be sacrificed because the presumption would be that the activity is taking place in wetlands, and the rule could require restoration of any disturbance. This would streamline maintenance for regulated parties and the Department. The regulated community would be required to restore any disturbances to wetlands, and schedule and complete maintenance sooner, providing further protection to the environment. Those projects in undisputed wetlands would not be required to obtain boundary verification, further reducing both the regulated community's and the Department's administrative costs. (24, 30)
RESPONSE: The applicant is not required to obtain an LOI prior to applying for authorization under general permit 2. However, at some point prior to issuance of the general permit 2 authorization, the wetlands boundary must be delineated so that the Department can determine whether the project complies with the general permit. It is important for the Department to know the wetland boundary when reviewing an application under general permit 2 because maintenance of a pipeline requires extensive soil disturbance, such as excavation and grading, which can have major wetland impacts. The soil disturbances necessary for maintenance of an underground utility line are much more disruptive of the environment than is spraying of vegetation with herbicides. Further, it has been the Department's experience that restoration plans require careful review as many revisions are usually necessary.

230. COMMENT: N.J.A.C. 7:7A-5.2(b): The terms of this general permit would allow underground directional drilling without the need for Departmental approval. Unless the Department has determined with certainty that there is no potential for the dewatering of wetlands or open waters or other impacts above an area where directional drilling might occur, this procedure should not be exempted from Departmental review. It is my understanding that directional drilling has caused direct destruction of bog turtles in Pennsylvania wetlands. (25)
RESPONSE: In 13 years of administering the freshwater wetlands program, it has been the Department’s experience that directional drilling is much less destructive to wetlands than excavating through wetlands and across streams. The Department has no evidence that such drilling results in draining or dewatering of wetland areas. Therefore, the Department encourages this procedure for utility line placement. However, the Department has clarified N.J.A.C. 7:7A-5.2(b) to ensure that it will not apply to any drilling that may cause draining or dewatering of the wetlands.

231. COMMENT: Under general permit 2, we strongly support the new provision to exclude directionally drilled underground activities from permitting requirements provided certain conditions are met. We would recommend, however, under subsection 5.2(b) that the Department <u>excludes</u> "no disturbance to transition areas" as well for electric utilities as the maximum width to augur a hole to allow placement of a conduit is <u>only</u> 6 inches. As presently proposed, in a worst case scenario, no auguring would be permitted from 25 feet to 150 feet of a wetland, i.e. maximum transition area, for a 6 inch wide upland "augured" hole. This restriction appears to be "overkill" given the small impact that a 6 inch hole would have on a non-wetland area. (5)
RESPONSE: The Department appreciates the commenter's support of the rules. However, the provision referred to by the commenter (N.J.A.C. 7:7A-5.2(b))

merely clarifies that if directional drilling is performed in such a way as to not involve any regulated activities in regulated areas, it does not require Department approval. The provision has been clarified with an example to illustrate this point. Further, the activities described by the commenter are clearly regulated under the FWPA at N.J.S.A. 13:9B-3 (also see N.J.A.C. 7:7A-2.2(a)1). In addition, while the commenter may be correct that the augur hole itself for the placement of a conduit by directional drilling may only be six inches wide, the total disturbance caused by such a directional drilling operation would be much larger. The disturbance caused by directional drilling typically includes impacts from the use of the heavy machinery used to power the augur, the disturbance of the surrounding area by the operation of the augur and related equipment, and the dirt brought out of the hole and deposited in the transition areas by the augur. For the above reasons, the suggested change has not been made. However, if best management practices for such operations could be developed such that disturbance could be reliably limited, the Department would consider the possibility of a general permit for such activities.

232. COMMENT: N.J.A.C. 7:7A-5.2(c)(1): Please clarify what is meant by permanent above ground disturbance of wetlands as it relates to the one acre fill. Since under (e) an applicant is required to backfill the disturbed area, stabilize it, and replant it with indigenous wetland plants, is this permanent disturbance or is this temporary disturbance? (13, 34)
RESPONSE: The provision has been clarified to indicate that any area that is maintained over time after the construction of the utility line is complete is considered permanent disturbance. Any thing that changes the character of the existing wetland, even if only to a different wetland type, is permanent disturbance. For example, maintained clearing over a utility line is permanent disturbance. The replanted area described by the commenter would constitute permanent disturbance if the area is periodically mowed or cleared in order to maintain it. If the area were replanted, left undisturbed and allowed to follow a natural vegetational succession without interference, that area would be considered temporarily rather than permanently disturbed.

233. COMMENT: N.J.A.C. 7:7A-5.2(c)(6) allows for sewage pump stations that do not disturb greater than 400 square feet. We have in the past provided the Department with examples of pump station designs where limiting the disturbance to 400 square feet is not always wise or prudent. The disturbance should be based upon the need for any safety or other auxiliary facilities at the pump station that are required as determined by the design engineer or determined through a treatment works approval application. (13, 34)

234. COMMENT: N.J.A.C. 7:7A-5.2(c)6: We object to the expansion of this general permit to allow sewage pumping stations. This general permit will promote rather than discourage use of wetlands for placement of pumping stations. The environmental assessment does not adequately address the potential impacts from this general permit. (2, 15, 33, 38)
RESPONSE to comments 233 and 234: Due to the level of commenter concern over the provision authorizing construction of sewage pump stations under general permit 2, the Department has not adopted this provision. The Department will work with applicants to assist them in finding appropriate locations outside of wetlands for sewage pump stations. If such an appropriate location cannot be

found in a given case, and there is no practicable alternative, the Department will determine if an individual permit should be issued to enable the pump station to be placed in the wetlands.

235. COMMENT: We are opposed to including sewage pump stations and roads as qualifying for this general permit. However, predictive data would shed light onto the impact of this change, and we might potentially view this as a *de minimis* change if predictive data was provided as to their impact. (12)

236. COMMENT: N.J.A.C. 7:7A-5.2(d): This general permit should not be expanded to include roads without an alternative analysis to prove there is no practical alternative that is less environmentally damaging. If roads are allowed, the rule should prohibit use of paving material and strictly limit the size of the road. (2, 15, 33, 38)

237. COMMENT: N.J.A.C. 7:7A-5.2(d) authorizes an access road; however, it is only applicable to municipal utilities authorities. Townships and other authorities, sewage authorities, water authorities and the like need an access road and we do not understand why an access road is limited to municipal utilities authorities. We would recommend that electric and gas utilities should also be allowed to qualify for general permit 2 if all conditions can be met. (5, 13, 34)

238. COMMENT: Please define the term "trunk main." (13, 34)
RESPONSE to comments 235 through 238: The Department has not adopted the provisions authorizing construction of sewage pump stations and access roads under general permit 2. The provisions generated a high level of commenter concern, and the Land Use Regulation Program is working with the Department's Treatment Works Approval unit to ensure adequate flexibility under that program to allow these activities to be undertaken outside of wetlands in most cases.

239. COMMENT: N.J.A.C. 7:7A-5.2(e)4: We oppose this provision that requires the disturbed area to be stabilized in accordance with the soil Conservation District requirements. This jeopardizes the integrity of the wetlands vegetation since the Soil Conservation Districts do not have the mandate to protect wetlands. (15)
RESPONSE: Although the Soil Conservation Districts do not have a mandate to specifically protect wetlands, they are charged with preventing erosion and sedimentation which can cause damage to wetlands. The rule requires stabilization in accordance with Soil Conservation District requirements in order to minimize erosion and sedimentation. However, the rule also requires at N.J.A.C. 7:7A-5.2(e)3 that the disturbed area be replanted with indigenous wetland plants. This will help restore the area's wetland functions.

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

240. COMMENT: N.J.A.C. 7:7A-5.2A(b) requires that the applicant demonstrate that alternatives will be used to minimize disturbance to wetlands, transition areas and State open waters, and it lists as an example jacking or directional drilling. This is confusing in that jacking or directional drilling is specifically excluded in these rules as needing a permit. We do not then understand how we could ever get this

permit if we have to show that we are using alternatives and one of the alternatives was an activity such as jacking that did not require a permit. It would appear that we would always have to jack and/or directional drill. (13, 34)
RESPONSE: Proposed N.J.A.C. 7:7A-5.2A(b) has not been adopted, as explained in response to commenter 241 below. However, similar provisions at N.J.A.C. 7:7A-5.2(b) have been adopted, with clarifications. Jacking or directional drilling is not always unregulated. As discussed in the response to comment 232 above, N.J.A.C. 7:7A-5.2(b) merely clarifies that if directional drilling is performed in such a way as to not involve any regulated activities in regulated areas, it does not require Department approval. The general permit is intended to cover only minimal disturbances. One of the ways to minimize the impact of a utility line is to use jacking or directional drilling, rather than other, more destructive methods. Therefore, if a line can be installed using directional drilling it usually should be done that way, even if this involves some regulated activities. If directional drilling is not feasible, then other methods may be acceptable. However if directional drilling can be used in such a way as to result in no disturbance to wetlands, transition areas, or State open waters, then no Department authorization is needed, either under the general permit or any other type of approval.

241. COMMENT: N.J.A.C. 7:7A-5.2A includes a requirement that the top of any utility and its encasement be at least three feet below the lowest point in the channel at the location of the proposed crossing. But there is also a requirement that the pipe be covered by at least four feet of stable material within the channel. Please clarify which distance is required. (13, 34)
RESPONSE: Proposed N.J.A.C. 7:7A-5.2A(b) has not been adopted. The proposed rule located all of the requirements for the combined permit in one place to the extent possible, making it easier for the reader to determine the requirements of both the freshwater wetlands and flood hazard area rules that applied to the activity. However, this approach seems to have generated confusion. Therefore, on adoption, the rule is modified to instead refer to the provisions in the flood hazard area rules which address underground utility lines.

242. COMMENT: N.J.A.C. 7:7A-5.2A(b)1 requires a demonstration that alternatives will be used to minimize disturbances. Alternatives analyses should not be required in a general permits. The assumption is that for general permits there is minimal impact. The Department should accept this premise and not require additional analyses or discussion of alternatives. (34)

243. COMMENT: N.J.A.C. 7:7A-5.2A: There are numerous new requirements included in this general permit about exactly how one needs to cross a stream and the type of slopes and distances that are not currently in the Flood Hazard Area Control Act Rules. Without seeing the new proposed Flood Hazard Area Control Act Rules, we cannot comment as to the appropriateness of these requirements. (13, 34)

244. COMMENT: N.J.A.C. 7:7A-5.2A: The Department is using the term riparian buffer. It needs to define this term. (13, 34)
RESPONSE to comments 242 through 244: Proposed N.J.A.C. 7:7A-5.2A(b) has not been adopted, as explained in the response to comment 241 above. Instead, the adopted rule refers to the provisions in the flood hazard area rules which address underground utility lines.

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

245. COMMENT: N.J.A.C. 7:7A-5.3 – general permit 3 – Discharge of return water. We oppose the proposal to add a provision that allows placement of pipes in wetlands and transition areas and allows for discharge to State open waters. This facilitates the disturbance of wetlands and transition areas and seems to give an automatic discharge permit. (15, 38)
RESPONSE: This is not a substantive change in general permit 3. Former general permit 3 (see the former rules at N.J.A.C. 7:7A-9.2(a)3), authorizes the discharge of return water in wetlands. A corresponding general permit special activity waiver, found in the former rules at N.J.A.C. 7:7A-7.4(e), authorizes the discharge of return water in transition areas. In order to ensure that these discharges do not cause erosion of the transition area and/or wetlands, the Department routinely requires the discharge to be channeled through a small diameter pipe laid on the ground for transport to its ultimate discharge point in a State open water. This prevents erosion and sedimentation that would result from discharging return water directly into the freshwater wetlands or transition area. However, the general permit does not authorize excavation or burial of a pipe, but only the discharge of the return water. This has been clarified on adoption. Finally, any impacts under this general permit will be very minor because it is used very rarely. The Department has issued only 17 authorizations under general permit 3 since November of 1989.

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

246. COMMENT: A provision should be added that does not require mitigation of wetlands that have formed on top of hazardous waste landfills that parallels this provision in general permit 5. (20)
RESPONSE: General permit 4 already includes a provision similar to the provision that the commenter suggests. N.J.A.C. 7:7A-5.4(c) exempts from mitigation requirements any disturbance of wetlands or State open waters that have formed "as a direct result of the remediation activities." The Department believes that this appropriately avoids penalizing applicants who inadvertently create wetlands during cleanup activities, while retaining protection for more valuable wetlands on a cleanup site.

247. COMMENT: General permit 4 – Hazardous site investigation and cleanup: The amended rule should continue the requirement that if the activity were to take place in an exceptional resource value wetland, an alternatives analysis be conducted. (15, 32)
RESPONSE: It has been the Department’s experience that requiring the alternatives analysis under general permit 4 has been of little benefit, since if a site is contaminated there are generally no alternatives but to clean up the contaminated area, even if it is a wetland. Alternative sites cannot be considered if the basic project purpose is to clean up a particular contaminated area. Therefore, the only alternatives that can be examined are alternative remediation methods. However, the Department's Site Remediation Program coordinates with

the Land Use Regulation Program when approving a cleanup that involves wetlands, in order to design a cleanup plan that will minimize impacts to wetlands. In addition, there are practical and legislative limits on the number of different types of remediation methods available, which further limits the utility of an alternatives analysis. Thus, it has been the Department's experience that the alternatives analysis required under the former rule has not resulted in significant environmental benefits and may, in some cases, have delayed needed cleanups.

248. COMMENT: The Department should require alternatives analyses and wetlands mitigation when wetlands are impacted by the remediation of a hazardous waste site. Mitigation should be coordinated with the Hazardous Site Remediation Program and Natural Resource Damage Program in relation to penalty compensation for past violations, especially for compensation for wetland impacts from ongoing or proposed remedial activities. (2, 12, 33)
RESPONSE: Please see the response to comment 247 above for a discussion of alternatives analyses and general permit 4. Regarding mitigation, general permit 4 does requires mitigation as suggested by the commenter (see N.J.A.C. 7:7A-5.4(b)). The commenter also states that the Department should "coordinate mitigation… in relation to penalty compensation for past violations…." It is not entirely clear what the commenter is suggesting. The Land Use Regulation Program coordinates with the Department's Hazardous Site Remediation Program when a cleanup plan is being developed, and works directly with the applicant on the restoration plan. In order to ensure that wetlands impacts are considered in the development of cleanup plans, the Department's Site Remediation and Land Use Regulation Programs are currently developing standard operating procedures that will systematize and ensure the continuation of the coordination between the Programs. In addition, the Land Use Regulation Program coordinates with the Natural Resource Damage Program when that program is involved with the site being remediated, in order to ensure consistent direction from the Department.

249. COMMENT: N.J.A.C. 7:7A-5.4. The Department's overall intent to facilitate hazardous site investigation and cleanup with the General Permit 4 is good, but the Department needs to be more flexible with the mitigation requirements. Often in-kind mitigation is not possible, so other reasonable options need to be understood and available. Because Site Remediation and the permittee are anxious for the work to proceed because of potential environmental impacts, the permittee needs to move ahead aggressively with the site investigation and cleanup and should not be sidetracked with mitigation alternative studies. Further, the permittee needs to understand its full mitigation financial liability before the investigation and cleanup work is begun. (46)
RESPONSE: The rules as readopted with amendments make the freshwater wetlands permit program more flexible in regard to mitigation options, and should provide more predictability to facilitate mitigation financial liability planning early in the remediation process (see N.J.A.C. 7:7A-15). Further, mitigation is and has historically been a required part of any project under general permit 4. Mitigation planning must be an integral part of a cleanup plan in order to ensure that mitigation is performed in a timely manner in accordance with N.J.A.C. 7:7A-15.3.

250. COMMENT: N.J.A.C. 7:7A-5.4: We support the Department in including this general permit for freshwater wetlands, transition areas and State open waters.

Also, the proposed deletion of the requirement for an alternatives analysis before a cleanup in an exceptional resource value wetlands area is good. Alternative sites cannot be considered if the basic project purpose is to clean up a particular contaminated area. Further, we support the flexibility to allow the required mitigation to be approved through a document equivalent to a mitigation proposal. This could be a proposal developed by Land Use Regulation and Site Remediation. (46)
RESPONSE: The Department appreciates this comment in support of the rule.

251. COMMENT: N.J.A.C. 7:7A-5.4(c) requires that mitigation activities be performed prior to or concurrently with the cleanup activities. Why is it necessary to require that mitigation be performed prior to or concurrently with the cleanup activities? While it may often make sense to conduct mitigation prior to or "concurrently" with the remedial activities, there may be other circumstances where mitigation must occur after a cleanup has occurred; e.g., logistics might require that mitigation occur following completion of the remedial action. The Department should amend this language to provide flexibility as to timing of mitigation activities. (46)
RESPONSE: When a permitted disturbance occurs, it removes wetlands values and functions from the ecosystem. Those wetland values and functions are not replaced until the mitigation for the disturbance is completed. Therefore, unless extra mitigation is performed to compensate for the time during which those functions and values were not present, the mitigation must be performed prior to or concurrently with the permitted activities.

252. COMMENT: N.J.A.C. 7:7A-5.4: This general permit for hazardous site investigation and cleanup should have the clause established for other general permits allowing for automatic authorization where there is no Department action within 30 days. In this case the activity has already been reviewed by the Department's Site Remediation program. Actions including site monitoring and investigation which have been approved by the Department should be afforded the 30 day review period. (34)
RESPONSE: The Department disagrees. Wetland disturbance due to remedial activities can potentially cover, and many times does cover, many acres. Therefore, careful review by the Land Use Regulation Program is critical to ensure that wetlands disturbance is minimized, and that any wetland disturbance is properly mitigated. The general permits for which the Department offers expedited approvals include limits on the size of the disturbance. It is the intent of the rule that the applicant develop plans for mitigation as part of the process of developing the clean up plan. If this is done, both the cleanup activities and the mitigation should not be difficult to review and approve, and unnecessary delay can be avoided.

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

253. COMMENT: General permit 5, landfill closures: why is there is no estimate of the scope of impacts over these 300 landfills? This general permit may involve hundreds of acres of wetlands. It would be better handled under an individual permit. There must be tremendous cost considerations and trade-offs involving landfill closure; if it is cheaper to scoop out wetlands around the edge of a landfill rather than set up a filtration and monitoring system, will wetlands disturbance be approved under the general permit? (32)
RESPONSE: Because the Department's Division of Solid and Hazardous Waste does not track the wetlands or non-wetlands status of inactive landfills that have not yet been closed, the Department cannot determine the exact acreage of potential impact under the general permit. Of the approximately 300 inactive landfills in New Jersey that have not been closed, the Division of Solid Waste has acreage data on the largest 175 landfills. These 175 larger landfills account for approximately 4,600 acres of land. The Division estimates that the remaining 125 or so landfills average approximately 5 acres in size, adding approximately 625 acres for a total of 5,200 acres of land covered by the 300 unclosed landfills. Of course, only a portion of that 5,200 acres is wetland. However, even if a substantial portion of the 5,200 acres were wetland, the Department believes that the environmental benefit of properly closing the landfills outweighs the potential environmental detriment of the wetland disturbance, especially in light of the fact that the disturbance will be mitigated for under the general permit. Further, the Land Use Regulation Program coordinates with the Division of Solid and Hazardous Waste in the development of closure plans for landfills, in order to ensure that closure plans minimize wetland disturbance.

254. COMMENT: N.J.A.C. 7:7A-5.5: We support the addition of this general permit for landfill closure but would like some clarification of application. We read this general permit to be applicable to all activities associated with landfill closure. If this is not the Department’s intent, please provide additional clarification (46)
RESPONSE: The general permit does not cover all activities "associated with" landfill closure, although it is not clear what class of activities the commenter considers "associated with" landfill closure. Some activities that are "associated with" a landfill closure may occur offsite or may not be necessary to carry out the Department-approved landfill closure plan. As stated at N.J.A.C. 7:7A-5.5(a), the activity must be approved 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. Further, N.J.A.C. 7:7A5.5(b) requires that the activities must be necessary to properly close the landfill. Thus, the general permit would not cover activities that take place at a location other than the landfill, even if they were "associated with" the landfill closure. Nor would the general permit cover activities that are associated with the landfill closure but that are not specified in the approved closure plan, or are not necessary to properly close the landfill. Land Use Regulation Program staff work closely with the Department's Division of Solid and Hazardous Waste to ensure that closure plans require as little disturbance of wetlands and transition areas as possible.

255. COMMENT: We are concerned that the mitigation associated with impacted wetlands not on the landfill or cover may need to be delayed until after the closure

is started in order to avoid impact to the mitigation area. The mitigation schedule should be determined based on the site-specific closure and specific mitigation. Thus, it may not be wise to begin the mitigation before or concurrently with the closure activities. The Department needs flexibility to work with the permittee. (46)
RESPONSE: As explained in the response to comment 251 above regarding general permit 4, when a permitted disturbance occurs, it removes wetlands values and functions from the ecosystem. Those wetland values and functions are not replaced until the mitigation for the disturbance is completed. Therefore, unless extra mitigation is performed to compensate for the time during which those functions and values were not present, the mitigation must be performed prior to or concurrently with the permitted activities.

256. COMMENT: This is a new general permit that does not put an upper limit on the amount of wetlands to be disturbed, but only states the permit is for disturbance necessary to properly close the facility and maintain and monitor it after closure. This could result in unlimited loss of wetlands. An alternatives analysis should be required to determine the least damaging alternative to wetlands disturbance. (2, 15, 44)
RESPONSE: The Department does not agree that an alternatives analysis is necessary to ensure minimal impact for this general permit. In fact, an alternatives analysis is not likely to be effective in limiting the amount of disturbance under the general permit because there is usually no alternative but to properly close a landfill, and failing to close a landfill brings its own adverse environmental impacts. Impacts from landfill closures can be most effectively minimized by continuing consultation between the Land Use Regulation Program and the Department's Division of Solid and Hazardous Waste landfill closure staff during the development of the landfill closure plan. In order to ensure that wetlands impacts are considered in the development of landfill closure plans, the Department’s Bureau of Landfill and Recycling Management and the Land Use Regulation Program are currently developing standard operating procedures that will ensure the continuation of the coordination between these Department units. Further, the limits and conditions in the general permit, including the requirement for mitigation, will also help minimize any wetlands impacts due to landfill closure.

257. COMMENT: General permit 5: We are opposed to the unlimited loss of wetlands that may occur under this general permit for landfill closures. However, if there were upper limits on wetlands disturbance, if some type of an alternatives analysis were coordinated to ensure minimum damage, and if data were supplied by the Department regarding its expectations of wetlands impacts under this proposed general permit, we could potentially support the concept. (12, 33)
RESPONSE: The Department does not believe that an upper limit on disturbance is appropriate for this general permit. First, general permit 5 covers activities necessary to remedy an existing environmental problem, so the wetlands disturbance allowed under the general permit is offset by the environmental benefits of the activity itself. Second, wetlands on landfill sites are in most cases not likely to be highly valuable and in some cases can even be dangerous to wildlife. For example, animals may be cut by metal debris, may ingest poisons or heavy metals, or may be choked by or become entangled in plastic debris. Finally, landfills in need of closure vary in size, and the Department does not have data on the amount of wetlands contained in each inactive landfill. The

Department has determine that under these circumstances, the ability to tailor the general permit authorization to each landfill closure plan is the appropriate way to minimize wetlands impacts. Regarding the issue of an alternatives analysis, please see the response to comment 256 above. Regarding the expected acreage impacts of the general permit, please see the response to comment 253 above.

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

258. COMMENT: N.J.A.C. 7:7A-5.6: This general permit can authorize impacts of up to one acre to an isolated open water, wetland, or transition area associated with the isolated wetland. Many isolated wetlands will have associated with them a 50 foot wide transition area. If the entire wetland is filled, the entire transition area disappears, whether or not any disturbance occurs in the transition area itself. In this case, it makes no sense to add the transition area loss to the wetland area loss in determining total impact and/or eligibility for the general permit. For example, if a 0.65 acre wetland is proposed to be filled, and prior to the fill the wetland has a 0.6 acre transition area, the impact should be calculated as 0.65 acre, and it should be allowed under general permit 6. The proposed rules seem to suggest that the impact might be construed to be 1.25 acres and thus not qualify for general permit 6. It is unreasonable to acknowledge any transition area impact when in fact there is no transition area absent the wetland. Since the transition area exists only if there is a wetland, and its purpose is to protect the functions and values of the wetland, there can be no independent transition area impact if the associated wetland is gone. (25)
RESPONSE: If a wetland is filled, impacts to the area that was formerly transition area would not be counted into the one acre limit on activities under general permit 6, because the Legislature authorized necessary access to activities authorized in the wetland. Therefore, in the example given by the commenter, the impact under general permit 6 would be 0.65 acres, not 1.25 acres. However, general permit 6 authorizes transition area disturbance because this is useful for an applicant who wishes to disturb only transition area, or who wishes to disturb a portion of the transition area that is not immediately adjacent to the portion of the wetland being filled under the general permit. Note that the Department has proposed amendments to general permit 6 elsewhere in this issue of the New Jersey Register, which narrow the general permit somewhat.

259. COMMENT: General permit 6: If 0.65 acre of a 0.85-acre isolated wetland must be impacted, and 0.5 acre of its transition area also would be disturbed, can this work be authorized under proposed general permit 6? The remaining wetland will continue to have associated with it a transition area, and that transition area may be larger in area than the wetland itself. If an applicant must add the transition area impact to the wetland acreage calculation in this example, then general permit 6 would not apply and an individual permit would be needed. The applicant would be strongly motivated to eliminate the entire wetland rather than try to preserve any of it, which clearly is not the intent of the proposed regulations or the FWPA. The calculation of impacts for general permit 6 should be limited to impacts to wetlands and open waters, and not include transition areas. (25)
RESPONSE: In the example given, the transition area impact would be included in the calculation of acreage disturbed only if the transition area impact were not

located in the area immediately adjacent to the filled wetland. However, as discussed in the response to comment 258 above, if the proposed disturbance were in the area immediately adjacent to the wetland being filled, that area would no longer be transition area because the filling would destroy the wetland. Therefore, the area would no longer be regulated as a transition area. However, the transition area that existed adjacent to the unfilled portion of the wetland prior to the filling would remain transition area and would continue to be regulated. Note that the Department has proposed amendments to general permit 6 elsewhere in this issue of the New Jersey Register, which narrow the general permit somewhat.

260. COMMENT: General permit 6 for isolated wetlands accounts for by far the largest single amount of wetlands destruction of all the general permits. Protecting vernal ponds under this permit is laudable and we strongly support it. It will protect important habitats and it will help reduce losses. However, recent research by Ralph Tiner on the landscape value of wetlands reveals that many wetlands that were apparently classified as isolated are in fact connected webs of wetlands, critical to the headwater areas of our streams. We urge the Department to follow the Federal lead and reduce the size of the wetland acreage under this permit to one half an acre. (15, 38, 47)
RESPONSE: The Department appreciates this comment in support of the restriction on use of general permit 6 in vernal habitats. Please see the response to comment 261 below for a discussion of general permit 6 in relation to Federal wetlands requirements.

261. COMMENT: The rules should tighten the limit on general permit 6 to ¼ acre in flood-prone basins and ½ acre elsewhere. (2, 12, 33)
RESPONSE: Although general permit 6 accounts for the greatest acreage of wetlands disturbance among the general permits, impacts under all general permits combined still total only averaged 130 acres per year between 1994 and 1999. Given that New Jersey has 739,160 acres of wetlands, this is still a minimal impact, especially considering that some of the disturbance under general permits is restored or mitigated for (for example, general permit 2 requires restoration of the area over an underground utility line and general permit 4 requires mitigation for wetlands disturbed during a hazardous site cleanup). Notwithstanding these facts, the Department has, upon a request from EPA, proposed amendments elsewhere in this issue of the New Jersey Register, which will narrow general permit 6. The proposed amendments will reduce the amount of disturbance authorized under general permit 6 in waters of the United States to one half acre. This will ensure that general permit 6 is as stringent as the corresponding provisions of the Federal wetlands program.

262. COMMENT: N.J.A.C. 7:7A-5.6(b): It is an improvement to allow disturbance of up to one acre in transition areas adjacent to non-tributary wetlands and waters, provided the total disturbance of one acre excludes the transition area associated with the part of the wetland being filled. (20)
RESPONSE: The Department appreciates this comment in support of the rules. As discussed in the response to comments 258 and 259 above, the acreage limit under general permit 6 does not include the transition area adjacent to a wetland being filled under the general permit.

263. COMMENT: N.J.A.C. 7:7A-5.6: We note that this general permit accounts for the most wetlands acreage loss of all the general permits, and for almost as much loss as all individual permits. We strongly support the exclusion of vernal ponds from this general permit as it will protect important habitats and it help reduce losses. (38)
RESPONSE: The Department appreciates this comment in support of the rules.

264. COMMENT: The enhanced protection of vernal ponds in general permit 6 appears to strengthen the rule, but we need predictive data as to the degree of strengthening in order to evaluate the overall improvement to wetlands protection. How often will this make a meaningful difference in the protection of a vernal pond? This provision should be expanded to include exceptional resource value classification for all vernal ponds. (2, 12, 33)
RESPONSE: The Department appreciates this comment in support of the protection of vernal habitats under general permit 6. The Department is currently compiling a list of certified vernal habitats, and cannot precisely quantify the expected impact of the vernal habitat protection at this time. However, due to the growing recognition around the U.S. of the importance of vernal habitats, the Department believes that the rule change will have a substantial protective impact. In fact, elsewhere in this issue of the New Jersey Register, the Department is proposing amendments to the FWPA rules which will prohibit use of all general permits in vernal habitats. The factors which result in an exceptional resource value wetland classification are set forth in the FWPA at N.J.S.A. 13:9B-7, and the FWPA does not include all vernal habitats as exceptional resource value wetlands, although some may be.

265. COMMENT: We applaud the rule proposal to help protect vernal ponds. Vernal ponds would often be ranked as exceptional resource value wetlands if they were considered something other than isolated wetlands. (12, 47)
RESPONSE: The Department appreciates the commenter's support for the protection of vernal habitats under general permit 6.

266. COMMENT: General Permit 6 needs to be tightened. It is being abused, when applicants claim that wetlands isolated but they are not. (47)
RESPONSE: The Department agrees that there are occasions where applicants claim that a non-isolated wetland is isolated. The Department addresses this problem by performing a site inspection for every LOI application, and for every general permit application where no LOI has previously been issued. At these site inspections, Department staff determine whether a wetland is isolated. An applicant's claim that a wetland is isolated is not sufficient for the Department to issue authorization under general permit 6. Note that the Department has proposed amendments to general permit 6 elsewhere in this issue of the New Jersey Register, which narrow the general permit somewhat.

267. COMMENT: Under General Permit 6, when permittees fill isolated wetlands, in a year or two septic systems may be installed on top of them, leading to a risk of contamination to ground water and to the streams in the area, especially in populated wetland areas. There should be prohibition against subsurface disposal systems in general permit 6. (47)
RESPONSE: Once an isolated wetland is filled and becomes non-transition area upland, the Department no longer has wetlands permitting jurisdiction over the

area. However, the Department's Onsite Wastewater Management Program (in the Division of Water Quality) and local health departments regulate the placement of septic systems, and these agencies would consider subsurface groundwater elevations during the review and approval process. Thus, the potential for groundwater contamination will be addressed during the septic system approval process. (For more information on the regulation of septic systems, see the Onsite Wastewater Management Program website at www.state.nj.us/DEP/dwq.)

268. COMMENT: General permit 6 should require mitigation. (47)
RESPONSE: Rather than requiring mitigation for every general permit 6 disturbance, the Department has chosen a more targeted approach that prevents destruction of valuable vernal habitats. A mitigation requirement for all general permit 6 disturbances would apply to all general permit 6 projects, whether the wetland disturbed is severely degraded or provides valuable habitat. In addition, the mitigation requirement would not prevent destruction of valuable vernal habitat, but would attempt to compensate for such destruction after the fact. By contrast, the bar against use of general permit 6 in vernal habitats protects the most valuable types of isolated wetlands, by preventing their disturbance in the first place. Therefore, the Department believes that the approach found in the adopted rules more effectively minimizes the impact of general permit 6. Further, the Department has authority under N.J.A.C. 7:7A-4.1(c), (d), and (e); 4.2(d); and 13.2(a) to add mitigation as a special condition on a general permit 6 authorization, if necessary to ensure that a particular project has minimal impact. Note that the Department has proposed amendments to general permit 6 elsewhere in this issue of the New Jersey Register, which narrow the general permit somewhat.

269. COMMENT: General permit 6 should not be available in sub-watersheds whose water quality has been classified as "impaired" or "severely impaired." In urbanizing areas these isolated wetlands may be some of the last wetlands remaining. (38)
RESPONSE: It may be true that in urbanizing areas in sub-watersheds with impaired water quality, isolated wetlands may be some of the last remaining wetlands. However, this is not true in every sub-watershed with impaired water quality. Therefore, it would not be appropriate for the Department to impose a blanket prohibition on use of general permit 6 in these sub-watersheds on this basis. If a situation such as that described by the commenter arises, the Department has authority under N.J.A.C. 7:7A-4.1(c), (d), and (e); 4.2(d); and 13.2(a), to require an individual permit or to add special conditions on a general permit 6 authorization, if necessary to ensure that a particular project has minimal impact.

270. COMMENT: The rules should prohibit use of general permit 6 and 7 in high quality watersheds. (2, 12, 33)
RESPONSE: The commenter does not specify what is meant by "high quality watersheds," nor does the commenter explain why these two general permits should be prohibited in these watersheds. These two general permits are already prohibited in exceptional resource value wetlands and in EPA Priority Wetlands, two types of high quality wetlands identified in the FWPA. Further, the Department has authority under N.J.A.C. 7:7A-4.1(c), (d), and (e); 4.2(d); and

13.2(a), to require an individual permit or to add special conditions on a general permit 6 or 7 authorization, if necessary to ensure that a particular project in a high quality watershed has minimal impact.

271. COMMENT: N.J.A.C. 7:7A-5.6(c)4: What is the statutory basis for limiting the application of this general permit to State open water of less than one acre? What is the technical basis for the one acre limit? Without the legal or technical basis for making this distinction this provision must be deleted. (34)
RESPONSE: This limit avoids 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 limit will ensure a consistent and logical application of the general permit. Further, although the Department has always allowed use of the general permit in State open waters, the FWPA provides at N.J.S.A. 13:9B-23b for filling of an isolated wetland, and does not specify that State open waters are covered. Based on experience with the general permit, the Department does not believe that allowing filling of a State open water greater than one acre meets the FWPA requirement of minimal impact.

272. COMMENT: N.J.A.C. 7:7A-5.6(e)5: The addition of vernal habitats as an area where this general permit cannot be applied is a significant change. The FWPA specifies that this general permit is for activities which would not result in the loss or substantial modification of more than one acre of freshwater wetlands, provided the activity will not take place in a freshwater wetland of exceptional resource value. The FWPA does not include vernal habitats. Thus the addition of vernal habitats is inconsistent with the statute. (34)
RESPONSE: The Department has determined that this limit on the use of general permit 6 in vernal habitats is necessary to ensure that general permit 6 will not result in more than minimal individual and cumulative impacts in contravention of N.J.S.A. 13:9B-23 and 27a. As explained in the proposal summary at 32 N.J.R. 2712, various studies have identified vernal habitat as ecologically important because, among other functions, it supports a unique ecological community with high species diversity; supports certain amphibians, some of which are endangered or rapidly declining; 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 which five are endangered, one is threatened, and five are declining because of loss of habitat. The Department believes that the adopted rule appropriately implements the statutory directive regarding this general permit.

273. COMMENT: The proposal notes that the Department will be providing a list of all vernal habitats in the State. Until such a list is provided, there is no way to assess the impact of this new provision. When does the Department anticipate having this inventory finalized? At a minimum, this provision should be held pending completion of the list followed by public review and comment. (34)

RESPONSE: The Department is currently developing a list of certified vernal habitats, and a detailed protocol setting forth the method it uses to certify vernal habitats. The Department anticipates making its list of certified vernal habitats and draft vernal habitat certification protocol available on the Land Use Regulation Program website at www.state.nj.us/dep/landuse in early September 2001. There is no need to hold the rule pending completion of the list, because if an area is not on the list, the Department will presume that the area is not vernal habitat. The only exception to this would be if evidence that an area is a vernal habitat were received by the Department after submittal of an application for regulated activities in the area. In such a case, the Department would investigate the evidence and the area prior to making a final decision on the application. Similarly, if an area is a certified vernal habitat, and if it is demonstrated that the area is no longer suitable for use by vernal habitat species, the Department will remove the area from the list of certified vernal habitats. The list of certified vernal habitats will be updated on an ongoing basis as more data are collected and more vernal habitats are certified. The determination of whether an area meets the protocol requirements for certification as vernal habitat is made by Department wildlife specialists based on scientific data, and based on their training, experience and judgment. These matters are technical and are unlikely to be illuminated by public comment on the list.

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

274. COMMENT: The definition of a headwater as a water or wetland upstream of the point on a non-tidal stream where the average annual flow is less than 5 cubic feet per second results in the definition of an area having approximately 3 to 5 square miles of upstream drainage basin area. The statement that in general, the Department considers a water body with a drainage area of less than 50 acres to be a headwater is confusing, inaccurate and overly restrictive, given the preceding definition of a headwater. The reader could instead be alerted that a Flood Hazard Area permit is required for activities in waterways or drainageways that have more than 50 acres upstream drainage basin area. (20)
RESPONSE: While the Department agrees that the last sentence in the definition of "headwater" is somewhat conservative, this is appropriate in order to ensure that impacts under the general permit are minimal. In addition, the definition also provides flexibility in that an applicant who wishes to dispute a determination by the Department that a wetland or water which drains less than 50 acres is not a headwater could provide flow data to show that flow is more than 5 cubic feet per second.

275. COMMENT: N.J.A.C. 7:7A-5.7(a): The Department is using a very lengthy definition of headwater area. However, it ends the definition with the words in general the Department considers a water body with less than fifty acres to be a head water. We would recommend that the Department use that specific language as definition of a head water and confirm that through these rules the Department regulates these areas. (13, 34)
RESPONSE: Flow rate data are not always available for a particular water, and sometimes it is difficult to determine a water's flow rate, especially in the field. Therefore, the 50 acre drainage area is a general rule which is meant to aid in

applying the technical language in the rest of the definition. However, to ensure consistency with the Federal 404 program, if adequate flow rate data are presented, the Department will apply the technical language rather than the 50 acre drainage area criterion. Therefore, the definition has been adopted as proposed.

276. COMMENT: The watershed management effort associated with the Clean Water Council is studying alternative headwaters definitions. Watershed management area 6 has also defined headwaters differently. We urge the Department to use the same definitions throughout its programs. The definition proposed here – that a headwater stream drains less than 50 acres – is not clear enough. (15)
RESPONSE: The Department is aware that the definition of "headwater" contained in the proposed watershed management rules differs from that in the freshwater wetlands rules. However, the definition in the freshwater wetlands rules is based on the Federal definition of the term in order to ensure consistency with the Federal 404 program. Therefore, the definition has been adopted as proposed.

277. COMMENT: N.J.A.C. 7:7A-5.7: Is it the intent that this general permit apply to human made ditches and human made swales? As it is written, this provision applies to human made ditches and swales. Whether or not the swales are human made is unclear. This needs to be clarified. (34)
RESPONSE: The general permit applies to human made ditches, and to swales that occur naturally or are of human construction. This has been clarified on adoption at N.J.A.C. 7:7A-5.7(a). By definition (see N.J.A.C. 7:7A-1.4) ditches are of human construction, while swales may be naturally occurring or of human construction.

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

278. COMMENT: General permit 9, Airport sight line clearing: Forested wetlands adjacent to northern NJ airports are quite extensive and likely could be lost under this general permit. While the trees will grow back, if a forested wetland is cut down, that results in about a 10 to 50 year change in the habitat quality of that wetland. We oppose this general permit on the ground that the scope is likely to be hundreds of acres of impacts over time, which should be handled under individual permits. We should know how many airports there are. We are very uncomfortable with the Department of Transportation (DOT) playing the lead role in deciding what gets cleared. We think Department staff needs to be in the field to double check the DOT determination. (32, 47)
RESPONSE: The Department acknowledges that there will be a change in the habitat type when trees are cut in forested wetlands for airport sight line purposes. However, the general permit does not allow clear cutting, but only allows cutting as necessary to ensure that the sight line areas required by the Federal Aviation Administration are clear of trees. This will minimize the potential for impacts on habitat. Furthermore, Federal Aviation Administration regulations require these sight lines for safety reasons. The applicant under these circumstances would be issued an individual permit for the cutting if the applicant could show that there is no practicable alternative to the tree cutting. At an airport, the only alternative to

the cutting is generally to close the airport or relocate it in an upland area. Given that the general permit applies only to existing public use airports, it is obvious that the alternatives of closing or relocating are not practical. Therefore, requiring an individual permit for this activity would result in burden and delay for no environmental benefit. There are approximately 50 public use airports in New Jersey. The Department of Transportation has examined the Department's freshwater wetlands mapping in the area of each airport. The mapping indicates that twenty of the airports have scrub/shrub or forested wetlands in the vicinity, 19 do not have any wetlands in the vicinity, and 11 have wetlands nearby, but require further investigation to determine if any wetlands fall within sightline areas. The Department notes that Department staff inspect virtually every site upon which an application for authorization under any of the general permits in these rules is submitted.

279. COMMENT: N.J.A.C. 7:7A-5.9(a): The regulation should state that the permit applies only to cutting of vegetation as necessary to bring existing operations into compliance with New Jersey Department of Transportation rules. This seems reasonable to assure safety; however, in Morristown, the clearing alone has led to the use of larger aircraft. Given the acknowledgement that this permit could lead in the long term to less productive wetlands – shrub/scrub as opposed to forested – this permit needs strict conditions spelled out beyond the words "cutting of vegetation only as necessary…". (15)
RESPONSE: The general permit does not allow cutting of vegetation in order expand the area of buildings or pavement at an airport. However, the general permit does not prohibit an airport from cutting trees to comply with sight line requirements because an airport begins using larger planes. If the general permit were revised as suggested, the Department would have to assume the role of evaluating whether an airport should be permitted to serve larger planes. The Department does not believe that this falls within the scope of its mandate under the FWPA.

280. COMMENT: N.J.A.C. 7:7A-5.9 – General permit 9 – Airport sight line clearing – We support this new general permit as it will allow for the more efficient implementation of measures when necessary to correct safety problems at public use aviation facilities. The New Jersey Department of Transportation's Division of Aeronautics has submitted a separate letter expressing its support for this general permit, and has also provided some technical clarifications. We would also like to note that this general permit only provides for the maintenance of required aviation safety zones for existing conditions. It will not be used to expand facilities, and since it only provides for maintenance, it will not result in the loss of any wetlands. (23)
RESPONSE: The Department appreciates this comment in support of the rules.

281. COMMENT: We applaud the Department for its foresight in adding general permit 9 for airport sight line clearing. General permit 9 will allow the expedited removal of hazards to air navigation, once they are identified by Federal Aviation Administration or State aeronautics officials in compliance with N.J.A.C. 16:54-1. This will allow us to improve the safety at State aeronautical facilities much faster than was possible under previous regulations. (28)
RESPONSE: The Department appreciates this comment in support of the rules.

282. COMMENT: We support proposed provisions under general permit 9 which will allow the removal of vegetation at airports that is identified by the Division of Aeronautics to be a hazard to aerial navigation. We note that five people were killed in two separate accidents on take-off last year that involved hitting trees at the end of runways. Airports comprise such a small portion of the State's land area that there can certainly be no consequence to clearing vegetation from runway end zones. Saving lives should be everyone's concern. Airports are also unique economic tools. Safety and economics should overcome any environmental issue involved in clearing vegetation from the end of runways. This is a lifesaving measure that should be adopted. (7, 27)
RESPONSE: The Department appreciates this comment in support of the rules.

283. COMMENT: N.J.A.C. 7:7A-5.9(b): The last sentence should read: "… Department of Transportation rules at N.J.A.C. 16:54-4.2 ~~(a)1iii.~~ for all public use aeronautical facilities." The Federal Aviation Administration and New Jersey Department of Transportation regulations apply to all types of public use aeronautical facilities, not just public use airports as identified in the referenced citation. The proposed wording limits the provision to only the protected airspace around public use airports. It does not cover the runway safety areas, nor the protected airspace required for other types of public use aeronautical facilities such as public use heliports. (28)
RESPONSE: The Department has corrected the citation as suggested.

284. COMMENT: N.J.A.C. 7:7A-5.9(c): This section should be clarified to allow for maintenance of sight lines for airports after new pavement or buildings have been constructed. (20)
RESPONSE: The rule states that the general permit is not to be used as part of a project to expand the area of pavement or buildings at an airport. If such an expansion involved regulated activities under these rules, an individual permit would be required, which would presumably include any cutting of vegetation needed to meet Federal Aviation Administration requirements. If such an expansion did not involve regulated activities, the cutting of vegetation could be authorized under the general permit after the expansion project was completed. The Department believes the rule is sufficiently clear on this point.

285. COMMENT: N.J.A.C. 7:7A-5.9(d): The proposed contents of the required certification should be changed to read as set forth below. This will clarify and simplify the submittal requirements and adds a requirement for documentation when there is a requirement to clear brush and stumps:
   1. A copy of the current license issued for the public use aeronautical facility;
   2. A description of the area required to be cleared, including the appropriate approach slopes required, or airport layout plans or other facility drawings, as applicable, showing the area to be cleared, including the appropriate approach slopes required;
   3. A statement citing the applicable regulation and an explanation of how the proposed cutting will bring the facility into compliance with the NJDOT regulations, or how it will maintain compliance of the facility with those rules; and
   4. Where clearing is required, a statement citing the applicable regulation and an explanation of how that proposed clearing will bring the facility into compliance

with the NJDOT and FAA regulations, or how it will maintain compliance of the facility with those rules. (28)

RESPONSE: The Department agrees that suggestions 1, 2 and 3 include information that will improve the clarity and accuracy of the rule and has rephrased the general permit and added specifics as suggested by the commenter. However, allowing removal of stumps as suggested in item 4 would be a substantial change on adoption and so this suggestion has not been followed. The Department will consider making this change in a future rulemaking.

286. COMMENT: N.J.A.C. 7:7A-5.9(e) should include this language allowing compliance with FAA requirements that require brush and stump removal: The permittee shall leave all tree stumps, brush stumps, and root systems in place, <u>except when they must be removed to meet FAA regulations.</u> This provides for compliance with FAA requirements which apply in certain runway safety areas. (28)

RESPONSE: As stated in response to comment 285 above, allowing removal of stumps would be a substantial change on adoption and so this suggestion has not been followed. The Department will consider making this change in a future rulemaking.

287. COMMENT: This general permit should also be amended to allow installation of fencing in wetlands and transition areas to keep deer from entering runways. (20)

RESPONSE: While the Department agrees that fencing may be needed at times to keep deer off of runways, the suggested change has not been made at this time. The Department will study this issue as it implements this new general permit, and will consider making the suggested change in a future rulemaking.

288. COMMENT: Predictive data on the need for clearing at existing airports would be helpful. Absent such data, there is no way to evaluate the potential impacts. We are also opposed to any process which would lessen public participation. We oppose the use of a general permit for this measure. If an individual permit process is really inhibiting the quest for public safety, perhaps a modified general permit process which requires an alternative analysis and inclusion of conservation agencies would work. These projects also present possibilities for mitigation banks in headwater areas. In a past case, negotiations between a North Jersey township and the DOT regarding the township's airport proved that the DOT standards were far too generous as far as sight line standards for safety. The continued use of an individual permit for these concerns allows for site-specific evaluations and potentially a significant reduction in wetlands impacts. (2, 12, 33)

RESPONSE: There are approximately 50 public use airports in New Jersey. The Department of Transportation has examined the Department's freshwater wetlands mapping in the area of each airport. The mapping indicates that twenty of the airports have scrub/shrub or forested wetlands in the vicinity, 19 do not have any wetlands in the vicinity, and 11 have wetlands nearby, but require further investigation to determine if any wetlands fall within sightline areas. The new general permit will not reduce public participation. As with all individual and general permits, the public will receive notice of the application for authorization under general permit 9 in accordance with N.J.A.C. 7:7A-10.9. Public comments on the application may be submitted in accordance with N.J.A.C. 7:7A-12.3, and a

public hearing may be requested under N.J.A.C. 7:7A-12.4. Because these activities are constrained in where they may be located (they must be adjacent to the runway at a particular airport), an alternatives analysis would not provide significant benefits. It is not clear what the commenters are trying to say regarding mitigation banks in headwaters. Apparently the commenters believe that mitigation should be required under this general permit, and that the mitigation should be through purchase of credits in mitigation banks in headwaters. Due to the fact that the general permit allows only cutting of vegetation and not more permanent disturbances, the Department does not believe that mitigation is necessary to meet the FWPA standard of minimal impact. The general permit only allows cutting of vegetation that is "necessary to comply with" FAA safety regulations (see N.J.A.C. 7:7A-5.9(b)). Further, N.J.A.C. 7:7A-5.9(d) requires the applicant to justify the amount of cutting proposed. This allows for the type of site-specific evaluations suggested by the commenter. Based on the above, the Department believes that the activities authorized under the general permit, as limited, will result in minimal impacts.

7:7A-5.10A General Permit 10A – Very minor road crossings

289. COMMENT: N.J.A.C. 7:7A-5.10A and B: We believe that the creation of two groups of minor road crossings is a positive change that will result in economies for both the applicant and the Department without compromising environmental protection. (49)
RESPONSE: The Department appreciates this comment in support of the rules.

290. COMMENT: N.J.A.C. 7:7A-5.10A(a)1 should be amended to include guide rails as attendant features. This should also be added to general permit 10B. (20)
RESPONSE: N.J.A.C. 7:7A-5.10A states that "attendant features" are covered by the general permit, and lists a few examples. The attendant features listed in this provision are only examples and are not an exhaustive list. Guide rails are clearly an attendant feature to a road crossing and will be authorized under both general permit 10A and general permit 10B.

291. COMMENT: N.J.A.C. 7:7A-5.10A(b): The Department is limiting the total cumulative disturbance of freshwater wetlands, transition areas and State open waters under 10A to one quarter (1/4) acre. We believe that the one quarter (1/4) acre should not include the transition area and should only be freshwater wetlands and State open waters. (13, 34)
RESPONSE: The one quarter acre limit for disturbance to wetlands, transition areas and State open waters is not a change. Former general permit 10 is limited to one quarter acre of disturbance of freshwater wetlands and State open waters combined, and the special activity transition area waivers for general permit activities have historically been limited such that both wetlands and transition area impacts must fall within the general permit impact limits (see former N.J.A.C. 7:7A-7.4(e)). (Of course, the transition area access necessary to get to the wetland for the general permit activities is not counted in these limits.) Thus, the commenter's suggested change would double the impacts allowed under this general permit. The Department does not believe the general permit would

continue to meet the requirement for minimal individual and cumulative impact if the acreage limit were doubled.

292. COMMENT: N.J.A.C. 7:7A-5.10A(b): The one-quarter acre and one-eighth acre limits are said to apply to aggregated disturbances of wetlands, open waters, and transition areas. However, pursuant to N.J.A.C. 7:7A-6.1(a)6, an "access transition area waiver" is automatically provided for that portion of the transition area bordering the wetland that must be crossed to gain access to the wetland crossing, and is not counted in the acreage limitation. The allowance for access should be made clear in this subsection. (25, 34)
RESPONSE: The Department agrees and has clarified the rules on adoption at N.J.A.C. 7:7A-4.2(c) by including and cross referencing information at N.J.A.C. 7:7A-6.1(a)6 that authorizes disturbance needed for access to a general permit activity, and by clarifying that this disturbance would not be counted in determining whether a project had exceeded impact limits under the general permit.

293. COMMENT: N.J.A.C. 7:7A-5.10A(b) – The Department is separating short crossings from long crossings and the long crossing scenario is limited to one eighth (1/8) acre. We do not understand why one eighth (1/8) acre is deemed appropriate for longer crossings and would seem to be contrary to the need to have a longer crossing. If the Department has decided that one quarter (1/4) acre of disturbance is the threshold for minimal impact, then why is it concerned with the length? (13, 34)
RESPONSE: In determining an amount of disturbance that will have minimal impacts, the Department must consider not only the size of the impact, but also the nature of the impact. A longer crossing tends to segment wetlands more and to interfered more with the movement of wildlife and the existing wetlands hydrology. Thus, longer crossings have a greater impact than shorter crossings, even if each crossing disturbs only a small total acreage. The longer crossing scenario was intended primarily to address the common situation of a single family home that must be placed far from the street, either because that is where the buildable upland is found on the lot, or because of the configuration of the lot (for example, a "flag lot" on which the only road access is through a long narrow portion of the lot). In such a situation, only a narrow driveway is needed, so 1/8 of an acre of disturbance would generally be sufficient.

294. COMMENT: N.J.A.C. 7:7A-5.10(b): We are encouraged to see that the Department will allow larger than two hundred cubic yards of fill to prevent erosion provided that it is required in order to comply with standards for soil erosion and sediment control in New Jersey. (13)
RESPONSE: The Department appreciates this comment in support of the rules.

295. COMMENT: N.J.A.C. 7:7A-5.10A(b)1 We support the short crossing scenario. (15)
RESPONSE: The Department appreciates this comment in support of the rules.

296. COMMENT: N.J.A.C. 7:7A-10A(b)2: We support the attempt in general permit 10A to discourage skirting a wetland for a long road crossing by requiring the alternatives analysis and the clarification that the acreage limit applies to the wetland, the transition area and the open water combined. (15)
RESPONSE: The Department appreciates this comment in support of the rules.

297. COMMENT: N.J.A.C. 7:7A-5.10A(c): An alternatives analysis is required for a crossing that skirts the edge of, but does not actually cross, a wetland or transition area. No such analysis is required for an actual crossing that satisfies the other conditions listed. I oppose the requirement for an alternatives analysis for such activities because (1) it is likely to encourage more direct wetland impacts (across wetlands) simply to avoid the need to analyze alternatives, and (2) it is unnecessary because the other requirements and limitations of this general permit adequately minimize environmental impacts. (25)
RESPONSE: The Department acknowledges that in some cases this provision may cause an applicant to move a road further into a wetland to create an actual crossing. However, the Department believes that the provision has advantages that outweigh this disadvantage. The provision will prevent a common abuse of former general permit 10, in which an applicant would design a road to just touch a wetland, on a site with ample available upland on which the road could be placed. This design would enable the applicant to place a large segment of road in the transition area under the transition area waiver for access to a general permit activity (the portion of the road in the wetland). By placing the road segment in the transition area, the applicant could preserve more upland for building lots. Further, applicants in the past have mistakenly tried to use the general permit for any type of disturbance that results in a road surface, for example, applicants have claimed that each driving aisle in a parking lot placed in wetlands is actually a road crossing and thus the acreage covered by the driving aisle portion of the parking lot should be authorized under general permit 10. This provision will help clarify that the purpose of the general permit is to allow disturbance in order to obtain access to buildable areas which otherwise would be inaccessible. Thus, the Department believes that the benefits of the provision outweigh any possible adverse effects.

298. COMMENT: N.J.A.C. 7:7A-5.10A(c): The language “without actually crossing through the wetland or transition area” should be stricken. Projects that do not cross through a wetland or transition area do not need permitting. (52)
RESPONSE: The provision is intended to address problems the Department has encountered over the years of administering the freshwater wetlands program. It has been the Department's experience that some applicants under the former general permit 10 attempted to preserve buildable upland by proposing to place roadways just inside the perimeter of wetlands and transition areas whenever possible, even when this was not necessary to access upland areas. Some applicants propose roads ending as a cul de sac in a transition area or wetland; while others propose roads that nick the edge of a wetland, in order to allow disturbance of more transition area under an access transition area waiver. However, the intent of general permit 10 is to allow a person who cannot gain access to a buildable upland area without crossing wetlands to cross wetlands only as necessary to access the buildable upland. The provision cited by the commenter is intended to ensure that new general permits 10A and 10B will fulfill this intent. In some cases, site conditions are such that access to a buildable area can best be achieved by nicking the wetland without crossing it. In such cases, this will become evident in the onsite alternatives analysis required under this subsection, and the general permit would authorize the project.

299. COMMENT: General Permit 10A requires an alternatives analysis if a road skirts a wetland or transition area. If the road skirts, but does not touch a regulated area, why would the Department have jurisdiction? (29)
RESPONSE: It is quite common for a road to skirt a wetland while passing through a transition area. The provision is intended to prevent placement of a road or driveway so as to touch a transition area or wetland without crossing through it, simply to maximize the buildable area onsite. If a road does not touch a transition area, State open water, or wetland, no permit is required.

300. COMMENT: N.J.A.C. 7:7A-5.10A(e) states that the length limit at (b)1 applies to each separate road crossing (i.e. a length of up to 100 feet per crossing). Yet, (e)2 states that "...the total length of disturbance ... connecting more than two upland areas separated by the same wetlands.." is "...the sum of all the lengths of crossings that traverse that particular wetlands.." At a meeting in Trenton on August 23, I was told that this paragraph was supposed to apply to "nipping" wetlands. However, the wording is not clear and seems to contradict the 100 foot length limit <u>per crossing</u> of wetlands. This language needs to be clarified. (21)
RESPONSE: As stated in the first sentence of N.J.A.C. 7:7A-5.10A(e)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." In other words, a road that repeatedly traverses the same wetland or State open water is considered one crossing, and under the "short crossing scenario" at N.J.A.C. 7:7A-5.10A(b)1i, such a road may not be longer than 100 feet. The rule has been clarified upon adoption to assist the reader in understanding this point.

301. COMMENT: The use of alternatives analyses for general permit 10A and 10B appears to strengthen the rule, but we need predictive data as to the degree of strengthening in order to evaluate the overall improvement to wetlands protection. (2, 12, 33)
RESPONSE: The Department does not have data on how many of the authorizations issued under former general permit 10 involved more than 1/8 acre of disturbance and also involved incursions into transition areas or wetland which were not necessary for access to a buildable upland. However, total acreage under general permit 10 averages approximately 16.5 acres per year, so the total acreage protected by this provision will be less than that. While the Department cannot predict the exact acreage that will be affected by the rule change, the Department believes that the provision closes a loophole in former general permit 10 and more closely fits the intent of the general permits.

7:7A-5.10B General permit 10B - Minor road crossings

302. COMMENT: N.J.A.C. 7:7A-5.10B(b)1 requires consideration of alternative locations and or configurations of the road crossing. This is inconsistent with the general permit concept. General permits are issued for activities found to have minimal impact. If an activity meets the standards of the general permit it should be acceptable. A requirement to investigate alternatives should not be included in a general permit. (34)
RESPONSE: While the Department agrees that ideally a general permit should be as procedurally simple as possible, there are some cases in which minimal

impact cannot be assured without a more complex review. In these cases, rather than abandoning the general permit altogether and requiring an individual permit for the activity, the Department believes an alternatives analysis is justified. In this case, the alternatives analysis is limited to any alternatives available within the site on which the activity is proposed.

303. COMMENT: N.J.A.C. 7:7A-5.10A and 5.10B: It appears that the Department may now require an alternatives analysis for a road crossing over 100 feet in length and over 1/8 acre of wetlands disturbance. As a public entity, we perform numerous roadway improvement projects to maintain county roadways within State Department of Transportation safety requirements. Most of these projects will be over 100 feet in length. It appears that obtaining a general permit for these road projects will become more cumbersome. The concern is what type of alternatives analysis will be required? Would a statement indicating that the project is a roadway widening and keeping the existing alignment will be least detrimental to the wetlands be sufficient? We request a clarification regarding the degree of alternatives analyses required for roadway widening projects for general permit 10B. (18)
RESPONSE: The alternatives analysis was included in the rules because it has been the Department's experience that site conditions and project requirements vary so widely that the Department must review site conditions on a case by case basis to ensure that proposed activities are located and configured in the least environmentally damaging manner. The alternatives analysis required under general permit 10B is limited to onsite alternatives. Thus, an alternatives analysis under general permit 10B would involve a statement identifying the location on the site, and the configuration, which would best minimize impacts to wetlands, transition areas, and State open waters. This should include a brief explanation of why the applicant believes the proposed location and configuration to be the least environmentally damaging. The Department's experience has been that for most road widening projects, the location that is least environmentally damaging is within the existing alignment of the road.

304. COMMENT: N.J.A.C. 7:7A-5.10B: The only difference between general permit 10A for short road crossings, and general permit 10B is that 10B has no limit on the length and might be approved based on a convincing alternatives argument. We do not support this provision, since it is a poor substitute for an individual permit review which should be required. (15)
RESPONSE: Although general permit 10B does not have a length limit, there is a one quarter acre disturbance limit, which will necessarily limit the length of a crossing authorized under general permit 10B. The Department believes that general permit 10B meets the FWPA standard of minimal impact and that therefore an individual permit should not be required.

305. COMMENT: N.J.A.C. 7:7A-5.10B(b)2: The one-quarter acre limit is said to apply to aggregated disturbances of wetlands, open waters, and transition areas. However, pursuant to N.J.A.C. 7:7A-6.1(a)6, an "access transition area waiver" is automatically provided for that portion of the transition area that must be crossed to gain access to the wetland crossing, and is not counted in the acreage limitation. The allowance for access should be made clear in this subsection. The summary states that this language is found in the existing rule at N.J.A.C. 7:7A-

9.2(a)10iii. The existing rules specify wetlands and State open waters only. Transition areas are not included. (25, 34)
RESPONSE: The Department has clarified the transition area waiver for access at N.J.A.C. 7:7A-4.2(c).

306. COMMENT: N.J.A.C. 7:7A-5.10B(d): The statement "presumptions at (d)1 through 4 below" should read "presumptions at (d)1 through 5 below." (25)
RESPONSE: The Department has corrected the rule as suggested.

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

307. COMMENT: N.J.A.C. 7:7A-5.11(a): The list of authorized activities should be amended to add an individual private well for water supply. These are generally low-yield wells that withdraw waters from aquifers not connected to the water table and, therefore, not affecting the wetlands. Additionally, their installation does not result in significant disturbance. (20)
RESPONSE: Such wells are already included in the rule as proposed and adopted, at N.J.A.C. 7:7A-5.11(a)4, because they are included in the definition of "non-public water system." However, a clarifying phrase has been added on adoption to indicate that this applies to certain private potable water wells.

308. We oppose adding water intake structures to general permit 11. (2, 11, 15, 38, 44)
RESPONSE: The Department believes that intake structures that meet the limits in the general permit will have minimal environmental impacts. A typical intake structure is no more than 24 inches wide, the disturbance to wetlands from construction and placement of the intake structure will be very small, and much of the disturbance will be temporary.

309. COMMENT: N.J.A.C. 7:7A-5.11: We oppose the 30-day default provision included in general permit 11. (12, 33)
RESPONSE: There is no 30 day default provision in general permit 11.

310. COMMENT: N.J.A.C. 7:7A-5.11(c): One quarter acre of disturbance should not include the transition areas and a one quarter acre of disturbance to transition areas should be allowed. (13)
RESPONSE: The one quarter acre limit for disturbance to wetlands, transition areas and State open waters is not a change. Former general permit 11 is limited to one quarter acre of disturbance of freshwater wetlands and State open waters combined, and the special activity transition area waivers for general permit activities have historically been limited such that both wetlands and transition area impacts must fall within the general permit impact limits (see N.J.A.C. 7:7A-7.4(e)). Thus, the commenter's suggested change would double the impacts allowed under this general permit. The Department does not believe the general permit would continue to meet the requirement for minimal individual and cumulative impact if the acreage limit were doubled.

311. COMMENT: N.J.A.C. 7:7A-5.11(c): We are encouraged to see that the Department is requiring that activities under the general permit comply with the standards for soil erosion and sediment control, as these standards should dictate

the amount of rip rap and the amount of disturbance associated with the outfall. (13)
RESPONSE: The Department appreciates this comment in support of the rules. It should be noted, however, that the general permit allows only the minimum amount of riprap necessary to prevent erosion and comply with the Standards for Soil Erosion and Sediment Control.

312. COMMENT: General permit 11. Physical constraints govern the size of rip-rap aprons at outfalls, and in some cases more than 10 cubic yards may be needed due to slopes, etc. This rule is an improvement, since an individual permit for 11 cubic yards of rip-rap at an outfall is burdensome. (21)
RESPONSE: The Department appreciates this comment in support of the rules.

313. COMMENT: N.J.A.C. 7:7A-5.11(i): This requirement allows the use of swales throughout wetlands. However, it can only be done if the use of a buried pipe is impractical. We believe that this is contrary to the intent of getting the water into the wetlands. One should be allowed to put in a properly constructed swale that is conducive to the wetland area and allow the water to flow over land through the wetlands and not be piped directly into the stream. (13, 34)
RESPONSE: The general permit discourages the placement of swales through wetlands because swales could drain the wetland or change its hydrology, and because swales frequently fail when used in forested situations or in improper soil types. A buried pipe, installed in accordance with the general permit, is less likely to cause these problems. Avoiding discharges to and through wetlands is preferred.

314. COMMENT: N.J.A.C. 7:7A-5.11(b): We are discouraged that the Department has not included in either the general permit 11 or under a separate permit an authorization to construct or place detention or retention facilities in freshwater wetlands, transition areas or State open waters. These facilities are needed in freshwater wetlands, transition areas and State open waters to properly address stream impairments in New Jersey. If we are to properly manage stormwater on a watershed basis, especially for control of existing runoff that is not currently properly detained or reduced, using wetlands to manage stormwater is critical because: (1) Providing detention basins at existing developed sites to control the 2, 10 and 100 year storm runoff will, in most instances, be impractical. (2) Engineered systems can readily be provided at existing developed sites to provide water quality for up to the water quality storm runoff. (3) The majority of stream impairments are caused by stream bank erosion due to the high volume and velocities of runoff from existing uncontrolled developed sites. The only way to cost effectively and properly resolve this problem is to reduce the stream flow velocity through in-stream and adjacent stream impediments. Directing stream flow into adjacent low lying wetland areas and providing the extended detention in these areas as well as constructing on-line detention basins and low cost/low impact flow restriction devices are the proper way to reduce the velocities, volume, erosion and stream impairments. (13, 34)
RESPONSE: The Department disagrees. Detention and retention basins should not be built in wetlands, transition areas or State open waters. First, construction of basins in these regulated areas would alter or destroy valuable habitat, which is not replaced or compensated for by a basin. Second, basins by definition and design must be maintained in order to function properly, thus causing ongoing

disturbance. Using wetlands, transition areas, or State open waters for stormwater management facilities is in direct conflict with the basic purposes of the FWPA, which is to preserve the purity and integrity of the State's remaining freshwater wetlands. The Department also disagrees that the majority of stream impairments result from bank erosion. Rather, the majority of stream impairments come from pollutants added as a result of development, such as nutrients, oil, grease, pesticides, and herbicides. Finally, the natural tendency of all streams is to meander and erode. To try to control natural erosion would require armoring of the banks of the State's waterways. This is not the intent of the FWPA. However, an effective way to manage stormwater is with on-stream regional stormwater management systems constructed in uplands. These systems aggregate stormwater from a large number of sites, and provide more effective treatment through one larger stormwater management facility constructed in uplands, resulting in more effective stormwater treatment and less environmental impact. An individual permit is the appropriate approval mechanism for the construction of these very complicated systems. Contrary to the commenter's assertion that "providing detention basins at existing developed sites to control the 2, 10 and 100 year storm runoff will, in most instances, be impractical," the Department believes that this is often practical and in fact regularly issues permits to do this.

315. COMMENT: It appears as though the Department is not going to allow for the use of wetlands for proper stormwater management and detention. The concern, apparently, is water quality. The phrase "storms that occur at a frequency of less than or equal to every two years" refers to the 2, 10, 25, 50, 100 and 500 year storms. The water quality storm occurs at a frequency of "greater" than every two years. The concern is easily resolved by requiring water quality controls for runoff generated by up to the water quality storm and then allowing all other runoff (that is, the runoff generated by the 2, 10, and 100 year storm) to be directed to the basin established in the wetlands. Water quality can either be provided by structural means such as basins, ponds, engineered systems, etc., or by non structural means such as sheet flow through buffers, filter strips and the like. (13, 34)
RESPONSE: The Department is not concerned solely with water quality. As discussed in the response to comment 316 above, the FWPA was established to protect the integrity of wetlands, transition areas, and State open waters, not to use them as engineered stormwater structures.

316. COMMENT: N.J.A.C. 7:7A-5.11(a)1: We strongly oppose the direct discharge of stormwater to wetlands even with the understanding that the stormwater will have to be pre-treated. Velocities and volumes of stormwater can have a seriously damaging impact on wetlands or transition areas. This is contrary to the wetland law, which states that a transition area “shall serve as: an ecological transition zone. . . a sediment and stormwater control zone to reduce the impacts of development upon freshwater wetlands and freshwater wetlands species. . . "
In urbanizing areas with few wetlands left and increasing demand for the creation of more impervious surfaces this solution risks damaging already overburdened natural wetlands. We believe that this new proposal is the ideal opportunity to make the rule comply with the legislative intent, and to protect wetlands from the periodic flushing that they often receive from such stormwater discharges. (2, 11, 15, 38, 44)

RESPONSE: The Department agrees that discharges to wetlands are not always the most desirable solution for stormwater management. However, they are one of many options, and may be the best option in some cases. Other options include discharges directly to watercourses or discharges to a transition area. Depending upon site conditions (soil type, texture, etc.) and the size and type of development, the best type of outfall and the best location for an outfall will vary. The Department must have the flexibility to approve the least damaging location. Finally, discharges to wetlands are sometimes necessary to allow applicants to comply with the Standards for Soil Erosion and Sediment Control in New Jersey, N.J.A.C. 2:90, which require that stormwater be discharged to a stable condition, where erosion will be minimized. Often, this requires that the stormwater be discharged at a low point on the site, which is also often wetlands.

317. COMMENT: N.J.A.C. 7:7A-5.11(a)2 – Not only does the rule proposal continue to allow discharge of stormwater into open water, it also allows any NJPDES permit to discharge. We oppose adding the direct discharge under a valid NJPDES permit to general permit 11. No attention is paid to the problems that increasing volumes or velocities of water bring. The Department acknowledges in the summary (on p. 2714) that “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 out fall structure.” Although the Department says these are minimal impacts, we have found that stormwater creates significant impact to wetlands and these newly added activities very likely will also. (12, 15, 33, 38, 44)
RESPONSE: General permit 11 has been clarified on adoption at N.J.A.C. 7:7A-5.11(a)2 to indicate that it authorizes a NJPDES outfall discharging to State open waters only, and not to freshwater wetlands or transition areas. This reflects the fact that the NJPDES program is designed to regulate discharges to surface waters and not wetlands, and that NJPDES permits are very rarely issued for discharges into wetlands. The Department believes that the authorization for a NJPDES discharge into open waters will have similar impacts to the stormwater discharge activities discussed in the response to comment 316 above,

318. COMMENT: N.J.A.C. 7:7A-5.11(f): We are encouraged to see that stormwater treatment requirements should be in compliance with the Department's Flood Hazard Area Control Act Rules in N.J.A.C. 7:13-2.8. We believe that the Department needs to develop a sliding scale for different types of best management practices (BMPs) to be used depending on drainage areas. We would also like again for the Department to confirm that the use of the BMPs to be used in 7:13-2.8 complies with the no degradation criteria in the Flood Hazard Area Control Act Rules. (13)
RESPONSE: The Department appreciates the positive response to this portion of the rules. Each BMP itself provides for a range of situations in which it will function properly, similar to the "sliding scale" suggested by the commenter. For example, a sand filter can only manage so much volume, and so may only be used where the stormwater volume will be under a certain amount. Likewise, a basin will not function properly without sufficient stormwater volume and so must not be used in a situation where stormwater volume will be below a certain amount. Proper engineering calculations and design are needed to decide on the appropriate BMP for each development type and size. BMPs, or best management practices, are not regulatory standards but are "...methods, measures, designs, performance standards, maintenance procedures, and other

management practices" which the Department may require for certain types of situations or sites. (See definition of "BMP" at N.J.A.C. 7:7A-1.4.) In fact, in many cases BMPs speak to construction methods and ongoing maintenance practices, rather than to the design of a stormwater management measure. As to whether the use of the BMPs required under the Flood Hazard Area Control Act rules at N.J.A.C. 7:13-2.8 meets no degradation criteria in the Flood Hazard Area Control Act rules, those rules are not the subject of this rulemaking. The Department is currently developing a Flood Hazard Area Control Act rule proposal, which will be subject to public comment.

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

319. COMMENT: N.J.A.C. 7:7A-5.12(a): We oppose removing a ceiling on the width of the disturbance allowed. (15)
RESPONSE: Since the proposed readoption was published, the Department has encountered applicants claiming that a wide swath of clearing, plowed through a forested wetland with a bulldozer, constitutes a "survey line." In order to prevent such misinterpretations and ensure that the general permit has minimal impacts, the Department has not adopted the proposal to delete the five foot width limit for survey lines. In addition, the Department can require a narrower survey line under N.J.A.C. 7:7A-5.12(b) if necessary to minimize disturbance.

320. COMMENT: N.J.A.C. 7:7A-5.12(a)5: The requirement of a general permit for the digging of exploratory pits for a geotechnical investigation is likely to cause extensive new permitting paperwork. While it seems reasonable to know whether the digging is in a wetland or transition area, a large proportion of due diligence work associated with land transactions now is probably being done prior to any formal determination of wetland limits. This general permit would require all disturbed soil to be restored to pre-existing elevations, and so most of the impacts likely will be temporary and then mitigated *in situ*. Thus, the impacts of this general permit should not be counted toward the "one acre" total of multiple general permits, nor should transition area impacts be counted as part of this general permit. (25)
RESPONSE: Adding this regulated activity to general permit 12 will provide more flexibility for the regulated community, since previously this activity would require an individual freshwater wetlands permit or open water fill permit. Other general permits (see for example, general permit 2) include temporary soil disturbance that must be replaced. The Department does not believe that a disturbance under this general permit will have any less impact than other disturbances, or should be treated any differently. Therefore, the suggested change has not been made.

321. COMMENT: N.J.A.C. 7:7A-5.12(a)5: We oppose not establishing a limit for the disturbance. (15)
RESPONSE: The activities authorized (digging of exploratory pits and/or other temporary activities necessary for a geotechnical or archaeological investigation) are generally very small and have minor temporary impacts. Geotechnical borings are usually approximately 4 to 6 inches in diameter. Archaeological pits can vary widely in size and impact, so the Department must review the size and impact of these pits as part of the application for authorization to ensue that the

impact is minor. Therefore, a size limit has not been established in the rule. However, N.J.A.C. 7:7A-5.12(c) has been clarified to indicate that restoration of soil disturbances requires replacement of original soil layers for all but the smallest disturbances.

322. COMMENT: N.J.A.C. 7:7A-5.12(c): This section should require that the soil profile be the same as before the disturbance so that the top level goes back on top, and so on through the layers, to preserve the ability of the area to reseed with indigenous vegetative species. (15)
RESPONSE: The rule has been clarified at N.J.A.C. 7:7A-5.12(c) to indicate that restoration of the soil includes retaining the original soil layers, unless the soil disturbance is six inches in diameter or smaller.

323. COMMENT: N.J.A.C. 7:7A-5.12: The expedited authorization process should be included for this general permit. The lack of a "guaranteed" time frame for permit application processing encourages people to undertake the routine, common activities covered by this permit without applying for authorization under the general permit. (34)
RESPONSE: While the commenter's suggestion may have merit, the Department cannot make such a change on adoption without providing opportunity for notice and comment. The Department will consider the suggested change for a future rulemaking, if its experience implementing the general permit indicates that doing so is appropriate.

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

324. COMMENT: N.J.A.C. 7:7A-5.13: We believe that the clarifying language relative to regulated dredging activities is very helpful. (49)
RESPONSE: The Department appreciates this comment in support of the rules.

325. COMMENT: N.J.A.C. 7:7A-5.13(a): Lake dredging should not be limited to disturbance in palustrine emergent freshwater wetlands but should also be allowed in scrub/shrub wetlands. Both wetland types could have formed within open waters created under artificial conditions. Woody shrub species can often colonize a new wetland area relatively rapidly. The limitation of use of this permit for only palustrine emergent wetlands is too restrictive. (20)
RESPONSE: Unlike emergent wetlands, scrub/shrub wetlands take many years to become established. Further, scrub/shrub wetlands are a naturally occurring habitat type adjacent to lakes, which often form a transition into forested wetlands. Thus, disturbance of the scrub/shrub wetland would in many cases result in an expansion of the lake. Since the intent of the general permit is to allow for lake maintenance rather than lake expansion, it would not be appropriate to allow removal of scrub/shrub wetlands without a more thorough review under an individual permit.

326. COMMENT: N.J.A.C. 7:7A-5.13(b): We appreciate the Department's exempting certain dredging projects from regulation under these rules; however, we would like clarification/description of what type of dredging project does not disturb a wetland located in the lake, pond or reservoir or transition area adjacent to the

lake, pond or reservoir. For example, would a project involving excavation of material from a pond with only fringing wetlands require a permit if the machine reached over the wetlands and worked from lawn surrounding the pond? Such a scenario could describe several irrigation ponds, park ponds, and golf course ponds. (8)
RESPONSE: The provision cited does not exempt any activities from regulation. It merely clarifies the Department's jurisdiction over dredging activities in State open waters. In open waters, the Department does not regulate any activities except the discharge of dredged or fill material. This is clarified on adoption by the addition of a cross reference to N.J.A.C. 7:7A-2.2(b). Therefore, dredging that does not involve the discharge of dredged or fill material is not regulated under the wetlands program and no authorization under this chapter would be needed. However, if there will be any disturbance of 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 in accordance with N.J.A.C. 7:7A-5.12(e). Further, if the project involves any placement of dredged or fill material in a State open water, it would be regulated. Examples of common practices involving the placement of dredged or fill material are the construction of a temporary access road in the lake bed for the purpose of bringing trucks to transport dredged material out of the lake; or the temporary placement of material dredged from one portion of the lake onto another portion of the lake bed while awaiting a truck to transport the material to a disposal location. The rule has been clarified at N.J.A.C. 7:7A-5.13(b)1, 2, and 3 by rewording the provision and adding an example to avoid confusion on this issue. The project described by the commenter would require general permit 13 authorization, because presumably the lawn surrounding the pond constitutes the transition area for the fringe of wetlands adjacent to the pond. Thus, there would be disturbance to a transition area for access to the dredging and authorization under the general permit would be required.

327. COMMENT: N.J.A.C. 7:7A-5.13(f)2ii. Since many lakes and ponds in the State have not been dredged for decades, a definitive list of sources of sediment and their relative contributions is impractical. Most applicants would cite upstream development, road sanding or farming practices. Also, providing such information would require an analysis of the history of the watershed including specific construction projects and farming activities. We ask the Department to clarify the purpose of such a list and the level of detail required. (8)
RESPONSE: The purpose of the list of sources of sediment required under general permit 13 is to encourage an understanding of why the lake or pond is accumulating sediment, as a first step in developing methods to reduce the frequency of dredging. If a lake or pond owner identifies the sources of sediment entering the lake or pond, they can begin developing measures to prevent sedimentation of the lake or pond. Such measures may include direct actions on the part of the lake owner, discussions with local or State government agencies, and/or actions aimed at encouraging upstream property owners to take measures to reduce sedimentation. In addition, the information can be used by the Department's Division of Watershed Management to assist in the development of watershed management plans, one goal of which is to reduce sedimentation of lakes and ponds. In the long term, the gathering of this information is the first

step toward managing excessive sedimentation. On adoption, N.J.A.C. 7:7A-5.13(f)2i has been modified to require only a map of the upstream area which drains to the lake, rather than the HUC-11, since this is the only area that is relevant to sedimentation in the lake and in most cases this area is smaller than the HUC-11. In addition, more detail regarding the types of sediment sources that must be reported has been included at N.J.A.C. 7:7A-5.13(f)2ii. In addition, the requirement that the sediment sources be ranked has been replaced at N.J.A.C. 7:7A-5.13(f)2iii with a requirement for an estimate of the percentage of the upstream drainage area that is covered with impervious surfaces. This modification is necessary because for most applicants it will be difficult to determine the relative contribution of various sediment sources to the total lake sediment, and the percentage of impervious surface in a drainage area is closely related to the amount of sediment in the waters to which the area drains.

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

328. COMMENT: N.J.A.C. 7:7A-5.14 (a): This section should be amended to clarify that installation of water monitoring devices in State open waters that do not include placement of fill material is not regulated under the FWPA. (20)
RESPONSE: The rule has been clarified as suggested by the addition of a new N.J.A.C. 7:7A-5.14(d) on adoption.

329. COMMENT: N.J.A.C. 7:7A-5.14(c): We oppose a blanket authorization for the number of monitoring wells that an applicant might need. The Department should place a ceiling on this, based on the type and location of the monitoring well. (15)
RESPONSE: The prior general permit 14 did not have a limit on the number of wells allowed. In many remedial investigations, it is impossible to determine at the outset how many monitoring wells will be needed, and their locations. The applicant can at this stage indicate what type of well will be used and the amount of disturbance it will cause, and in some cases can provide a general area of the site within which drilling will occur. However, it is only after drilling preliminary wells that the exact number and location of wells can be determined. This is because the number and location of wells depends on the direction of the flow of the groundwater contamination, which can only be determined by drilling the first few wells. The disturbance caused by these wells is minor (typically 4 to 6 inches in diameter), and it is doubtful that an applicant will spend the money required to install any more wells than is necessary to gather the data needed. Further, the monitoring wells must be approved by the Department's Site Remediation Program or the USEPA. Therefore, the Department does not believe a cap on the number of wells is necessary to ensure minimal impact.

330. COMMENT: General permit 14 should be linked to the Natural Resources Damage program. (2, 12, 33)
RESPONSE: It is not clear in what way the commenters believe the general permit should be linked to the Natural Resources Damages program.

331. COMMENT: N.J.A.C. 7:7A-5.14: The expedited authorization process should be included for this general permit. The lack of a "guaranteed" time frame for permit application processing encourages people to undertake the routine, common

activities covered by this permit without applying for authorization under the general permit. (34)
RESPONSE: While the commenter's suggestion may have merit, the Department cannot make such a change on adoption without providing opportunity for notice and comment. The Department will consider the suggested change for a future rulemaking, if its experience implementing the general permit indicates that doing so is appropriate.

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

332. COMMENT: General permit 15, Mosquito control activities: We oppose eliminating the ban on the use of this general permit in exceptional resource value wetlands– exceptional resource wetlands should continue to be protected by an individual permit for these activities. We note that unlike the general permits, the individual permit request has a specific and very explicit “determination of public interest” section (N.J.S.A. 13:9B-11) where the conflicts inherent in the nature of mosquito control can be played out. It may not continue to be the case in the future that there will be few options to current mosquito control activities. (32)
RESPONSE: The Department has found over the years that the bar to mosquito control activities in exceptional resource value wetlands has produced project delays without benefiting the environment. Under former general permit 15, an applicant had to obtain an individual permit for mosquito control activities in an exceptional resource value wetland, even if all other requirements of the general permit were met, including prohibitions against adverse impacts to threatened or endangered species. However, when an individual permit is required for a mosquito control project, it is difficult to find a practicable alternative. (See detailed analysis of this issue in the summary of the proposed readoption at 32 N.J.R. 2716.) Should more alternative methods for dealing with mosquito problems be developed, the Department will consider amending the rules.

333. COMMENT: We strongly oppose the deletion of the prohibition against spraying in exceptional resource value wetlands. Spraying will upset the ecosystem balance and should be avoided unless a proven and documented public safety issue. (15)
RESPONSE: The Department believes that the requirements of N.J.A.C. 7:7A-5.15(b) ensure that activities under the general permit will not upset the ecosystem balance. The general permit requires the use of best management practices that will minimize environmental damage, and also requires a determination from the State Office of Mosquito Control Coordination that "the project is necessary to control a documented mosquito problem affecting existing residents." Furthermore, mosquitoes carry many diseases, including West Nile virus, encephalitis, and canine heartworm. There has even been recent documentation of malaria caused by bites from New Jersey mosquitoes. Thus, the general permit is adopted as proposed.

334. COMMENT: N.J.A.C. 7:7A-5.15(f): We appreciate the Department's modification of public notice requirements. Although not necessary to place in the rule, guidance on what should be included in the display advertisement is requested. (8)

RESPONSE: The application checklist for a general permit authorization includes attachments containing a model newspaper notice, which can be used by applicants required to provide such notice.

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

335. COMMENT: N.J.A.C. 7:7A-5.16(a). This general permit authorizes certain activities that are sponsored or partially funded by a Federal or State agency or other resource protection agency. A “sponsor” is defined as an “active participant in” or financial contributor to the activities, and shall approve the activities in writing. The intent of N.J.A.C. 7:7A-5.16(a) is unclear. We request that this section be clarified such that it apply to private parties conducting habitat creation and enhancement activities under agency oversight. (34, 46)
RESPONSE: There are two ways in which a nongovernmental entity may pursue activities under general permit 16: if the entity participates in a program listed at N.J.A.C. 7:7A-5.16(b)2 through 5; or if the entity is a charitable conservancy (as defined at N.J.A.C. 7:7A-15.1) and is sponsored by one of the government agencies listed at N.J.A.C. 7:7A-5.16(b)1 through 5. These parameters are designed to authorize habitat creation and enhancement projects by entities whose enabling authority or mission is habitat enhancement type activities, and whose expertise in these matters will maximize the probability of success. The provision has also been clarified on adoption to emphasize that a sponsor must be a substantial financial contributor to the activities.

336. COMMENT: N.J.A.C. 7:7A-5.16(a): This section should clarify exactly what is meant by "or other resource protection agency." The intent seems to be to limit this section to land conservation or land trust type organizations. (15)
RESPONSE: This phrase was intended merely to summarize the types of entities listed in N.J.A.C. 7:7A-5.16(b), and has been clarified to that effect. N.J.A.C. 7:7A5.16(b), rather than N.J.A.C. 7:7A-5.16(a), is the provision that is intended to set forth the types of entities and programs that are covered by the general permit.

337. COMMENT: N.J.A.C. 7:7A-5.16(a) and (b): We believe that, consistent with the current permit language, public agencies such as park systems, which manage wildlife management areas, parks or reserves, should be considered "resource protection agencies" for the purposes of this general permit. Such agencies should specifically be listed at subsection (b) as authorized to create, approve, and carry out habitat creation, restoration and enhancement plans. Otherwise, this amendment will discourage rather than encourage worthwhile creation and enhancement activities by agencies with the land and skilled staff capable of effectively implementing such projects. (49)
RESPONSE: The general permit is intended to allow habitat projects conducted by the agencies described by the commenter. This has been clarified on adoption at N.J.A.C. 7:7A-5.16(b)6.

338. COMMENT: N.J.A.C. 7:7A-5.16(a) and (b): We recognize the importance of wetlands habitat creation and enhancement whether or not directly related to a documented mosquito-breeding problem. Are projects outside of the programs and agencies listed not eligible for a general permit 16? Although this request

may be out of the purview of the rule proposal, we request that a mosquito control agency be included in the development or review of a habitat creation or enhancement plan when hydrology is involved to avoid the inadvertent creation or enhancement of mosquito breeding habitat. (8)
RESPONSE: A project must be performed by or sponsored by an entity described at N.J.A.C. 7:7A-5.16(b) in order to be authorized under general permit 16. Mosquito control agencies are not resource protection agencies and thus may not serve as a sponsor for activities under the general permit. However, these agencies could undertake projects under the sponsorship of a State or Federal agency listed at N.J.A.C. 7:7A-5.16(b)2 through 5. Regarding the inclusion of mosquito control agencies in the development and review of habitat creation or enhancement plans under the general permit, the Department has provided for this review through the notice requirements for all applications. The county receives notice of each application under the general permit through the requirement at N.J.A.C. 7:7A-10.9(e)4 that the applicant notify the county planning board of the application. Thus, any concerns can be identified at that point and brought to the attention of the Department, the applicant, and/or the sponsoring agency. Constructive comments on projects are always encouraged.

339. COMMENT: It is not clear whether habitat creation and enhancement activities that are part of a private mitigation project are entitled to general permit 16, or if general permit 16 is necessary for mitigation activities that are part of an approved permit. This should be clarified. It should be the case that an approved mitigation plan is automatically granted a general permit 16 as part of the approval, or is exempt from the requirement. (29)
RESPONSE: If mitigation by a private party is required under a permit or approval under this chapter, the mitigation would be covered by N.J.A.C. 7:7A-15.2(g) and would not require a separate approval under general permit 16. If mitigation by a private party is required as compensation 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 under general permit 16 or through a permit or other document issued by the Department under this chapter.

340. COMMENT: N.J.A.C. 7:7A-5.16(b)1. The Department's Division of Fish and Wildlife will need to prepare written guidelines and best management practices for fish and wildlife management plans in order to fulfill the responsibility assigned to it under this section. The staffing capability of the Division to assume a "sponsor" role in projects undertaken by others should also be assessed; limited capabilities could unnecessarily stall or cancel worthwhile projects. (49)
RESPONSE: Staff from the Department's Division of Fish and Wildlife worked with the Land Use Regulation Program in the development of the general permit. The Division is aware of the need for its guidance and assistance.

341. COMMENT: N.J.A.C. 7:7A-5.16(g): The elimination of application fees for General Permit 16 is an appropriate acknowledgment of the net environmental benefit of habitat creation and enhancement activities. (49)
RESPONSE: The Department appreciates this comment in support of the rule, and hopes the elimination of fees will help to encourage beneficial wetland related creation and enhancement activities.

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

342. COMMENT: – The ¼-acre area of disturbance for wetland, transition area and open water for trail and boardwalk construction is too restrictive. No justification for this restriction is provided. General permit 2 for utilities allows disturbance of up to one acre of regulated area with a disturbance of 20 feet and can be approved on private lands. Trails are generally only a 6 foot wide area of disturbance. Installation of trails and boardwalks across and in the vicinity of wetlands adds to the education of the public and has no significant impact on these areas. This limitation will significantly affect projects on large tracts of public open space that may entail minor disturbance along narrow strips within transition areas and wetlands. Much of northern New Jersey contains exceptional resource value wetlands located in steeply sloping areas. The best place to locate trails is often in the transition area. Most existing trails are located in these areas and proposed trails will usually follow these existing trails. A trail project can therefore readily exceed an acre of transition area disturbance but not have any significant environmental impacts. Lands further away from wetlands and stream corridors are usually very steeply sloping. Installation of trails in steeply sloping areas requires a wider area of disturbance than in more gently sloping areas and can result in greater environmental disturbance through tree removal and an increase in erosion. (20)
RESPONSE: The Department proposed the one quarter acre limit in order to ensure that the general permit would have minimal impact in light of the expansion of the general permit to cover activities on private land (see the proposal summary at 32 N.J.R. 2717). However, the commenter has raised an important point regarding the size of public lands. A one quarter acre limit is very restrictive as applied to the types of large properties typically held by public entities such as parks, nature preserves, and public schools. Such a limit on trails on public property conflicts with the recent State effort to increase biking and walking trails on properties preserved for public use as open space. Therefore, the Department has not adopted the one quarter acre limit as it applies to public lands. See N.J.A.C. 7:7A-5.17(b). This will also help achieve the important goal of facilitating public environmental education and public access. From July 1995 through July 1999, when general permit 17 applied to public lands with no acreage limit, 1.4 acres per year of wetlands were disturbed under general permit 17. This indicates that not adopting the limit as it applies to public land will not cause a significant increase in impacts. However, there are many more private properties in the state, partly because private properties are generally smaller than public properties. Therefore, allowing more than ¼ acre limit on each of the as it applies to private lands could result in more than minimal impact. Therefore, the ¼ acre restriction has been adopted as it applies to private land.

343. COMMENT: N.J.A.C. 7:7A-5.17(b): The proposed exclusion of recreational trails from the general permit for trails and boardwalks could severely undermine the Governor's objective of creating a Statewide network of walkways, trails, and public access rights-of-way. Further, the one quarter acre limit may unduly restrict opportunities for environmental education within public park lands. In large park holdings such as those managed by the State and many counties, it would not be unusual for a network of nature education trails and boardwalks to

be within and cross more that one quarter acre of wetlands. If the concern is ensuring the general permit has minimal impacts after lifting the restriction limiting its applicability to public lands, it is suggested that the new one-quarter acre limit be applied only to private lands. (49)
RESPONSE: The general permit does not exclude recreational trails. Please see the response to comment 342 above for a discussion of the limit of one quarter acre of disturbance.

344. COMMENT: N.J.A.C. 7:7A-5.17(b) limits the disturbance for trails and boardwalks to one quarter (1/4) acre. Previously, there had been no limit on disturbance and limiting disturbance would seem to be contrary to the need to have trails and boardwalks. We do not understand why one quarter acre limit is being imposed. (13)
RESPONSE: Because general permit 17 is no longer limited to public land only, there is a potential for an increase in impacts from the general permit. As discussed in the response to comment 342, the Department has adopted the one quarter acre limit in regard to private lands.

345. COMMENT: N.J.A.C. 7:7A-5.17: I am pleased to see that this general permit has been expanded to allow the construction of certain trails and boardwalks on non-publicly owned lands. Land ownership is not relevant to the impact of trails and boardwalks. (25, 29)
RESPONSE: The Department appreciates this comment in support of the rules.

346. COMMENT: N.J.A.C. 7:7A-5.17(a): The Department needs to clarify what is meant by the term roadway as it would be improper not to allow motorized vehicles such as golf carts or handicap vehicles to be used on boardwalks through wetlands. (13)
RESPONSE: As stated in the proposal, general permit 17 does not authorize construction of a path for use by golf carts. However, while the general permit authorizes construction of a path for use by non-motorized vehicles only, the Department recognizes that in some cases a person with disabilities who uses an electric wheelchair or similar vehicle may use a path which was constructed primarily for use by non-motorized vehicles. N.J.A.C. 7:7A-5.17(a) has been clarified on adoption to expand the list of examples of vehicles for which a roadway is not authorized under the general permit.

347. COMMENT: We strongly oppose removal of the provision prohibiting encroachment of trails on threatened and endangered species. It should be explicitly stated. (15)
RESPONSE: There is no need to restate this limit in each general permit, since this is a general provision that applies to all general permits under N.J.A.C. 7:7A-4.3(b)3.

348. COMMENT: N.J.A.C. 7:7A-5.17: The exemption of public lands from application fees for general permit 17 is an appropriate acknowledgement of the educational values of trails and boardwalks. (49)
RESPONSE: The Department appreciates this comment in support of the rules.

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

349. COMMENT: General permit 18, Dam Repair: Our fear is that dam removal can permanently drain/destroy wetlands that have grown up with the impounded waters, with some dams in New Jersey dating back more than two centuries. Removal of a dam could have an effect on scores if not hundreds of acres of wetlands and losses of that magnitude need the scrutiny of an individual permit. Individual permit controls are fairly tight and make it clear in that a dam cannot be taken down unless it is an emergency situation. Also, if there are exceptional quality wetlands there is a protocol to be followed before removal would be allowed and in most instances removal would not be allowed. We know of a situation where dam owners wanted the dam removed but knowledgeable local citizens said it was not a safety threat and removal would jeopardize exceptional resource wetlands. Dam repair seemed a very viable option, but perhaps more expensive. We were told by Department dam safety staff that removal of the dam would allow the stream to revert to natural (pre-dam) conditions. But in this case, the “artificial” dam may have created wetlands of greater value or extent than was the case under original stream flow conditions, in much the same way beaver dams create shallow water bodies that develop extensive wetlands over time. We think that if the removal of a dam threatens more than an acre of wetland, the current law requires an individual permit to make sure there is no other option and that the dam removal question is one of threat to life or extreme threat to property. (32)
RESPONSE: The commenter states that activities under general permit 18 should require an individual permit if they will "threaten" more than one acre of wetlands. N.J.A.C. 7:7A-5.18(c)2 (recodified on adoption to (d)2) limits disturbance under general permit 18 to one acre of wetlands, transition areas, and/or State open waters combined. The provision has been clarified on adoption to indicate that the drainage of wetlands caused by the dam removal is not counted in determining if the impact exceeds one acre. As discussed in the response to comment 350 below, the Department believes that removal of dams will have an overall beneficial effect, and may result in an increase in wetlands acreage.

350. COMMENT: General permit 18 for the first time authorizes dam removal. These water features can have enormous negative impacts on water resources, and should require an individual permit. It should be an individual permit in order to insure no loss of wetlands and to provide adequate evaluation of the potentially far reaching impacts on watersheds. (4, 15, 38, 43, 54)
RESPONSE: The Department does not agree that the removal of a dam, within the limits set forth in general permit 18, will have a drastic effect on the ecosystem. Removal of a dam would convert an area of still, ponded water into an area of flowing water, and in many cases the area of wetlands edging the water body will be the same or larger than before the dam removal. Generally, removal of a dam benefits species that thrive in wetlands or in flowing water (for example trout), while it has a negative impact on wildlife species that thrive in ponded open waters. However, the overriding concern is for the safety of the residents downstream of the dam. It is the responsibility of the Department's Dam Safety Program to ensure that dams are safely maintained, or are removed if necessary to protect downstream residents. It would be inappropriate to prevent a dam from being removed if it is found to be unsafe. Further, in order to ensure that wetlands impacts are considered when the Dam Safety Section is evaluating

whether to order removal of a dam, the Department's Dam Safety and Land Use Regulation Programs are currently developing standard operating procedures that will ensure adequate coordination between the Programs.

351. COMMENT: Dam removal should require an individual permit and the procedures should be considered in the context of the watershed management planning process endorsed by the Department. (44)
RESPONSE: Regarding the use of a general permit as opposed to an individual permit for dam removal, please see the response to comment 350 above. Regarding the watershed management planning process, a project cannot be pursued under a general permit unless it is consistent with the applicable water quality management plan (see N.J.A.C. 7:7A-4.3(b)14). These plans are prepared with public input as part of the watershed management program. Thus, if a dam removal is not consistent with the existing water quality management plan it will require a plan amendment, and the local public advisory group will be notified and can provide input at that time.

352. COMMENT: Dam removal: We are opposed to the transfer of this activity from the individual permit to the general permit category, as dam removal can result in substantial impacts to the wetlands, water quality and watershed flows. However, a modified general permit which included an alternatives assessment for wetland impacts, small upper limits on allowable impacts, and data to predict the outcome of such a new rule could lead to support of a provision to expedite the removal of aging dams. The removal of a dam can sometimes be designed as wetlands mitigation, which could create mitigation banks closer to the headwater regions of sub-watersheds. The decrepit system of dams throughout New Jersey needs attention, and careful crafting of a set of procedures could yield significant habitat restoration. An emergency permit could always be available for highly hazardous situations. (2, 12, 33)
RESPONSE: The Department's Dam Safety Section issues approximately 20 orders per year to lower lakes as a result of unsafe dam conditions. Some but not all of these orders result in permits to permanently remove a dam. The Section processed five applications for dam removal permits during the past year. The Department does not have data on how many of the dam removals permitted in the future will affect wetlands, or if they do affect wetlands, how many acres of wetlands might be affected. However, the Department believes that the impacts will be minimal and in many cases environmentally beneficial (see response to comment 350). Further, the general permit already includes the "small upper limits on allowable impacts" suggested by the commenter. See N.J.A.C. 7:7A-5.18(c) and (d) (recodified on adoption at (d) and (e)). The Department does not believe that an alternatives analysis is necessary to ensure that the general permit has minimal impacts. As noted above, dam removal is generally environmentally beneficial and restores the wetlands and waters to a more natural condition. In addition, the removal has already been approved (and in many cases, ordered) by another Department unit. Finally, as noted by the commenter, "The decrepit system of dams throughout New Jersey needs attention…" and delays in providing this attention may result in serious risks to public safety. An applicant who wishes to design a dam removal project as wetlands mitigation may do so if the project meets the mitigation requirements at N.J.A.C. 7:7A-15.

353. COMMENT: The definition of an unserviceable dam is confusing, because it rests upon a dam that is not being used. When is a dam not “in use?". One would have to distinguish lack of maintenance from a storm breach. (32)
RESPONSE: The rule has been clarified on adoption at N.J.A.C. 7:7A-5.18(b) regarding the meaning of the term "in use." The definition of the term "in use" relates to the functions being served, or not being served, by the dam at the time of application. The definition does not address the issue of how the dam came to be in the condition it is in at the time of application. This issue relates to the maintenance of dams, which is governed by the Dam Safety Rules at N.J.A.C. 7:20.

354. COMMENT: The restriction that the dam be "currently serviceable" unfairly prohibits the use of this permit for dams recently breached from significant storm events. A time limitation could be added to allow approval of dam reconstruction for dams breached within a year prior to application. (20)
RESPONSE: General permit 18 does not prohibit reconstruction of a dam that was recently breached by a storm event. N.J.A.C. 7:7A-5.18(b)2 and 3 both provide for a dam that is not in use but which has been out of use for a certain period of time to be considered “currently serviceable.” If an application for repair of a breached dam is submitted within these time periods, general permit 18 could cover the repair. The rule has been clarified on adoption on this point.

355. COMMENT: N.J.A.C. 7:7A-5.18(b): How about a case where a dam is considered serviceable but the owner, due to financial burdens, desires to remove the dam instead of reconstructing? Since the Dam Safety Standards (N.J.A.C. 7:20-1.7(h)) outline the requirements for a dam removal and specifically require an environmental review as well as a public hearing, it would seem appropriate to allow the dam removal under the general permit regardless of the serviceability of the dam if approved by Dam Safety Section. (18)
RESPONSE: The Land Use Regulation Program developed the general permit in consultation with the Department's Dam Safety Section, and the general permit reflects the fact that the Dam Safety Section, not the Land Use Regulation Program, is responsible for determining when a dam should or should not be removed. Therefore, the general permit reflects the current policy of the Dam Safety Section. Should that policy change, the Department will consider amending the general permit.

356. COMMENT: The criteria to determine whether a dam is serviceable do not further any legitimate environmental policy. The criteria do not address disturbance of wetlands, transition areas and/or State open waters. Instead, it depends upon what the owner of the dam has been doing for the previous 5 or 10 years. (54)
RESPONSE: The commenter is correct in stating that the criteria for whether a dam is currently serviceable are not based on environmental impact. This is because the dam removal provisions are intended to facilitate removal, within limits to ensure minimal environmental impacts, of those dams which have been ordered removed for safety reasons by the Department's Dam Safety Section. Therefore, the term "currently serviceable" relates to whether the dam has deteriorated to an extent that it may pose a safety risk.

357. COMMENT: N.J.A.C. 7:7A-5.18(c)(5) requires that repaired, rehabilitated, replaced or reconstructed dams shall not deviate from the original structure. This

needs to be clarified to allow for expansions of spillways and other dam related facilities that need to be expanded to meet dam safety requirements. (13, 34)
RESPONSE: N.J.A.C. 7:7A-5.18(c)5 (recodified on adoption to (d)5) allows for minor deviations due to changes in materials or construction techniques. The rule has been clarified upon adoption to allow deviation if required under the Department's Dam Safety rules in order to meet safety requirements.

358. COMMENT: Proposed N.J.A.C. 7:7A-5.18 would reward a neglectful dam owner with a new piece of property. My property abuts a lake. The lake owner has deliberately allowed the dam to fall into disrepair. The Department has failed to enforce regulations requiring that the owner make repairs. The dam is now unsafe and the Department is forcing the dam owner to remove the dam. The Department in effect rewarded the owner for delaying tactics and indifference to the law. In this case, the proposed regulations would give the property owner the ability to remove the dam under general permit 18. Then, after five years, the proposal would reward this owner with an unregulated piece of property no longer subject to the jurisdiction of the Department. The lake bottom, which undoubtedly would have been a freshwater wetland at the time of the dam removal, may no longer be subject to Department jurisdiction. From an environmental standpoint, this makes no sense. This general permit allows property owners to drain wetlands. (54)

359. COMMENT: I object to the proposal for any reevaluation of the wetlands associated with the previously impounded area five years after the dam is removed. The proposed regulations will permit the removal of wetland areas from the environmental inventory of our State and will allow development of previously restricted areas in many towns. This will cause adverse impacts on municipal facilities such as potable water supplies, sewage facilities and other municipal infrastructure. (4)
RESPONSE to comments 358 and 359: The dam removal provisions are intended to facilitate removal of unsafe dam structures when removal is required under the Dam Safety Act to prevent flooding and hazards to downstream property owners. While it is true that in some cases the removal of a dam will reduce total wetlands acreage, dam removal has substantial positive environmental effects. These include restoring anadromous fish runs, reestablishing trout streams, and removing of a source of warm water that disrupts wildlife habitat on a cold water stream, to name only a few. In addition, removal of unsafe dams is necessary to prevent the loss of life and property that could result if a poorly maintained dam failed. In many cases, the area covered by the dammed up waters was originally wetlands prior to the dam's construction, and the impoundment of water destroyed the wetlands and replaced them with open waters. In these cases the wetlands remaining in the lake bed area, as well as any transition areas and State open waters, would be regulated under this chapter in the same manner as any other freshwater wetlands, transition areas, and State open waters. Even in cases where the lake bottom was not wetland prior to dam construction, the stream which feeds the impoundment will remain after the dam is removed and will likely support some surrounding wetlands. Therefore, the Department does not anticipate that the general permit will result in a large increase in developable areas. In the unlikely event that a significant reduction in regulated area does result in some cases, the Department believes

that this is outweighed by the safety and environmental benefits of removing unsafe dams.

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

360. COMMENT: N.J.A.C. 7:7A-5.19(c): The elimination of minimum height and plank width and spacing for docks and piers is a positive change. This will permit the use of floating docks, the installation of which involves significantly less disturbance than a conventional dock supported by pilings. Further, in lakes and reservoirs where water levels are managed, floating systems ensure easier and safer access under changing conditions. (49)
RESPONSE: The Department appreciates this comment in support of the rule. It should be noted that, in general, the Department regulates docks and piers only if they cross freshwater wetlands and/or transition areas. A dock or pier in a State open water, which does not cross or disturb freshwater wetlands or transition areas, would not require a freshwater wetlands permit unless the project involved the discharge of fill. However, docks and piers in tidal areas generally are regulated under the Department's Coastal Zone Management rules, N.J.A.C. 7:7E.

361. COMMENT: We oppose the allowance of more than one dock per lot. (2, 12, 33)
RESPONSE: The Department believes that allowing more than one dock per lot on publicly owned land strikes an appropriate balance between the public interest in access to the water and the need to minimize impacts caused by public activities. In many cases, publicly owned lots are very large, and can contain a long shoreline area. In such cases, allowing only one dock per lot can severely restrict even beneficial public uses such as environmental education and passive recreation such as bird watching. In addition, although more than one dock may be constructed on a public property, the combined disturbance from all docks must remain within the limit of one tenth acre of disturbance at N.J.A.C. 7:7A-5.19(b). This one tenth acre of disturbance includes the impact caused by the dock's shading of the wetlands.

362. COMMENT: N.J.A.C. 7:7A-5.19(f): The elimination of a one dock per lot limit for public properties is a positive change. Public access facilities are highly desirable and large public properties can accommodate multiple docks with minimal environmental impact. (49)
RESPONSE: The Department appreciates this comment in support of the rule.

363. COMMENT: N.J.A.C. 7:7A-5.19(f)(2) limits the width of a private dock or pier to six feet. Please explain why public docks are treated differently than private docks. ADA requirements should be key in determining the width of the structure whether it be public or privately owned. (13, 34)
RESPONSE: The Department has made the suggested change on adoption, in order to prevent any conflict between the freshwater wetlands program and the barrier free subcode. However, it should be noted that under N.J.A.C. 5:23-7.15, the subcode applies only to a dock that costs at least $17,500 to build. Thus, the change will likely affect only a very small class of docks.

364. COMMENT: N.J.A.C. 7:7A-5.19(g): The exclusion of certain public docks and piers from the six foot maximum width provision appropriately acknowledges the need to accommodate persons with disabilities and group instruction at public facilities. (49)
RESPONSE: The Department appreciates this comment in support of the rules.

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

365. COMMENT: N.J.A.C. 7:7A-5.20(c) – Bank stabilization. Due to the substantial expansion of this permit, a provision to protect threatened and endangered species must be incorporated into any stabilization activity. (15, 38)
RESPONSE: This is already incorporated in the rule at N.J.A.C. 7:7A-4.3(b)3, which sets forth conditions that apply to all general permit authorizations. Therefore, there is no need to restate this limit in each general permit.

366. COMMENT: N.J.A.C. 7:7A-5.20(c)3ii prohibits the application allowing up to 500 feet of stream bank stabilization where there are threatened or endangered species in the municipality in which the stream bank is located. Why is the entire municipality to be considered with regard to threatened or endangered species? The presence of endangered or threatened species should be related to the immediate stream bank environment. In addition, was consideration given to the fact that if the stabilization is not done there may be potential impact to downstream species? (34)
RESPONSE: The Department agrees that the proposed provision was inappropriately broad and has adopted the same language as is found at N.J.A.C. 7:7A-5.26(c)5, in order to ensure consistency. Both provisions address the conduct of activities in or near streams, which may affect threatened or endangered species habitat.

367. COMMENT: N.J.A.C. 7:7A-5.20(c)3i. We are pleased that the Department is allowing general permit authorization for projects funded under the Division of Watershed Management; however, "Action Now" lists are being prepared by the watershed process, not necessarily by the Division of Watershed Management. These lists are currently under development and non-existent in much of the State. Stating their availability may be premature. (8)
RESPONSE: The Department is aware that the "action now" project list is a new initiative that is only just beginning. However, the Department currently has a partial list of “Action Now” projects, and as more projects are added to the list, more areas will be eligible for this portion of general permit 20.

368. COMMENT: N.J.A.C. 7:7A-5.20(c)3i – We object to the provision allowing up to 500 feet of stream bank activity if the activity is funded by the Department’s Division of Watershed Management or included on an “action now” list. These qualifications do not necessarily establish the criteria necessary to minimize environmental damage and may, in fact, cause more short-term and long-term damage. Stream bank restoration without addressing upstream problems that caused them means only temporary results at the expense of preventing continuing environmental damage. (15, 38)

RESPONSE: The Department agrees that addressing upstream problems that contribute to the need for downstream bank stabilization is important. Therefore, the Department's Division of Watershed Management is pursuing a major watershed management initiative, which involves working with local citizens to identify waters with erosion problems, and to address these problems through bank stabilization projects and through efforts to correct upstream causes of erosion. (For more information on the Division's programs, see the Division's website at www.watershedmgt.state.nj.us.) One component of this initiative is the "action now" project list, which will prioritize those projects that will have immediate significant benefit or that will have immediate negative consequences if left undone. Because of the types of projects that will be on the list, and the 500 foot length limit for these projects, the Department believes that the general permit will have minimal impact while furthering important environmental improvements.

369. COMMENT: General permit 20: The Department needs to define the term action now since the proposed Watershed Management Area Rules do not use the term action now. (13, 34)
RESPONSE: See the response to comment 369 above for more information on the Division of Watershed Management's "action now" list.

370. COMMENT: N.J.A.C. 7:7A-5.20(c): The reference to "a project listed as a priority by the Department's Watershed Management Program" is of concern. The proposed Water Quality and Watershed Management rules only list priorities for TMDL development and watershed management grants. That would mean that only grant funded stream bank stabilization projects would be allowed the use of the special general permit provision. Any stream bank stabilization project in an impaired water body should be deemed a priority. This provision should be deleted. (13, 34)
RESPONSE: The commenter appears to have misunderstood this provision. N.J.A.C. 7:7A-5.20(c) applies not to "projects listed as a priority," but to projects funded by the Department's Division of Watershed Management, or listed by the Division as an "action now" project. These are specific projects identified and listed on an ongoing basis by the Division, which are not listed in the proposed Water Quality and Watershed Management rules. The "action now" list is compiled based on the need for swift action to prevent environmental degradation and is not restricted to grant funded projects. Thus, the commenter is incorrect in assuming that only grant funded bank stabilization is eligible for the 500 foot length limit.

371. COMMENT: We support the clarification of the Bank Stabilization General Permit section. Although we understand the Department's desire to encourage the use of vegetative and soil bioengineering bank stabilization methods rather than rip-rap, there has not been enough consideration given to the long-term stability of the banks and the cost impacts. (46)
RESPONSE: The Department appreciates the commenter's support of general permit 20. However, the Department believes that vegetative and soil bioengineering can be viable in many situations. During recent years, a variety of soil bioengineering and vegetative bank stabilization measures have been developed and extensively tested. All indications are that these more

environmentally friendly techniques, if used in the proper situations, can be highly effective and cost effective.

372. COMMENT: N.J.A.C. 7:7A-5.20(c): The relaxation of bank stabilization length limits to encourage use of vegetative or bioengineering methods is a positive change. (49)
RESPONSE: The Department appreciates this comment in support of the rule.

373. COMMENT: I am encouraged that the Department is expanding the length allowed for stream bank stabilization beyond 150 feet, but the restrictions that are imposed on using the expanded length are troubling and confusing. High stream flow velocities are the cause of bank erosion and subsequent stream impairment. Bioengineering techniques are limited to stream flow velocities of less than 6 feet per second and most stream bank erosion is caused by velocities greater than 6 feet per second. Therefore, projects that are addressing erosion caused by velocities of less that 6 feet per second will be very limited improvement to stream impairments. There should, therefore, be no requirement on limiting the length or the stabilization techniques in waters with documented stream impairments as long as the project is designed and implemented in accordance with the Standards for Soil Erosion and Sediment Control (cost factors will limit the length). Limiting the stabilization technique (but not the distance) in high quality waters would be much more plausible. (13, 34)
RESPONSE: The Department agrees that there are some cases in which the velocity of a stream prohibits use of certain soil bioengineering techniques for bank stabilization. However, this does not mean that unlimited riprap should be allowed under a general permit. In many of these cases, a more complex and comprehensive solution, which does not lend itself to the general permit format, is the best approach. For example, upstream problems that cause downstream erosion could be addressed through better stormwater management, perhaps including construction of a detention basin or a combination of other stormwater management measures. For such cases, the Department believes that an individual permit is appropriate, in order to ensure that effective measures will be taken to address the root cause of the problem and to minimize environmental impacts. Therefore, general permit 20 is adopted as proposed.

374. COMMENT: General permit 20: The new State Standards for Soil Erosion and Sediment Control give specific criteria for soil bioengineering systems. Therefore, the reference to Chapter 16 of the NRCS Engineering Field Handbook is not needed. All work should be done in accordance with the SCS Standards. (13, 34)
RESPONSE: The commenters suggest that SCS (Soil Conservation Service) standards be referenced in general permit 20. However, as stated in the definition of NRCS, the Natural Resources Conservation Service was previously known as the Soil Conservation Service. The standards the commenters prefer were developed by the New Jersey Department of Agriculture's State Soil Conservation Committee. These standards are based on the NRCS standards referenced in the rule, and are very similar to the NRCS standards. Therefore, the suggested change has not been made.

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

375. COMMENT: N.J.A.C. 7:7A-5.20A: The combination freshwater wetlands general permit and stream encroachment permit will assist the permittee in getting approvals and starting the bank stabilization activities. (46)
RESPONSE: The Department appreciates this comment in support of the rule.

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

376. COMMENT: N.J.A.C. 7:7A-5.21 -- Above ground utility lines. The Department should include a combined freshwater wetland and Flood Hazard Area Control Act permit for these activities. (13, 34)
RESPONSE: The Department is adopting several combined authorizations for selected activities which the Department has found very commonly occur in wetlands located in floodplains. However, the structures involved in supporting above ground utility lines can often create obstructions to flow, and thus may require more extensive review than could be provided through a combined approval. However, if the combined authorizations adopted herein prove effective and useful, the Department will consider whether a combined authorization can be used to cover at least some types of above ground utility lines.

377. COMMENT: N.J.A.C. 7:7A-5.21(b) should include a provision that the original soil profile be maintained to discourage undesirable plants, such as Phragmites, from developing. (15)
RESPONSE: The Department does not believe that this is necessary because, since the general permit covers above ground utility lines only, the only excavation allowed under the general permit would be small excavations for placement of poles or towers, which would remain in place. Therefore, replacement of soil is not an issue.

378. COMMENT: Regarding N.J.A.C. 7:7A-5.21 (General Permit 21), the Department states that there shall be no temporary disturbance greater than 60 feet during construction. Please note that 60 feet is applicable for a linear corridor for higher voltage corridors, i.e., 34.5 kV, 115 kV or 230 kV, to allow sufficient arcing space. However, for a laydown <u>temporary</u> construction site to install a steel pole with a concrete caisson, the work area is typically 100 feet x 100 feet to accommodate a crane to install tubular steel pole sections. Thus it is recommended that the Department consider the <u>temporary</u> disturbance of a 100 feet by 100 feet area to allow construction of the actual tower or steel pole. The disturbed area would then be restored, reseeded, etc. as no further activity would be required (5)
RESPONSE: The 60 feet that is allowed under this permit is the same as it was in the former rules, and is necessary to minimize impacts. If a utility line support requires more area, it must be relocated to an unregulated upland area. In many cases, a 100 foot square work area can be found using a combination of regulated and non-regulated areas.

379. COMMENT: We commend the Department for ensuring that any wetlands or transition areas disturbed immediately following construction are allowed to revert back to their natural condition in lieu of planting with indigenous wetland species. (5)

RESPONSE: The Department appreciates this comment in support of the rules.

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

380. COMMENT: General permit 22, Animal waste management activities: We cannot imagine that there are more than a couple of instances in New Jersey where manure storage has to take place in a wetland. The need for manure management got national attention in the attempts to clean up Chesapeake Bay because of the nutrient overload coming from agriculture nutrients pouring into the bay. But this is a winter problem when the cows and pigs are in the barn, not in the pasture, and the manure gets mechanically thrown on frozen fields in quantities that the weather conditions and soil characteristics cannot absorb. We are not aware that there is a problem due to barns in wetlands that requires the manure control/storage facilities to be built in wetlands too. Even if there are barns in historic wetlands, it is not clear why, in the era of tractors that the manure control facility needs to also be built in the wetlands. The Department should tell farmers to seek assistance from their State legislators or one of the special grant programs that are available from the Federal government to help with this problem. It does not merit a general permit. (15, 32)

381. COMMENT: The general permit that we are most concerned about is animal waste lagoons. We do not have combined area feed operations or "CAFOs" in New Jersey, or at least not many of them. These are the biggest threat to water quality in parts of the United States. What happened in North Carolina last year bears us out. It is critical that we not add animal waste into former wetlands with high water tables in the State of New Jersey, because even though we do not have many yet, the combined area operations may start coming to the State because you do not need a lot of land. On 20 acres you can stick a 100,000 hog farm and a couple of buildings, or even on a smaller piece of property if it is a chicken farm. (47)

382. COMMENT: We oppose this general permit as it involves a water quality enforcement issue. (2, 12, 33, 44)
RESPONSE to comments 380 through 382: In response to commenter concern, the Department has reviewed the projects to which the general permit could apply and has determined that the range of projects is too broad for practical application. The Department will consult further with the agricultural community and consider developing one or more general permits that more narrowly focus on specific types of animal waste management projects.

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

383. COMMENT: The cranberry general permit is subject to abuse and should be rescinded. Doing so would be a major step to protect critical habitat in the Pinelands, and protect natural resources in the State. (47)
RESPONSE: It is not clear in what way the commenter believes that general permit 23 is "subject to abuse." The Department believes that the general permit meets the FWPA standard of minimal impacts, as discussed in the proposal

summary for the general permit, found at 31 N.J.R. 1562(a) (June 21, 1999). Further, if necessary to ensure minimal impacts individually and cumulatively in a specific case, the Department can invoke the provisions at N.J.A.C. 7:7A-4.1(d), 4.2(d), and 13.2(a).

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

384. COMMENT: The spring general permit makes some sense, because cows want to head for the water and pasture near the water. (32)
RESPONSE: The Department appreciates this comment in support of the rules.

385. COMMENT: If this permit is approved, we strongly urge the Department to require an alternatives analysis so that disturbance of wetlands can be avoided. (15)
RESPONSE: The Department does not believe that an alternatives analysis is necessary. It has been the Department's experience, confirmed by information from the Natural Resource Conservation Service, that trampling and excessive nutrient input due to livestock grazing can seriously degrade streamside wetland areas. Thus, general permit 24 will help to alleviate this problem, while keeping wetland disturbance to a minimum.

386. COMMENT: N.J.A.C. 7:7A-5.24(d): Any part of a watering system should not only be outside of the wetlands, but outside of the transition area as well. (15)
RESPONSE: Agricultural activities in a transition area adjacent to a wetland that is part of an established, ongoing farming operation are exempt under the farming exemption at N.J.A.C. 7:7A-2.8(b). Therefore, the suggested change has not been made.

387. COMMENT: We oppose this permit for spring development, because it does not establish badly needed criteria to protect wetlands. As proposed, it could attract livestock to transition areas and wetlands and create more environmental harm than good. However, if the Department could provide predictive data as to the impact of this general permit and if it were strictly tied to USDA-NRCS technical advice and design, we might be able to support the concept. (2, 12, 33)
RESPONSE: The Department believes that allowing farmers to divert and pump a moderate amount of water (enough for livestock watering) away from a farmed wetland or State open water will divert livestock away from wetlands and State open waters, thereby minimizing trampling and excessive nutrient input due to livestock grazing. Further, the general permit covers only activities approved by the USDA's NRCS, as the commenter suggests. N.J.A.C. 7:7A-5.24(c)1 requires that any spring development authorized under the general permit must be necessary to carry out a farm plan developed by the NRCS and approved by the local Soil Conservation District (SCD). Because an NRCS farm plan encompasses not only the spring development activity but all environmental management issues at a farm, this will ensure that environmental management will be improved across the entire farm, and will result in overall environmental benefits.

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

388. COMMENT: We oppose the proposed 30-day default provisions for general permit 25. This is not an emergency situation. Not requiring written authorization before an activity can commence mimics the U.S. Army Corps of Engineers approach, which proved to be very destructive to wetlands. (2, 12, 15, 33)
RESPONSE: The default issuance of authorization under general permit 25 is not a change, and can be found in the former rules at N.J.A.C. 7:7A-9.5(f). However, the general permit has been modified on adoption by the addition of new N.J.A.C. 7:7A-5.25(b), which defines "individual subsurface sewage disposal system" in accordance with the Department's rules for individual subsurface sewage disposal systems at N.J.A.C. 7:9A, and also defines "malfunctioning." In addition, N.J.A.C. 7:7A-5.25(d) (proposed at N.J.A.C. 7:7A-5.25(c)) clarifies that a change in use of a facility includes a situation where the facility has been abandoned or unused and the repairs to the sewage system are caused by plans to use the facility again. These changes will ensure that the general permit is used as intended, as an authorization for repairs that are necessary to correct pressing problems which may cause groundwater pollution if left unaddressed. While a malfunctioning septic system may not always be an emergency situation, it can cause significant environmental impacts and public health problems. In addition, if the application raises any concerns with the proposed septic system, the Department has the option under N.J.A.C. 7:7A-5.25(e) to require a full general permit review.

7:7A-5.26 General permit 26 – Minor channel or stream cleaning for local government agencies

389. COMMENT: N.J.A.C. 7:7A-5.26: We believe that the general permit for stream cleaning is a positive change. Escalating sedimentation and clogging of streams contributes to potential health and flooding problems and detracts from recreational use of streams. Permitting counties and municipalities to receive stream cleaning authorization on an expedited basis and under the conditions outlined will benefit the public and the environment. (49)
RESPONSE: The Department appreciates this comment in support of the rule. It should be noted that the term "channel" has been added to the general permit on adoption. This more clearly indicates the purpose of the activities authorized under the general permit, and is consistent with the Department's practice under the Flood Hazard Area Control Act.

390. COMMENT: general permit 26 – Minor stream cleaning for local government agencies. We oppose a default permit if the Department does not respond within 30 days. Limits and criteria should be established. Because the regulation allows sediment removal, it simply does not qualify as an activity that will cause minimum individual or cumulative negative impacts. Note, the law requires that removal of sediment cannot go below natural watercourse channel – a difficult thing to accomplish. Unless conditions causing the sedimentation are corrected, it will continue. Stream cleaning that involves sediment removal can also generate very severe impacts. If the permit is adopted, it should prohibit use of heavy equipment in the streambed to truly minimize potential damage. (15, 38)

391. COMMENT: We are very ambivalent about stream cleaning. It is an age old problem in New Jersey. The local governments get the tractors in there fast and furious and clean everything in sight, oblivious to many of the environmental considerations. We would like to see this activity remain subject to an individual permit. (32)
RESPONSE to comments 390 and 391: General permit 26 does not provide for a default authorization if there is no response within 30 days. Rather, there is a 60 day review period for a project involving sediment removal, and a 15 day review period for a project that does not involve sediment removal but only involves removal of snags, garbage and debris. The general permit does establish limits and criteria at N.J.A.C. 7:7A-5.26(b), (c), and (d). The general permit is designed to be consistent with the Department's existing requirements for channel cleaning under 1997 amendments to the New Jersey Flood Hazard Area Control Act at N.J.S.A. 58:16A-67, which allow local governments to clean streams under the conditions in the general permit. The Department is also preparing amendments to the Flood Hazard Area Control Act rules to implement these statutory amendments. Because of the constant sedimentation of streams and water bodies, and their tendency to become clogged with branches, garbage, and other debris, channel cleaning is an ongoing activity in New Jersey. The Department retains full authority to deny authorization under general permit 26 for a project that does not meet the limits in the general permit. The expedited review will allow local governments to perform stream or channel cleaning in a predictable and orderly way in order to help to relieve local flooding problems. Finally, the Department understands that there are many sources contributing to stream sedimentation, and takes this into account to the extent possible within the authority of the FWPA. Therefore, the general permit is adopted as proposed, with changes only for clarification (these changes are described in the summary of agency-initiated changes below).

392. COMMENT: Minor stream cleaning for local government agencies. We do not understand the need for this general permit as the law specifically states that permits from the Department are not needed to perform minor stream cleaning activities. (13)
RESPONSE: Presumably, the commenter is referring to the Flood Hazard Area Control Act provisions at N.J.S.A. 58:16A-67, from which this general permit is derived. The law requires the local government entity to submit certain information demonstrating that certain requirements and limits are met, and allows the local government to proceed if the Department does not respond within a certain time. If the project does not comply with the limits, the law does not apply to that project. This general permit codifies this scheme in order to implement the law. The Department has labeled the authorization a "general permit" and the submittal an "application" so as to avoid complicating the rules by introducing an additional type of authorization and submittal into the rule. This prevents unnecessary complexity, but does not change the practical effect of the general permit, which is that a local government may proceed with authorized activities upon expiration of a certain period of time after submittal of the required information.

393. COMMENT: Channeling stream beds can adversely affect habitat and increase streambank erosion. Therefore, any work of this nature should be funded so as to

also restore stream bank vegetation. Channels should be sinuous, not straight, as sinuosity increases the ability of the habitat to recover from channeling. (39)
RESPONSE: The commenter's concerns are addressed in general permit 26 at N.J.A.C. 7:7A-5.26(b). N.J.A.C. 7:7A-5.26(b)3 states that the stream bank may not be altered, and N.J.A.C. 7:7A-5.26(b)4 specifically states that stream straightening or realignment is not authorized under the general permit and requires an individual permit.

394. COMMENT: Minor stream cleaning --- We suggest that State agencies, such as the New Jersey Department of Transportation, be listed as eligible to use this general permit. (23)

395. COMMENT: We would like to see the eligibility for the permit extended to the private sector and property owners. Although local government appreciates the expedited permit process, not allowing others to apply implies that the municipality or county is responsible for maintaining the waterways or obligated to by default. (8)

396. COMMENT: N.J.A.C. 7:7A-5.26: Why is this general permit limited to government agencies? (34)
RESPONSE to comments 394 through 396: General permit 26 is designed to be consistent with the requirements for channel cleaning under the 1997 amendments to the New Jersey Flood Hazard Area Control Act at N.J.S.A. 58:16A-67. These legislative amendments apply only to local governments. If, after implementing this adopted general permit, the Department determines that the commenters' suggested changes are appropriate and will meet the statutory standards, the Department will consider further expansion. Finally, the general permit does not determine who is responsible for maintaining waterways in any particular jurisdiction.

397. COMMENT: N.J.A.C. 7:7A-5.26: We applaud the Department's development of a general permit for stream cleaning where sediment is to be removed. We require clarification, however, on the permit's applicability where garbage, trash and debris are removed by hand or with handheld tools. As written, the general permit implies that a local government agency needs a general permit 26 for any litter clean up involving a stream. Would non-government agencies (property owners, community groups) be allowed to conduct stream-cleaning activities under this permit or even require a permit? Requiring a permit for simply removing garbage and debris blocking the flow of streams is onerous and discourages simple maintenance. Since even the smallest containers can hold water and breed mosquitoes, we encourage the removal of litter from streams and stream corridors and would like to see such activities allowed without a permit requirement. (8)
RESPONSE: Any activity that qualifies as a regulated activity under N.J.A.C. 7:7A-2.2 requires authorization from the Department, whether conducted by a government agency or private entity. If the removal of garbage, trash and debris can be accomplished without conducting regulated activities in either an open water or a freshwater wetlands, the removal would not require a permit at all. Different activities are regulated in wetlands and open waters. The only activity regulated in open waters under the freshwater wetlands rules is the discharge of dredged or fill material. See N.J.A.C. 7:7A-2.2(b). However, almost all activities are regulated in freshwater wetlands. Therefore, if a stream has no wetlands in it

or on its bank, the hand removal of garbage, trash and debris without any deposition of fill in the stream would not be regulated. However, if any deposition of fill is involved, the activity would require Department authorization. Where there are wetlands, either in the stream or on the stream bank, hand removal of garbage, trash and debris would also be unregulated as long as it did not involve any of the regulated activities listed at N.J.A.C. 7:7A-2.2.

398. COMMENT: We would like clarification on the certification requirements. Since we are a county agency, does our professional engineer qualify? Would the professional engineer for a county or municipal park system qualify? We would like to be able to use the general permit 26 as a vehicle to clean streams where mosquito breeding is likely but not definitively documented as required for a general permit 15. (8)
RESPONSE: The county's or municipal park system's professional engineers do qualify to sign the certifications required by N.J.A.C. 7:7A-5.26(e)8i, provided they are designated to do so by the county or municipality. It should be noted that general permit 26 does not authorize mosquito control or drainage activities, but only authorizes desnagging, removal of sediment, and removal of obstructions to flow.

399. COMMENT: We would like the Department to consider multiple projects (stream segments) be covered by one permit application, especially if the linear footage to be cleaned falls under the 500 feet limit stated in the rules. (8)
RESPONSE: General permit 26 covers a channel or stream cleaning project. Thus, if a project includes multiple segments of the same channel or stream, with the application submitted as one project, the Department could issue one authorization under general permit 26, provided the total length of the project complies with the general permit.

400. COMMENT: N.J.A.C. 7:7A-5.26(c): This permit should be expanded to authorize cleaning of more that 500 feet of stream, as is permitted under the Flood Hazard Area Control Act rules. (20)
RESPONSE: The Flood Hazard Area Control Act does not authorize cleaning of more than 500 feet of stream under the expedited permit process included in general permit 26. (see N.J.S.A. 58:16A-67.) In addition, it should be noted that the 500 foot limit applies only to removal of sediment. If a project involves only the removal of trash and debris, there is no limit on the length of the project.

401. COMMENT: Concerning the 500 linear foot limit, we believe that more than 500 feet in several streams in our County are impaired by excessive sedimentation. We request the Department to develop a mechanism for segments beyond 500 linear feet allowed to be cleaned under the general permit; for example, in stages with each stage reviewed by the Department. (8)
RESPONSE: It has been the Department's experience that 500 linear feet is sufficient for most channel cleanings, and that projects over 500 feet have the potential for causing major impacts on wetlands, transition areas and State open waters. If a channel cleaning project involves more than 500 linear feet of stream, the Department does not believe it is appropriate for the general permit, and should be subject to the review required for an individual permit.

7:7A-5.27 General permit 27— Redevelopment of previously disturbed areas

402. COMMENT: Redevelopment of previously disturbed areas: the Department should not adopt this general permit because it cannot tell the public what the scope of potential wetland losses will be. (32)
RESPONSE: The number of acres that will be affected by this general permit will vary depending on many factors, including development pressure, land prices, the real estate market, and the number and size of properties that the Brownfields Redevelopment Task Force finds qualify for listing as brownfields sites, meet State brownfields agreements, or are within municipally designated environmental opportunity zones. The Brownfields Redevelopment Task Force has so far listed approximately 471 sites as brownfields. To date, ten sites have been the subject of brownfields redevelopment agreements. The only economic opportunity zone in New Jersey is the city of Newark. Some of the sites in the above programs may include wetlands. However, since many of these sites are contaminated, wetlands disturbance on many of these sites is already authorized under general permit 4 for cleanups of contaminated sites. Although the Department cannot assess the exact acreage of impact under the general permit, the Department believes that the general permit will have minimal impacts because of the limits in the general permit, and because the overall effect of the general permit will discourage disturbance of pristine wetlands by reducing the difficulty of redeveloping previously disturbed wetlands. (Note that the Department has proposed amendments to general permit 27 elsewhere in this issue of the New Jersey Register, which narrow the general permit somewhat.)

403. COMMENT: General Permit 27 -- We strongly oppose allowing one acre of wetlands disturbance in degraded wetlands (formerly industrial or commercial use) in addition to other general permit disturbances that can total one acre. There are many upland redevelopment areas that can be covered without having to get into filling wetlands. Although this permit sounds worthy, it is not clear why wetlands, even though disturbed, should be the obstacle to development that is removed, among several others. There are many other hurdles that redevelopment must clear. Instead of writing off these degraded wetlands, we should encourage their restoration and addition to the community as an ecological, aesthetic asset. (15, 32, 38)
RESPONSE: The general permit is in fact intended to facilitate redevelopment of upland sites, because many upland redevelopment sites contain pockets of small wetlands which, without the general permit, would interfere with redevelopment of the uplands on the site. Due to past development practices and sometimes inadequate filling or grading, it is quite common to find several small pockets of previously disturbed and degraded wetlands on a previously developed site. The general permit is intended to allow a redeveloper with such a site to disturb these small wetlands to facilitate redevelopment, and to perform mitigation for these wetlands in such a way that the resulting wetlands will be of higher value. For example, a developer may fill several of these small degraded wetlands in one portion of the site, and restore and expand other wetlands as mitigation on another portion of the site. (Note that the Department has proposed amendments to general permit 27 elsewhere in this issue of the New Jersey Register, which narrow the general permit somewhat.)

404. COMMENT: We strongly oppose the general permit allowing the loss of wetland acres as an incentive to redevelop brownfield sites. Especially in urban areas, remnant wetlands should be tied to floodplain and wetland restoration projects, not treated as throw-away, marginal habitats. Many of these troubled sites are along potential urban and suburban greenways. In order to redevelop a thriving urban environment, we need to revive the wetland environments, rather than trying to develop every square inch in our cities and towns and forcing more people to move out into sprawling suburbs. Along with rebuilding structures, there must also be an emphasis on rebuilding natural resource values within a city. We should not be creating new general permits which destroy the potential to make our densely populated areas more livable. (2, 11, 12, 33)

405. COMMENT: There should not be a two-tiered approach to wetlands in New Jersey so that in an urban area you may fill more wetlands than in a rural or pristine area. We should be creating and enhancing wetlands in these areas in parks and open space in order to mitigate the environmental impacts that are already there. Urban wetlands, even though they may be degraded, are still mitigating a lot of the pollution in those areas, and should be enhanced. (47)
RESPONSE to comments 404 and 405: General permit 27 does not specifically target urban wetlands, but rather allows disturbance of degraded wetlands which have already been determined to be suitable for redevelopment under State brownfields laws, not all of which are in urban areas. 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 that has not previously been developed. The Department has attempted to balance this goal against the need (both in urban and non-urban areas) for the functions wetlands can provide, by limiting the general permit to substantially degraded wetlands on sites previously identified as suitable for redevelopment.

406. COMMENT: By virtue of the definition of "degraded," <u>all</u> urban wetlands would be defined as degraded, as would the Meadowlands. Urban wetlands deserve protection due to the important functions they serve in providing flood control and water filtration, among others. This general permit should be deleted. (44)
RESPONSE: The Department has not adopted the definition of "degraded" to which the commenter objects. Please see N.J.A.C. 7:7A-1.4 and 15.1 for the adopted definition of "degraded wetland." Please see the response to comments 404 and 405 above regarding the issue of urban wetlands.

407. COMMENT: We are pleased that the proposed wetlands regulations contain a new general permit intended to promote brownfields redevelopment. Environmental regulation has not lent itself to an accessible sorting of conflicting public policy goals (urban revitalization versus environmental cleanup) or even prioritization between environmental requirements. (40)
RESPONSE: The Department appreciates this comment in support of the rules. (Note, however, that the Department has proposed amendments to general permit 27 elsewhere in this issue of the New Jersey Register, which narrow the general permit somewhat.)

408. COMMENT: We support the adoption of general permits. A developer's ability to consolidate degraded and orphan wetland pockets into viable wetland areas will

give New Jersey a better environmental outcome. The possibility that a brownfield site may need an individual permit could kill the marketability of an urban site. This rule modification should increase the economic value of many brownfields sites that have these accidental wetland areas and improve municipal marketing options for these sites. This rule will give a developer more flexibility and certainty in taking on urban projects. (40)
RESPONSE: The Department appreciates this comment in support of the rules. It should be noted that this general permit is intended to allow filling of wetlands previously disturbed and those formed accidentally on previously developed sites, and is not intended to allow filling of undisturbed remnant wetlands that were left on the site after the first development. This has been clarified on adoption at N.J.A.C. 7:7A-5.27(b)1.

409. COMMENT: The only sites eligible for general permit 27 are former commercial or industrial sites that are abandoned or underutilized. The sites must also be either an environmental opportunity zone, have been subject of a remediation agreement with Treasury, or be on the Office of State Planning's list of brownfields sites. These are overly restrictive conditions on what is basically a sound economic and environmental step forward. The general permit should be applied to all properties that could utilize its benefits. (40)
RESPONSE: The Department believes that these restrictions are necessary to ensure that the general permit will meet the FWPA standard of minimal impact. Once the Department has experience implementing the general permit, it can be reevaluated.

410. COMMENT: N.J.A.C. 7:7A-5.27(a): Please explain why this permit is limited to areas previously significantly disturbed by industrial and commercial activities only. Why would this general permit not apply to areas disturbed by residential activities as well? (13, 34)
RESPONSE: General permit 27 is intended to cover redevelopment of significantly degraded wetlands. Sites that were previously disturbed by residential development and are abandoned or underutilized (as required at N.J.A.C. 7:7A-5.27(b)2) are rarely substantially degraded. By contrast, sites previously developed for industrial or commercial purposes are usually substantially degraded. If a site previously developed for residential use contains wetlands that are substantially degraded, the owner can demonstrate this in an application for an individual permit.

411. COMMENT: N.J.A.C. 7:7A-5.27(b). The conditions under which general permit 27 applies are too limiting. There are many sites being remediated with future site end use (e.g., site redevelopment) in mind. Many of these sites are not on the brownfield inventory, in environmental opportunity zones, or the subject of a redevelopment agreement. The Department should amend this section such that a Department Site Remediation Program case manager, as part of approval of the remedial action work plan, may authorize this general permit where a remedial action is undertaken as part of the redevelopment of the site. (46)
RESPONSE: As stated in the response to comment 410 above, the Department believes that these general permit restrictions are necessary. If a site is suitable for redevelopment but is not on the brownfield inventory, in an environmental opportunity zone, or the subject of a redevelopment agreement, a person can work with State and local authorities to qualify the site to meet one or more of

these criteria. The Department does not believe that the general permit would meet the FWPA requirement for minimal impact if the general permit were broadened as suggested. Therefore, the suggested change has not been made.

412. COMMENT: N.J.A.C. 7:7A-5.27 allows for activities in degraded areas. The Department is to be commended for attempting to facilitate the redevelopment of disturbed areas. The use of this general permit will be very limited due to the restrictive language of the rule. All criteria under N.J.A.C. 7:7A-5.27 (b) must be met in order for the general permit to be applicable. Rather than requiring that all the criteria be met, the proposal should allow for any one of the criteria being met as qualifying for use of the general permit. (34)
RESPONSE: The Department appreciates the commenter's support of the general permit. However, as discussed in the response to comment 410 above, the Department believes the restrictions are necessary to ensure minimal impacts under the general permit. Also, it should be noted that, while the general permit requires that all criteria at N.J.A.C. 7:7A-5.27(b) be met, only one of the criteria at N.J.A.C. 7:7A-5.27(b)3 must be met.

413. COMMENT: N.J.A.C. 7:7A-5.27. We support the general permit to authorize the disturbance of degraded freshwater wetlands, transition areas or State open waters necessary for redevelopment in previously disturbed areas. However, we believe that the criteria for this rule are too limiting. There are a number of sites in need of redevelopment that may not be identified on the inventory compiled by the Brownfields Redevelopment Task Force, be subject to a Redevelopment Agreement or be in an environmental opportunity zone. We believe that in addition to these criteria, the Department should allow this general permit to be used upon showing that the site meets the definition of a brownfield within the brownfields and Contaminated Site Remediation Act. This means that the site must be abandoned or underutilized as a result of known or suspected contamination. We also believe that mitigation on such sites should primarily be done through mitigation banking credit purchase or donation. Since many of the sites are within urban areas, it would be difficult to perform mitigation on site. (29)
RESPONSE: The Department appreciates the commenter’s support for this new general permit. However, as discussed in the response to comment 410 above, the Department disagrees that the criteria for the general permit are too limiting. Mitigation under the general permit may be performed through credit purchase or donation if the use of these mitigation alternatives complies with the requirements for mitigation set forth in N.J.A.C. 7:7A-15.5 or 15.6, as applicable.

414. COMMENT: N.J.A.C. 7:7A-5.27(a): We are encouraged to see that the Department is allowing an additional acre of disturbance under this general permit. However, since the permit is only authorized for wetlands, transition areas and State open waters that are significantly degraded and are of little ecological value, why limit the disturbance at all? (13, 34)
RESPONSE: A general permit may only be adopted if the Department determines that the activities authorized will have only minimal environmental impacts. See N.J.S.A. 13:9B-23c. Even wetlands that are significantly degraded generally provide some of the values and functions that the FWPA was intended to protect. For example, even very degraded wetlands usually provide some stormwater retention. Therefore, the one acre limit is included in the general permit in order to ensure minimal loss of wetlands functions and values, in

accordance with the FWPA. (Note that the Department has proposed amendments to general permit 27 elsewhere in this issue of the New Jersey Register, which narrow the general permit somewhat.)

415. COMMENT: General permit 27: The Department is going to require mitigation if the disturbance is greater than one half (1/2) acre. If the wetland is of no value, why require mitigation, especially if the mitigation is to occur on site? This goes against the whole intent of the permit to allow and encourage redevelopment of brownfields. If one is going to then have to mitigate the wetlands on site then there will be less area to redevelop, thus impeding the redevelopment of the brownfields area. (13)
RESPONSE: As discussed in the response to comment 414 above, even degraded wetlands generally provide some wetlands values and functions. Regarding mitigation, onsite mitigation can be very useful to a redeveloper with a site containing several small pockets of wetlands. Relocating several small wetland pockets in one larger area on a site can greatly improve the developability of the site. In addition, mitigation may occur offsite in many cases, depending on the factors set forth in N.J.A.C. 7:7A-15.5 or 15.6, as applicable.

416. COMMENT: N.J.A.C. 7:7A-5.27(b)1 references "disturbed" area. Disturbed needs to be defined. (34)
RESPONSE: The term "disturbed" is used throughout the rules to mean altered by human activities. The Department does not believe that a definition is necessary for the purposes of general permit 27, because the types of areas eligible for the general permit are clearly described in the limits and conditions included in the general permit.

417. COMMENT: N.J.A.C. 7:7A-5.27(b)4 specifies that to be authorized under this general permit the freshwater wetlands, transition area, and/or State open waters must be significantly degraded. The general permit is for disturbance of degraded wetlands, transition areas or State open waters. The term degraded is defined. What is the meaning of significantly degraded? This provision is inconsistent with N.J.A.C. 7:7A-5.27(a) which specifies application to degraded wetlands, transition areas or State open waters. (34)
RESPONSE: The term "significantly degraded" is intended to set a higher standard than the term "degraded." N.J.A.C. 7:7A-5.27(a) has been clarified to indicate that it applies only to "certain" degraded wetlands, i.e., those which meet all of the requirements in the general permit, and examples of significantly degraded wetlands have been added at N.J.A.C. 7:7A-5.27(b)4.

418. COMMENT: N.J.A.C. 7:7A-5.27(d): If activities under general permit 27 disturb more than one-half acre of freshwater wetlands or State open waters, the rules should allow the applicant to perform on site mitigation at a ratio of 1 acre created per 1 acre disturbed (enhancement mitigation ratio determined on a case by case basis). Creation of wetlands of similar resource value is assumed. Purchase of off site credits from a bank located at previously disturbed site in the same or adjacent HUC 11 at a 1:1 ratio. (40)
RESPONSE: N.J.A.C. 7:7A-15.8 details the amount of mitigation required. N.J.A.C. 7:7A-15.8(j) requires a person to carry out the full acreage amount of mitigation required under N.J.A.C. 7:7A-15.8, unless the person demonstrates, through use of productivity models or similar studies, that a smaller mitigation

area will result in a mitigation area sufficient to comply with this section. Therefore on a case-by-case basis the mitigation may be less than 2:1 for creation. The commenter has provided no indication as to why activities under general permit 27 should require less mitigation than activities authorized under other general permits.

SUBCHAPTER 6 TRANSITION AREA WAIVERS

7:7A-6.1 General transition area waiver provisions

419. COMMENT: N.J.A.C. 7:7A-6: Provisions should be included for constructing a transition area capable of treating nonpoint source runoff at a Brownfields site. This may include a wetland planting in the transition zone capable of stormwater capture and treatment prior to flow entry into the protected wetlands. (40)
RESPONSE: The construction of a transition area capable of treating nonpoint source runoff is the same thing as the construction of a stormwater management facility. Construction of a stormwater management facility in a transition area involves activities which are regulated activities under N.J.A.C. 7:7A-2.6, and is therefore permissible if it meets the requirements for a transition area waiver under N.J.A.C. 7:7A-6.

420. COMMENT: N.J.A.C. 7:7A-6.1(a)5: Each general permit that applies to the general permit transition area should be identified at this location. Proposed general permit 22, farmed wetlands, and general permit 24, spring development do not include transition areas. The provisions allowing certain activities in farmed wetlands under general permit 22 and general permit 24 should also apply to farmed transition areas. Alternately these should be identified as "not prohibited activities" or "not regulated activities" in transition areas. (20)
RESPONSE: The Department has added to this provision a list of general permits that do not authorize activities in transition areas. The Department has not adopted general permit 22. The commenter is correct that general permit 24 does not authorize activities in transition areas. The reason for this is that the activities authorized under the general permit are exempt in transition areas, even though they are not exempt (hence the need for the general permit) in freshwater wetlands. The farming exemption at N.J.A.C. 7:7A-2.8(c) is limited by N.J.A.C. 7:7A-2.8(b)1, which excludes from exemption any discharge of dredged or fill material that brings an area of freshwater wetlands or State open water into a use to which it was not previously subject, where the flow or circulation patterns of the wetlands are impaired or the extent or values of the freshwater wetlands or State open waters is reduced. The limits in N.J.A.C. 7:7A-2.8(b)1 do not apply to transition areas. Thus, an activity described at N.J.A.C. 7:7A-2.8(c) that is located in a transition area is exempt. The activities authorized under general permits 22 and 24 are exempt agricultural soil and water conservation practices under N.J.A.C. 7:7A-2.8(c)1, so the general permit does not need to authorize them. This has been clarified on adoption at N.J.A.C. 7:7A-5.22 and 5.24.

421. COMMENT: N.J.A.C. 7:7A-6.1(a)6. It should be clearly stated that the acreage associated with this "access transition area waiver" is <u>not</u> counted in the impact

acreage limits associated with specific general permits. This would best be stated in a new subsection within proposed 7:7A-4.3. (25)
RESPONSE: The Department has clarified that the access transition area waiver is not counted in calculating compliance with the acreage limits in general permits. This has been included in the adopted rules at N.J.A.C. 7:7A-4.2(c).

422. COMMENT: Moving the discussion of transition area requirements to subchapter 2 does not make much sense. It seems more logical to retain the discussion of transition areas in the subchapter, or immediately preceding it, that discusses transition area waivers. Otherwise, the emphasis on protecting them is lost. (15)
RESPONSE: The rule contains a great deal of interrelated information. The Department has attempted to organize the information in as simple and logical a way as possible. Although the list of regulated activities in a transition area was previously located in subchapter 6, the Department believes that relocating this material in subchapter 2 substantially improves the flow of the rules. Further, grouping the description of regulated transition areas and transition area activities with the description of regulated freshwater wetlands and freshwater wetlands activities highlights the importance of transition areas and their protection.

423. COMMENT: N.J.A.C. 7:7A-6.1(c). We support this provision which attempts to protect transition areas from projects immediately adjacent to them. (15)
RESPONSE: The Department appreciates this comment in support of the rules.

424. COMMENT: With respect to subsection (d), the Department is not statutorily authorized to require the recording of a conservation easement within a transition area. This requirement should be eliminated. (29)
RESPONSE: This is not a new provision. It is found in the former rules at N.J.A.C. 7:7A-7.1(g)1, and is intended to ensure that a reduced or averaged transition area will continue to provide the basic function of a transition area, i.e., to protect the freshwater wetland. The conservation restriction also serves to notify future land owners of the presence and configuration of the transition area. The FWPA authorizes the Department to include permit conditions and requirements that are necessary to ensure compliance with the FWPA.

425. COMMENT: N.J.A.C. 7:7A-6.1(f)2: Strike “not hydrologically connected,” and replace with “isolated.” The interpretation and recognition of isolated wetlands as defined in 7:7A-1.4 should be applied consistently throughout the FWPA Rules. (20)
RESPONSE: This provision is intended to distinguish one wetland area from another for the purposes of transition area waiver review. Two wetland areas can be hydrologically separate without either one being an isolated wetland. For example, a site may have two wetlands that are not connected to each other, each of which drains to a different surface water. Therefore, the suggested change has not been made.

426. COMMENT: N.J.A.C. 7:7A-6.1(f)2 – The Department should indicate that hydrological connection includes groundwater as well as surface water connection. (15)
RESPONSE: The Department does not use groundwater connection as an indicator of hydrologic connection under this provision. The purpose of this provision is to ensure that compensation for a transition area reduction occurs on

the same freshwater wetland as the reduction, so as to ensure a replacement of values and functions as close as possible to the location of the loss of these values and functions. Using groundwater connection as an indicator of hydrological connection could result in movement of the compensation area further away from the reduction area. Therefore, the suggested change has not been made.

427. COMMENT: N.J.A.C. 7:7A-6.1(h): The recording of a Department-approved conservation restriction should be limited to the area of transition area compensation only. The FWPA rules would still apply for the remaining transition areas. The language implies that the entire transition area associated with the onsite wetland is subject to a conservation restriction. In this sense, the ability to secure additional transition area waivers and hence develop the property in accordance with the standards contained in the FWPA Rules is relinquished. (20)
RESPONSE: The rule is intended to restrict the entire transition area on the site, as modified by the matrix waiver or averaging plan waiver. Further regulated activities in this area are permitted only if they meet the requirements for an individual freshwater wetlands permit. This has been the Department's longstanding practice, and it prevents the transition area from being averaged or reduced by subsequent development activities which further reduce the ability of the transition area to protect the wetland. If the Department approved an averaging plan for a subdivision without imposing a deed restriction on the entire transition area, many of the subsequent individual lot owners could qualify for a matrix type width reduction, even though the predevelopment property containing these same lots did not qualify. Applying double reductions would reduce the overall functions of the entire transition area beyond its ability to protect the adjacent wetland.

428. COMMENT: N.J.A.C. 7:7A-6.1(h). We strongly oppose this proposed regulation. The Department is not statutorily authorized to require the imposition of a conservation easement on a transition area. A regulatory requirement for such a conservation easement would constitute a taking of an interest in property. The Department already regulates transition areas and, presumably, future impacts in the transition area would be subject to obtaining a transition area waiver. There is no need for the Department to obtain an interest in property which could have a negative impact on its value and raise additional implications. The proposed rule should be deleted. (29)
RESPONSE: This is not a new provision. It is found in the former rules at N.J.A.C. 7:7A-7.1(g)1, and is intended to ensure that a reduced or averaged transition area will continue to provide the basic function of a transition area, i.e., to protect the freshwater wetland. The Department disagrees that the requirement to deed restrict such a modified transition area constitutes a taking, because a transition area reduction or averaging allows property use to occur. Restrictions on property use do not constitute takings, where they may reduce the property's value but do not deprive the property of all beneficial use.

429. COMMENT: N.J.A.C. 7:7A-6.1(h) – The wording of the existing regulation is far preferable to this. This seems to open the door for allowing later prohibited activities in transition areas, rather than discouraging them. (15)

RESPONSE: It is not clear why the commenter believes that the meaning of the formerly effective rules differs from the adopted provision. It is true that the adopted provision relocates some substantive requirements to N.J.A.C. 7:7A-15.14. However, these requirements still apply. Further, the adopted requirements for a conservation restriction not only continue the requirements from the former rules, they add additional requirements regarding notice to the Department of planned construction activities. (See N.J.A.C. 7:7A-15.14(c)3.)

430. COMMENT: We recommend that no transition area waivers be issued in the Passaic River Basin above Little Falls. Transition area waivers are now being granted for wetlands around ponds, along small tributary streams, and along the Passaic River and other major streams that have the effects of removing vegetation, increasing erosion, and increasing runoff so that both water pollution and flooding are exacerbated. Such effects run counter to the purposes of the Freshwater Wetlands Protection Act, and the purposes of transition areas as stated in N.J.A.C. 7:7A-2.5(a). No waivers should be granted based on flood management and water quality needs. (16)
RESPONSE: In the FWPA, the Legislature acknowledged the vital role wetlands play in ameliorating flooding and improving water quality. However, the regulatory scheme mandated by the FWPA provides standards the Department must use when reviewing applications for transition area waivers. The standards are designed primarily to ensure that each transition area functions to protect its adjacent wetland. Further, the FWPA requires that these standards be applied on a case-by-case basis. The commenter's suggestion would require a blanket assumption that no project in the Passaic River Basin above Little Falls will meet these standards. This would be a misapplication of the FWPA regulatory scheme. Therefore, the suggested change has not been made.

7:7A-6.2 Transition area averaging plan waiver

431. COMMENT: N.J.A.C. 7:7A-6.2(c)1: with reference to threatened or endangered species, add, “as defined in N.J.A.C. 7:7A-1.4” to the end of the sentence. (20)
RESPONSE: The rule, recodified at N.J.A.C. 7:7A-6.2(d)1 on readoption, has been clarified as suggested.

432. COMMENT: N.J.A.C. 7:7A-6.2(c)1 -- We support these provisions. (15)
RESPONSE: The Department appreciates this comment in support of the rules.

433. COMMENT: N.J.A.C. 7:7A-6.2(c)2i and ii, and (c)3i: We strongly oppose these measures that do not require a 150 foot buffer as the minimum protection for trout production waters. (15)
RESPONSE: While these provisions do not always require a 150 foot transition area on all trout production waters, they retain existing protections and add more. The provisions proposed at N.J.A.C. 7:7A-6.2(c)2i and ii (adopted at N.J.A.C. 7:7A-6.2(d)2i and ii) contain the former limits that applied to transition area averaging adjacent to exceptional resource value wetlands, and add additional limits that further restrict transition area averaging adjacent to some trout production waters. The provisions proposed at N.J.A.C. 7:7A-6.2(c)3i (adopted at N.J.A.C. 7:7A-6.2(d)3i) are not new and are found in the former rules at N.J.A.C.

7:7A-7.5(b)3. The additional limits will increase the buffer on trout production waters and their tributaries. However, the Department believes that in some cases a transition area averaging plan that allows for a portion of the transition area to be narrower than 150 feet can result in a functional transition area that protects adjacent wetlands. Further, the Department has clarified the provision on adoption to refer to the individual permit standards rather than to the standards for a scientific demonstration that an activity will have no substantial impact on the adjacent wetlands. The individual permit standard is used in the former rule at N.J.A.C. 7:7A-7.5(b)3, and the provision was intended to relocate and reword N.J.A.C. 7:7A-7.5(b)3 without changing its meaning (see summary description of proposed N.J.A.C. 7:7A-6.2(c) at 32 NJR 2722).

434. COMMENT: The transition area averaging plan waivers that strengthen protection of trout production waters appear to strengthen the rule, but we need predictive data as to the degree of strengthening in order to evaluate the overall improvement to wetlands protection. (2, 12, 33)
RESPONSE: The Department believes that the provisions will improve protection for trout production waters because they add protection for tributaries to trout production waters, and will provide for a larger transition area than previously required in cases where a trout production water has only a small fringe of wetlands. The provisions are intended to remedy problems Department staff have encountered during inspections, where staff have noticed that averaging can often result in insufficient protection for trout production waters and tributaries, especially those with only a small fringe of wetlands along the stream. Because these areas, especially tributaries, are not recorded separately in the Department's permitting database, the Department cannot provide a specific prediction of the number of acres that will be covered by this new provision. It is clear, however, that the provision will improve protection of these areas by limiting averaging in these circumstances.

435. COMMENT: N.J.A.C. 7:7A-6.2(d) – This section refers to N.J.A.C. 7:7A-6.1(f) which needs more detailed clarification. (15)
RESPONSE: N.J.A.C. 7:7A-6.1(f) addresses the issue of determining when one or more wetland areas are part of a larger wetland or are separate wetlands. It is not clear what type of detail the commenter believes should be added to the provision.

436. COMMENT: N.J.A.C. 7:7A-6.2(d)2 – The expanded part of a transition area must be located on the same tract of land where wetlands are being disturbed. In the past there have been instances where the Department allowed transition areas on separate tracts of land that did nothing to protect the part of the wetland being disturbed. (15)
RESPONSE: It is not clear exactly what the commenter means by "tract of land." The rules require that the compensation area be on the same site, which, as defined at N.J.A.C. 7:7A-1.4, includes all contiguous properties owned by, or under the control of, the same person or persons. The Department believes that this, along with the requirement that the compensation must occur on the same wetland, is adequate to ensure protection of the wetland.

437. COMMENT: N.J.A.C. 7:7A-6.2(d)3: Add “or property owner” to the end of the first sentence in this subsection. (20)

RESPONSE: The Department has not made the suggested change. The person who is responsible for the permitted activity for which compensation is required must also have legal control over the area that will be used for compensation, so that they will also be responsible for ensuring that requirements such as the requirement for a conservation restriction are met. The person who is responsible for the permitted activity is the applicant. In some, but not all cases, the applicant is also the property owner. (see N.J.A.C. 7:7A-10.1(d)). Please note that the provision referenced by the commenter has been recodified on adoption as N.J.A.C. 7:7A-6.2(e).

438. COMMENT: N.J.A.C. 7:7A-6.2(d)4. There is no apparent justification for this provision. Under the rules, all transition areas, whether they are forest, fields, or gravel parking lots, are treated as though they have equal ecological value. Therefore, vegetative cover is not necessarily indicative of the ecological value of the transition area. (20)
RESPONSE: The rule states that vegetation is included as one of the ecological characteristics of a transition area, but the rule does not state that vegetative cover is indicative of the ecological value of a transition area. Other ecological characteristics will also be considered, such as soils, hydrology, topography, presence of threatened or endangered species habitat, and the ability of the area to filter stormwater or perform other functions. The Department agrees that vegetative cover is not necessarily indicative of the ecological value of a transition area. That is why the cited provision requires that the expanded portion of the transition area "have the same ecological characteristics" as the reduced portion. Vegetation is only one of the characteristics that will be examined to ensure that this requirement is met.

439. COMMENT: N.J.A.C. 7:7A-6.2(d)4 – A new requirement proposed for transition area averaging plans is that the expanded area have the "same ecological characteristics" as the reduced area. This provision is superficially reasonable, but I expect it will be quite complex in application. The Department acknowledges that certain characteristics or combinations of characteristics make some transition areas more suitable for protecting the adjacent wetland than others (as illustrated in the matrix calculation for allowable width reductions). This same reasoning could be applied in averaging plans, so that transition areas that differ in ecological character may still be available for averaging. As written, however, the proposed rules do not allow an applicant to reduce an herbaceous transition area and compensate by expanding a forested transition area, even though this would provide a net increase in the ecological value of the final transition area. I suggest that this subsection be deleted or revised. One possible revision would be to state "... *Have the same**, equivalent, or higher** ecological characteristics as* ...". (25)
RESPONSE: The rule, recodified on adoption at N.J.A.C. 7:7A-6.2(e)4, has been clarified with similar language to that suggested.

7:7A-6.3 Special activity transition area waiver

440. COMMENT: N.J.A.C. 7:7A-6.3(d). We object to the new definition for stormwater management facilities. The existing definition at existing N.J.A.C. 7:7A-7.4(b) is much clearer. (15, 38)
RESPONSE: The Department agrees that the proposed rule has not provided the additional clarity desired and has not adopted the proposed new definition. Instead, the definition found in the former rules at N.J.A.C. 7:7A-7.4(b) has been restored on adoption (with minor clarifications) and has been placed in the definitions section at N.J.A.C. 7:7A-1.4.

441. COMMENT: N.J.A.C. 7:7A-6.3(f) – Includes several references to significantly disturbed areas. As noted previously the term significantly disturbed needs to be defined. (34)
RESPONSE: The Department disagrees. The term "significantly disturbed" is used in different ways in different parts of the rules. In each provision, the term is illuminated by the context, and by modifying language. In the provision cited by the commenter, the term is elucidated by the modifying phrase immediately following the term, which states "so that it [the transition area] is not functioning as a transition area at the time of application..."

442. COMMENT: N.J.A.C. 7:7A-6.3(f) – We object to expansion of this special activity transition area waiver for new development without putting some limits on it. Impervious cover, gravel or paver blacks can be removed for restoration activities. Restoring water quality in developed areas having degraded wetlands will be hampered by the proposed regulations. (15, 38)
RESPONSE: The Department agrees that limits are necessary and has included them in the conditions of the transition area waiver at N.J.A.C. 7:7A-6.3(f)1 through 4. While it is true that a significantly disturbed transition area can be restored, many degraded transition areas are unlikely to be restored because of their small size or location. In such cases, if a site meets the conditions of the transition area waiver, redevelopment may be the best option.

443. COMMENT: N.J.A.C. 7:7A-6.3(f)4: A conservation restriction should not be imposed upon the remaining disturbed transition area, since the existing use of a property may not comply with the limitations imposed by said conservation restriction. For example, the remaining disturbed transition area may be a component of an active school or community playground/athletic field that predated the FWPA Rules. (20)
RESPONSE: A conservation restriction is required under N.J.A.C. 7:7A-6.3(f)4 only "where practicable." This will allow for flexibility in cases such as that described by the commenter.

444. COMMENT: N.J.A.C. 7:7A-6.3(g): This section is unreasonably stringent in light of the provisions of the FWPA. The FWPA authorizes transition area encroachments <u>without compensation</u> for certain special activities (including stormwater management facilities and linear development) provided only that they have no feasible alternative locations. To require an applicant to demonstrate that a transition area special activity, if proposed in a wetland, would meet the standards for an individual wetland permit elevates by an order of magnitude the significance of any potential impacts of these special activities. It may be impossible to demonstrate (*i.e.,* prove) that the special activity would otherwise be allowed in a wetland. In effect, there may as well be no special activity transition

area waiver at all, and such activities should be included in an individual wetland permit application. However, that is not what the FWPA envisioned. (25)
RESPONSE: The cited provision includes an option designed to provide flexibility for applicants. As stated in both the proposed and adopted rule at N.J.A.C. 7:7A-6.3(b), the transition area waiver based on a project meeting the standards for an individual permit is just one of the types of transition area waivers available. If an activity can meet the standards for one of the other types of transition area waivers (for example if the activity meets the requirements for a special activity waiver for stormwater management at N.J.A.C. 7:7A-6.3(d) or a special activity waiver for linear development at N.J.A.C. 7:7A-6.3(e)), an applicant need not make the demonstration required under this provision.

445. COMMENT: N.J.A.C. 7:7A-6.3(g): This section is unnecessary in light of the requirements at 7:7A-6.3(c) through 7:7A-6.3(f). These previous sections establish strict requirements for demonstrating that there is no feasible alternative location. No further demonstration should be necessary. (25)
RESPONSE: As discussed in the response to comment 444 above, this option is provided for applicants who cannot meet the requirements at N.J.A.C. 7:7A-6.3(c) through (f). It is not a "further" requirement, but an alternative option.

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

446. COMMENT: N.J.A.C. 7:7A-6.4(b) – The construction of this section is unclear. It looks like the last phrase in (b)1 should be a separate criteria. (15)
RESPONSE: N.J.A.C. 7:7A-6.4(b)1 has been clarified on adoption to resolve this confusion.

447. COMMENT: N.J.A.C. 7:7A-6.4(c) – The phrasing here needs to be reworded to clarify where you may not get a waiver, rather than to focus on where you can get a waiver. The phrasing is confusing. (15)
RESPONSE: N.J.A.C. 7:7A-6.4(c) has been clarified on adoption to resolve this confusion.

448. COMMENT: N.J.A.C. 7:7A-6.4(h) – The first sentence makes no sense if the word "site" has the meaning as defined at N.J.A.C. 7:7A-1.4. The plant community which covers the most surface area of the transition area on the "site" may have little or no relation to the dominant vegetation community in the specific transition area where the width reduction is proposed. This is particularly true of large, diverse sites. I suggest the wording be changed as follows: *"... of the transition area* ***at the location of the proposed width reduction***." (25)
RESPONSE: The suggested change has not been made. The provisions for a matrix transition area waiver, within which the cited provision is found, result in reduction of the width of the entire transition area on the site. Therefore, it is appropriate to consider the plant community of the entire transition area on the site.

449. COMMENT: N.J.A.C. 7:7A-6.4(h)2: A forested wetland with little or no herbaceous or shrub layer is not ecologically comparable to a scrub/shrub wetland and, as such, should not be categorized as a scrub/shrub wetland when

applying the matrix evaluation. A distinction should be made for when a “forest” is dominated by saplings less than 4” dbh and thus could be treated the same as a scrub/shrub wetland. (20)
RESPONSE: The matrix transition area width reduction waiver is based on sediment transport models and litter transport models. The provision allows a narrower transition area if the area is forested, because a forested area generally is more effective at performing the functions of a transition area, including filtering out sediment and litter. However, without the normal herbaceous or shrub layer, a forested transition area must be wider in order to provide the same functions. The suggestion to consider an area dominated by small saplings as equivalent to a scrub/shrub wetland for matrix purposes has merit, but cannot be made on adoption. The Department will consider this for a future rulemaking.

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

450. COMMENT: N.J.A.C. 7:7A-6.6 – This section refers to subchapter 10 for the application requirements for transition area waivers; however, they are not contained in subchapter 10. (20)
RESPONSE: N.J.A.C. 7:7A-10.1(b), which lists the applications covered by subchapter 10, includes at N.J.A.C. 7:7A-10.1(b)4 "an individual transition area waiver." This covers an application for a transition areas waiver for activities in a transition area that are not covered under a general permit. If an activity in a transition area is covered under a general permit, the application would be for an authorization under a general permit, for which application requirements are listed at N.J.A.C. 7:7A-10.1(b)2.

SUBCHAPTER 7 INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

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

451. COMMENT: N.J.A.C. 7:7A-7.2(b)4, 6, & 7 – The citation of other regulations is helpful and should be left in for reference. (20)
RESPONSE: The Department appreciates this comment in support of the rules.

452. COMMENT: N.J.A.C. 7:7A-7.2 – Eliminate an alternatives analysis for brownfield redevelopment. (40)
RESPONSE: The FWPA requires an alternatives analysis for all individual permits. Therefore, the suggested change has not been made.

453. COMMENT: N.J.A.C. 7:7A-7.2. We are concerned with the incorporation of the State Development and Redevelopment Plan, even as a guidance document, in the proposed rule. We believe this matter is already covered by the State Planning Act and Department internal guidance and it should not again be incorporated in the rule even for guidance purposes. (29)
RESPONSE: The Department believes that the State Plan embodies the type of balance that was intended by the Legislature when it enacted the public interest test as part of the FWPA. 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 in applying the public interest test under the FWPA.

454. COMMENT: N.J.A.C. 7:7A-7.2(b)12i – We support reference to the State Development and Redevelopment plan only if the Department clarifies that the public interest test rests on the environmental and water resource goals of the plan. (2, 12, 15, 33, 38)
RESPONSE: The Department does not believe that the FWPA mandate that a project be in the public interest was intended to be limited to environmental and water resources aspects concerns, but instead is meant to enable the Department to balance a broader range of issues that might affect the public interest.

455. COMMENT: The rule states that the State Development and Redevelopment Plan (SDRP) will be used as one source to determine whether an activity is in the "public interest" in reviewing Individual Permits. On August 23rd I questioned whether this requirement would effectively deny all individual permits in Planning Areas 3, 4 and 5. Department staff indicated that this will not be the case, that it is only one source of guidance. I am concerned as to whether other sources used for guidance will be given the same weight as the SDRP, and that this language might allow the Department to declare any individual permit in Planning Area 3, 4 and 5 inconsistent with the "public interest." This language lacks any explanation of how this criteria will be objectively applied and lacks clarification so that the reviewer and applicant will each know exactly how much weight inconsistencies with Planning Area goals will be given. (21)

456. COMMENT: N.J.A.C. 7:7A-7.2(b)12i requires inclusion of the goals, strategies, policy objectives and policies of the State Development and Redevelopment Plan in determining whether a proposed activity is in the public interest. There are hundreds of goals, strategies, policy objectives and policies in the SDRP including the need for safe, healthful and affordable shelter. Does the Department consider shelter to be in the public interest? How will the competing goals, strategies, policy objectives and policies be addressed? How will the Department ensure consistency in review of submittals made in accordance with this provision? What criteria will be used? (34)
RESPONSE to comments 455 and 456: While it is always desirable to provide as much predictability in rules as possible, the analysis of whether to issue an individual permit is complex, dependent on many factors, and therefore necessarily flexible. This flexibility is necessary not only to comply with the requirements of the FWPA, but is appropriate in light of the wide variation among proposed activities, site conditions, and regional conditions, all of which must be considered when reviewing an application for an individual permit. The use of the State Plan as guidance will provide some additional guidance on the issue of what is in the public interest. However, the Department does not believe that further narrowing is appropriate under the FWPA. While the Department will support the goals of the State Plan (including shelter) generally through the

FWPA rules, the freshwater wetlands protection goals of the FWPA are paramount.

457. COMMENT: Provisions proposed at N.J.A.C. 7:7A-7.2(a)14 may add time to the approval process. Permits may be granted with conditions that other approvals be obtained prior to construction, such as Wastewater Management Plan (WMP) amendments. This paragraph seems to be saying that if you do not have a WMP amendment when you apply for a wetlands permit, you will not get a wetlands permit until the WMP amendment is issued, which could take years. Even Planning Boards will issue approvals with this type of condition, knowing full well that the WMP amendment must be obtained in order to construct the project. (21) RESPONSE: The commenter is correct that an applicant must demonstrate that a project is consistent with the applicable wastewater management plan (WMP) prior to issuance of the permit. This is required under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., which states at N.J.S.A. 58:11A-10: "The commissioner shall not grant any permit which is in conflict with an adopted areawide plan." Planning boards are not covered by this provision and thus are not required to withhold permits on this basis. Since this is the Department's current practice, it is not expected to add delay to the application review process.

458. COMMENT: N.J.A.C. 7:7A-7.2(b) – We request that the following be added to the standards for individual permits proposed at N.J.A.C. 7:7A-7.2(b): "<u>If the activity is proposed within an area under the jurisdiction of the Pinelands Commission, the applicant must demonstrate that the application requirements of the Pinelands Comprehensive Management Plan have been satisfied and that the activity has been determined by the Pinelands Commission to be consistent with the Pinelands Comprehensive Management Plan."</u> The purpose of this standard is the same as we indicated above in relation to N.J.A.C. 7:7A-4.3(b). (3) RESPONSE: The adopted rule has been clarified at N.J.A.C. 7:7A-7.1(d) to ensure that the public is aware that the Pinelands CMP applies to some individual permit activities in the Pinelands.

459. COMMENT: N.J.A.C. 7:7A-7.2(c)3 – We strongly oppose this presumption of no practical alternatives for construction of a single-family house on a lot pre-existing 1988. The potential impact of this provision is very significant. Further, the requirement that the property be sewered can only have a detrimental effect on environmentally sensitive areas. The constraint that the lot must be sewered adds fuel to secondary impacts from sewer expansions in environmentally sensitive areas. It is also contrary to Federal sewer water treatment plant funding requirements that no hook-ups be permitted to structures built in wetlands. This regulation will assure that privately owned wetlands are developed rather than maintained in their natural state. It is also contrary to the FWPA. (2, 12, 15, 33, 38, 44)

460. COMMENT: Accepting the presumption that there is no practical alternative to construction of a single family home on a lot pre-existing 1988 defies the intent of the law, the alternatives test is applied to non water dependent activities. Clearly houses are not water dependent. To paraphrase the judge in the Florida estuaries case, no one has the absolute right to so change his land as to change its intrinsic nature and function. (15)

461. COMMENT: N.J.A.C. 7:7A-7.2(c)3ii – The acreage limitation of 1/8 acre seems overly restrictive. A driveway access alone could disturb up to ¼ acre under a general permit. (20)

462. COMMENT: N.J.A.C. 7:7A-7.2(c)3vi seems to prohibit the possibility of obtaining a permit for construction for a house served by septics. Is this the Department's intent? If it is not, the provision needs to be clarified. If it is, what is the justification for the blanket prohibition? There may be instances where a single family home served by septics would be a viable option. Such a possibility should be allowed for consideration. This provision should be deleted. (34)
RESPONSE to comments 459 through 462: The Department has determined that this provision is not necessary and has not adopted the provision. Although it is often the case that offsite alternatives are not practicable, the concerns addressed by the provision are addressed by the takings provisions proposed at N.J.A.C. 7:7A-12.7 (as discussed in the response to comments 517 through 521, the takings provisions were relocated at N.J.A.C. 7:7A-7.3 on adoption).

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

463. COMMENT: N.J.A.C. 7:7A-7.3(a) – We suggest that the first sentence be modified at the end to read "…requirements of this section <u>except as provided at 7:7A-7.2(c)3 above</u>". (20)
RESPONSE: The Department has not made the commenter's suggested change because the provision proposed at N.J.A.C. 7:7A-7.2(c)3 has not been adopted, as discussed in the response to comments 459 through 462.

SUBCHAPTER 8 EMERGENCY PERMITS

7:7A-8.2 Obtaining an emergency permit

464. COMMENT: N.J.A.C. 7:7A-8.2(a) – Activities for which an emergency permit may be requested from the Department may also be subject to the provisions of the Pinelands Comprehensive Management Plan (CMP). Under the CMP, specifically N.J.A.C. 7:50-4.5, the Commission's Executive Director may determine that immediate action pursuant to the CMP is necessary to remedy or prevent a condition that is dangerous to life, health or safety. To ensure that an emergency permit issued by the Department is consistent with the provisions of the CMP, we request the following amendment: "A person in need of an emergency permit shall inform the Department as to the extent of work to be performed, the reason for the emergency, and the location of the project. <u>If the work is to be performed within an area under the jurisdiction of the Pinelands Commission, the person shall either demonstrate that the Executive Director of the Pinelands Commission has issued an emergency approval for the work pursuant to the Pinelands Comprehensive Management Plan (N.J.A.C. 7:50-4.5) or demonstrate that the application requirements of the Pinelands Comprehensive Management have been satisfied and that the Pinelands Commission has determined that the work is consistent with the standards of the Pinelands</u>

Comprehensive Management Plan. This information shall include a written description of the work, plans of the work, and photographs of the site, and shall be prior to the issuance of the emergency permit." (3)

465. COMMENT: N.J.A.C. 7:7A-8.2(c) should be revised as follows: "If the Director of the Department's Land Use Regulation Program gives oral approval for an emergency permit, the emergency work may be started. However, if the work is to be performed within an area under the jurisdiction of the Pinelands Commission, prior to granting such an approval, the Director of the Department's Land Use Regulation Program shall either confirm that the Executive Director of the Pinelands Commission has granted an emergency approval for the work pursuant to the Pinelands Comprehensive Management Plan (N.J.A.C. 7:50-4.5) or confirm that the applicant has satisfied the application requirements of the Pinelands Comprehensive Management Plan and that the Pinelands Commission has determined that the work is consistent with the standards of the Pinelands Comprehensive Management Plan. The person who received the oral approval shall keep Department staff informed by telephone regarding the situation at the site. The Department will offer guidance and instructions in performing the work." (3)

466. COMMENT: N.J.A.C. 7:7A-8.2(d) – In order to ensure that the approval of an emergency permit is consistent with the provisions of the CMP, we request the following amendment: "If the Director of the Department's Land Use Regulation Program does not give oral approval, the Department may issue a written emergency permit at any time within 15 days after the initial request. However, if the work is to be performed within an area under the jurisdiction of the Pinelands Commission, prior to granting such a permit, the Director of the Department's Land Use Regulation Program shall either confirm that the Executive Director of the Pinelands Commission has granted an emergency approval for the work pursuant to the Pinelands Comprehensive Management Plan (N.J.A.C. 7:50-4.5) or confirm that the applicant has satisfied the application requirements of the Pinelands Comprehensive management Plan and that the Pinelands Commission has determined that the work is consistent with the standards of the Pinelands Comprehensive Management Plan. (3)
RESPONSE to comments 463, 464, and 465: A provision alerting the public to the fact that emergency activities in the Pinelands may require Pinelands Commission approval, and providing information on how to contact the Pinelands Commission to determine what is necessary, has been added on adoption at N.J.A.C. 7:7A-8.1(f).

SUBCHAPTER 9 PRE-APPLICATION CONFERENCES

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

467. COMMENT: The limitation on participants and those who may request a pre-application conference is worrisome. Frequently there are other interested parties in any land use decision, but especially in wetlands, that can control or add to neighborhood flooding and can affect [inaudible on hearing transcript] for recharge for area wells. Those parties directly affected should be allowed to

participate in a pre-application meeting to make those concerns known. They should be allowed to request such a conference. They could save an applicant money and time by raising vital concerns up front before any large investment has been made. In the past, non-profits have initiated pre-application conferences on stream encroachment applications with the Department and the applicant and made substantial progress in improving projects. (11, 15)
RESPONSE: The Department has not made the suggested change. The purpose of a pre-application conference is primarily for the Department to educate the applicant about the application and review process, and the standards that will apply to a particular project. Comments from third parties are solicited during the application review process, through the notice each applicant is required to provide as part of the application. To provide a third-party right to participate in any pre-application conference would be extremely time-consuming and costly to both the Department and applicants. A third party who believes the applicant would benefit from their input may contact an applicant and, if the applicant chooses, the applicant may invite the third party to such a conference. Note that pre-application conferences are governed by N.J.S.A. 13:1D-104.

SUBCHAPTER 10 APPLICATION CONTENTS AND PROCEDURE

7:7A-10.1 Basic application information

468. COMMENT: N.J.A.C. 7:7A-10.1(b) – An application for a transition area waiver is missing from this list and there are no specific provisions for transition area waivers in the subsequent rules under this subchapter. (20)
RESPONSE: The commenter is mistaken. Application requirements for transition area waivers are found in this subchapter. N.J.A.C. 7:7A-10.1(b), which lists the applications covered by subchapter 10, includes at N.J.A.C. 7:7A-10.1(b)4 "an individual transition area waiver." This covers an application for a transition area waiver for activities in a transition area that are not covered under a general permit. If an activity in a transition area is covered under a general permit, the application would be for an authorization under a general permit, application requirements for which are listed at N.J.A.C. 7:7A-10.1(b)2.

469. COMMENT: N.J.A.C. 7:7A-10.1(d): Any person, agency, corporation, etc. should have the ability to submit an application provided the owner of the property consents in writing to the submission of said application. (20)
RESPONSE: The Department has clarified the provision in accordance with the commenter's suggestion.

470. COMMENT: N.J.A.C. 7:7A-10.1(g): Requires that applicant keep all data used for the application for three years after the date of submittal. Will this requirement be included as a permit condition? What action will be taken should records not be kept as specified? (34)
RESPONSE: The commenter appears to be referring to N.J.A.C. 7:7A-10.1(n). This is not a new provision. It is recodified from former N.J.A.C. 7:7A-11.2. EPA rules governing State assumption of the Federal wetlands program require the Department to set record keeping requirements (see 40 CFR §233.22) and also

require the Department to have the authority to modify, suspend or revoke permits if there was misrepresentation in the application process, for example if an individual permit should have been required rather than a general permit. (see 40 CFR §233.36). Requiring records to be retained helps the Department meet these Federal requirements. Further, it is in the applicant's interest to retain these records in case an extension or modification is needed after the permit is issued. The Department does not anticipate specifically restating this requirement in each issued permit. However, this fact does not relieve the permittee from the obligation to comply with the provision. Any enforcement action taken would be governed by the requirements in N.J.A.C. 7:7A-16.

471. COMMENT: N.J.A.C. 7:7A-10.1(g): The application checklists should be included as an Appendix to the regulations so that the regulated community can go to the rules and find all of the information that is necessary for a successful permit application. We respectfully disagree that putting application requirements in the rules are burdensome to read. This method of distributing application requirements has several significant drawbacks, including: (1) The Department will be able to add/change the requirements contained in the forms/checklists without first going through the due regulatory process including public comment. Changes to the forms/checklists could be significant, thereby increasing the burden on the regulated community. (2) the end-user will not know for certain whether he/she is using the most updated forms/checklists without first contacting the Department. For companies that do upwards of a hundred permit applications per year, this could be a continuous problem. Due to the penalties provided at N.J.A.C. 7:7A-10.1(f), it is even more important that all application requirements be put in the rules. (3) All parties involved in an application, such as the applicant, engineer, and wetland consultant, need to all have ready access to the same set of application requirements to avoid conflicts in the development of the application. (6, 20)

472. COMMENT: The technical requirements for LOIs and permits should remain in the rules and not be located in checklists only. I believe that their inclusion in the rules are necessary so that all concerned parties can view the complete requirements in the published rules, and any changes to these technical requirements would be subject to notice in the New Jersey Register. (21)
RESPONSE to comments 470 and 471: The Department does not believe that potential applicants will be hampered by the placement of application checklists in separate documents. The specific information necessary for an application varies depending on the project, the site, and the type of approval sought. Therefore, the rule provision broadly lists the categories of information which may be required. Each application checklist then focuses these broader requirements, by specifying the information from each category that is required for an application for that particular approval. The application checklists will be available on or before September 4, 2001 on the Land Use Regulation Program web site at www.dep.state.nj.us/DEP/landuse. The separation of the checklists from the rules will have several advantages for applicants and the Department. The use of separate application checklists is authorized under N.J.S.A. 13:1D-101, and the Department is limited by the rules as to what may be required by the checklists. An item may not be required by the application checklist if it does not fall into one of the categories of information described in the application requirements in the rules. Furthermore, the checklists will be more readily available in their most up

to date form because they will be posted on the Department's website, as well as being available through the traditional methods (i.e. telephoning the Department and requesting a paper copy). Finally, all parties involved in an application can simultaneously view the up to date checklist on the web, so as to avoid conflicts in the development of the application. In fact, the Department believes that separating the checklists from the rule will provide a substantial benefit for applicants by allowing for fast and widespread dissemination of up-to-date information on how to prepare an application.

473. COMMENT: The regulator should be subject to a defined time period during which to review and process a simple permit application. We recognize that a complex application involving an individual permit and a mitigation plan is subject to many back and forth engagements between the Department and the regulated entity. However, a simple general permit application should not be allowed to hold up a construction project indefinitely. By setting a deadline for the regulator to process permit applications, the regulated community can better anticipate the timing of the permitting process. The inclusion of an “average” processing or review time in the regulations does not provide any certainty to the regulated community. It is unclear how the Department prioritizes the processing of applications for an increasingly over worked staff. We advocate writing required turnaround times for each type of permit application into the rules to ensure that the Department allocates the proper resources to the review and processing of wetlands permits. (6, 20)
RESPONSE: The FWPA sets forth substantive findings the Department must make in order to issue a permit. If the Department were to adopt required review periods as suggested by the commenter, there would be cases where a permit might be issued or denied solely because of these deadlines, rather than because the Department had made the findings required by the FWPA. This would violate the Department's mandate under the FWPA. However, the Department strives to process applications as quickly and efficiently as possible within its statutory mandate.

474. COMMENT: N.J.A.C. 7:7A-10.1(k) provides estimated time frames for application review. Some of the time frames are inconsistent with those established in the Freshwater Wetlands Protection Act. The rules at 7:7A-3.1(f) specify up to 75 days review time for an LOI. However, this rule says an LOI requires approximately 105 days. The reason for this discrepancy is unclear. (20, 34)
RESPONSE: As discussed in the response to comments 144 and 145 above (regarding N.J.A.C. 7:7A-3.1(f)), the timeframes set forth for review of an LOI application at N.J.A.C. 7:7A-3.1(f) are derived from the FWPA, and were found in the former rules at N.J.A.C. 7:7A-8.8. However, further information is usually required for a complete LOI application, so the 30 day time frame at N.J.A.C. 7:7A-3.1(f) is rarely applicable. Further, the timeframe set forth at N.J.A.C. 7:7A-10.1(k) for a decision on an LOI application is an average time from receipt of the application to final Department decision. These timeframes have been updated on adoption to reflect the Department's actual experience with applications during 2000. Each timeframe includes not only the time spent by the Department in reviewing the application, but also the time spent waiting for the applicant to supply requested additional information, time required for site inspections, etc. The timeframes provided at N.J.A.C. 7:7A-10.1(k) are intended to provide a realistic timeframe for applicants to use in planning projects. A reference to

N.J.A.C. 7:7A-10.1(k) has been added to N.J.A.C. 7:7A-3.1(f) upon adoption to reduce confusion.

475. COMMENT: N.J.A.C. 7:7A-10.1(l) allows applicants to submit one application if there is more than one permit needed for a project. This section should state that public notice must be absolutely clear on the permits being applied for. (15)
RESPONSE: This is made clear by a modification to the rules on adoption at N.J.A.C. 7:7A-10.9(h).

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

476. COMMENT: N.J.A.C. 7:7A-10.2(b)7: This statement is rather broad-based and vague. The specific information and/or certifications regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources, etc. must be clearly defined by the Department in order for the consultant to adequately address said requirements. (20)
RESPONSE: The specific information required varies from approval to approval and site to site. Therefore, the rule provision broadly lists the categories of information which may be required. Each application checklist then focuses these broader requirements, by specifying the information from each category that is required for an application for that particular approval. The application checklists will be available on or before September 4, 2001 on the Land Use Regulation Program web site at www.dep.state.nj.us/DEP/landuse.

477. COMMENT: N.J.A.C. 7:7A-10.2(b)9: This rule is too vague for people not familiar with the Federal regulations. We request that the Department be more specific here so all involved parties know what is expected. (20)
RESPONSE: This provision is intended only to allow the Department to require any additional information not already listed, if necessary to ensure compliance with Federal regulations. The rule has been clarified on adoption to indicate this.

478. COMMENT: A proper site map should be included with an application for a wetlands permit. (16)
RESPONSE: Different types of approvals and different sites require different types of maps. Therefore, the application checklist for each approval specifies the types of maps which must be included in an application for that approval.

7:7A-10.4 Additional application requirements for a general permit authorization

479. COMMENT: N.J.A.C. 7:7A-10.4(a)2, 10.5(a)1, and 10.6(a)2– It would be useful for the Department to require, or at least recommend, that a surveyed wetland boundary be provided <u>with</u> the general permit application, rather than waiting until after the site inspection (for sites where no LOI already has been issued). This is especially important in a general permit application, because eligibility for most general permits is critically dependent on the size and location of wetlands to be affected. Unless the applicant and the Department know exactly where the wetlands and transition areas are, the actual impacts cannot be determined or evaluated until late in the review process. To delay the time that a survey of the

wetland boundaries is required will cause unnecessary revisions in applications and will waste the time of applicants and of Department staff in reviewing projects that are ineligible. (25)
RESPONSE: The Department considered this option. However, the wetlands boundary is frequently adjusted after the site inspection, requiring the applicant to pay for another survey after the inspection. Therefore, the suggested change has not been made. Instead, the applicant will have the same options regarding the timing of the survey that they would have if they were applying for an LOI. Under the adopted rule at N.J.A.C. 7:7A-3.1(i), an applicant for an LOI may choose whether to submit the survey with the application or after the site inspection. This will allow applicants to choose the timing that will best minimize their survey costs.

480. COMMENT: The requirements also indicate that we would have to fill out an application checklist. Are these checklists available? (13)
RESPONSE: An application checklist is a comprehensive listing of all required components of a complete permit application. The completed application checklist must be submitted as part of the application. Application checklists will be available on or before September 4, 2001 on the Land Use Regulation Program web site at www.dep.state.nj.us/DEP/landuse.

481. COMMENT: N.J.A.C. 7:7A-10.4(a)4 provides the option for the Department to require soil sampling and analyses to address possible toxic substances. The authority to deal with site contamination rests with different Department programs and is not under the purview of the Freshwater Wetlands Protection Act. This requirement is inconsistent with other statutes and Department programs governing the investigation and remediation of contaminated sites. Any actions taken to address such issues must be done in conformance with these statutorily established programs. This provision should be deleted. (34)
RESPONSE: This requirement is found in the former rules at N.J.A.C. 7:7A-9.2(a)13v, in the general permit for lake dredging. Dredging of a contaminated lake bottom or stream bed could have significant environmental impacts if the excavated material is not properly managed. Without the ability to screen for contamination, the Department cannot ensure that the general permit will have minimal environmental impacts. Should old contamination be discovered on a site, the Department agrees that programs other than the Land Use Regulation Program would be involved, and the requirements of those programs would have to be met.

482. COMMENT: N.J.A.C. 7:7A-10.4; 10.5; and 10.6 – According to these proposed sections, in the event that an LOI regulatory line verification has not been secured for the property, an application for a general permit transition area waiver and remaining transition area waivers must contain the information necessary for a LOI regulatory line verification. These sections should clarify that the wetland delineation applies only to the affected (permitted) area, not the entire property, as would an LOI regulatory line verification. (20)
RESPONSE: The commenter is correct that the Department's practice for a general permit application, as reflected in the former rules at N.J.A.C. 7:7A-9.5(a)2i, has been to require that only the affected area be delineated. N.J.A.C. 7:7A-10.4(a)2 has been clarified on adoption to indicate this. However, as regards an individual transition area waiver application under N.J.A.C. 7:7A-10.5, some applications will require that the entire site be delineated (for example, for a

matrix width reduction waiver). Further, an individual permit application under N.J.A.C. 7:7A-10.6 must always include a delineation of the entire site in order to evaluate practicable alternatives on the site. Therefore, the suggested change has not been made at N.J.A.C. 7:7A-10.5 or 10.6.

483. COMMENT: N.J.A.C. 7:7A-10.4(a)3; 10.5(a)2; and 10.6(a)3: It is not really possible to know if the proposed activities are consistent with the rules of other agencies unless the permit or approval has been obtained. Therefore, this rule seems to require an applicant to obtain all other permits prior to applying to the Department. This provision can result in serious delays for a project. (20)
RESPONSE: The provision referred to is not new. It is found in the former rules at N.J.A.C. 7:7A-11.1(b)7. It does not require that all other permits be obtained prior to application. It merely requires information on whether such approvals will be required and/or have been obtained.

484. COMMENT: We request that the list of municipalities with swamp pink, found in the prior rules at N.J.A.C. 7:7A-4.5(a)1, not be deleted from the rules. Keeping this list in the rules allows for public notice of changes, otherwise the Department could revise the list and no one would know. If necessary, the list could be put in an appendix. (20)
RESPONSE: This list has been removed from the rules and placed in an appendix to the application checklists, in accordance with N.J.S.A. 13:1D-101. The checklists and appendix will be available on or before September 4, 2001 on the Land Use Regulation Program web site at www.dep.state.nj.us/DEP/landuse. This will allow for easy public access to the most up to date version of the list, so that everyone will know when the Department revises the list.

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

485. COMMENT: N.J.A.C. 7:7A-10.6(a)5: It is unclear why the Department would require an actual deed and not just an outbound survey. How would a right-of-way be handled? This requirement could be burdensome because public agencies may not have ready access to such legal documents. (20)
RESPONSE: The Department requires a copy of the deed to assist in evaluating possible alternatives to the project. The deed indicates when the site was acquired and for what consideration – factors which could affect the practicability of alternatives to the proposed activities. It is unclear why it would be more difficult for a public agency to provide a copy of the deed to property it owns than for a private entity to provide a copy of a deed. Regarding rights of way, N.J.A.C. 7:7A-10.6 sets forth basic application requirements in general terms. Detailed requirements that apply to different situations, different sites, and different types of approvals are set forth in the application checklists. In the case of a right of way, the application checklist would require a copy of the legally binding document that sets forth the boundary of the right of way, rather than a deed. Application checklists will be available on or before September 4, 2001 on the Land Use Regulation Program web site at www.dep.state.nj.us/DEP/landuse.

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

486. COMMENT: N.J.A.C. 7:7A-10.7 is duplicative and requires readers to jump back and forth between different sections of the rules. These requirements should be placed here, or in the specific sections of the particular general permits involved. (15)
RESPONSE: The Department disagrees. The rules contain a great deal of interrelated information. The Department has attempted to organize the information in as simple and logical a way as possible, without repeating large amounts of information in several different portions of the rules.

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

487. COMMENT: N.J.A.C. 7:7A-10.8(a): In order to apply for even a minor modification, such as a change in ownership, the full scope of permit application materials is required. This is onerous, as the Department would already have a full application on file as part of the original permit process. A simple letter referencing the permit number and documentation of the transfer of responsibility should be sufficient. (29)
RESPONSE: N.J.A.C. 7:7A-10.8(a) requires that an application for a minor modification to reflect a change in ownership of a site must include the basic information for all applications set forth at N.J.A.C. 7:7A-10.2, as well as some information pertinent to the transfer of the property. The commenter apparently assumes that every item on the list at N.J.A.C. 7:7A-10.2(b) will be required for every application. However, the application checklist for each approval will be tailored to the approval sought, and will not require unnecessary information. N.J.A.C. 7:7A-10.2(b)4, 5, 6, and 9 have been clarified to this effect upon adoption. The Department does not believe that a letter would suffice as an application for a transfer of ownership of a site or project. The Department must have certain assurances and information from the new owner, such as written authorization for Department staff to enter the property. It is most efficient for the Department to obtain these assurances and information through use of its existing application forms and procedures.

488. COMMENT: N.J.A.C. 7:7A-10.8(f): This section requiring that an LOI extension shall include any information reasonably necessary to determine if the information in the original LOI remains correct needs much greater clarity. For example, a check with the Threatened and Endangered Species database, a check with the local environmental commission and the watershed management planning entity should be included in the criteria for an extension. (15, 38)
RESPONSE: The provision refers to the application checklist for an LOI, which may include more detailed requirements as necessary. However, Department staff routinely check every application for an LOI (including LOI extensions) to determine if the site is within an area listed on the threatened or endangered species database. Therefore, requiring an applicant to include this information would be redundant. Further, the rule requires at N.J.A.C. 7:7A-3.6(c) that an application for an LOI extension comply with the application requirements at N.J.A.C. 7:7A-10, which include notice requirements at N.J.A.C. 7:7A-10.9. Under

N.J.A.C. 7:7A-10.9, notice of the application must be provided to local environmental commissions, municipal and county clerks and planning boards. Local governments are members of the local watershed management planning entities, so separate notice to the planning entity is not necessary.

7:7A-10.9 Public notice requirements for applications

489. COMMENT: N.J.A.C. 7:7A-10.9 We support the proposed change to allow for property owner notifications when they are located within 200 feet of the disturbance, rather than to require notice to those within 200 feet of the site as is the current situation. In many cases we have had to send certified letters to large numbers of people for what were essentially minor activities that nobody ever noticed. This will make it more efficient for agencies such as the New Jersey Department of Transportation that often have a large acreage property but may only be doing some minor work in a small section of the site. It will also be useful for work at aviation facilities, which are large acreage sites, as it will only be necessary to notify those who are most likely to be affected by the proposed work. (23)
RESPONSE: The Department appreciates this comment in support of the rules.

490. COMMENT: N.J.A.C. 7:7A-10.9(e): We believe that the inclusion of an option to notify landowners within 200 feet of the disturbance rather than the site is a positive change. Those most likely to be affected are ensured notice while relieving the burden on applicants such as park agencies with large sites and small disturbances. (49)
RESPONSE: The Department appreciates this comment in support of the rules.

491. COMMENT: N.J.A.C. 7:7A-10.9(e)5 -- We strongly object to this provision that changes the provision that notice be given to landowners within 200 feet of the project rather than the tract to be developed. Municipalities are responsible for compiling lists of those within 200 feet of particular parcels of land -- these are legally defensible. Under this proposal neither municipalities nor applicants could provide the list with any degree of certitude. (15)
RESPONSE: The burden of determining who should be notified under this provision will be on the applicant, as will the burden of proving that the list complies with the rule requirement. The Department expects that most applicants will prefer to use the municipally provided list of properties within 200 feet of the site, for convenience and to avoid the possibility of delays caused by challenges. However, the rules provide this option for those applicants with a small project proposed on a very large site.

492. COMMENT: Within the Pinelands Area, there are several military installations and State parks and forests which are comprised of significant land holdings. In the past, it has been unclear whether public notice to neighboring property owners should be provided for activities that are proposed a significant distance from the boundary of these sites. To dispel this confusion, we suggest that proposed N.J.A.C. 7:7A-10.9(f) be expanded to include these types of situations. (3)
RESPONSE: Although this suggestion has merit, the Department cannot make this change on adoption and will therefore consider including it in a future rule making.

493. COMMENT: Under N.J.A.C. 7:7A-10.9(f), we assume conveyance means "transport or transmission of electricity" (as utility line is defined in the definition section under N.J.A.C. 7:7A-1.4 regardless of whether the structure is a pole or tower). The word "small" was added in this proposal and should be deleted as no definition is provided. For the record, diameters of a telephone pole and a mid-sized utility pole are the same. Please note that regarding spraying activities, there is no distinction in the information submitted to the Bureau of Pesticide Control whether the activity is associated with small or large structures. (5)
RESPONSE: The commenter is correct that the term "conveyance" in this provision refers to the transport or transmission of electricity or similar items. The Department has not deleted the word "small" from the provision, because it clarifies that large support structures, such as lattice towers, are not covered by the parenthetical exception to this provision.

494. COMMENT: N.J.A.C. 7:7A-10.9(g): The need for a form letter is unclear. If you are sending a letter that describes all regulated activities, then why is it necessary to attach a form letter also? Who receives this form letter? Only property owners or do the public agencies receive a copy also? (20)
RESPONSE: The form letter is necessary because it ensures that those who receive the notice are given key information, such as the exact location of the site and the right to submit comments on the application. The form letter will require some description of the proposed project (the model form letter can be viewed and/or downloaded from the Land Use Regulation Program website at www.state.nj.us/dep/landuse). For a small project, the brief description may fit into the space provided in the form letter, in which case the form letter would be sufficient. However, for a larger project, a separate description would likely be necessary. The form letter is part of the notice sent to all persons who must be notified under N.J.A.C. 7:7A-10.9, except the municipal clerk. The municipal clerk instead receives a full copy of the entire application, in accordance with N.J.A.C. 7:7A-10.9(d).

495. COMMENT: N.J.A.C. 7:7A-10.9(h): The requirements for newspaper notices should be commensurate with the level of activity. Both local and regional notices are required for a general permit, for example, but an individual permit only requires regional notification when the disturbance is greater than ten acres. We suggest that only a notice in a local paper be required for all applications, except notice for an individual permit can be as proposed. (20)
RESPONSE: The commenter notes that regional notice is always required for a general permit application for a linear development that is more than one half mile, but is only required for an individual permit project that disturbs more than ten acres. Linear developments stretch over longer distances and by their nature tend to have more regional effects. Therefore, the greater emphasis on regional notice is appropriate for linear developments, and the suggested change has not been made.

496. COMMENT: Watershed associations should be notified by applicants requesting wetlands permits as a public participation component. (16)
RESPONSE: Under N.J.A.C. 7:7A-10.9, notice of applications must be provided to local environmental commissions, municipal and county clerks and planning boards. A full copy of each application is provided to the municipal clerk.

Requiring notice to each watershed association would increase the burden on applicants and is not necessary because a watershed association can contact the municipality and review applications at municipal offices.

7:7A-10.10 Signatories to permit applications and reports

497. COMMENT: N.J.A.C. 7:7A-10.10: The proposal that any person responsible for preparing any portion of a permit application sign a certification is unworkable and is inconsistent with Department practices and procedures under other programs. The rules governing the reporting of discharges (N.J.A.C. 7:1E), for example, require that a certification of diligent inquiry and accuracy be signed by "the highest ranking individual with overall responsibility for the information contained in the certified documents". A wetland application can, in the case of an individual permit, contain "information" which involves interpretations of public policy, case law, economics and other matters of opinion not susceptible to certification. Any work product submitted by an engineer, surveyor or attorney is already subject to the licensing laws governing those professions. The fact that N.J.S.A. 2C:28-2 makes the false swearing of documents a crime of the fourth degree, together with the requirement that the application be certified by a responsible individual, is a reasonable safeguard against the submission of false information. (34)
RESPONSE: This provision is not new. It is found in the former rules at N.J.A.C. 7:7A-11.3(d). The certification requirement is necessary to comply with the EPA regulations for assumption of the Federal 404 program at 40 CFR 233.30(b)4. Further, the information required in an application is factual and does not require interpretations of public policy, case law, or economics.

498. COMMENT: N.J.A.C. 7:7A-10.10(b) -This rule seems to imply that only someone involved in the construction of the project can serve as an authorized agent. However, a contractor is typically not involved in the project until after the permits are obtained. In addition, the contractor also would not likely have the knowledge necessary to represent a technical report required for a permit application. Whoever prepared the report or application should have the ability to act as an agent for the applicant. (20)
RESPONSE: The provision does not prohibit an applicant from submitting information compiled and signed by others, but does require that the applicant also sign such information if the person who prepare the information does not meet the definition of an authorized representative. Thus, the provision ensures that the applicant is aware of and accountable for information submitted to the Department. Further, the provision applies not only to information submitted as part of a freshwater wetlands permit application, but also to monitoring reports or other information submitted to the Department after a permit is issued. Finally, the provision is consistent with the signatory requirements found in the Department's NJPDES rules at N.J.A.C. 7:14A-4.9.

SUBCHAPTER 11 FEES

7:7A-11.1 General fee provisions

499. COMMENT: Fees for freshwater wetland permits should be waived for brownfields redevelopment. (40)
RESPONSE: While the Department wishes to encourage redevelopment of brownfields sites, the review of proposed regulated activities on a brownfields site is often as complex or more complex than review of the same activities would be on a non-brownfields site. Therefore, the Department has not made the suggested change.

500. COMMENT: N.J.A.C. 7:7A-11.1(c) -- We request that any check or money order which accompanies an application for Freshwater Wetlands General Permit Authorizations or an application for Letter of Interpretation and that is to be processed by the Pinelands Commission on behalf of the Department, be payable to the "NJDEP-Pinelands Wetlands Program." This practice, which has been in existence since the Pinelands Commission first started issuing authorizations and Letters of Interpretation, was developed in consultation with the Department's Budget and Finance office. To ensure that this practice continues, we suggest the following amendment: "All fees shall be paid by personal check, certified check, attorney check, or money order payable to "Treasurer, State of New Jersey." <u>If the fee is intended for an application to be reviewed by the Pinelands Commission pursuant to N.J.A.C. 7:7A-2.9(c)1 or 3.5(b), the check or money order shall be payable to "NJDEP-Pinelands Wetlands Program."</u> *Please note: the inclusion of N.J.A.C. 7:7A-3.5(b) assumes that this section will be amended as we requested above.* (3)
RESPONSE: The Department agrees that the public should be notified that a check for application fees for general permit activities in the Pinelands should be paid to the Pinelands Commission rather than to the Department. However, this is the type of detail that the Department believes is best located in the application checklist for general permit activities. Therefore, the provision has been changed on adoption to refer to the application checklist, which will include the commenter's suggested information. The adopted rules also include new N.J.A.C. 7:7A-10.1(p), which indicates that certain applications are submitted directly to the Pinelands Commission. Copies of application checklists for each type of approval will be available on or before September 4, 2001 on the Land Use Regulation Program web site at www.dep.state.nj.us/DEP/landuse.

501. COMMENT: N.J.A.C. 7:7A-11.1(c): The fee provisions should be amended to include government purchase orders as an accepted form of payment. As the Department should understand, issuance of a purchase order encumbers the public funds and ensures payment. By insisting on a check to declare an application administratively complete, processing of public applications are often unduly delayed and payment and applications can become separated causing further delays. (49)
RESPONSE: A government purchase order is an acceptable form of fee payment, and is routinely accepted by the Department. The Department agrees that payment options and instructions should be communicated to applicants. However, rather than making the suggested changes to the rules, the rule has been simplified on adoption to refer applicants to the application checklists. The application checklists will include specific and detailed instructions regarding the proper instruments for paying fees, to whom checks should be made out, etc.

502. COMMENT: N.J.A.C. 7:7A-11.1(h) establishes a $1,000 fee for instances where, due to the applicant's act or omission, additional site visits by the Department are required. Who will make the determinations as to where there was an omission? How will the determination be made? How was the $1,000 fee established? This fee should be based on actual cost. The provision as written is subjective and, therefore, open to abuse. Specific criteria for what will be considered an act or omission resulting in additional site visits must be provided. Also, there are instances where the Department conducts a site visit and does not notify the applicant. Without the applicant at the site there may be unanswered questions or confusion and additional site visits will be required. In instances where the "omission" lies with the Department's actions, will the applicant be compensated? (34)
RESPONSE: This is not a new provision. The provision is recodified, with clarifying changes that do not affect meaning, from former N.J.A.C. 7:7A-16.2(d), 16.3(c), and 16.5(a)5. The Department has not often needed to use this provision, and does not believe that more specificity is required. This requirement provides an important incentive to encourage applicants to include all required information, and to ensure that wetland limits are flagged so that applications can be processed as quickly and efficiently as possible.

SUBCHAPTER 12 DEPARTMENT REVIEW OF APPLICATIONS

7:7A-12.1 Completeness review

503. COMMENT: N.J.A.C. 7:7A-12.1(b). We are encouraged that the Department has chosen to commit to review an application for permits within 20 days of receipt and comment on its completeness. However, a stronger driver for regulatory expediency and efficiency is necessary to streamline the regulatory process. The public expects regulatory response within a reasonable timeframe, and a barometer or estimate of that timeframe should be included in the rules to allow regulated parties to put their affairs and schedules in order. (46)
RESPONSE: The Department has included estimated decision times for various applications in the rule at N.J.A.C. 7:7A-10.1(k). While these are only estimates, they are intended to provide the type of information needed for applicants to plan their projects.

504. COMMENT: N.J.A.C. 7:7A-12.1(c): we support eliminating the 15-day response time limit which used to be required of the Department if it wanted to ask for more information after an initial request for information. (15)
RESPONSE: The Department appreciates this comment in support of the rules.

505. COMMENT: N.J.A.C. 7:7A-12.1(d): The Department is to be commended for correcting a longstanding flaw in the review process. It is both helpful and appropriate to require an applicant to submit to the persons who received a copy of the original application copies of any additional information requested by the Department to make the application technically complete. The same also should be done for the final surveyed wetland boundary map (in an LOI) and the final site plan map showing regulated encroachments and compensations (in a general permit, transition area, and/or individual permit). (25)

RESPONSE: The Department appreciates this comment in support of the rule. The Department routinely sends a copy of each issued LOI, general permit authorization, transition area waiver, or individual permit to the clerk of the municipality in which the site is located. In almost all cases (see N.J.A.C. 7:7A-10.9), the clerk is the only person who received a copy of the original application. Other persons generally receive a notice of the application but not the full application. Interested persons may inspect the final LOI by contacting the municipal clerk or the Department.

506. COMMENT: N.J.A.C. 7:7A-12.1(f): The following additional general permits should be added to those listed as being granted automatic approval if the Department does not meet the deadlines imposed by the subchapter; general permit 4 - hazardous site investigation and cleanup, general permit 12 - surveying and investigation, and general permit 14 - water monitoring devices. These are all routine activities which are done on a regular basis and need to be done in a timely manner. Often these activities are done based on government regulation and with government supervision. (34)
RESPONSE: The Department does not agree. All three of these activities can vary widely depending on the site and the particular project. This is especially true of activities under general permit 4. Thus, while some projects under these general permits are quite simple and might lend themselves well to the default approval procedure, for most activities such an approval would be inappropriate.

7:7A-12.2 USEPA review

507. COMMENT: N.J.A.C. 7:7A-12.2(b)3 establishes that the Department may send any application it determines is appropriate to USEPA for review. This provision gives too much discretion to the Department and provides no certainty for the applicant. Some criteria as to which applications would be sent to USEPA should be provided. Sending applications to USEPA for review will add an undefined amount of time to the review process. Applicants need to be able to assess the total review time frame up front, thus need some idea of whether the application will be sent to USEPA. (29, 34)
RESPONSE: This is not a new provision. It is found in the former rules at N.J.A.C. 7:7A-12.2(b). It is required in order for the Department to retain its assumption of the Federal 404 program. Over the years the Department has administered the wetlands program, the Department has exercised this option judiciously and thus has not found that it has injected significant uncertainty into the permit process.

508. COMMENT: N.J.A.C. 7:7A-12.2(k) – We understand the need to coordinate applications with the US Fish and Wildlife Service if there is a potential for Federal endangered species involvement, however we suggest the proposed regulation clarify that their scope of authority for this review is limited only to Federal endangered species. Comments on impacts to non-endangered species should not be considered. Also, the proposed regulation should have a reasonable time limit (e.g., 30 days) for their review and response, rather than extending the time required for a decision to as long as necessary as is proposed. (23)

509. COMMENT: N.J.A.C. 7:7A-12.2(k) establishes that the Department will submit individual and certain general permits to the U.S. Fish and Wildlife Service for

review. Under what legal authority is such a submittal required? Time frames for the review by U.S. Fish and Wildlife Service should be established. A 15-day review period would be consistent with that accorded under the equivalent Federal authority as stated in the Fish and Wildlife Coordinating Act and its implementing regulations. If the review is not done in the 15-day period, the application should be assumed acceptable and moved forward in the review process. (34)
RESPONSE to comments 507 and 508: The rule has been clarified upon adoption to indicate that US Fish and Wildlife Service (USFWS) review is limited to impacts on Federally listed species. The Department's memorandum of agreement (MOA) with the USFWS sets forth deadlines and time limits for USFWS review, and the rule has been clarified to indicate that USFWS review is subject to these limits. A copy of the MOA with USFWS is available from the Land Use Regulation Program upon request.

510. COMMENT: N.J.A.C. 7:7A-12.2(k); This new provision requires the Department to submit applications to the Fish and Wildlife Service for both individual permits and General Permits 2, 4, 6, 7,10, 11, 13, 15, 18 or 23, if the site is in a municipality that has documented occurrences of threatened and endangered species, or critical habitat. This provides for a potentially major delay in authorizing activities under as-of-right general permits where activities meet the permit conditions. There is no time limit for this review. Again, the general permits were authorized because a determination was made that they would have minimal cumulative impacts. A review by Fish and Wildlife should not be necessary. Further, a species sighting could have occurred several years ago, and in a habitat or location far from the project site. At a minimum, there should be a 30-day time limit imposed, with the requirement triggered only if a sighting has occurred in the past three years within a minimum radius from the site itself. (29)
RESPONSE: While this requirement is newly added to the rules, it has been legally binding on the Department since 1994, when the Department assumed authority for the Federal 404 program. In order to retain its assumption of the Federal wetlands program, the Department is required to provide certain applications to the U.S. Fish and Wildlife Service (USFWS) for review. This is found in the Department's memorandum of agreement (MOA) with the USFWS, and is also consistent with direction from EPA pursuant to the Federal regulations governing State assumption of the Federal 404 program. The Department's MOA with the USFWS sets forth deadlines and time limits for USFWS review, and the rule has been clarified to indicate that USFWS review is subject to these limits. A copy of the MOA with USFWS is available from the Land Use Regulation Program upon request.

7:7A-12.3 Public comment on an application

511. COMMENT: N.J.A.C. 7:7A-12.3(d) allows the Department to accept comments after the 30 day public comment period. Comments submitted after the close of the comment period should not be accepted. Applicants should be able to rely on the timely submission of all comments to establish the record. (34)
RESPONSE: It is not clear to what "record" the commenter refers. If the commenter is referring to the record of the permit decision, for purposes of

appeal, all comments received, whether before or after the comment period closes, will be part of the record of the permit decision. It would be inappropriate for the Department to ignore relevant information submitted prior to the Department's decision on an application. Further, it is not clear how inclusion of such information in the record of the Department's decision on an application can disadvantage the applicant.

7:7A-12.4 Hearings on an application for an individual permit or individual transition area waiver

512. COMMENT: N.J.A.C. 7:7A-12.4(b)1: What is considered “a significant degree of public interest in the application”? (18)
RESPONSE: A "significant degree of public interest" would generally exist when a number of comments or hearing requests are received, which indicate that holding a hearing would provide additional information relevant to the Department's decision on the application.

7:7A-12.5 Final decisions

513. COMMENT: N.J.A.C. 7:7A-12.5 – In addition to publishing each final decision in the DEP Bulletin, a copy of the final decision (and a copy of the site plan or survey map showing the approved/surveyed wetland boundary delineation) should be provided to each person who received a copy of the original application. (25)
RESPONSE: Upon issuance of a permit under the freshwater wetlands rules, the Department sends a copy to the clerk of the municipality in which the project is located. This comports with the commenter's suggestion, as the municipal clerk is the only person who receives a full copy of the permit application (others receive only notice in accordance with N.J.A.C. 7:7A-10.9). Any person may review these materials by contacting the municipal clerk.

514. COMMENT: N.J.A.C. 7:7A-12.5(f) -- The Department should provide expedited review deadline for brownfields sites (60 days or less). (40)
RESPONSE: The review of brownfields sites to ensure compliance with the rules is not likely to be significantly simpler, and may in fact tend to be more complex, than the review of activities on other sites. Therefore, the requested change has not been made.

7:7A-12.6 Cancellation, withdrawal, resubmission and amendment of applications

515. COMMENT: N.J.A.C. 7:7A-12.6(f) is helpful in that all information amending an application is proposed to be copied to all persons who received a copy of the original application. (25)
RESPONSE: The Department appreciates this comment in support of the rules.

516. COMMENT: N.J.A.C. 7:7A-12.6(f): The Department should define what is meant by, or what level of change constitutes, an application "amendment". In N.J.A.C.

7:7A-10.8, the terms "minor modification" and "major modification" are used, but those terms are not defined either. (25)
RESPONSE: An amendment to an application would be any change in the project or the site conditions that is reported to the Department as part of application review. The terms "minor modification" and "major modification" are explained at N.J.A.C. 7:7A-14.3(c) and (d), respectively.

7:7A-12.7 Taking without compensation

517. COMMENT: N.J.A.C. 7:7A-12.7(d): The definition of property as a whole is inconsistent with that defined by case law (Loveladies). (34)
RESPONSE: The definition of a "property as a whole" is consistent with the factors listed in cases such as Ciampitti v. U.S., 22 Cl. Ct. 310 (1997), which also recognize that under some circumstances, a "property as a whole" could include non-contiguous lots. The "property as a whole" is determined on a fact-specific, case-by-case basis. The provision in the rule are intended to allow the Department to employ this approach. If and when the courts adopt a specific approach to this issue, the Department will adhere to it. The Department's "property as a whole" definition is intended to reflect existing case law on this issue, and to afford the Department the ability to tailor its decision-making to the judicially determined standards that apply in takings cases.

518. COMMENT: Another area where the Department has assumed judicial authority is in the consideration of takings claims in part of the application process. Historically, the courts decide any takings consideration. This has always been done on a case by case basis. Having the takings information presented at the time of application, and having this particular item as a consideration for part of the permit decision, cannot help but prejudice and influence those giving the permit. The Department "legitimizes" the takings defense by offering to consider it in every application. We would hope that the Department would put protecting and preserving our environment first and foremost and leave the legal determinations to the courts. There are better ways to insulate the people of New Jersey from taking claims from builders and other property owners than this. (11, 15, 38, 44, 47)

519. COMMENT: We oppose the new takings provisions at N.J.A.C. 7:7A-12.7. (2, 33)

520. COMMENT: We oppose the new takings provisions at N.J.A.C. 7:7A-12.7. We would like to understand the legal arguments behind the Department's weakening stance on wetlands takings issues. Finally, we are very concerned about the new rules that give the Department additional ability to resolve taking disputes. The process is moved further from the public arena, or the judicial branch of government, and placed in a private setting. Currently, the wetland rules direct administrators to rule on unambiguous parameters, and if there are disagreements, that is for the courts to arbitrate and decide both on takings and the strict interpretation of the rules. It is unacceptable to place the judicial role in the hands and at the discretion of the administration of the Department. (12)

521. COMMENT: The takings issue is clearly not applicable to every case. This defense has been and will in the future be asserted by applicants claiming they have been deprived of the economic benefit of property by the permit denial when no economic benefit ever existed (for example, when the property is already classified as wetlands and therefore undevelopable.). This evaluation properly belongs in the Office of Administrative Law, where it can be decided in a legal context. (44)

522. COMMENT: N.J.A.C. 7:7A-12.7. We appreciate the Department's willingness to consider whether a permit denial would constitute a taking without compensation. We are concerned, however, that incorporating this provision in the rule may be interpreted as the creation of an administrative remedy which would preclude property owners from pursuing their constitutional rights to challenge permit denials on taking grounds. Moreover, the rule, if adopted as written, would create a situation whereby the Department is acting in a judicial capacity in making a takings determination, a matter which is better left for the courts. The proposed rule also does not indicate the remedy if the Department determines the denial of a permit would constitute a taking. Under such circumstances, the rule should indicate whether the permit would be issued or compensation paid. Since it is our assumption that the latter is not the case, the rule seems to be unnecessary. A better rule would simply indicate that the Department will consider whether its action would constitute a taking in making permitting decisions based upon information to be supplied by the application without the specificity or the other requirements set forth in the rule. (29)
RESPONSE to comments 517 through 521: This rule is not intended to usurp the role of the courts in deciding takings claims, nor is it intended to allow disturbance of freshwater wetlands where there is a practicable alternative; the disturbance is not in the public interest, taking into consideration the factors set forth in N.J.S.A. 13:9B-11; potential impacts to wetlands have not been avoided or minimized to the greatest extent practicable, and other criteria have not been met. Instead, this rule is intended to enable the Department to evaluate the takings issue as appropriate during the application process, if requested by an applicant. The public interest test at N.J.S.A. 13:9B-11 requires the Department to consider, among other things, both the public interest in wetlands preservation and the owner's interest in reasonable economic development. This rule will allow the Department to obtain information that is pertinent to these issues, including information on whether and the extent to which the owner's interest in reasonable economic development will be affected by a permitting action, and whether there is an interest in preservation by a neighbor or conservation agency. The Department will use the information it obtains to reach a more informed decision regarding whether the project would be in the public interest. The Department believes that the ability to obtain this information during the application process will be beneficial, because it may result in the identification of satisfactory alternatives to development, such as sale to a neighbor or conservation group, and may induce applicants to more carefully consider alternatives and minimization. The Department currently gathers this sort of information when takings claims are brought in court, or when they are raised in administrative proceedings in the Office of Administrative Law. The Department believes that it is appropriate and beneficial, for applicants and the public, to provide a uniform process for this information gathering, through rule-making, so that applications raising these issues are handled consistently. The Department does not think it is

beneficial to defer these issues until a takings claim is filed in Superior Court or as part of a contested case hearing at the Office of Administrative Law, because consideration of the issues during the application process can reduce costs in time and money for both applicants and the Department, can avoid potential court cases, and may identify alternative, environmentally protective uses for a property, such as sale to a conservation group, early on, rather than after months or years of litigation. Because takings claims are decided by the courts, the Department may evaluate a takings assertion, but it will not make the ultimate determination of whether a taking has occurred. The rule has been revised on adoption for clarity, and to remove a redundant reference to decision making on individual permit applications. Finally, the rule has been relocated at N.J.A.C. 7:7A-7.3 in the subchapter governing individual freshwater wetlands permits and open water fill permits, in response to discussions with EPA, and because the Department believes the criteria discussed in the rule are germane to the public interest analysis. Cross references to the takings provisions are also added at N.J.A.C. 7:7A-7.2(b)12viii. A provision ensuring that the rule will continue to apply to individual transition area waivers is also added at new N.J.A.C. 7:7A-6.1(h).

SUBCHAPTER 13 CONTENTS OF PERMITS AND WAIVERS

7:7A-13.1 Standard conditions that apply to all permits

523. COMMENT: N.J.A.C. 7:7A-13.1(d): The requirement that a copy of the permit and plans be available on-site for public inspection is unreasonable. For small permitted projects and those at remote locations, e.g., stream cleaning, there may be no permanent or temporary structure at which the permit or plans can reasonably be made available on-site. The on-site posting of an informational sign, indicating where the permit and plans can be inspected, is adequate. (49)
RESPONSE: N.J.A.C. 7:7A-13.1(d) requires an informational sign (this requirement was found in the former rules at N.J.A.C. 7:7A-13.1(a)17). Such signs have been effective for informing the public about permitted activities. However, it has been the Department's experience that such signs are not sufficient to enable Department enforcement staff to effectively enforce the rules. Further, if permitted activities are being conducted onsite, the permit and plans must be present on the site to guide the workers who are performing the permitted activities. For the types of small permitted projects discussed by the commenter, the permit and plans could be placed directly on the required informational sign.

7:7A-13.2 Establishing permit conditions

524. COMMENT: Permit writers should be aware that a buyout of houses is taking place within the floodway of the Central Passaic Basin. Permits in this area should contain conditions that assure that the project will not have a negative impact on the benefits of the buyout. (16)
RESPONSE: The Department is bound by the FWPA to issue permits based on certain standards set forth in that statute. To the extent that the effects of a

permit on the referenced buyout program are within the purview of the FWPA standards for issuance of a permit, the Department will consider those effects.

SUBCHAPTER 14 CHANGES TO ISSUED PERMITS OR WAIVERS

7:7A-14.1 General provisions for changing an issued permit

525. COMMENT: When considering a permit, previous conditions should be reviewed before an amendment to a permit is considered. If the applicant does not indicate that an amendment or modification is being sought and it is discovered that full disclosure was not presented to the Department then a violation notice should be issued and, if necessary, relevant action taken. (16)
RESPONSE: The Department does consider the history of a permit when considering whether to approve an amendment to that permit. In a case where an applicant for any approval fails to disclose relevant information, the Department can terminate the permit under N.J.A.C. 7:7A-14.5(a)2, and can exercise its enforcement authority under N.J.A.C. 7:7A-16.

7:7A-14.2 Transfer of a permit

526. COMMENT: N.J.A.C. 7:7A-14.2 requires a modification for a transfer of a site or transfer of control of permitted activities. This is inconsistent with N.J.A.C. 7:7A-13.1(e) which states that permits run with the land and are binding upon the permittee and the permittee's successors. (34)
RESPONSE: It is true that the rights and obligations that adhere to a permit run with the land in accordance with N.J.A.C. 7:7A-13.1(e). However, the requirement that a permittee submit a minor modification to notify the Department of a transfer of a site or of permitted activities is not inconsistent with this. Such notification is necessary to ensure that the Department can hold the proper person responsible for compliance with the permit, and is also required in order to ensure that the Department's program is consistent with a similar Federal requirement.

7:7A-14.3 Modification of a permit

527. COMMENT: N.J.A.C. 7:7A-14.3(c)3: This rule should clearly indicate that there is no need to modify a permit to reflect a change in ownership once the project and regulated activity is completed. This would include any ongoing mitigation obligation. (29)
RESPONSE: This point has been clarified at N.J.A.C. 7:7A-14.2 and N.J.A.C. 7:7A-14.3(f)6.

528. COMMENT: N.J.A.C. 7:7A-14.3(f)2 establishes that the Department may modify a permit on its own initiative where it receives information that was not available at the time the permit was issued and which would have justified different conditions. Such modification should not be made without first meeting with the applicant and if the applicant objects, holding a hearing on the issue. (34)

RESPONSE: The rule has been clarified upon adoption by the addition of new N.J.A.C. 7:7A-14.3(g), which provides for notice to the permittee and an opportunity for a meeting or public hearing.

529. COMMENT: N.J.A.C. 7:7A-14.3(f)2: This provision is unduly subjective as it allows for the modification when the Department receives information which indicates the cumulative effects of the issued permits are unacceptable. What criteria will be used to established what is unacceptable? These must be specified. (34)
RESPONSE: This is not a new provision, but is found in the former rules at N.J.A.C. 7:7A-13.7(a)2, and is required in order to be as stringent as the Federal regulations governing the Department's assumption of the Federal 404 program, found at 40 CFR 233.36(a)3. It should be noted that the provision applies only when the Department obtains information that was not available at the time the permit was issued (other than revised regulations, guidance, or test methods). In making this determination, the Department would perform an analysis of the impacts of the permitted project in light of the new information, in order to assess whether the new information affects the compliance of the project with the rules. The Department is not aware that the provision has caused problems thus far, and therefore does not believe that further specificity is needed.

7:7A-14.5 Termination of a permit

530. COMMENT: N.J.A.C. 7:7A-14.5(a)1: The language of this provision needs to be changed to clarify that the provision applies to only those permits where an alternative analysis was done. (34)
RESPONSE: The Department has not made this change. Although the example given applies to an individual permit, the provision applies to both general permit authorizations and individual permits.

7:7A-14.6 Permit extensions

531. COMMENT: N.J.A.C. 7:7A-14.6. We strongly oppose extensions of general permits or transition area waivers for five years. If a permit has not been acted on in five years, an application process and public notice should be required. Five years is too long a period as there may be new reasons for requiring a re-examination, such as discovery of an endangered species on the site and changed site conditions and established TMDLs. (15, 38)
RESPONSE: The rule as proposed and adopted does require an application process and public notice (see N.J.A.C. 7:7A-14.6(e)). There are cases such as that described by the commenter, but in most cases the permit has been acted upon, but permitted activities have not been completed by the end of the permit term. In many of these cases, the reasons for the delay are beyond the control of the permittee. If the site conditions, project, and applicable rules have all remained the same, an extension is appropriate because if the application were for a new permit, the project would still meet all requirements and a permit would be issued. If site conditions have changed, including discovery of an endangered species, the limits at N.J.A.C. 7:7A-14.6(b), especially (b)2, will ensure that the extension would not be granted.

532. COMMENT: N.J.A.C. 7:7A-14.6: We believe that the new provision for permit extensions is a positive change that will result in economies for both the applicant and the Department without compromising environmental protection. (49)
RESPONSE: The Department appreciates this comment in support of the rules.

533. COMMENT: N.J.A.C. 7:7A-14.6(b)1: Why must the request for an extension be submitted prior to the expiration of the permit? The Municipal Land Use Law allows for extensions after an expiration, as does the Department's Treatment Works Approval program. Why in this instance is this unacceptable? (34)
RESPONSE: To allow an extension to be requested up to one year after the expiration of a permit, as is allowed for approvals under the MLUL, would effectively change the term of a permit to six years. However, a five year term is required under the Federal 404 program, and is consistent with other Department approvals. While transition area waivers are not governed by the Federal program, the Department believes that providing a different term for transition area waivers would cause confusion without providing any significant benefit.

SUBCHAPTER 15 MITIGATION

534. COMMENT: 7:7A-15: Much of the proposed subchapter 15 was previously utilized by the Department as guidance. The tendency of the Department in the past several years to turn guidance into regulation has stunted the use of scientific advances, and inhibited the flexibility necessary to adjust to site-specific conditions. The regulations include numerous and lengthy lists that will be required for each submittal. Promulgating lists of requirements as regulation sets an expectation in the regulator’s mind that such criteria must presumptively be necessary, regardless of site conditions. Unnecessary, time-consuming, costly documents will be required which may or may not advance the issue. Environmental professionals, through years of working closely with the Department, have obtained a level of sophistication that makes command and control, prescriptive regulations unnecessary. The practicable solution would be a guidance document that apprises the regulated party of what could be required, coupled with an up front agreement with the Department on what information is necessary to make a reasoned, informed decision. (46)
RESPONSE: The Department does not believe that promulgating the mitigation requirements will inhibit necessary flexibility. The information required in the rules for each mitigation proposal is purposely stated in broad terms so as to allow the flexibility necessary for the Department to require more or less information as necessary based on the site and project. The rule provisions thus accomplish the commenter's stated objective – they apprise the regulated public of what may be required, while the application checklists provide detailed application requirements, tailored to the mitigation alternative proposed and the type of mitigation area. Further, drafts of the proposed mitigation provisions were presented and discussed at a public meeting in early 1999, and at a meeting of the Freshwater Wetlands Mitigation Council on January 13, 2000. Input from both of those meetings is reflected in the adopted rules.

535. COMMENT: We understand that a Statewide assessment of the past success of wetland mitigation projects is underway and we hope to have some information on

the success of this ten years of mitigation projects. So at this time it is inappropriate to propose changes to the mechanisms by which mitigation is accomplished without first learning of the results of the last ten years of field experience, nor without very close coordination with the members of the wetland mitigation council, and the conservation community. (12)
RESPONSE: The Department disagrees that these rule changes are inappropriate at this time. It is true that the above-mentioned Statewide assessment will provide valuable information and will help the Department further improve its mitigation program. However, the Department already has much information garnered through years of field experience, professional staff training and staff interchange with other wetland scientists through organizations such as the Association of State Wetland Managers and Society of Wetland Scientists. The Department does not believe it is necessary to wait for further research before putting this experience to use in the rules. Further, the Department has coordinated with the Wetlands Mitigation Council and the public in developing the mitigation provisions adopted herein. Drafts of the proposed mitigation provisions were presented and discussed at a public meeting in early 1999, and at a meeting of the Freshwater Wetlands Mitigation Council on January 13, 2000. Input from both of those meetings is reflected in the adopted rules.

536. COMMENT: We recommend that, in the Passaic River Basin above Little Falls, mitigation programs be expanded to include "buyouts" of existing structures in natural wetland areas that are critical to reducing flooding and nutrient loadings. Present mitigation efforts, which occur in upland areas that were never natural wetlands, are destroying the natural functions of the converted lands, such as aquifer recharge. The consequences of these conversions are increased flooding and degraded water quality. There are thousands of acres of degraded/developed natural wetlands, particularly in the Central Basin, that could be effectively restored to functional freshwater wetlands. Mitigation efforts should be directed towards the restoration of wetlands where nature has made the hydrologic conditions and soils right for fully functioning wetlands ecosystems. Not only should such wetlands be purchased, or "bought out," but they should be restored and maintained in perpetuity to serve as nature designed them to function. Who will be responsible for restoration and maintenance is an issue that needs to be considered. (16)
RESPONSE: The Department agrees that purchase and/or restoration of wetlands is a good mitigation alternative, and the rules at N.J.A.C. 7:7A-15 allow for mitigation through purchase and restoration of wetlands. The Land Use Regulation Program is developing a process which will use the GIS and other Department resources to identify sites that would be good candidates for mitigation projects funded by the Wetlands Mitigation Council. This process can also be used by other Department units such as the division of Watershed Management and the Natural Resource Damages Program. Under N.J.A.C. 7:7A-15.14, every mitigation site (except a site compensating for certain temporary disturbances) must be protected in perpetuity from future development and maintained in its natural state. If mitigation is performed through land donation or upland preservation, N.J.A.C. 7:7A-15.17(c) and N.J.A.C. 7:7A-15.19(c) require that the mitigation area must be given to a government agency or a charitable conservancy and a maintenance fund for the long term maintenance and supervision of the property must be established.

537. COMMENT: Open waters are allowed as part of the mitigation. Some mitigation looks like a detention pond with a couple of cat tails around the edges. it is not a functioning wetland and it may have destroyed a very functioning wetland that is not being replaced. (47)
RESPONSE: The commenter is correct that in some cases open waters may be included as part of a mitigation project. However, the adopted rules are intended to result in a mitigation project of equal ecological value. Open water can be an important component of a mitigation project because open waters can provide ecological diversity. If open waters are part of a mitigation project, this will only be where the permitted activities impacted open waters, since hydrology is a critical part of a successful mitigation project.

538. COMMENT: Having a bank of mitigated wetlands ready in advance of future wetland losses may make permit approvals even easier, even though permitting and mitigation are supposed to be separate processes under our law. (32)
RESPONSE: The Department's permit review process is performed separately from the mitigation review process, in accordance with the FWPA and N.J.A.C. 7:7A-7.1(b). The use of mitigation banks provides many environmental benefits. 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. Another benefit of credit purchase is that the mitigation is completed prior to the disturbance in most cases, unlike mitigation performed by a permittee, which is rarely completed prior to the start of the permitted disturbance.

539. COMMENT: The Department is extensively revising the format and language of the mitigation section of the rules, and moving forward with the implementation of mitigation "banking." We are critical and cautious about the concept of mitigation banking because the track record on creating wetlands has left a lot to be desired. (32)
RESPONSE: The Department has worked closely with the Freshwater Wetlands Mitigation Council regarding this issue and believes the adopted rules address these concerns. First, mitigation banks do not always employ wetlands creation to generate credits. A bank can include any of the mitigation alternatives set forth under the mitigation rules. Second, under N.J.A.C. 7:7A-15.23(e), every resolution approving a wetland mitigation bank must include a schedule under which a bank operator may sell credits. This credit release schedule requires that a banker provide evidence of successful completion of each stage of the construction and monitoring of a mitigation bank. As each stage is completed, a small number of credits may be sold. This will ensure that the mitigation is in place prior to the sale of the credits, which in turn assures the Department that wetlands functions will be present at the bank prior to the disturbance of wetlands functions by permitted activities.

540. COMMENT: N.J.A.C. 7:7A-15.1: We adamantly insist that in-kind mitigation should be required in the watershed adversely affected by development. The wetland's value to a specific watershed cannot be mitigated in another watershed. (38)
RESPONSE: The Department has historically required in-kind mitigation and this is continued under N.J.A.C. 7:7A-15.2(c). While the Department agrees that it is

usually best to perform mitigation in the same watershed as the permitted disturbance, this is not always practicable or feasible because of regional development patterns and lack of suitable mitigation sites. Therefore, N.J.A.C. 7:7A-15.5 and 15.6 contain a hierarchy designed to ensure that, to the extent possible, mitigation will be performed in the same HUC-11 as the disturbance, in an adjacent HUC-11, or in the same watershed management area. This will maximize mitigation in close proximity to the disturbance, within the constraints described above. Please see the responses to comments on N.J.A.C. 7:7A-15.5, below, for a more detailed discussion of this issue.

541. COMMENT: The regulations are biased in such a way as to send small wetland disturbances to mitigation banks. The hierarchy of mitigation --- on site-off site, but in the same watershed and so on seems to diminish the need to mitigate loss of these wetlands as close to the disturbance as possible. If we are to protect the water quality in our streams, rivers and lakes we must mitigate as close to the disturbance as possible. Relying on mitigation banks for numerous small disturbances will not help protect water quality where wetlands disturbance occurs. This form of mitigation will cause our wetlands, unless we have a much larger number of banks, to suffer another "death from a thousand wounds." (12, 15)
RESPONSE: The Department agrees that there are environmental benefits to locating mitigation close to the site of the disturbance. However, there are also environmental benefits to the use of mitigation banks, especially when the alternative is a plethora of small mitigation projects. Further, the Department does not believe that the hierarchy provided in the rules will diminish the likelihood that mitigation for a disturbance will be located in close proximity to the disturbance. Most existing mitigation banks are located in highly developed corridors in the State, where a greater proportion of permits are being sought. In addition, the Department anticipates that the new rules may encourage creation of more mitigation banks, making it more likely that a permittee will be able to find a bank close by the permitted disturbance. Finally, the Department has recommended to the Wetlands Mitigation Council that the service area for any new banks approved be confined to the watershed management area in which the bank is located. This will also encourage bankers to locate mitigation banks in areas where impacts are occurring. Please see the responses to comments on N.J.A.C. 7:7A-15.5, below, for a more detailed discussion of this issue.

542. COMMENT: Inclusion of criteria to help insure successful mitigation is good. (2, 33)
RESPONSE: The Department appreciates this comment in support of the rules.

543. COMMENT: We asked the Department for a report on past mitigation projects. We were told that a grant had been given to the Department to assess 100 examples of previous mitigation. This is rather evasive, since we asked for some statistical framework. (32)
RESPONSE: The Department prepared a draft mitigation report in 1991, but the report was never finalized. This draft report primarily assessed coastal wetland mitigation sites since at that time very few freshwater wetlands individual permits had been issued so there were very few mitigation projects to assess. This draft document is public information and is available for review upon request. The grant to which the commenter refers is presumably the award by the Department

of a contract to a consultant to evaluate approximately 100 completed mitigation projects that were required as a condition of freshwater wetlands permits. The sites have been inspected and a report is being prepared on the results of the research. The Department expects the report to be released to the public in October. Contact the Land Use Regulation Program for further details.

544. COMMENT: The chief worry is the severing of the legal obligation of the people who are causing the wetland loss. The owners or the enterprise, whether it is a public agency or a private entity, seems to be losing legal liability for what happens by delegating it to a non profit, to a bank, or to the engineering firm. That does not make sense. You are committing to the mitigation bank concept without publishing a track record for it. (32)
RESPONSE: Mitigation banking has several advantages, both environmentally and administratively. It is true that when a banker sells a credit, they take on the legal obligation from the permittee. However, this is offset by the fact that, under the adopted rules, the banker must show substantial progress in performing the mitigation before credits may be sold, so that banking results in mitigation being performed earlier in relation to the disturbance, when compared to other mitigation alternatives.

7:7A-15.1 Mitigation definitions

545. COMMENT: “Credit purchase”- This definition does not include any description of a mitigation credit that relates a credit to a standard unit of measure. Therefore, a credit in Bank A could be worth a different amount than a credit in Bank B. This can result in uncertainty for the mitigation bankers and confusion for Department regulatory staff. One standard unit of measure that could be used is to relate one credit to one successful acre of wetland mitigation creation. (20)
RESPONSE: The Department considered including a standard unit of measure for mitigation credits in the rule as suggested. However, the Department found that mitigation banks vary far too widely for such standardization. Mitigation banks vary in the mitigation alternative(s) performed, the site conditions on the mitigation area before bank construction, the time required before the bank begins to provide substantial wetlands functions, and the types and values of wetlands and/or State open waters that result from the bank. Therefore, the Department must maintain some flexibility in assigning credits to banks, in order to carry out the FWPA requirement that disturbed wetlands are replaced by wetlands of equal ecological value.

546. COMMENT: N.J.A.C. 7:7A-15.1 - The definition of "degraded" includes wetlands with a predominance (over 85%) of a noxious or invasive type of vegetation. What is the basis for the 85%? If a wetland is 70% Phragmites is it not degraded? How will these percentages be certified? There needs to be more flexibility in the ability to find a wetland is degraded. What species will be considered as noxious or invasive? This definition needs to be clarified. (34)

547. COMMENT: N.J.A.C. 7:7A-15.1 - Following the definition for enhancement, the Department states that improvement of a wetland or water that is not degraded does not constitute enhancement. Therefore the Department is limiting the option

for enhancement to wetland areas which would be classified as "degraded". The definition of degraded is somewhat vague in that it has to be substantially impaired in its ability to provide most of the values and functions presented in N.J.S.A. 13:9B-2. The example of a degraded wetland containing over 85 percent noxious or invasive plant species is somewhat flawed since this type of vegetative community would still be capable of the providing most of the values and functions presented in this citation. (46)
RESPONSE to commenter 545 and 546: The Department proposed a new definition of "degraded" in an attempt to clarify which wetlands are appropriate for mitigation through enhancement. However, the proposed definition of "degraded" resulted in more confusion than clarity and has therefore not been adopted. Rather, the definition of "degraded wetland" in the former rules has been restored. It was never the Department's intent to imply that a wetland should be considered degraded just because it is dominated by noxious or invasive species. The Department has historically required a showing that wetland functions are impaired before a wetland is classified as degraded, and a wetland dominated by noxious or invasive vegetation can often retain many important wetlands functions.

548. COMMENT: The Department should redefine enhancement to include that it is an increase in function and value of any type of habitat. We discourage the Department's focus of limiting enhancement options to only degraded wetlands. (46)
RESPONSE: It has been the Department's experience that some people propose to "enhance" wetlands that are already valuable and provide many functions and values. In such cases, the proposed "enhancement" project often would result not in an increase in wetland values and functions, but merely in a change from one type of wetlands values and functions to another. This type of alteration in a wetland does not meet the FWPA requirement that mitigation compensate for wetlands values destroyed by a permitted disturbance. Further, the Department's definition is consistent with the use of this term in wetland programs across the nation.

549. COMMENT: N.J.A.C. 7:7A-15.1 - The definition of in-kind mitigation includes the purchase of credits. This is an out of kind mitigation. (34)
RESPONSE: N.J.A.C. 7:7A-15.1 defines in-kind mitigation in relation to mitigation credits as "the purchase of credits in a bank at which similar values and functions have been established." Further, N.J.A.C. 7:7A-15.2(c)3 requires that mitigation through credit purchase involve only credits that are appropriate to the type of disturbance for which the mitigation is compensating. In applying this requirement, the Department will consider the types of wetlands values and functions created by a bank, in relation to the types of values and functions that were lost through the permitted disturbance.

550. COMMENT: N.J.A.C. 7:7A-15.1 – Definitions. The definition of a mitigation bank service area should be much more specific. The service area should be confined to one of the 20 watershed management planning areas within which it lies. (15)
RESPONSE: The service areas for mitigation banks are set by the Wetlands Mitigation Council, with the recommendation of the Department. The Department's goal is to have all bank service areas be the same as the

Department's 20 watershed management areas and will continue to make recommendations to the Council that are consistent with that goal.

7:7A-15.2 General mitigation requirements

551. COMMENT: N.J.A.C. 7:7A –15.2(a) - This up front statement of sequencing is helpful. It would also be good to provide language here regarding the use of avoidance and minimization in project planning. (20)
RESPONSE: The Department appreciates this comment in support of the rules. The avoidance and minimization of a project's impact to wetlands is addressed through the permitting process under N.J.A.C. 7:7A-7.2(b)2.

552. COMMENT: N.J.A.C. 7:7A-15.2 – We generally support the provisions that spell out criteria for successful mitigation. (15, 38)
RESPONSE: The Department appreciates this comment in support of the rules.

553. COMMENT: N.J.A.C. 7:7A-15.2(a): Development of a strategic wetlands management plan for a brownfields site should be encouraged if the mitigation plan was a factor in determining the quality of an individual permit. (40)
RESPONSE: In accordance with the FWPA (see N.J.S.A. 13:9B-13b), the Department does not consider mitigation during the review of a permit application.

554. COMMENT: N.J.A.C. 7:7A-15.2(c): In-kind mitigation should allow restoration, enhancement or creation of wetlands at other brownfields locations. Provision should be made to allow the Council to approve “degraded” wetlands banks on brownfields sites located in ecologically sensitive areas such as riverfronts or urban areas where wetland resources are limited. (40)
RESPONSE: The options suggested by the commenter are available under the rules as adopted, provided the proposed mitigation area or mitigation bank meets the standards in the rules for a mitigation area or mitigation bank.

555. COMMENT: N.J.A.C. 7:7A-15.2(c)3: This section states that the purchase of credits from a mitigation bank shall be appropriate to the type of disturbance. It is not clear as to what is meant by this. For example, if emergent wetlands and forested wetlands are impacted, does this mean that the appropriate acreage of emergent wetlands and forested wetlands must be provided as mitigation? We believe that if the purchase of credits from a bank is the mitigation option, it should not be necessary to specify what type of credits, i.e. forested, emergent, etc., must be obtained. It should be sufficient to simply purchase credits. During the review and approval process for a mitigation bank, much consideration goes into providing the greatest possible ecological benefits for that particular site, and all the wetlands in the bank should be considered equally valuable. (23)
RESPONSE: N.J.A.C. 7:7A-15.2(c)3 is a separate requirement from the requirement (found at N.J.A.C. 7:7A-15.2(c)2) for in-kind mitigation. N.J.A.C. 7:7A-15.2(c)3 is intended to ensure that mitigation through credit purchase is appropriate to the permitted disturbance in other ways than in the values and functions represented by the credits. For example, credits from a wetlands bank that involves enhancement of tidal wetlands might not be appropriate for use as mitigation for a disturbance of non-tidal wetlands.

556. COMMENT: N.J.A.C. 7:7A-15.2(c)5 establishes that the Council shall approve any monetary contributions. The acceptable monetary contribution should be established by the Department and published in the rule. This will then serve as the maximum prices and should encourage competition and lower prices. Without this setting of such a standard there will be no driving force for competition and lowering of prices. (34)
RESPONSE: The FWPA mandates at N.J.S.A. 13:9B-13c that a monetary contribution shall be determined by reference to the cost of performing various types of mitigation for the disturbance in question. This is set forth in the rules at N.J.A.C. 7:7A-15.21(b). Because these costs fluctuate over time and vary from region to region, the Department cannot establish a standard monetary contribution in the rules.

557. COMMENT: N.J.A.C. 7:7A-15.2(e): Mitigation approval should be expanded to allow credit for fortuitous wetland creation at a brownfields site (such as revegetation of tank containment areas, upland detention basins or remediation areas) to be approved as mitigation areas after they are established eliminating the requirement for prior approval by the Department. Retroactive approval and mitigation credit could be contingent on the value and integration of the wetlands into the regional watershed management plan, municipal open space objectives or site redevelopment strategy that prioritizes wetlands by incorporation into architecture or landscape. (40)
RESPONSE: The adopted rules do not prevent the establishment of a mitigation bank on a brownfields site provided that the site is free of hazardous materials and meets the other standards for mitigation areas. However, retroactive approval of any mitigation area is problematic. In order to consider an increase in wetlands values to be mitigation, baseline conditions on the site must be documented prior to the increase in wetlands values. The Department documents these baseline conditions on mitigation sites through submittal of detailed site information by the mitigator, and through Department site inspections. Without such prior documentation, the Department cannot determine the type and amount of improvement in wetlands values and functions, and therefore cannot allow this to be used as mitigation.

558. COMMENT: N.J.A.C. 7:7A-15.2(g) requires that where mitigation is not required by a Department issued permit, the Department must issue a permit for the mitigation. This is an unnecessary bureaucratic step and is not authorized by the Freshwater Wetlands Protection Act. Further, this provision requires that all other permits including CAFRA or Waterfront Development, be issued prior to commencement of mitigation. Why wouldn't these permits be automatically issued with the mitigation permit or approval? (34)
RESPONSE: This is not a change from the Department's existing practice. This provision is also not likely to be invoked very often, because it is extremely rare that mitigation is required but is not linked to a Department-issued permit or enforcement document. However, mitigation involves many regulated activities that disturb wetlands. The Department cannot ignore the FWPA mandate to regulate these activities based on the fact that the activities are part of a mitigation project. The Department still must review them to ensure that they meet FWPA requirements. In these rare cases, the Department coordinates as much as possible to ensure that all approvals are consistent and timely.

559. COMMENT: N.J.A.C. 7:7A-15.2(h) – We oppose any mitigation arising from a violation that does not include a mandatory increase in mitigation to compensate for the time lapse between the disturbance and the completion of mitigation, including the deterrent value to repeated violators. (15, 38)
RESPONSE: The Department agrees that the delay between a disturbance caused by a violation, and any mitigation required as a result of the violation, can have substantial environmental impacts. Therefore, Department enforcement staff take this into account, along with other factors, in determining penalties for violations.

560. COMMENT: N.J.A.C. 7:7A-15.2(j) will cause further impairment to water quality. Our area has little remaining upland. (38)
RESPONSE: The Department disagrees that this provision will cause impairment to the quality of local waters in areas with little remaining uplands. Preservation of uplands, within the limits and conditions established under N.J.A.C. 7:7A-15.9, can help prevent degradation of water quality. Uplands serve as buffers to wetlands, provide recharge zones, and trap and filter runoff prior to its discharge into open waters. Further, the preservation of uplands as mitigation is expressly allowed by the FWPA at N.J.S.A. 13:9B-13c.

561. COMMENT: N.J.A.C. 7:7A-15.2(j) requires that if mitigation is performed through uplands preservation or land donation, all rights in the mitigation area must be transferred to a government agency or charitable conservancy. What if those agencies are unwilling to take title? If the mitigation is viable the rule should allow it to occur with a deed restriction or with the Department taking title. (34)
RESPONSE: The Department believes that the best way to ensure that preserved upland or donated land is protected and managed as mitigation in perpetuity is through the donation of property to a government agency or charitable conservancy whose goal is to manage land for the public good (see definition of "charitable conservancy" at N.J.A.C. 7:7A-15.1). It has been the Department's experience that problems arise on land managed by a homeowners association or other private entity, usually associated with trespassing or dumping by individuals who are not members of the association or private entity. The Department understands that some government agencies and charitable conservancies hesitate to accept properties. In order to encourage these entities to accept preserved land, the rules include requirements that the mitigator provide a maintenance fund, and include requirements that mitigation areas must meet to ensure that mitigation areas are more likely to be acceptable to these entities.

562. COMMENT: N.J.A.C. 7:7A-15.2(k) -- Without mitigating in the sub-watershed affected, the rule will enhance the water quality in another watershed at the expense of the damaged watershed. (1, 38)
RESPONSE: This provision would allow the aggregation of mitigation projects only if the aggregated mitigation meets all requirements in relation to each disturbance, including the requirements for locating the mitigation area within a certain proximity to the disturbance. For a discussion of whether mitigation should be allowed outside of the subwatershed where the disturbance occurs, please see the responses to comments on N.J.A.C. 7:7A-15.5, below.

563. COMMENT: N.J.A.C. 7:7A-15.2(k). We support the approach where a permittee may aggregate the mitigation for multiple disturbances to achieve economy of scale. We recommend that this approach be expanded so that mitigation can be conducted in one or more areas to account for disturbances at diverse locations within a watershed or region of the State. In this way, those entities that have activities Statewide may be allowed to conduct mitigation at one or more appropriate locations rather than every site where disturbance has occurred. (46)
RESPONSE: This provision would allow the type of aggregation suggested by the commenter, provided that the mitigation meets all requirements in relation to each disturbance.

564. COMMENT: 7:7A-15.2(k) - Aggregation of mitigation for multiple disturbances into a single mitigation project can be useful for the permit applicant, the Department, and the environment. For example, the applicant benefits from expedited permitting times and economies of scale in mitigation implementation. The Department benefits from expedited permit times and consolidated compliance requirements. Environmentally, one large mitigation area often functions at a higher level and can support a greater mosaic of different habitat types than small, isolated pockets of wetlands surrounded by incompatible land uses. For these reasons, it could be beneficial to allow such aggregated mitigation projects to be used by more than one permittee, as long as all impacts are known, quantified, and adequately reported to the Department prior to permitting of the consolidated mitigation project. Under the Federal definition of mitigation banking, a mitigation project need not be classified as a mitigation bank unless mitigation credit is being reserved for some undefined future wetland impacts. (20)
RESPONSE: The rule as adopted does not prohibit an arrangement such as that suggested by the commenter. However, it will probably be rare that multiple permits will be issued for projects in such close proximity to each other that such aggregation could be achieved within the adopted limits at N.J.A.C. 7:7A-15 on the location of mitigation sites.

565. COMMENT: The proposed regulations do not indicate whether combinations of the various mitigation options are acceptable, for example providing some creation, some credit purchase, or preservation. Guidance on this type of mitigation approach should be included. (23)
RESPONSE: A provision has been added on adoption at N.J.A.C. 7:7A-15.2(m) to indicate that more than one mitigation alternative may be used to compensate for a permitted disturbance.

7:7A-15.3 Timing of mitigation

566. COMMENT: Timing of mitigation. We believe that the rules should require that developers deposit an escrow to guarantee that mitigation is performed within the applicable time period. If a permittee fails to perform mitigation as required, the escrow deposit should be forfeit. The 20% acreage annual penalty is meaningless and not tied to good science. For example, would the penalty compensation be required in the same watershed as the disturbance? If not, it

will not "compensate for the absence of the functions and values that were to be provided by the mitigation." (38)
RESPONSE: The Department has authority under the financial assurance provisions at N.J.A.C. 7:7A-15.13 to require an escrow. However, the 20% penalty is designed for situations where the permittee is uncooperative. In some cases, a permittee fails to perform any aspect of the mitigation requirements, including the requirement to provide financial assurance. A permittee who has ignored the initial financial assurance requirement is unlikely to cooperate with a second Department mandate to establish an escrow account. Further, among the available forms of financial assurance, escrows are not favored, because they require a third party to hold the escrow and are cumbersome to establish. Based on this, the Department believes that the 20% penalty will provide a better incentive to perform mitigation in a timely manner. In the event that the 20% penalty is applied, the Department will ensure that the extra mitigation performed meets all mitigation requirements of the rules, including the requirements for where the mitigation must be performed.

567. COMMENT: N.J.A.C. 7:7A-15.3(a)(2). Rather than specify that mitigation for a temporary disturbance must begin immediately following completion of the activity, we recommend that the permittee be allowed to propose when such activity should begin. For example, if the temporary disturbance is completed in January, given the time of year and resulting problems that might arise in obtaining the appropriate plants, conducting the planting, etc., it would make more sense to begin the work later in the spring when conditions are more likely to result in a successful planting. (46)
RESPONSE: To minimize the environmental impact of a disturbance, the loss of the wetland functions and values must be replaced as quickly as possible. In the example given, if the permittee finds it feasible to pursue permitted activities during January, it is likely to be feasible to proceed with mitigation during that time also, thus having the site stabilized and planted within six months as required under the rules. In some cases, the requirement may mean that an applicant must delay permitted activities, or alternatively, must perform mitigation as required for non-temporary activities. However, the Department believes that this constraint is justified by the environmental impact of permitted activities.

568. COMMENT: N.J.A.C. 7:7A- 15.3(b) proposes that mitigation be performed concurrently with the permitted activities or the mitigation will be increased by 20% each year. We suggest some additional clarification be provided, as it is confusing as to how this will be implemented. For example, if the mitigation is started at the same time as the permitted activity, but the mitigation takes two years longer to complete than the permitted activity, does this mean that 40% more mitigation is owed? Suppose the mitigation is completed after the permitted activity, but within the five year period for which a permit is valid. Will additional mitigation still be needed? We would like to suggest that the requirement for additional mitigation be made only when the originally required amount was not provided by the time the permit expired. (23)
RESPONSE: The time period within which mitigation must be performed in order to avoid the 20% penalty is the applicable time period set forth in N.J.A.C. 7:7A-15.3(a).

569. COMMENT: N.J.A.C. 7:7A-15.3(b)--There should be some consideration given to provide relief from the 20% additional mitigation requirement if the cause for the delay results from circumstances beyond a contractor's control, such as very bad weather, unexpected site conditions, etc. (23)

570. COMMENT: N.J.A.C. 7:7A-15.3(b). The penalty specified for failure to meet a mitigation schedule may be unrealistic and in some cases potentially infeasible to implement. We recommend that the statement “the acreage of mitigation required shall be increased by 20 percent” be changed to “the acreage of mitigation required may, after consultation with the permittee, be increased by 20 percent". This would allow both parties the opportunity to determine why mitigation did not occur as scheduled and to modify the schedule or approach if needed. (46)
RESPONSE to comments 568 and 569: The penalty applies if the mitigator fails to meet the timing requirements established under N.J.A.C. 7:7A-15.3(a). The timing requirements at N.J.A.C. 7:7A-15.3(a) provide flexibility in determining the schedule under which mitigation shall be completed. The Department believes that this flexibility is sufficient to ensure that a permittee who is proceeding with mitigation with reasonable speed will not be penalized for bad weather or other factors beyond their control. The Department intends the penalty to encourage permittees to understand that mitigation is an essential part of the permitted project, and thus to encourage permittees to plan and implement mitigation as carefully as permitted development activities.

571. COMMENT: N.J.A.C. 7:7A-15.3 requires that if mitigation is not performed prior to or concurrent with the regulated activities the mitigation acreage required will be increased by 20% each year. This is an inappropriate solution for the identified problem. The Department needs to follow up on mitigation requirements to make sure the applicant is compliant. These follow ups should be done at the time the mitigation is to be commenced. This would give the Department time to force the applicant to take the necessary actions, rather than waiting until after the fact. In addition, how would one add the 20%? There might not be room or the hydrology might not be acceptable. (34)
RESPONSE: The Department has been working to improve enforcement of mitigation requirements in various ways. First, the Department has consolidated responsibility for all mitigation in one mitigation specialist, to ensure better tracking of mitigation projects and better support for applicants preparing mitigation proposals. Second, the Department awarded a contract to a consultant to survey and evaluate mitigation projects the Department has required as a condition of past permit issuances. Finally, the Department has included in the adopted rule the mitigation requirements for smaller disturbances at N.J.A.C. 7:7A-15.5, which will reduce the number of small mitigation projects scattered around the State and replace them with a small number of mitigation banks. This will allow for more efficient enforcement because it is much easier to monitor and ensure the compliance of a few mitigation banks than a large number of small individual mitigation sites. If an additional 20% mitigation is required in a situation where the original mitigation was to be performed on a site with insufficient space or unacceptable hydrology for expansion, the mitigator must provide the additional mitigation on another site or through another mitigation alternative (for example, through credit purchase).

572. COMMENT: N.J.A.C. 7:7A-15.3(c)--This section states that if mitigation is required for a publicly funded project, all work necessary to complete the mitigation shall be included in the contract for the project. We do not believe that this is a very practicable idea, given the complexity of most of our projects, and we would strongly suggest that this proposed requirement be eliminated. In some situations, including the mitigation in the project may be possible and even beneficial, and we would be able to do what is suggested. However, in other situations, there may be multiple contracts that are awarded for what is considered to be one project, and these may be advertised at different times. Also, on many projects, we have seen where it is more desirable to treat the mitigation as a separate contact, and to prepare a specialized set of plans just for that work. There needs to be some flexibility in how complex public works projects can implement their mitigation requirements so that scheduling, staging the work, and distributing the costs, are considered in developing what may be multiple contracts for one project. (23)
RESPONSE: The Department has extensive experience with public projects for which mitigation is covered by a contract that is separate from the contract for permitted activities. In most of these cases, the mitigation is often delayed and does not meet the requirement that mitigation occur prior to or concurrently with permitted activities. Therefore, the Department believes that this provision is necessary to ensure that public agencies, like other permittees, understand that mitigation is an essential part of a project that must be planned and implemented as carefully as permitted development activities.

573. COMMENT: We recommend that, in the Passaic River Basin above Little Falls, the rules limit mitigation sites to areas upstream of the wetland to be damaged. In order for mitigation efforts to afford any benefits for flood and nutrient reduction for areas downstream of a wetland to be damaged or destroyed, these efforts must be carried out upstream in the same watershed in which the damage is to occur. The loss of wetlands in the Passaic River Basin, which may be accelerating, is causing irreversible damage to the ecological functions of the watershed. For this basin, including the Lower Passaic, mitigation sites should be selected only from the watershed near or above the site of wetland damage. (16)
RESPONSE: Due to the very small number of potential mitigation sites in this basin, the suggested change could not realistically be implemented. The rules do, however, strive to ensure that mitigation is performed in the same watershed as the disturbance to the extent possible. There are two wetland mitigation banks in the Passaic River Basin above Little Falls. This has helped the Department address the need to find suitable mitigation in this very developed watershed. The adopted rules will encourage the use of those banks.

7:7A-15.4 Property suitable for mitigation

574. COMMENT: N.J.A.C. 7:7A-15.4 – Suitable sites for mitigation of wetlands on previously disturbed urban sites should be specified to include other previously disturbed urban sites in the same or adjacent HUC 11. (40)
RESPONSE: If a previously disturbed urban site meets the mitigation requirements of the rules, it may be used for mitigation. There is no need to specifically list previously disturbed urban sites as eligible for mitigation.

575. COMMENT: The proposed rules, including but not limited to proposed N.J.A.C. 7:7A-15.4(a), should be modified to the extent that they preclude mitigation through land donation of public land. Such a restriction on donation of public land is inconsistent with the Freshwater Wetlands Protection Act ("FWPA"), N.J.S.A. 13:9B-1 et seq. Moreover, in many situations there is no reasonable basis for distinguishing between private land and public land. N.J.S.A. 13:9B-13 provides for mitigation as a condition of certain freshwater wetlands permits. The FWPA establishes a preference for mitigation by means of the onsite creation, enhancement, or restoration of freshwater wetlands. N.J.S.A. 13:9B-13b and c. If the Department determines that such onsite mitigation is not feasible, then N.J.S.A. 13:9B-13c provides that the Department may consider other options. The statute limits certain of these mitigation alternatives to private property, while for other alternatives there is no such limitation. Specifically, the statute provides that the option of creating freshwater wetlands off-site, or enhancing or restoring the degraded wetlands off-site must occur "on private property." N.J.S.A. 139B-13(c). The FWPA specifies that mitigation through the protection of off-site transition areas or upland areas that are valuable for the protection of freshwater wetlands ecosystems must occur "on private property." Id. But, with regard to mitigation by donation of land, ***the FWPA does not require that the donated land be "private property".*** It is a well known precept of statutory construction that where the Legislature includes such restrictive language in one instance, but does not include such a restriction in another, it is presumed that the Legislature intended the restriction to apply in the former situation but not in the latter. Higgins v. Pascack Valley Hospital, 158 NJ 404, 416 (1999); G.S. v. Department of Human Services, 157 NJ 161, 173 (1999); Alan J. Cornblatt, P.A. v. Barrow, 153 NJ 218, 234 (1998) GE Solid State, Inc. v. Director, Division of Taxation, 132 NJ 298, 308 (1993). Thus, it must be presumed that where mitigation is satisfied through the donation of land, the Legislature did not intend to preclude the donation of publicly owned land. In the absence of a legislative proscription on the use of public property to satisfy mitigation through land donation, it is arbitrary and unreasonable to impose such a requirement. This is particularly so in a situation where the public land to be donated was neither purchased with Green Acres funds nor is otherwise restricted from development or sale to a private party. Public entities such as municipalities and counties routinely sell land to private parties for development. New Jersey law expressly authorizes this. See N.J.S.A. 40A:12-13 et seq. Accordingly, donation of such publicly owned land serves the same benefits to protection of the freshwater wetlands ecosystem as the donation of privately owned land. (22)

RESPONSE: The FWPA provides at N.J.S.A. 13:9B-13c that if freshwater wetlands creation, enhancement or restoration is not feasible onsite, the Department in consultation with USEPA may consider creation, enhancement or restoration offsite on private property; or the protection of transition areas or uplands offsite on private property; or the making of a contribution to the Wetlands Mitigation Bank, which contribution may include a donation of land. Thus, the FWPA provides that offsite mitigation shall occur on private property, not on public property. Nevertheless, the Department does not believe that the Legislature intended to preclude a public entity from conducting offsite mitigation on property owned by the entity, if the entity acquired the property in order to perform mitigation, or if the entity simply holds title to the property by virtue of a device such as a tax foreclosure. Accordingly, the adopted rules allow offsite mitigation

on public property under these limited circumstances since otherwise a public entity would never been able to conduct offsite mitigation on land owned by the entity, but would always be required to conduct offsite mitigation on property owned by someone else. This would not be a rational result. The Department believes that the restriction limiting offsite mitigation to private land under N.J.S.A. 13:9B-15(c) also applies to land donation and upland preservation, because the same reasons that such a restriction would have been placed on mitigation through creation, restoration, and enhancement (for example, to keep large amounts of public land from being used for private mitigation projects) would apply to mitigation through land donation and upland preservation. Another factor that persuades the Department that the restriction was intended to apply to land donation is that, if it did not, a land donation could involve the transfer of land that is already in public ownership from one public entity to another, i.e., to the Wetlands Mitigation Council. The Department does not believe that the Legislature intended this type of land transfer to be used as mitigation, nor would such a transfer accomplish the mitigation goals envisioned by the FWPA.

576. COMMENT: N.J.A.C. 7:7A-15.4(a): We strongly oppose this provision that allows creation of wetlands on public lands. It is contrary to the explicit provisions of the law. This proposal provides for all forms of mitigation of wetlands on public land. This is contrary to the law which excludes at least creation on public lands. (2, 12, 15, 33, 38)
RESPONSE: The rule does not provide for all forms of mitigation on public land. N.J.A.C. 7:7A-15.4(a) allows only creation, restoration, or enhancement on public land. It does not authorize upland preservation or land donation involving public land. In stating that the FWPA excludes creation on public lands, the commenter appears to be referring to N.J.S.A. 13:9B-15a. N.J.S.A. 13:9B-15a authorizes the Wetlands Mitigation Council to fund or perform restoration or enhancement on public land, but does not specifically authorize creation on public land. However, the Department does not find the authority for a public agency to mitigate for a public project on public land in that provision, which governs only the Wetlands Mitigation Council. Rather, as discussed in the response to comment 575 above, the Department interprets N.J.S.A. 13:9B-13c to allow mitigation on public land under certain limited conditions.

577. COMMENT: N.J.A.C. 7:7A-15.4(a): We believe that only off-site creation, not offsite restoration and enhancement, should be prohibited forms of mitigation on land acquired with Green Acres funding. Mitigation projects involving restoration and enhancement should be permitted as they would clearly benefit many Green Acres lands by providing the resources necessary to restore and enhance existing wetlands. (49)
RESPONSE: The Department does not allow mitigation on land acquired with Green Acres funding because, while the Department believes that the Legislature did not intend to completely preclude a public entity from conducting offsite mitigation on its own land, the FWPA clearly was intended to prevent mitigation on public property in most cases, and certainly by private entities. Land acquired with Green Acres funding is held for conservation and recreation purposes, not for mitigation. Moreover, Green Acres legislation does not allow property acquired with Green Acres funds, or held for conservation and recreation, to be diverted to another use without approval of the State House Commission.

578. COMMENT: N.J.A.C. 7:7A-15.4(a): Several additional categories of property should be added to the types of property suitable for mitigation. We are a public agency, and when building a road, we occasionally acquire lands because access may be restricted to a particular location, or because of severe economic damages that may be incurred on remaining lands after we take what is necessary for the actual transportation improvement. These types of properties should be permitted to be used for mitigation. Another type of public land that should be considered for mitigation, under strictly controlled conditions, is State Parks and Forests, and State Wildlife Management Areas, even if purchased with Green Acres funds. There are locations within these areas that have degraded wetlands or other habitats, and the agency that owns the land may not have the resources or funding to implement ecologically valuable improvements. If areas like this are identified by the operating agency, approved by the LUR, Green Acres, etc., then we should be able to implement the improvements as mitigation. We believe that the use of existing State properties for mitigation could make sense for the involved agencies, and be beneficial to the State's citizens. (23)
RESPONSE: The types of land described by the commenter (land acquired because access may be restricted, or because of severe economic damages that may be incurred on remaining lands) could in some cases be used for mitigation, if they were obtained or held for mitigation and were not purchased with Green Acres funds. However, as discussed in the response to comment 575, the Department does not believe the intent of the FWPA was to authorize the use of public land for offsite mitigation except as necessary to enable public agency permittees to comply with mitigation requirements. Regarding the use of parks and wildlife areas, and land purchased with Green Acres funds, there may be areas on these properties that would be excellent subjects for mitigation projects. The Legislature contemplated that these projects could be funded by the Wetlands Mitigation Council. See N.J.S.A. 13:9B-15a. In fact, the Council currently has funds available for such projects. Any person who is aware of a site with potential to support a worthwhile mitigation project, on public or private land, should contact Council staff at the address in N.J.A.C. 7:7A-15.2(f).

579. COMMENT: We are concerned about the ability for creation of wetlands on public lands. Despite an exemption for lands acquired with Green Acres funds, there are thousands of acres of State, County, Municipal parks that have not been acquired with Green Acres funds, and this might leave them open to targets for Wetland creation. We have two problems with that: 1) wetland creation projects often fail; and 2) there's no other mechanism to protect uplands except by making them parks. Regardless of funding source or acquisition history, no upland should be sacrificed to create wetlands on public lands. (12)
RESPONSE: Mitigation in the form of wetlands creation could not be undertaken in a State, county, or municipal park because such lands are not obtained or held for mitigation, as required for mitigation on public land under N.J.A.C. 7:7A-14.5(a)1. Under the Green Acres rules at N.J.A.C. 7:36, a local government that accepts Green Acres funding for any property must provide a list of all properties held for conservation or recreation use. This list becomes the Green Acres inventory for that local government. Any land on the inventory, even if not acquired with Green Acres funding, may not be diverted to non-conservation or non-recreation use without approval of the State House Commission (see N.J.A.C. 7:36-20.2). Regarding the commenter's concern with the loss of uplands through wetland creation, the Department understands that current data indicate

that creation of wetlands may pose a greater risk of failure than other mitigation alternatives. Therefore, the Department encourages other mitigation alternatives when possible. However, the FWPA allows creation and, for some sites and situations, creation may be the best mitigation alternative. Finally, the commenter's concerns are addressed at N.J.A.C. 7:7A-15.4(d), which prohibits use of any mitigation area, including an upland, which is already ecologically valuable or contains significant cultural or historic resources.

580. COMMENT: N.J.A.C. 7:7A-15.4(c): This provision is useless unless the Department requires mitigation inventories to be established for all of New Jersey's watersheds through the watershed management process. We recommend that the Department request funds to have Watershed Management Area Plans include suitable wetland mitigation sites. The Department must be proactive in selecting potential sites for mitigation to offset wetland loss at the river ecosystem level. The review should include any applicable county mitigation site inventory in accordance with N.J.S.A. 13:9C-1 et. seq. The Department must provide incentives for counties to create such mitigation inventories, not "hope" that they exist as suggested in this section. The Department should maintain an inventory of wetland fill permits issued to each watershed as possible candidates for future mitigation sites. (38)
RESPONSE: The Department does not believe that mandating the creation of mitigation inventories through the watershed management process is necessary. The Department's Division of Watershed Management is forming a Public Advisory Committee (PAC) for each watershed management area in New Jersey. PACs can compile a wetlands mitigation inventory as part of the watershed management area plan. The Land Use Regulation Program provides information to the PACs regarding the role they can play in helping to identify sites that would be good candidates for mitigation projects. Although PACs have not yet been formed in all watershed management areas, some of the existing PACs have already chosen to make compilation of a wetlands mitigation inventory one of their goals. Information regarding PACs can be obtained by contacting the Department's Division of Watershed Management at www.state.nj.us/dep/watershedmgt. In addition, counties may compile such inventories in accordance with N.J.S.A. 13:9C. The Department maintains a database listing all permits issued, including freshwater wetlands individual permits. Further, the Department lists all permit actions in the DEP Bulletin, which can be viewed online through the Department's website at www.state.nj.us/dep.

581. COMMENT: The Department must set a limit for the percentage of total wetland loss allowed in specific sub-watersheds and river ecosystems. (38)
RESPONSE: It appears that the commenter is suggesting that the Department set limits on the cumulative amount of disturbance that may occur in each sub-watershed under all freshwater wetlands permits issued over time. The regulatory scheme established by the FWPA focuses mainly on a site-by-site analysis of wetlands impacts and/or practicable alternatives to the project. Therefore, the Department believes that a more appropriate avenue for managing cumulative wetlands impacts, as well as other environmental impacts, on a watershed basis is through the watershed management initiative currently being conducted by the Department's Division of Watershed Management.

582. COMMENT: N.J.A.C. 7:7A-15.4(c), 7:7A-15.9(b), and 7:7A-15.22(b): We believe that adopted municipal and county open space plans should be considered in determining the suitability of sites for mitigation, upland preservation and land donation. (49)
RESPONSE: The Department's mitigation staff routinely refer those seeking technical assistance for mitigation to county and municipal open space plans as a resource in selecting mitigation sites. However, the Department does not list every source of potential mitigation sites in the rules, because they are too numerous and the list of such sites changes often.

583. COMMENT: In the past the Department has placed conservation restrictions or mitigation requirements on applicants as a result of allowing an applicant to conduct an activity in wetlands on another portion of a site. Often these restrictions or mitigation requirements are placed within a utility right-of-way easement where electrical infrastructure exists. As a result, a utility company may be limited in its activities to maintain or expand existing facilities either due to access or structural modifications, converting single poles to H-frame structures. As required by Board of Public Utilities regulations, these trees, shrubs or other vegetation planted by property owners as part of an approved mitigation plan may have to be cut or removed by the utility to insure the integrity of the system (preventing vegetative interference with conductors). Secondly, as a result of mitigation, in addition to inappropriate replanting, manmade structures, e.g. retention basins, are created by developers that result in access restrictions or water conditions within our corridors. We strongly recommend that the Department be more vigilant in not placing conservation restrictions within utility rights-of-way. (5)
RESPONSE: The Department recognizes that this has been a problem and has included in these rules a requirement at N.J.A.C. 7:7A-15.4(e) requiring that, for creation, restoration and enhancement, the person responsible for the mitigation must either own the mitigation site in fee simple or demonstrate that they have adequate legal rights to the property to ensure that they can comply with the rules. See the response to comment 584 regarding modifications to this provision on adoption.

584. COMMENT: N.J.A.C. 7:7A-15.4(e) - How will an applicant be required to demonstrate full legal control over a piece of property? Will they be required to provide a title opinion? Title insurance? If encumbrances do exist, must they all be extinguished, or will a determination be made as to whether or not a given encumbrance would detract from the functioning of the site as a mitigation area? (20)
RESPONSE: To demonstrate legal control of a site, an applicant must certify that it is the owner of the property, or must provide documentation showing full legal authority to perform the mitigation and to deed restrict the property as required by the rules. The applicant must also demonstrate that the mitigation is not proposed within an area subject to utility easements, or other encumbrances that would conflict with the mitigation. N.J.A.C. 7:7A-15. 4(e) has been clarified on adoption to address the issue of a property with encumbrances. On such a property, the applicant must either extinguish the encumbrance, or demonstrate that the encumbrance will not inhibit compliance with mitigation requirements.

585. COMMENT: N.J.A.C. 7:7A-15.4(e). The Department should not limit mitigation to property that is owned in fee simple. The only requirement should be that the party demonstrate through easements, licenses or other agreements that the property can be used for mitigation and that the property owner consents to recording of a conservation easement on the parcel for mitigation purposes. This will enable, for instance, mitigation to be conducted on existing wetlands to be enhanced or other publicly owned lands to the benefit of the public at large without the need for cumbersome transfers of property solely for the purposes of performing mitigation. (23, 29)
RESPONSE: N.J.A.C. 7:7A-15.4(e) has been revised on adoption to incorporate the commenter's suggestion. Regarding mitigation on publicly owned lands, please see the responses to comment 575 through 579.

7:7A-15.5 Mitigation for a smaller disturbance

586. COMMENT: N.J.A.C. 7:7A-15: There are some benefits to the revised mitigation regulations, such as the recognition that credit purchases may be more appropriate for small disturbances than on-site mitigation and allowing upland preservation in some cases. (29)
RESPONSE: The Department appreciates this comment in support of the rules.

587. COMMENT: N.J.A.C. 7:7A-15.5 Mitigation for a smaller disturbance. The smaller disturbance bias of this section will accelerate the destruction of urban wetlands. The Department should amend the proposed rules to forbid all wetland fills in watersheds where water quality is below national standards. When such filling is in the overwhelming public interest, the offsetting mitigation should only take place within the same watershed where the damage occurs. Efforts to improve water quality have in some cases resulted in new, difficult to control sources of pollution. Construction of a new regional sewer collection system in one case allowed a construction boom which expanded sprawl development which in turn increased stormwater runoff and non-point source pollution. It has even resulted in the continued destruction of wetlands from the development allowed by the increased capacity of the sewer system. (38)
RESPONSE: It is not clear in what way the commenter believes that the provisions for smaller disturbances will accelerate the destruction of urban wetlands. The rules allow the destruction of wetlands only if the permitting standards set forth in the FWPA are met, and these mitigation requirements are not part of those permitting standards. Therefore, these mitigation standards will affect neither the acreage of wetlands disturbed, nor the types of wetlands disturbed. The commenter suggests that the Department should not issue permits for wetlands fill in watersheds with water quality below national standards. The FWPA mandates that the Department evaluate an application based on certain standards. While the Department takes into account water quality to the extent possible within the FWPA mandate, the FWPA does not provide for a denial of a permit solely on the basis of the water quality in the watershed in which the site is located, although that would be a consideration. Regarding mitigation in the same watershed as a disturbance, please see the response to comment 540 above. The construction of regional sewer systems, and the

stimulation of development that may be caused by such systems, is beyond the scope of the wetlands rules.

588. COMMENT: We cannot support eliminating the normal mitigation hierarchy for disturbances of 1.5 acres or less, so that applicants can go directly to mitigation banks which are far downstream. Mitigation must take place in the same sub-watershed (HUC-14) as the disturbance. The rule should include revised language which encourages mitigation banks to be created closer to the headwater regions where so many impacts are occurring. Watershed Management Planning Area groups and watershed associations should be consulted to insure that mitigation can take place in the same sub-watershed. (2, 12, 33)

589. COMMENT: The Department should not allow any mitigation to be conducted outside the affected sub-watershed if it has no proof that there are no alternatives. The proposed rules would allow and encourage the destruction of wetlands within our watershed by allowing developers to offset damaged wetlands by purchasing wetland mitigation bank "credits" in areas outside the sub-watershed where the permit to allow wetland filling occurs. (38)
RESPONSE to comments 588 and 589: The Department agrees that it would be ideal if all mitigation occurred within the watershed of the permitted disturbance. That is why the rules require that mitigation (whether through credit purchase or other mitigation alternatives) occurs in the same watershed as the disturbance when possible. The rule 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. The rule then establishes a hierarchy at N.J.A.C. 7:7A-15.5(d). The hierarchy requires that any credits must be purchased from a mitigation bank in the same HUC-11 as the disturbance if possible, except that credits may also be purchased from one of the eight mitigation banks approved prior to January 1, 1999. This is necessary to honor pre-existing bank approvals issued by the Wetlands Mitigation Council. If credits are not available in the same HUC-11 or from a prior approved bank, the credits must be from a bank in the same watershed management area as the disturbance AND in a watershed adjacent to that in which the disturbance occurred. If no such credits are available, credits must be purchased from a bank in the same watershed management area as the disturbance. Finally, if no such credits are available, the credits may be purchased from any bank which serves the area in which the disturbance occurred. This hierarchy strives to keep mitigation and mitigation banks as close to the disturbance as possible.
Further, the rule encourages creation of mitigation banks closer to disturbances by encouraging permittees to use credit purchase as a mitigation alternative. This will increase the number of banks, and because the rule requires that credits be purchased from a bank in the same watershed or watershed management area as the disturbance if possible, this will encourage banks to locate where disturbances are occurring.
The reason for the rule's emphasis on mitigation banking for smaller disturbances is 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. However, the rules allow mitigation in other subwatersheds, and other watersheds, both for environmental and practical reasons. First, a subwatershed can be as small as four square miles, making it very difficult to find suitable mitigation sites in the same subwatershed as a disturbance, especially in areas that are heavily developed. Therefore, even if mitigation banks did not exist, the result of restricting offsite mitigation to the subwatershed of the disturbance would be that the applicant could more easily prove that offsite mitigation is infeasible and could pursue less favored mitigation alternatives such as monetary contributions and land donations. (Please see the response to comment 591 below for a detailed discussion of this issue.)

590. COMMENT: N.J.A.C. 7:7A-15.5: The rules proposed for "mitigation for a smaller disturbance" will insure the rapid disappearance of wetlands in urban and suburban areas. The proposed rules are not protecting our remaining wetlands and actually encourage their destruction in favor of mitigation banks in other watersheds. Instead of requiring on-site mitigation as the first priority, the proposed rule reverses good biology and requires credit purchase unless an applicant can demonstrate a more environmentally beneficial alternative. If there are no mitigation banks in a watershed, wetlands destroyed in a watershed will be mitigated by wetland bank credit purchases in other watersheds. This is designed to subvert the original purposes of the Freshwater Wetland Protection Act. Adopting this rule will insure that the most burdened waterways will have the least water quality protection by eroding away their wetlands. (38)
RESPONSE: The Department does not believe that the rules in any way encourage the destruction of wetlands. The rules encourage mitigation banking, but require that credits be purchased from a mitigation bank in the same watershed as the disturbance if possible, and in the same watershed management area if the same watershed is not possible. While it is true that it can be difficult to find credits in the same watershed and/or watershed management area because of the paucity of mitigation banks, the fact that this rule encourages mitigation banking will cause an increase in the number of banks, thus making it easier to purchase credits in the same watershed as a disturbance. Further, the freshwater wetlands rules allow the destruction of wetlands only if the permitting standards set forth in the FWPA are met, and these mitigation requirements are not part of the determination of whether a project meets the permitting standards. Therefore, these mitigation standards will affect neither the acreage of wetlands disturbed, nor the types of wetlands disturbed. The rules encourage mitigation banking because the Department believes, based on its 13 years administering the freshwater wetlands program, that smaller mitigation projects are generally less successful than larger mitigation projects. Please see the response to comment 591 below for a discussion of the relative merits of smaller and larger mitigation projects. The commenter is correct in stating that, under certain circumstances, a developer could perform mitigation for a disturbance by purchasing credits in a mitigation bank located outside of the subwatershed in which the disturbance is located. This would occur when there is no mitigation bank in the HUC-11 where the disturbance is located. However, as

noted above, this rule will stimulate creation of more mitigation banks, thus increasing the likelihood that the Department can require the purchase of credits from a bank in the same HUC-11 as the disturbance.

591. COMMENT: There is no scientific data to support the presumption that mitigation for disturbances of 1.5 acres or less is not feasible. In fact, smaller mitigation areas are more feasible in developed areas, while larger parcels are more difficult if not impossible to assemble at a reasonable cost. (38)
RESPONSE: The Department's focus is on environmental results, rather than on the ease or difficulty of purchasing a suitable mitigation area. In addition, it should be noted that in cases where an applicant can demonstrate that onsite mitigation for a smaller disturbance would be ecologically beneficial, the rules do allow onsite mitigation under N.J.A.C. 7:7A- 15.5(c) and (e). However, the rules require banking in the same watershed or watershed management area as the disturbance when possible, because the Department believes this is better environmentally than onsite mitigation and small mitigation sites.
Generally speaking, an applicant for an individual permit is developing the majority of the site. When mitigation is placed onsite, the newly created wetlands are surrounded by developed areas with less open space and is thus likely to provide less ecological value. Larger sites tend to have multiple sources of water (typically a combination of stream water, overland runoff and groundwater), which increases their success rate. The sources of water for smaller sites are generally stormwater runoff from the permitted development, which is unpredictable and encourages the colonization of the site with invasive plant species. Larger sites also tend to be near other large wetland areas, which provide a source of seeds of native wetland vegetation. This increases the vegetative coverage, which in turn increases wetlands functions.
Further, there are practical and logistical reasons that larger mitigation areas are better. Larger mitigation projects involve economies of scale. The cost and effort required to construct a smaller mitigation site is generally similar to that required for a larger mitigation project. Generally speaking, it costs the sam amount to bring heavy equipment and personnel to a site that is one acre as to a site that covers 100 acres. The time required for an applicant to prepare and for the Department to review a mitigation proposal is similar for small and large mitigation projects. Thus, several smaller sites require a great deal of effort, which can better be spent on ensuring the success of one larger site. Similarly, it is easier for the Department to supervise and monitor a small number of large sites than a large number of small sites, making implementation and enforcement of the mitigation program more successful. More effort is usually put into the design of a larger mitigation project. Developers who design large mitigation sites spend more time and effort on complying with monitoring requirements after mitigation is completed, since they have a larger investment at risk. After mitigation is completed, it is easy for a small mitigation area to be lost in a development and forgotten about. Residents near a small site often think the area is only a vacant lot and are not aware that it is a protected site, resulting in mowing of the area or dumping of yard waste and rubbish on it. Smaller sites are frequently overseen by entities with fewer resources or less interest in environmental preservation (such as homeowners associations), and therefore are often neglected by those responsible for them after mitigation is completed. Furthermore, a mitigation area or mitigation bank must be donated to a government agency or a charitable conservancy to be maintained in perpetuity.

Many such conservancies will not accept small properties because of the difficulties in managing many small sites. A final benefit of the rule's focus on aggregating mitigation for small disturbances through mitigation banking is that this will encourage replacement of wetland losses early, prior to the wetland destruction.

The benefits of larger mitigation sites are supported by research and by other states' experiences. The Pennsylvania Department of Environmental Protection analyzed 69 wetland mitigation sites and found that the larger the replacement area, the greater the chance for successful created wetlands. Sites that were over 1.01 acres in size were 86.7 percent successful while sites between 0.241 and 0.50 were only 56.3 percent successful. (Pennsylvania Department of Environmental Protection. 1995. Unpublished fourth year wetland monitoring results from a five year study of 72 randomly selected replacement wetlands located in the Commonwealth of PA. Harrisburg, Pennsylvania. 1995.)

The State of Michigan evaluated its wetland program and found that its preference for on-site mitigation contributed to the poor quality of many wetland mitigation sites, because on-site mitigation often resulted in wetlands being constructed in unsuitable locations. Seventy-six percent of the mitigation projects evaluated were constructed on-site. The study found that the mitigation sites were often surrounded by developed areas where the only available source of hydrology was from urban runoff. Further, the mitigation sites often had poor water quality which directly affected the vegetative community on the mitigation site. (Land and Water Management Division, Michigan Department of Environmental Quality. February 2001. Michigan Wetland Mitigation and Permit Compliance Study Final Report. Lansing, Michigan)

Most recently, the National Academy of Sciences has made available a pre-publication report documenting problems with the Army Corps of Engineers wetland mitigation program. The study recommends that the ACOE wetland mitigation program move towards a watershed/landscape focus. The study states that:

> "Corps field experience has shown ecological value in pursuing practicable and successful mitigation within a broader geographical context. This approach, combined with innovations such as mitigation banks and in-lieu-fee programs, provides proportionately higher ecological gains where the aquatic functions are most needed." (National Academy of Sciences. 2001. Compensating for Wetland Losses Under the Clean Water Act. National Academy Press. Washington D.C.)

The Department is also moving towards a watershed focus in order to holistically address historic and future wetland losses. This approach aims to keep mitigation in the same watershed or watershed management area as much as possible, but places less emphasis on mitigating on the site of the disturbance.

The scientific findings have been borne out by the experience of Department field staff, who have identified recurring problems associated with smaller mitigation sites, and in general have found that larger mitigation sites have been more successful than smaller ones.

592. COMMENT: N.J.A.C. 7:7A-15.5(c) – We adamantly oppose this provision which indicates that smaller wetland disturbances, 1.5 acres or less, are not worth mitigating on site or near the site. Smaller headwater wetlands are especially critical to maintaining water quality in our streams and river systems and to our watershed management efforts. (15, 38)

RESPONSE: The Department does preserve the option for on-site or off-site mitigation provided the mitigation is environmentally beneficial (See N.J.A.C. 7:7A-15.5(e)). As to the location of mitigation banks in headwater areas, the Wetlands Mitigation Council recently approved a wetland mitigation bank in headwaters in Easthampton Township, Burlington County. While the Department believes that smaller wetlands can be as valuable as large wetlands, depending on the particular wetland and other factors, the Department has found that smaller wetland mitigation projects are not as successful as larger wetland mitigation projects. Further, one large mitigation project (or mitigation bank) provides a greater environmental benefit for a lower cost than several smaller mitigation projects. Please see the response to comment 591 above for a discussion of the relative merits of smaller and larger mitigation projects.

593. COMMENT: The only way to restore waterways is to create and enhance lost or damaged wetlands. These proposed regulations at N.J.A.C. 7:7A-15.5(c) would shift responsibility to the applicant to prove there are alternatives to mitigation banking. The applicant naturally would want to use the mitigation bank for the convenience and, in some cases, to avoid the cost and liability associated with their own mitigation. The Department is responsible for protecting water quality, and should not provide developers a quick and easy "out" for the damage they do to wetlands and the watershed. The Department's use of contaminated dredge spoil sites for mitigation banks located in watersheds outside of the damaged watershed does nothing to mitigate the damage caused to the watershed where the project is located. (38)
RESPONSE: For smaller disturbances, the rules do require the applicant to use mitigation banking unless the applicant can demonstrate that onsite or offsite mitigation is more environmentally beneficial. This stems from the Department’s experience that, for smaller disturbances, banking is more environmentally beneficial than onsite mitigation. Please see the response to comment 591 above for a detailed discussion of this issue. While in some cases this results in mitigation located in a different watershed than the disturbance, the Department believes that, as more permittees purchase credits, more banks will be created, thus increasing the likelihood that future permittees can purchase credits from a bank in the same watershed as their permitted disturbance. The Department agrees that contaminated sites are not good locations for mitigation projects. The adopted rules at N.J.A.C. 7:7A-15.13(d)14 require a "no further action" letter from the Department's Site Remediation Program for all mitigation sites where there is reason to suspect contamination. New N.J.A.C. 7:7A-15.4(h) has been added on adoption to reiterate this requirement in order to ensure that mitigation is not performed on a contaminated site unless the site has been cleaned up sufficiently to ensure that mitigation will not reintroduce or expose contaminants. A cross reference to new N.J.A.C. 7:7A-15.4(f) is added at N.J.A.C. 7:7A-15.11(c)5. Presumably, the commenter is referring to one mitigation bank approved by the Wetlands Mitigation Council in 1995, on a site with a history of contamination. Since that approval, the Council has passed a resolution requiring a No Further Action Letter for potential banks, stating that there is no contamination on the bank site.

594. COMMENT: N.J.A.C. 7:7A-15.5(c) presumes that onsite mitigation for a smaller disturbance is not feasible. While this may be true for housing and commercial developments, we have found that for linear projects such as roads, it is often

very feasible to perform mitigation onsite next to the impact, particularly for bridge replacements and roadway widenings. We suggest that an exception be made for linear projects so that the applicant does not have to perform unnecessary studies to prove otherwise. (23)
RESPONSE: The adopted rules at N.J.A.C. 7:7A-15.5(e) allow for flexibility in the determination of whether onsite mitigation is environmentally beneficial. The rules also allow flexibility in the amount of information an applicant must submit to demonstrate that onsite mitigation is environmentally beneficial, which will prevent the unnecessary studies about which the commenter is concerned. Further, it is doubtful that the environmental benefit of onsite mitigation is the same for all linear projects. Therefore, rather than adopt a blanket rule regarding all linear projects, the rule is adopted as proposed, and the Department will consider each project on a case-by-case basis.

595. COMMENT: N.J.A.C. 7:7A-15.5(c). Rather than the Department "presuming" whether it is feasible to complete onsite mitigation for a small disturbance, the initial decision step for determining the mitigation alternative for a smaller disturbance should be same as for a larger disturbance. The permittee should make the initial decision whether it is feasible to create, restore, or enhance. (46)
RESPONSE: The presumption that onsite mitigation for a small disturbance is not feasible is based on the Department's experience over 13 years administering the freshwater wetlands program. Small mitigation sites are generally less successful than large ones, and harder for the Department to supervise and monitor.

596. COMMENT: We are greatly concerned that you can be destroying headwater wetlands in one place, but the mitigation is occurring in another town, not even in the same basin. It might be in the same general watershed, but not above those reservoirs that you are trying to protect. (47)

597. COMMENT: One of our greatest concerns is N.J.A.C. 7:7A-15.5(c), in which the Department, "presumes that onsite mitigation for a smaller disturbance is not feasible," and encourages smaller disturbances (less than 1.5 acres) to seek mitigation through credit purchase at a wetland mitigation bank located within the same HUC 11 area. Our primary concerns with this proposal are:
- developers will satisfy their regulatory requirements in the less costly manner at the mitigation bank located at the far eastern comer of our watershed;
- wetland acreage and habitat losses will increase in headwater areas throughout our watershed (especially where acreage is expensive);
- water quality in these areas will be reduced without the filtering capacity of wetlands; and
- flooding will occur more frequently in these areas because wetland mitigation would be provided at a great distance away from the newly urbanized areas.

This modification conflicts with other recent Department watershed programs to preserve or enhance water quality, such as Clean Water Standards, future Total Maximum Daily Load standards (TMDLs), and the upcoming Federal NPDES Phase II Stormwater Regulations, which will mandate that municipalities prevent or minimize impacts to water quality from non-point sources. Compliance with these watershed programs will require the preservation and the mitigation of wetlands and their filtering capabilities and stormwater controlling capacities throughout the watershed, not only at distant wetland banks. (The commenter

included various statistics relating to wetlands impacts and mitigation projects in one portion of its watershed.) (1)
RESPONSE to comments 596 and 597: As more permittees use credit purchase to satisfy mitigation obligations, this will stimulate the construction of more mitigation banks, which will in turn allow for credit purchase closer to disturbances. This will also help to address the commenters' concerns regarding the loss of headwater wetlands, and water quality and flooding in newly urbanized areas, because the creation of more mitigation banks will likely result in the location of more banks in these areas, and the wetlands in the banks will ameliorate the loss of wetlands functions to development. The Department does not believe that this conflicts with the Department's watershed management initiatives. The Department encourages those developing each watershed management plan to include inventories and rankings of possible mitigation sites in the watershed. These plans can be used to find and utilize mitigation sites and mitigation bank sites in locations that will provide maximum benefit to the watershed.

598. COMMENT: N.J.A.C. 7:7A-15.5(d)2ii – We adamantly oppose freezing the service areas at those established prior to January 1, 1999. This predates work in the 20 watershed management planning areas. In order to protect water quality – one of the prime functions of wetlands – mitigation must be confined to the watershed area in which it took place. The service areas do not have this as a consideration. (15, 38)
RESPONSE: The Department believes that ideally the service area of each mitigation bank should be coextensive with the boundaries of the watershed management area in which the bank is located. Since the start of the freshwater wetlands program and prior to January 1, 1999, the Council approved eight mitigation banks. Because there were so few banks, the approved service areas were necessarily large, and all are larger than the Watershed Management Area in which they are located. While the Department would like to see smaller service areas, it would be unfair to grant a mitigation banker the right to sell credits in a certain service area through a Council bank approval, and then to restrict the sale of those credits to a substantially smaller area through a rule change. Further, allowing the purchase of credits from these banks will increase the options available to mitigators. The Department expects that the number of mitigation banks being created will increase, and this will allow for smaller service areas for banks approved in the future. In fact, the service area of the one mitigation bank approved since January 1, 1999 is coextensive with the Watershed Management Area in which it is located. The Department will continue to recommend to the Council that bank service areas be limited to the Watershed Management Area in which the bank is located, and the Department believes the Council will continue to act positively on this recommendation. As noted in the rules at N.J.A.C. 7:7A-15.20(c), Council meetings are open to the public, and meeting dates and agendas for upcoming meetings can be obtained by contacting the Department.

599. COMMENT: N.J.A.C. 7:7A-15.5(d)ii - What is the significance of the January 1, 1999 date for mitigation bank approval? (34)
RESPONSE: The date was established in order to fairly balance the rights of existing mitigation banks against the environmental goal of making bank service areas coextensive with watershed management areas. The Department must honor the service areas granted in existing mitigation bank approvals. The

Council has advised mitigation bankers that future bank service areas will be reduced in size in order to further the Department's goal to require that mitigation be located within the same Watershed Management Area as the permitted disturbance. By January 1, 1999, this policy was fully established and had been explained to all prospective mitigation bankers of which the Department is aware.

600. COMMENT: N.J.A.C. 7:7A-15.5(e) – By requiring an applicant to meet the criteria set up here, the Department is making it more difficult for the applicant to do on-site or near site mitigation and prejudicing the purchase of mitigation credits in banks which may be located in an area that has no relationship to and does not compensate for the wetlands area lost. For example, a permittee could mitigate loss of wetlands in the headwaters area of the Passaic River through use of the Hackensack Meadowlands mitigation bank. This would result in substantial unmitigated wetlands loss in the Upper Passaic. This proposal puts the Department in the position of assuring the profitability of wetland mitigation banks at the expense of damaged watershed left unmitigated. (15, 38)
RESPONSE: The Department agrees that the provision makes it more difficult to perform onsite mitigation, unless the onsite mitigation is demonstrated to be environmentally beneficial. The provision is intended to encourage mitigation banking for smaller disturbances for the reasons stated in the response to comment 591 above, and thus to increase the likelihood of success of the mitigation.

601. COMMENT: N.J.A.C. 7:7A-15.5(e). The rule lists four determining factors for whether onsite or offsite mitigation would be environmentally beneficial. Definitions are not provided for "environmentally beneficial" or "critical wildlife species." This suggests that determination of what is appropriate mitigation would be subjective and provide little flexibility in terms of mitigation options. It is clear that the Department will only consider larger areas (size not defined) near preserved open space that provides valuable habitat to critical wildlife species or threatened or endangered species, and complements nearby "resources" to be environmentally beneficial. The Department should be more flexible and evaluate the proposed alternative based on function and value of the habitat for wildlife. (46)
RESPONSE: The listed factors are intended to provide guidance for permittees, while retaining sufficient flexibility for the Department to appropriately address a broad range of sites and situations. While the commenter is concerned that the Department will apply the provision subjectively, adding specificity to the provision in order to reduce the potential for subjectivity would hamper the flexibility that the commenter also seeks. Therefore, the provision is adopted as proposed.

COMMENT: N.J.A.C. 7:7A-15.5 and 15.6: On the flow charts for both smaller and larger impacts, there is an option under the second column, the second box down. It says you must purchase credits from one of these banks, or create, restore and enhance on-site or off site, or preserve uplands off site. Whose discretion is that? Is that up to the applicant or to the Department? (19)
RESPONSE: First, it should be noted that the flow charts in the rules should not be used to determine regulatory requirements. As noted at the top of each flow chart, the flow charts are intended to illustrate the regulatory provisions, and are not a substitute for them. Thus the reader should rely on the regulatory provisions rather than the flow charts. The boxes referred to by the commenter summarize

provisions at N.J.A.C. 7:7A-15.5(c) (for smaller disturbances) and 15.6(c) (for larger disturbances). N.J.A.C. 7:7A-15.5(c) requires an applicant with a smaller disturbance to purchase credits unless the applicant demonstrates under N.J.A.C. 7:7A-15.5(e) that onsite or offsite mitigation (in accordance with N.J.A.C. 7:7A-15.5(c)1 or 2) is more environmentally beneficial. Therefore, for a smaller disturbance, the applicant has the discretion to either purchase credits or to attempt to demonstrate to the Department that other alternatives have more environmental benefit. N.J.A.C. 7:7A-15.6(c) requires an applicant with a larger disturbance to perform onsite mitigation to the maximum extent feasible. Therefore, for a larger disturbance, the applicant has the discretion to perform onsite mitigation or to attempt to demonstrate to the Department that onsite mitigation is not feasible, in which case other mitigation alternatives could be used.

7:7A-15.6 Mitigation for a larger disturbance

602. COMMENT: N.J.A.C. 7:7A-15.6(c)--This section provides the preferences for mitigation from a larger disturbance, and it contains a provision that onsite mitigation shall not be performed through upland preservation. In some situations, the preservation of uplands that are adjacent to wetlands could be beneficial from an ecological viewpoint, and may be a component of a plan that includes a combination of creation, restoration and preservation. We suggest that consideration be given to providing credit for upland preservation under these circumstances. (23)
RESPONSE: The FWPA provides for upland preservation only offsite as a mitigation alternative. Therefore, onsite upland preservation cannot be included in the rules as a mitigation alternative. See N.J.S.A. 13:9B-13c.

603. COMMENT: N.J.A.C. 7:7A-15.6(d), (e), and (f). - Mitigation through land donation should also include privately owned, unprotected wetland parcels, especially when located in a densely developed area in a severely impaired watershed. This is an extremely urgent change since development pressures and increased land values put the last remaining privately owned wetland parcels at special risk and they might be removed completely once buildout is achieved. (38)

604. COMMENT: N.J.A.C. 7:7A-15.6(f)--This section specifies that land donation is still the last choice for mitigation, and that this option must be approved by the Wetlands Mitigation Council. We would like to see more flexibility provided in the sequence of mitigation choices. There may be opportunities to acquire and preserve ecologically valuable or threatened parcels that could be missed, because, in most cases, some other mitigation would be available. (23)
RESPONSE to comments 603 and 604: Mitigation through donation of lands such as those listed by the commenter is allowed under the rules as proposed and adopted. However, under N.J.S.A. 13:9B-13c, the Department may allow the donation of land as a part of the contribution to the Wetlands Mitigation Bank only after determining that all alternatives to the donation are not practicable or feasible.

7:7A-15.7 Mitigation for a temporary disturbance

605. COMMENT: N.J.A.C. 7:7A-15.7(a)2 -- With regard to the restoration of a forested wetland resulting from a temporary disturbance, the proposed regulation needs to clarify what constitutes an acceptable restoration. Does one have to put back the same size and species of trees that were removed, or can seedlings of the same species be planted? Technically, by definition, a forested wetland has trees that are 20 feet tall, so even if seedlings or larger landscape stock is planted, the area may still not be considered forested. Also, some temporary disturbances may only involve minimal vegetation disturbance to obtain access to an area, and the only restoration needed may be to stabilize the soil. (23)
RESPONSE: As with all mitigation projects, an acceptable restoration will depend heavily on the site conditions prior to the disturbance and on the approved mitigation proposal. The Department understands that a forest cannot be created in five years. Therefore, if the approved mitigation involves activities intended to result in a forested wetland, the approved mitigation proposal will require replanting with seedlings in such a way that the area will eventually be reforested. If this is done properly, at the end of the five year monitoring period the applicant will be able to demonstrate that the trees that were planted are well established and will continue to grow and thrive, such that the area will eventually become a forest. The Department understands that sometimes a temporary disturbance involves minimal disturbance of vegetation. However, such a disturbance must still be mitigated for in accordance with N.J.A.C. 7:7A-15.7. In some cases, the Department may determine that N.J.A.C. 7:7A-15.7 requires only soil stabilization to restore a temporarily disturbed area.

7:7A-15.8 Amount of mitigation required

606. COMMENT: N.J.A.C. 7:7A-15.8(b). Although we agree that a transition zone between wetland and upland areas can provide important ecological functions as well as afford protection to wetlands themselves, we believe the Department's size requirement for transition zones is overly prescriptive. There may be instances where the size of the transition zone, to provide the appropriate ecotone between the two main habitat types, could be greater than 50 feet or 150 feet. In other cases this zone may be less than 50 feet or 150 feet and still provide the type of protection and functions important to the success of the mitigation. The size of the transition zone should be a function of the site specific conditions where the mitigation is being implemented, and based on sound scientific information. (46)
RESPONSE: These minimum transition area widths are the same as those required for all wetlands under N.J.S.A. 13:9B-16. Further, although the appropriate size of a transition zone may vary somewhat from site to site, almost all of the published wetland functional assessment techniques indicate that wetlands need at least a fifty foot transition area. Transition areas are especially critical for the fledgling wetlands found in mitigation areas. For some mitigation areas, a larger transition area might be desirable to ensure success of the mitigation. Therefore, the Department believes that the transition areas required

in this provision provide for the minimum transition areas necessary to carry out the requirements of the FWPA.

607. COMMENT: N.J.A.C. 7:7A-15.8: We recognize that creation or restoration of a wetland will, if necessary, lead to the creation of a transition area around the created or restored wetlands. We urge that the Department consider that the transition area will have habitat value and the establishment of the transition area should be taken into account in any wetlands value assessment undertaking in determining the amount of mitigation necessary. Transition areas created around mitigation sites should be susceptible to the issuance of transition area waivers for future activities allowable under the transition area process. (29)
RESPONSE: In order to ensure that a mitigation area meets the FWPA standard of providing equal ecological value, the freshwater wetlands must provide certain functions and values. If the wetlands providing these functions and values are not adequately protected by a transition area, the wetlands will deteriorate and will no longer provide the necessary functions and values. Therefore, even though the transition area may incidentally provide some ecological benefits, the transition area is required not as mitigation itself, but rather to ensure that wetlands used as mitigation continue over time to provide the values and functions required by the FWPA. If the Department were to issue a transition area waiver for activities in a transition area adjacent to a wetland created, restored, or enhanced as mitigation, this would diminish the ecological value of the wetland and the mitigation would therefore no longer meet the mitigation requirements of the FWPA.

608. COMMENT: N.J.A.C. 7:7A-15.8(c)(1): In determining the proper ratio of mitigation required for certain actions, the permittee should have the option of providing a scientific basis for an appropriate ratio. There could be instances where a one to one mitigation will be sufficient to provide the same or greater level of ecological services lost to wetland disturbances. In addition, we encourage the Department to discuss with permittees and others what ecological values and functions will be used in determining the type and magnitude of mitigation needed. (46)
RESPONSE: The rule provides the option suggested by the commenter at N.J.A.C. 7:7A-15.8(j), which states 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 may a mitigation area be smaller than the disturbed area.

609. COMMENT: N.J.A.C. 7:7A-15.8(e) - It would be helpful if the Department would provide further guidance such as ranges of mitigation ratios for enhancement to decrease uncertainty for the regulated community. Please specify how the functions and values will be determined. What information will the applicant be required to provide? (20)
RESPONSE: The Department has in the past attempted to set standard enhancement ratios. However, permitted disturbances vary widely in the nature and amount of their ecological impacts, and enhancement projects vary widely in the nature and amount of ecological value which result from them. Therefore, it is not possible to predict an acreage ratio for enhancement that will ensure that all enhancement projects will meet the FWPA requirement of equal ecological value.

The basic types of information the applicant will be required to provide is set forth at N.J.A.C. 7:7A-15.12, and more detail is provided in the application checklist for the particular type of mitigation proposal. Application checklists will be available on or before September 4, 2001 on the Land Use Regulation Program web site at www.dep.state.nj.us/DEP/landuse.

610. COMMENT: N.J.A.C. 7:7A-15.8(f --We note that when credits from a mitigation bank will be purchased, the number of credits that must be obtained will be determined on a case by case basis. Thus, the amount may be more or less than on a 2:1 ratio. It would be useful to include additional guidance, along with an example of some of the factors and the methodology that will be used to make this determination in the proposed regulations. An applicant should be able to estimate how many credits may be needed so that the cost of performing other mitigation, such as creation, can be compared to the cost of the credit purchase. It would also be useful to have an estimate so that it can be determined if any mitigation banks have the necessary amount of credits available for purchase. Considering the Department's emphasis on having the mitigation done at the same time as the permitted activity and as part of the same contract, an applicant should be able to have enough guidance early in the project planning process to estimate what mitigation will be acceptable. (23)
RESPONSE: Permitted disturbances vary widely in the nature and amount of their ecological impacts, and mitigation banks vary widely in the nature and amount of ecological value which result from them. Therefore, it is not possible to predict a ratio for credit purchase that will ensure compliance with the FWPA requirement of equal ecological value in all cases. However, the Department employs mitigation experts who offer technical guidance on mitigation issues and alternatives upon request.

611. COMMENT: N.J.A.C. 7:7A-15.8(f) establishes that the Department will determine on a case-by-case basis the number of credits which must be purchased. This is inconsistent with the rule summary where it is noted that this section provides for mitigation through credit purchase of two credits for each acre disturbed. The rules should be consistent with the 2:1 criteria except in those cases where you can demonstrate equal ecological value. (34)
RESPONSE: The commenter is correct that the summary contained an error. The Department seriously considered assigning a 2:1 ratio for all credits. However, after exploring the possibility, the Department concluded that mitigation banks vary too widely in the nature and amount of ecological value that results from them and that a standard ratio would not be sufficiently flexible to meet the FWPA requirement of equal ecological value in all cases. Therefore, the number of credits which must be purchased will be determined on a case-by-case basis, as stated in N.J.A.C. 7:7A-15.8(f).

612. COMMENT: N.J.A.C. 7:7A-15.8: We recommend on-site mitigation at a ratio of 1 acre created per 1 acre disturbed (enhancement mitigation ratio determined on a case by case basis). Creation of wetlands of similar resource value is assumed. Purchase of off site credits from a bank located at a previously disturbed site in the same or adjacent HUC 11 should be at a ratio of 1:1 but all banked wetlands at previously disturbed sites should be of enhanced habitat quality. (40)
RESPONSE: It is generally acknowledged in the scientific community that creation of wetlands is difficult and rarely, if ever, results in wetlands of equal

value to undisturbed natural wetlands. Therefore, the one to one ratio for creation that the commenter suggests would not meet the FWPA requirement of equal ecological value. Regarding the ratio of mitigation bank credits that should be required, mitigation banks vary widely in the nature and amount of ecological value that results from them and a standard ratio would not be sufficiently flexible to meet the FWPA requirement of equal ecological value in all cases. Therefore, N.J.A.C. 7:7A-15.8(f) provides that the Department will determine on a case-by-case basis the number of credits required to ensure that mitigation results in wetlands of equal functions and values to those lost.

7:7A-15.9 Requirements for upland preservation

613. COMMENT: N.J.A.C. 7:7A-15.9: The FWPA says "the applicant may also donate land as part of the contribution if the Mitigation Council determines that the donated land has potential to be a valuable component of the freshwater wetlands ecosystem." It does not specify that the land be upland and not wetland. (38)
RESPONSE: The commenter has apparently confused the provisions for land donation with the provisions for upland preservation. The mitigator has the option, within the applicable limits at N.J.A.C. 7:7A-15.5 or 7:7A-15.6, to donate wetlands or uplands in accordance with N.J.A.C. 7:7A-15.22, or to preserve uplands in accordance with N.J.A.C. 7:7A-15.9. Both mitigation alternatives are authorized under N.J.S.A. 13:9B-13c, and they are very similar.

614. COMMENT: N.J.A.C. 7:7A-15.9: We applaud the Department's flexibility in allowing valuable uplands areas to be preserved for mitigation. This recognizes the overall importance of valuable habitats within the State and how protecting upland habitats adjacent to wetlands represents a greater gain than either wetlands or uplands alone. (46)
RESPONSE: The Department appreciates this comment in support of the rules.

615. COMMENT: The preservation of uplands does not meet the regulatory goal of no net loss as defined by the EPA in its statements and guidance, and we would therefore question the propriety or whether it is proper to include N.J.A.C. 7:7A-15.9 to allow people to preserve uplands off-site as mitigation. (1,19)
RESPONSE: Preservation of uplands as a mitigation option is required under N.J.S.A. 13:9B-13c, although the Department does not favor this form of mitigation if other options are available. The Department believes that its freshwater wetlands regulatory program is consistent with the Federal policy. The State of New Jersey has adopted a goal of no net loss of wetlands, although this is not mandated by the FWPA. However, the Department's wetlands regulatory program is not intended to be the State's sole or even primary vehicle for meeting the goal of no net loss of New Jersey wetlands. It is intended to preserve the State's freshwater wetlands from unnecessary or undesirable alteration or disturbance by the systematic review of activities in and around wetlands. See N.J.S.A. 13:9B-2. The Department is pursuing the goal of no net loss through various avenues, including partnerships with other agencies and the development of programs under its strategic plan. In addition, the recently enacted open space initiative (Garden State Preservation Trust Act, P.L. 1999, c. 152, N.J.S.A. 13:8C-1 to 13:8C-42) is expected to increase wetlands acreage through the acquisition

of wetlands that have been drained or disturbed (primarily through farming), but which will revert to wetland conditions if left alone.

616. COMMENT: N.J.A.C. 7:7A-15.9(c)(1): We are puzzled by the statements made in this section. First of all, it is not a fact that uplands preservation, unlike other mitigation alternatives, does not replace the wetland values and functions destroyed by a disturbance. An upland may not replace the structural elements of a wetlands but given the universal nature of many ecological functions provided by diverse habitats (shelter, food source, water retention, nutrient cycling, etc.), there is no basis in fact for the statement made in this section. We recommend that the Department modify this statement to note that structural elements of wetlands may not be fully mitigated by an upland area, but that some of the ecological functions and values will be evaluated for their commonality in determining mitigation actions. (46)
RESPONSE: The provision has been clarified on adoption to indicate that, while preservation of uplands can be very beneficial in that it can protect the integrity of nearby wetlands and increase their values and functions, uplands preservation will not directly replace the lost wetland functions and values.

617. COMMENT: In reference to N.J.A.C. 7:7A-15.9(c)(1), it is unclear how the Department derived the requirement for 5 acres as mitigation. We recommend that the scientific information (publications, for example) be referenced for this statement since we are unaware of data that would support this requirement. (46)
RESPONSE: This provision provides a minimum size for preserved uplands, in order to ensure that the preserved upland is large enough to provide the increase in values and functions necessary to offset the wetland functions and values being lost through permitted activities. As discussed in the response to comment 591 above, it has been the Department's experience that the benefit of preserving less than five acres is minimal. Like large wetland sites, large areas of preserved upland benefit environmentally from their tendency to be near other preserved tracts, which provide seeds for native vegetation, and encourage use of the site by a greater diversity of species. In addition, many of the practical and logistical advantages of larger wetland mitigation sites also apply to larger upland mitigation sites, including the effort required to demonstrate equal ecological value, the tendency of smaller sites to be forgotten and become neighborhood dumping grounds, and the difficulty of finding an agency or conservancy to accept long term responsibility for the site.

7:7A-15.10 Conceptual review of a mitigation area

618. COMMENT: N.J.A.C. 7:7A-15.10 to 15.16 will insure that the applicant will have little incentive to look for mitigation sites within the affected watershed. (38)
RESPONSE: It is not clear why the commenter believes these application requirements will affect where an applicant seeks a mitigation site, since the information requirements do not differ based on whether or not mitigation is located within the watershed in which a permitted disturbance occurs.

619. COMMENT: N.J.A.C. 7:7A-15.10(a) and (d) "strongly recommends" applicants obtain the Department's conceptual review of potential mitigation areas. Yet the

proposal states that the guidance issued will be non-binding. If the Department is serious about strongly recommending this up front review, any guidance given should be binding. If the guidance is non-binding there is little reason for an applicant to participate. (34)
RESPONSE: The Department's experience has been that many applicants find conceptual review very helpful, even without a binding result. Until the Department receives a complete mitigation proposal, it cannot provide a final decision as to whether the proposed mitigation will meet the requirements in the rules.

620. COMMENT: N.J.A.C. 7:7A-15.10(a): The conceptual review of a mitigation area must include not only the applicant and the Department, but also a member of the watershed management area with knowledge of the affected watershed's mitigation inventory. (38)
RESPONSE: While the Department welcomes input from local groups with knowledge of an area, the Department cannot include all of these persons in every conceptual review. Instead, every permit application requires notice to the environmental commission and planning board of the municipality in which a permitted disturbance will occur. Local people with knowledge of the area can follow the progress of an application through contact with municipal officials and Department staff, and through the DEP Bulletin, and can comment to the Department on the project and its mitigation component. In addition, all permit files are public information, including the mitigation aspects of each project, and are available for review upon request.

7:7A-15.11 Basic requirements for all mitigation proposals

621. COMMENT: N.J.A.C. 7:7A-15.11(a)1: The mitigation proposal is required to be submitted 90 days prior to the start of the authorized activities. The Department states that authorized permit activities cannot begin until the mitigation proposal is approved and the mitigation has begun. Ninety days provides an adequate amount of time for the Department to review and approve the mitigation proposal, therefore, this section should also mandate that the Department should work towards having an approval within these 90 days so that the permitted activities could begin as scheduled. Start of the mitigation should also be provided some flexibility as to what is appropriate based on the mitigation activities. Planting a wetland area may not be appropriate in January but would be more successful if it was completed in spring. (46)
RESPONSE: Mitigation proposals vary tremendously in size, complexity, site conditions and other parameters. This results in a wide variation in the amount of time required for the Department to review mitigation proposals and to determine whether a mitigation proposal meets FWPA requirements. Therefore, the Department cannot set a standard time limit that will apply to all mitigation proposals. The Department offers a conceptual review process under N.J.A.C. 7:7A-15.10, which is intended to provide guidance early in the process, reducing the total amount of time required for a final decision on the mitigation proposal.

622. COMMENT: N.J.A.C. 7:7A-15.11(a)1 requires that for an individual permit, the mitigation must begin at the same time as the permitted activities. However, in

many cases this is not practicable or possible on transportation projects. The proposed regulations should have more flexibility and should recognize that there may be multiple contracts on a project, and the mitigation may not be possible or desirable to implement in the beginning of a project. (23)
RESPONSE: The requirement that mitigation be performed prior to or concurrently with permitted activities is a longstanding requirement, found in the former rules at N.J.A.C. 7:7A-14.1(c). This minimizes delay between the permitted loss of wetlands values and the creation of those values through mitigation. Without this requirement, the mitigation will not meet the FWPA requirement of equal ecological value. Permit applicants must plan mitigation as thoroughly and carefully as they plan permitted activities. If this is done, there should be no problem in meeting the rule's requirement.

623. COMMENT: N.J.A.C. 7:7A-15.11(c)5 prohibits use of areas which contain hazardous contamination as possible mitigation sites. This provision should be deleted as it is inconsistent with the State government's "brownfields" and urban open-space initiatives and could preclude use of sites which would otherwise be good sites. Sites with low levels of contamination or historic fill are examples of such sites. In these cases the contamination would not affect the function or value of the wetland and therefore should be allowed as mitigation sites. (34, 40)
RESPONSE: The provision does not prevent use of a brownfield site for mitigation, if the site has been previously developed in the past in such a way that no hazardous contamination has been placed on the site, or if the site has been contaminated in the past but has been cleaned up so that there is no danger of reintroduction or exposure of hazardous contamination. See new N.J.A.C. 7:7A-15.4(h). At a minimum, the site must be the subject of a No Further Action letter from the Department's Site Remediation Program issued in accordance with N.J.A.C. 7:26C, and further assurances may also be required in accordance with N.J.A.C. 7:7A-15.4(h).

624. COMMENT: N.J.A.C. 7:7A-15.11(c)--This proposed section requires that in order to demonstrate that a mitigation alternative is not feasible, the applicant has to identify at least six potential areas upon which the mitigation could be performed. Some additional guidance on this is needed, as it is not clear how this fits in with the priorities specified for mitigation. For example, on projects classed as larger disturbances, onsite mitigation is preferred. How do you evaluate six properties that are to be considered onsite? (23)
RESPONSE: The rule has been clarified on adoption to indicate that this provision applies only to the selection of a site for offsite mitigation.

625. COMMENT: N.J.A.C. 7:7A-15.11(c): The Department states that at least six potential areas be provided upon which the mitigation alternatives might be performed. We suggest that a minimum of three alternatives be presented. In many cases, feasible alternatives may be limited. Searching and evaluation of additional alternatives with less likelihood of success only lengthens the process, and provides little useful information. (46)
RESPONSE: The Department's experience with certain permittees has been that the permittee is interested in pursuing only a particular mitigation alternative and so attempts to demonstrate that other mitigation alternatives are not practical or feasible, or makes no meaningful effort to find suitable sites. Typically, these permittees either state that there are no sites available that are suitable for these

other mitigation alternatives, or list possible sites that are clearly unsuitable, such as a site perched on the side of a cliff with no water nearby. The adopted rule requires that six suitable sites be presented, in order to ensure that the permittee has thoroughly investigated the possible sites. Although in some cases more sites would be desirable in order to ensure that possible sites were not missed, the Department believes that six is adequate, and that the provision strikes a balance between the need for a thorough investigation of possible sites, and the burden on the applicant and the Department of evaluating multiple sites. Further, the provision provides guidance for applicants regarding the characteristics of a suitable mitigation site.

7:7A-15.12 Contents of a mitigation proposal

626. COMMENT: N.J.A.C. 7:7A-15.12 establishes the required contents of a mitigation proposal. The required submittal includes what could be very onerous and detailed information to determine a loss of functions and values caused by the disturbance for which mitigation is proposed. Why would you need this information for the purchase of credits? (34)
RESPONSE: The FWPA requires that all mitigation provide equal ecological value to the wetlands lost through the disturbance for which the mitigation is intended to compensate. An evaluation of the loss of functions and values caused by the disturbance is necessary to determine the ecological value of the wetlands lost, so as to determine how much and what type of mitigation should be required in order to ensure equal ecological value. This applies to all types of mitigation, including credit purchase.

627. COMMENT: N.J.A.C. 7:7A-15.12(d)8. We support the flexibility of using scientific literature to demonstrate ecological value and mitigation ratios. (46)
RESPONSE: The Department appreciates this comment in support of the rules.

628. COMMENT: In N.J.A.C. 7:7A-15.12(d)14, there is a reference to obtaining a No Further Action Letter for a mitigation site. I believe this should instead be a Letter of Non-Applicability. (29)
RESPONSE: Letters of non-applicability are limited to a subset of contaminated sites, and do not indicate whether there is contamination on a site, or the level of contamination that may be present. There are many contaminated sites that are covered by a letter of non-applicability, but which nonetheless are contaminated to a degree that makes them unsuitable for mitigation. Therefore, the broader term is retained on adoption.

629. COMMENT: N.J.A.C. 7:7A-15.12(d)14. Although we recognize the Department's concerns in excluding heavily contaminated property from satisfying mitigation requirements, we do not believe that a "No Further Action" letter from the Department's Site Remediation Program is necessary for two primary reasons. First, not all potential upland preservation sites are captured by the Site Remediation Program and adding these sites could markedly increase the work load of an over-burdened Department. Second, the time and cost involved in getting a site through the agency are extremely prohibitive given the current system. Instead of a No Further Action letter, the regulated party should be permitted to provide a signed affidavit stating that there is no basis for assuming

any significant contamination on the property based on the known uses of the property proposed for preservation. (46)
RESPONSE: The provision has been modified on adoption to indicate that the No Further Action (NFA) letter will only be required where there is reason to suspect contamination. However, where contamination is suspected, the time and cost required for a NFA letter are justified in order to ensure that an area does not require remediation. A NFA letter is better than an affidavit from the applicant. A NFA letter represents a formal determination regarding the condition of the site, made by specialists in the Department's Site Remediation Program after a thorough review of the site and its history, whereas an affidavit could be submitted by an applicant with very little expertise in this area and/or with no knowledge of the history of the site.

7:7A-15.13 Financial assurance for a proposal to restore, create, or enhance wetlands

630. COMMENT: The rules should state that all financial responsibility mechanisms shall be established with a State or national bank, savings and loan association, or other financial institution, licensed in this State. In the case of letters of credit, the letter of credit must be issued by an entity which has authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or State agency. In the case of a surety bond, the surety bond must be issued by a surety company registered with this State. (20)
RESPONSE: N.J.A.C. 7:7A-15.13(b) already includes a requirement that a firm providing financial assurance must be licensed in New Jersey. This provision is broad enough to enable the Department to impose the requirements that the commenter suggests.

631. COMMENT: A general suggestion on the financial assurance language to make it more enforceable: The financial responsibility mechanism shall become effective at least 60 days prior to initiation of construction of the mitigation bank, or as otherwise required by the mitigation bank permit prior to initiation of bank construction. (20)
RESPONSE: N.J.A.C. 7:7A-15.23(e)1ii has been clarified on adoption to indicate that no credits will be released until adequate financial assurance has become effective.

632. COMMENT: A general suggestion on the financial assurance language to make it more enforceable: The financial responsibility mechanisms shall not expire or terminate prior to completion of the applicable permit conditions. (20)

633. COMMENT: A suggestion on the financial assurance language to make it more enforceable: The financial responsibility mechanisms shall name the Department as sole beneficiary or shall be payable to the Department, and be retained by the Department, if it is of a type which is retained by the beneficiary according to industry standards. (20)

634. COMMENT: A general suggestion on the financial assurance language to make it more enforceable: If bonds or an irrevocable letter of credit are used as the financial mechanism, a standby trust fund shall be established in which all

payments under the bonds or irrevocable letter of credit shall be directly deposited. (20)

635. COMMENT: A general suggestion on the financial assurance language to make it more enforceable: No person shall withdraw or transfer any portion of the monies provided for financial responsibility without first obtaining prior written approval from the Department. (20)

636. COMMENT: A general suggestion on the financial assurance language to make it more enforceable: The financial responsibility mechanisms shall not be terminated or canceled by the banker. Within 90 days of receipt of a notice of cancellation of a financial responsibility mechanism or other actual or constructive notice of cancellation, the banker shall provide an alternate financial responsibility mechanism which meets the requirements of this section. (20)
RESPONSE to comments 630 through 636: The Department appreciates these suggestions and will consider them in developing financial assurance documents. However, the Department believes that the details and phrasing of financial assurance documents are not appropriate for inclusion in the rule, but instead should be handled on a case-by-case basis, in consultation with legal counsel.

637. COMMENT: N.J.A.C. 7:7A-15.13(b) - Will the Department provide suggested acceptable draft language for letters of credit and other financial assurances? This can save review time later on. (20)
RESPONSE: The Department is currently developing model financial assurance documents including model letters of credits, and will make these models available to the public as soon as possible.

7:7A-15.14 Protecting a mitigation area from future development

638. COMMENT: N.J.A.C. 7:7A-15.14. We recognize the importance of protecting the mitigation site from future development. However, the proposed restrictions should be written so that routine maintenance and needed repairs can be performed without encountering problems with deed restrictions. If activities that are regulated or prohibited under the FWPA must be conducted, these should be allowable provided the Department issues the required permit. (23)
RESPONSE: The standard conservation restriction that the Department uses allows maintenance as necessary to ensure that the mitigation area continues to meet the requirements of the approved mitigation plan. Therefore, the Department does not believe that it is necessary to provide in the rule for the issuance of a permit for regulated activities in order to ensure that such maintenance can be performed.

639. COMMENT: N.J.A.C. 7:7A-15.14(g) - Prior to the recording of the conservation restriction, the Department should require a disclosure of all encumbrances on the land, via title insurance or other acceptable mechanism. Any encumbrances that adversely affect the functioning of the proposed mitigation project should be extinguished prior to acceptance of the conservation easement. A statement regarding existence of any hazardous waste or other contaminants should also be required. (20)

RESPONSE: Several changes have been made to the rule to address the issue of encumbrances on land used for mitigation. N.J.A.C. 7:7A-15.4(e) has been clarified to require that an encumbrance must be extinguished or the applicant must demonstrate that the encumbrance will not inhibit compliance with mitigation requirements. N.J.A.C. 7:7A-15.8(k) has been clarified on adoption to indicate that a portion of a mitigation area that is subject to an encumbrance will not be counted in determining the total area of mitigation unless the applicant demonstrates that the encumbrance does not inhibit compliance with mitigation requirements. Further, a clarification to the requirements for mitigation proposals has been added at N.J.A.C. 7:7A-15.12(d)1, indicating that the Department will required a No Further Action letter only if there is reason to suspect contamination in the mitigation area. A clarification to N.J.A.C. 7:7A-15.14(f) requires that the conservation restriction include information regarding encumbrances and contamination.

640. COMMENT: N.J.A.C. 7:7A-15.14(g) requires that a conservation restriction include a survey and metes and bounds description for the entire mitigation project, including any transition area required. For properties that are separate lots, why is the metes and bounds description necessary? It could be very expensive depending on the size of the lot. What is the justification for requiring the metes and bounds as opposed to a lot description? (34)
RESPONSE: The commenter appears to be asking whether, if the boundaries of a mitigation area are coextensive with the boundaries of a municipal lot, the metes and bounds description could be omitted from the conservation restriction. A municipal tax lot is inadequate to definitively identify the area covered by the conservation restriction. Only a survey is sufficiently accurate. The Department has in the past encountered problems with adjacent property owners arguing that mitigation was built on their property. Further, a municipal tax lot can be easily changed by subdivision, or by municipal renumbering, and the conservation restriction is not likely to be updated to reflect such changes, leading to confusion over what area is protected. With the metes and bounds description the Department has the most up-to-date and accurate legal description of the area covered by the conservation restriction.

7:7A-15.15 Department review of a mitigation proposal

641. COMMENT: N.J.A.C. 7:7A-15.15 requires the mitigation proposal to be submitted 90 days prior to the start of the authorized permit activities. Under N.J.A.C. 7:7A-15.15(c), the Department shall review the proposal for completeness within 30 days of receipt. The remaining 60 days is still adequate time for the Department to work to achieve completeness and consult with USEPA to approve the proposal. We request that N.J.A.C. 7:7A-15.15(c) contain an approval time that falls within the 90 day submittal time and will coincide with the scheduled activities. Without enforced approval dates, obtaining approval from the Department will be difficult and result in unreasonable delays in the permitted activities and mitigation. (46)
RESPONSE: Mitigation proposals vary tremendously in size, complexity, site conditions and other parameters. This results in a wide variation in the amount of time required for the Department to review mitigation proposals and to determine

whether a mitigation proposal meets FWPA requirements. Therefore, the Department cannot set a standard time limit that will apply to all mitigation proposals. The Department offers a conceptual review process under N.J.A.C. 7:7A-15.10, which is intended to provide guidance early in the process, reducing the total amount of time required for a final decision on the mitigation proposal.

7:7A-15.16 Requirements that apply after the Department approves restoration, creation, or enhancement

642. COMMENT: N.J.A.C. 7:7A-15.16 through 15.18: We strongly support the requirements that apply after approval of mitigation. (15)
RESPONSE: The Department appreciates this comment in support of the rules.

7:7A-15.17 Requirements that apply after the Department approves credit purchase or uplands preservation

643. COMMENT: N.J.A.C. 7:7A-15.17(c)2 provides that for upland preservation the land must be transferred to a government agency or charitable conservancy and there must be a maintenance fund determined by agreement between the mitigator and the agency or conservancy. To avoid unnecessarily high or inadequate maintenance funds, the proposal should establish guidelines for determining what is an acceptable amount for the maintenance fund. (34)
RESPONSE: The Department considered establishing standards for the amount of a maintenance fund. However, there is such a wide variation in mitigation sites, the organizations that accept them, and the costs of maintenance that the Department believes this should be decided on a site by site basis between the mitigator and the entity that accepts the property.

7:7A-15.18 Requirements that apply after the Department approves mitigation through a monetary contribution

644. COMMENT: N.J.A.C. 7:7A-15.18(c)2 is an especially important provision that we strongly support. (15)
RESPONSE: There is no provision with this citation.

7:7A-15.19 Requirements that apply after the Department approves mitigation through a land donation

645. COMMENT: N.J.A.C. 7:7A-15.19(c)2 provides for a maintenance and supervision fund for land donation. If the land is merely being donated, why are such funds necessary? Such funds would only be necessary where there was prior maintenance and supervision for the same parcel of property. (34)
RESPONSE: It is quite common for unattended land to be subject to dumping, littering, or other inappropriate uses. In order to ensure that a mitigation area

functions at the level for which it was approved, an organization that accepts the responsibility for a mitigation area should patrol the area regularly to detect any misuse of the property. They should maintain signs, fences, or safety barriers; remove litter and materials dumped on the property; and ensure that environmental conditions on site are consistent with the restrictions imposed with the land donation. Further, these organizations must be able to protect themselves from legal liability in the event that someone is injured on the property. Since the organizations accepting these properties often do not have funds for these activities, they often cannot properly oversee and maintain the property without additional funds, and usually require a maintenance fund as a condition of accepting a property. The rule provides for such a maintenance fund.

7:7A-15.21 Council review of a proposed monetary contribution

646. COMMENT: If a monetary contribution or land donation is approved by the Department, the matter should not have to be approved by the Mitigation Council unless the applicant wants to use the Council to review a proposal that the Department does not approve. (29)
RESPONSE: The Department and the Wetlands Mitigation Council approve different aspects of a monetary contribution or land donation. For a monetary contribution, the Department determines under N.J.A.C. 7:7A-15.5 or 15.6 whether the applicant may use monetary contribution as a mitigation alternative for the particular disturbance, or whether the applicant must use some other mitigation alternative. To do this, the Department determines whether the applicant has demonstrated that mitigation alternatives other than monetary contribution are not practicable or feasible (see N.J.A.C. 7:7A-15.5(f) and 15.6(f)). Once the Department has determined that a monetary contribution is an acceptable mitigation alternative for that particular disturbance, the Council determines the amount of the monetary contribution in accordance with N.J.A.C. 7:7A-15.21(b) and (c). This is consistent with the FWPA at N.J.S.A. 13:9B-13c. A similar system applies to land donations. First, the Department must determine that a land donation is an acceptable mitigation alternative for the disturbance, using the standards at N.J.A.C. 7:7A-15.5 and 15.6. Once the Department has approved the use of a land donation as the mitigation alternative for the disturbance, the Wetlands Mitigation Council determines whether the land proposed for donation has potential to be a valuable component of the freshwater wetlands ecosystem, as provided by the FWPA at N.J.S.A. 13:9B-13c. In the case of both monetary contributions and land donations, the Council considers the Department's recommendations in making its determinations, but is not bound by the recommendations.

647. COMMENT: N.J.A.C. 7:7A-15.21: The Mitigation Council should determine the monetary contribution based on the cost of mitigating in the damaged watershed, and those monies should be designated for mitigation purposes in the damaged watershed lest we improve one watershed at the expense of another. (38)
RESPONSE: Under the FWPA at N.J.S.A. 13:9B-13c, the amount of a monetary contribution must be the lesser of two costs: the cost to buy a degraded wetland and enhance it, or to buy an upland and create wetlands. When determining this amount, the Wetlands Mitigation Council requires an appraisal of the lot upon

which the permitted activities for which monetary contribution serves as mitigation will occur. This ensures that the land costs used in determining the amount of the monetary contribution reflect conditions in the watershed where permitted activities will occur. When considering whether to fund a wetland restoration proposal, the Council attempts to direct the mitigation fund dollars to watersheds in which permitted wetland losses have occurred. However, the Council is not required to fund mitigation in the same watershed in which the loss has occurred.

7:7A-15.22 Council review of a proposed land donation

648. COMMENT: N.J.A.C. 7:7A-15.22(b) - Include a statement here about easements or other encumbrances. (20)
RESPONSE: N.J.A.C. 7:7A-15.22(c) has been clarified so that any encumbered portion of a donated parcel is not included in calculating the amount of land unless the applicant demonstrates that the encumbrance will not inhibit compliance with the mitigation requirements of the chapter.

649. COMMENT: N.J.A.C. 7:7A-15.22(b)1. The requirement to not consider land less than five acres should be deleted. We understand the desire to create large tracts of land for conservation. However, the rule should allow for site-specific determinations by the Department or Council as to whether a proposed land contribution, regardless of its acreage, is considered valuable. Areas of less than five acres can provide valuable ecological functions and serve as important islands or refuge for plants and wildlife, especially in developed areas. Requiring that all land contributions be greater than five acres will prohibit responsible parties with small mitigation requirements (e.g., less than five acres) from participating in the land contribution program and eliminates from consideration properties of less than five acres that may be of value. In addition, future conservation of larger tracts of valued land that is currently divided among multiple owners may be possible by allowing multiple contributions over time, each of less than five acres. (46)
RESPONSE: The FWPA does not favor land donations, and in fact requires that land donation be accepted only if all other forms of mitigation are not feasible. See N.J.S.A. 13:9B-15c. Further, land donation is only permissible if the Wetlands Mitigation Council finds that the land to be donated has the potential to be a valuable component of a wetland or surface water ecosystem. The rule reflects the Council's assessment of the types of land that would meet this standard. In developing this assessment, the Council took into consideration many factors, including the location of a property, its environmental benefits both as a property and as a component of the larger ecosystem, and the likelihood of finding a conservation agency that will accept and maintain the property after the mitigation is accomplished. The Council adopted the 5 acre criterion as guidance and the rule codifies the Council’s guidance.

650. COMMENT: N.J.A.C. 7:7A-15.22(b)1. The prohibition of land contributions that "contains solid or hazardous waste, or water or soil pollution" is unreasonable due to ubiquitous distribution of contaminants due to anthropogenic sources. Much of the United States has been impacted by anthropogenic releases that have altered the “background” concentrations of many chemicals of concern (COCs). For

example, the historical spraying for agricultural purposes or pest control has left residual contamination of pesticides and herbicides worldwide. In addition, the atmospheric deposition associated with facilities such as coal-burning power plants and municipal waste incinerators has resulted in concentrations of mercury and other bioaccumulating COCs at concentrations of potential concern throughout the United States even in areas deemed to be “pristine.” The State of New Jersey is no exception in these respects. (46)
RESPONSE: The commenter is apparently referring to N.J.A.C. 7:7A-15.22(b)2, which prohibits the donation of land that is "adversely affected by" such waste. Land donation is the least favored mitigation option under the FWPA. Before accepting a land donation, the Council must ensure that the land has the potential to be a valuable component of a wetland or surface water ecosystem (see N.J.S.A. 13:9B-13c). Further, donated land is open to the public after mitigation is complete, and the Council must consider the potential for increased exposure of contaminants to the water column, wildlife and humans. This provision is necessary to provide the Council with the authority to carry out the mitigation requirements of the FWPA.

651. COMMENT: N.J.A.C. 7:7A-15.22(b)2. We understand the Department’s desire to exclude degraded or impacted property, and the desire to conserve valued wetlands. However, the rule should recognize the intrinsic ability of wetland ecosystems to naturally remediate themselves. Without this recognition, vast acres of wetlands that could be conserved will not be available for contribution or for the mitigation program. The Department or Council should have the authority and flexibility to accept land contributions based on ecological benefit, regardless of the presence or absence of anthropogenic impact. (46)
RESPONSE: The cited provision as proposed and adopted already gives the Council the suggested flexibility in evaluating property for land donation. The provision does not exclude from consideration all land that contains or has contained waste or pollution. Rather, it excludes only land that is *adversely affected* by waste or pollution (emphasis added). Thus, if a wetland with past pollution has naturally remediated itself to the point where it is not adversely affected by that pollution, it may be considered for land donation.

7:7A-15.23 Mitigation banks

652. COMMENT: How a Mitigation Service Area will be determined is not defined. Guidance should be provided in the rules. (20)
RESPONSE: The service area is determined by the Wetlands Mitigation Council on a case by case basis, with the recommendation of the Department. Generally, the Department recommends that a bank service area be coextensive with the Watershed Management Area within which the bank is located. However, the size of a service area may depend on many factors, including where the bank is located, the type of mitigation being proposed, and where permitted activities are concentrated.

653. COMMENT: It should be made clear that mitigation credits are transferable. That is, can they be sold and resold until they are used to offset an impact. (20)

RESPONSE: Credits are transferable and may be sold and resold until they are used for mitigation for a permitted activity. However, credits may only be used for mitigation in accordance with the mitigation requirements in the rules. If an individual purchases credits prior to the Department's determination that the credits may be used as mitigation for a particular permitted disturbance, the individual takes the risk that the credits will not be usable and the individual may have to try to find another buyer for the credits or may be required to perform another form of mitigation.

654. COMMENT: It should be permissible to construct a mitigation bank in phases if each phase will stand alone, ecologically and financially. (20)
RESPONSE: The rules do not prohibit the construction of a mitigation bank in phases, and the Wetlands Mitigation Council has in the past approved banks that are constructed in phases. However, credit release will be based on the standards at N.J.A.C. 7:7A-15.23(e) and therefore a phased bank will have fewer credits available at the outset.

655. COMMENT: Credit tracking guidelines should be established and a central credit ledger should be maintained by the Department. (20)
RESPONSE: The Department tracks credits and maintains a ledger of credits sold for each bank approved by the Council. In addition, a banker must notify the Department of each individual credit transaction as it occurs, and must submit a yearly report of all credit transactions. This ledger is available from the Department upon request.

656. COMMENT: N.J.A.C. 7:7A-15.23. Many mitigation bank costs, including site acquisition, engineering, legal design, construction, etc., occur in the first phases of the project. The release schedule in the proposal would restrict bankers' abilities to realize an acceptable rate of return over time for the bank. The proposed release schedule allows for 40% of credits to be sold upon the successful completion of planting. That assumes that all the other costs have been incurred. Instead, we would suggest a release schedule such that 25% of credits are awarded after all approvals had been completed, 30% released after successfully establishing hydrology, that is doing all of the earth work, and 25% after successfully completing the planting. This would allow for 80% of the credits to be sold after the costs have been incurred. Then 5% should be released after the first year of monitoring, 5% after the 3rd year of monitoring, and 10% after the 5th year of monitoring. (17, 19, 31, 42)
RESPONSE: This credit release schedule in the rules is intended to balance the need to ensure successful bank construction against the need for bankers to have some financial return to support the progress of bank construction. The Wetlands Mitigation Council has experienced problems in the past when credits were released too early in the process of completing a mitigation bank. The credit release schedule in the adopted rules is similar to that established by the Meadowlands Interagency Mitigation Advisory Committee (MIMAC) for banks in the area of jurisdiction of the Hackensack Meadowlands Development Commission. MIMAC uses the Federal Mitigation Guidelines (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 at 60 Fed. Reg. 58605 when reviewing and approving a wetland mitigation bank. This credit release schedule will ensure that credits purchased for mitigation

reflect actual gains in wetlands values and functions before sale of significant amount of credits

657. COMMENT: N.J.A.C. 7:7A-15.23(e) - This credit release schedule is a good balance between the financial requirements of a mitigation banker and the ecological requirements of the Department. (20)
RESPONSE: The Department appreciates this comment in support of the rules.

658. COMMENT: Our farm land adjoins a mitigation bank that is currently under construction. We had farmed the land that the mitigation bank is on before its conversion to a wetlands mitigation bank. An application will soon be submitted for a new bank on property that is currently part of our farm. Once the bank is built, it will be deed restricted, preventing any building or development. We are aware that your guidelines require that once the wetlands bank is built and the credits are sold, the property should be dedicated to a non profit conservation organization. For the best interest of the bank, the Council should consider allowing us to retain ownership of the new bank since the continuing stewardship of this bank next door to our ongoing farm operation is of great importance to us, and even a greater importance to the Department. No one can watch a property like this better than the neighbor next door. We see people dumping, and in many cases have called the police and helped prosecute some of these dumpers. By contrast, the township recently took over possession of a property near us on a tax default. The township is not there 7 days a week, and dumpers dump when people are not looking. Allowing bankers to keep ownership of a bank would be important for the long term maintenance and for the well-being of the mitigation bank. (41)
RESPONSE: All mitigation sites, including bank properties and land donations, must be protected as mitigation sites in perpetuity. The Wetlands Mitigation Council believes that this can best be accomplished through the donation of the land to a charitable conservancy or a governmental agency whose goal is to manage land for the public good in accordance with the conservation restriction. Too often when mitigation land is managed by a private landowner that is not engaged in the practice of conservation, complications arise when the land is transferred or devised. Further, private landowners often fail to open the land to the public for uses such as environmental education, bird watching, etc. Finally, the rule includes a new requirement for a maintenance fund that will prevent the types of problems the commenter mentions.

7:7A-15.25 Application for Wetlands Mitigation Council approval of a mitigation bank

659. COMMENT: N.J.A.C. 7:7A-15.25(b)4 - Include a statement regarding hazardous waste, pollution, etc. and a statement regarding easements or encumbrances. (20)
RESPONSE: The rule as proposed and adopted includes a requirement at N.J.A.C. 7:7A-15.25(b)4iv that the applicant provide information on hazardous waste and pollution. A clarification has been added at N.J.A.C. 7:7A-15.25(b)4ii regarding easements and other encumbrances.

660. COMMENT: N.J.A.C. 7:7A-15.25. The application for a mitigation bank is required to be submitted to the Council at least 60 days before the Council meeting at which the application will be discussed. Similar to the approval of the mitigation proposal, an approval timeframe should be clearly stated so that the Council continues to work with the applicant regarding the necessary requirements and approval or denial of the application is provided by the Council in a timely manner. (46)
RESPONSE: Mitigation bank proposals, like other mitigation proposals, vary tremendously in size, complexity, site conditions and other parameters. This results in a wide variation in the amount of time required for the Wetlands Mitigation Council to review mitigation bank proposals and to determine whether a proposal meets the requirements of the FWPA. Therefore, the Council is not able to set one time limit that would be reasonable to apply to all mitigation proposals. However, staff continue to work with applicants to ensure timely submittal to the Council. Further, the Council offers a conceptual review process under N.J.A.C. 7:7A-15.25(a), which is intended to provide guidance early in the process, reducing the total amount of time required for a final decision on the mitigation bank proposal.

661. COMMENT: N.J.A.C. 7:7A-15.25. The requirements listed for final approval of a proposal for a mitigation bank are extensive and may be unnecessary and/or non-applicable for a given site and, thus, may place an undue burden on the applicant. We incorporate by reference our caution against regulatory lists or requirements without regard to site-specific conditions, contained in our comment to N.J.A.C. 7:7A-15. At a minimum, the wording "as applicable" should be added to the end of the text. (46)
RESPONSE: N.J.A.C. 7:7A-15.25(b) includes a list of the *types* of information that will be required by an application checklist. Not every item will be required for every mitigation bank. Rather, items required will vary according to the specifics of the proposed mitigation bank. This system will allow the flexibility for the Department to require only relevant information as part of the mitigation bank application.

SUBCHAPTER 16 ENFORCEMENT

662. COMMENT: The rules should narrow enforcement discretion with stricter criteria and a publicly visible enforcement process. (2, 12, 33)
RESPONSE: N.J.A.C. 7:7A-16.8, 16.9, and 16.10 (found in the former rules at N.J.A.C. 7:7A-17.4 and 17.5) set limits on the Department's enforcement discretion by providing a system by which penalties are determined. The adopted rules add further limits provisions which narrow enforcement discretion, set forth at N.J.A.C. 7:7A-16.6(c). The adopted rules also include provisions for public involvement in the enforcement process, at N.J.A.C. 7:7A-16.17(a)4, which provides for public hearing and comment on the Department's intent to issue an after the fact permit; and at N.J.A.C. 7:7A-16.18, which provides for, among other things, public notice and comment regarding proposed settlements of enforcement actions.

7:7A-16.6 Assessment, settlement and payment of a civil administrative penalty

663. COMMENT: N.J.A.C. 7:7A-16.6(c). We adamantly oppose this new provision that is meant to codify existing practice. It is diametrically contrary to the Freshwater Wetlands Protection Act. The law makes absolutely no provision for the amount of discretion provided here for settlement. The strength of the law largely lies in the unambiguous nature of its enforcement provisions. (11, 15, 38)
RESPONSE: The FWPA at N.J.S.A. 13:9B-21d states that "Any civil administrative penalty assessed under this section may be compromised by the commissioner upon the posting of a performance bond by the violator, or upon such terms and conditions as the commissioner may establish by regulation." The provisions of N.J.A.C. 7:7A-16 are the terms and conditions established by the Commissioner by regulation, to govern the settlement of penalties. These factors are consistently used in enforcement cases across the Department, and are designed to encourage violators to take active steps to comply with Department enforcement directives.

7:7A-16.17 "After the fact" permit

664. COMMENT: N.J.A.C. 7:7A-16.17(a): No after the fact permits should be issued for actions that could not be approved under this chapter. Instead, violators should be required to restore the site and pay significant penalties. (38)
RESPONSE: In some cases, restoration of a site can cause more environmental damage than leaving the area alone. Therefore, the FWPA specifically authorizes issuance of an "after the fact" permit in cases where "restoration of the site to its previolation condition would increase the harm to the freshwater wetland or its ecology." N.J.S.A. 13:9B-21h. In some cases, this will involve a project that could not have been approved under this chapter. The FWPA also requires, as a condition of an "after the fact" permit that the Department assess penalties against the violator.

Comments on application checklists

665. COMMENT: Application Checklist for an LOI : Item 3 states that an applicant for an LOI must submit verification that notice of the application has been published in a local newspaper. This notice requirement is nowhere found in the existing or proposed rules. This discrepancy should be corrected by deleting this provision from the checklist. (25)
RESPONSE: The Department agrees and has deleted this portion of item 3.

666. COMMENT: Application Checklist for an LOI : Item 11 asks in several places that the applicant submit a "site plan," but this term generally connotes a plan for development. A LOI simply addresses the presence, absence, or location of wetlands and other regulated features on a property and has nothing to do with any potential plan for development. I suggest that the term "site plan" be changed throughout this checklist to "property map" or "site map". (25)
RESPONSE: The Department will clarify this portion of item 11 to indicate that an LOI application need not show proposed activities.

667. COMMENT: Application Checklist for an LOI: Item 11 asks for soil logs describing, among other things, "depth to seasonal high water table". Neither the existing nor the proposed rules provide guidance as to how this depth is to be determined (e.g., monitoring, appearance of mottling, soil survey data). Furthermore, a seasonal high water table, although relevant for siting an on-site sewage disposal system, is irrelevant for wetland delineation purposes. Wetland hydrology is dependent on prolonged inundation or saturation during the growing season, and not on a seasonal high water table level. The Department should delete this provision from the checklist, or at minimum provide guidance as to how to make the determination and why this information is relevant. (25)
RESPONSE: Seasonal high water table is one criterion that can be used to determine the hydrology of the site, and delineators should look for indicators of seasonal high water table. If such indicators are encountered during soil borings, this must be presented as part of the soil log. However, the checklist has been clarified to indicate that such indicators may not be present in all cases and the data need only be presented when indicators are present.

668. COMMENT: Application Checklist for General Permit Authorization: Item 3 suggests that an applicant for any general permit must submit verification that notice of the project has been published in a local newspaper, and that if the project involves more than 10 acres of disturbance, notice must be published in a newspaper with regional circulation. Neither of these notice requirements is found in the rules. Newspaper notices are required only for specific projects, such as those that are linear development or for boardwalks and trails. This discrepancy should be corrected by deleting these provisions from the checklist. (25)
RESPONSE: This portion of Item 3 has been revised to indicate that a newspaper notice is required only if the general permit application is subject to the special notice requirements for linear developments at N.J.A.C. 7:7A-10.9(f).

669. COMMENT: Application Checklist for General Permit Authorization: It should be made clear in Item 3 whether the "10 acres of disturbance" refers to total project disturbance or disturbance within regulated areas. (25)
RESPONSE: This portion of item 3 has been deleted. The requirement for newspaper notice for a project disturbing more than 10 acres applies only to individual permits.

Summary of Agency-Initiated Changes:

1. At N.J.A.C. 7:7A-1.4, the Department has corrected a grammatical error in the definition of "discharge of dredged material by replacing "freshwaters" wetlands with "freshwater" wetlands.
2. At N.J.A.C. 7:7A-1.4, the Department has clarified the definition of "HUC 11" by adding further detail regarding how to obtain information on the boundaries of HUC 11s in New Jersey, and by deleting a reference to the USGS as a source of information.
3. At N.J.A.C. 7:7A-1.4, the phrase "or NRCS" has been added to the definition of "Natural Resources Conservation Service," to allow for use of this acronym in the rules.

4. At N.J.A.C. 7:7A-1.4, the definition of "vernal habitat" has been modified on adoption. First, the word "permanent" was added on adoption to item 1 of the definition. This reflects the fact that it is possible for a vernal habitat to have a temporary flowing outlet during heavy rain or flood events. Second, a change has been made on adoption to correct an error in the presumption proposed in item 2 of the definition. The presumption in the definition as proposed is that, if an area shows evidence of breeding by either an obligate or facultative species, the area is presumed to pond each year and to be fish free or to dry up each year. However, this presumption was intended to apply only to evidence of breeding by obligate species. An obligate vernal habitat species is one which can breed only in vernal habitats. A facultative species will often use vernal habitat for breeding, but can also use other types of habitats. The presumption reflects the fact that the species listed as obligate depend on vernal habitats for breeding, and cannot breed in other types of habitat. Therefore, if an area shows evidence of breeding by an obligate species, the area must be a vernal habitat, and the presumption that an area is ponded for at least two months and is fish free is appropriate. However, the presumption is not appropriate where only facultative species have been found. In those cases, the ponding of water and the lack of fish must be independently demonstrated. Further, applying the presumption to both types of species produces an illogical result, and renders the criteria at items 3 and 4 redundant. The proposed definition stated that an area must meet criteria at items 1 through 4, and that evidence of breeding that satisfies both prongs of item 2 creates a presumption that items 3 and 4 are satisfied. This renders items 3 and 4 unnecessary because any area that met the requirements at item 2 would be presumed to meet the criteria at items 3 and 4. Therefore, on adoption, the presumption is deleted from item 2 and is relocated to the opening part of the definition, and modified to apply only to evidence of breeding by obligate species. This change also ensures that the definition more closely comports with research on vernal habitat species. It would be very unlikely for an area to show evidence of breeding by obligate vernal habitat species unless the area also ponds each year and is free of fish or dries up each year. However, it would not be uncommon for an area to show evidence of breeding by facultative species and yet not meet the ponding and fish-free criteria.
5. The Department has modified the provisions governing the timing of a request for a hearing on a permit decision, set forth at N.J.A.C. 7:7A-1.7(d). The proposed provisions required that a person submit a hearing request within 30 days after the later of two possible dates – the date upon which the hearing requester received notice of the decision, or the date on which the decision was published in the DEP Bulletin. The provision has been simplified on adoption to require submittal of a hearing request within 30 days after notice of the decision is published in the DEP Bulletin. This change is based on two problems with the portion of the rule requiring the hearing request within 30 days after the person receives notice of the decision being appealed. First, the provision was intended to continue the scheme in the former rule and inadvertently changed it to a scheme that is unfair and difficult to administer. Second, it is extremely unlikely that this portion of the provision will ever come into play because publication in the DEP Bulletin will invariably occur later than the other date.

   As indicated in the proposal summary at 32 N.J.R. 2702, the proposed provision was intended to continue the substance of the former rules at N.J.A.C. 7:7A-8.10 (addressing hearings on letters of interpretation) and 12.7 (addressing hearings on individual permits), and add detail. However, the proposal rephrased the provisions

in such a way as to inadvertently change their meaning. The former rules at N.J.A.C. 7:7A-8.10 stated that:

> "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.

The former rules at N.J.A.C. 7:7A-12.7 stated that:

> "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 proposed provisions were clear and consistent regarding the submittal date within 30 days of publication in the DEPE (sic) Bulletin. However, they were not clear or consistent regarding the other submittal date. N.J.A.C. 7:7A-8.10 identified the date of the Department's decision as the start of the 30 day period for submittal of a hearing request, but gave no indication of how anyone other than the applicant would know this date (except through the DEPE Bulletin), thus implying that this date might apply only to the applicant. N.J.A.C. 7:7A-12.7 set the date at the date of receipt of the permit decision, even more strongly implying that this provision for the start of the 30 day submittal period applied only to the applicant.

As stated in the proposal summary at 32 N.J.R. 2702, the proposal was intended to continue the scheme found in N.J.A.C. 7:7A-12.7. However, throughout the proposed section, the Department also simplified the rule language by replacing "applicant or other affected party" with "person." This simplification changed the meaning of the provision in an unanticipated way. Rather than requiring submittal of a hearing request within 30 days after the <u>applicant</u> received notice of the decision, the rule as proposed would allow any person to submit a hearing request 30 days after <u>that person</u> received notice of the Department's decision. This effectively extends the hearing request submittal deadline indefinitely, because a person other than the applicant might receive notice of the Department's decision in any number of ways at any time, such as by passing the site while the work is proceeding and reading the posted notice required at N.J.A.C. 7:7A-13.1(d), or by reading a newspaper article published several months or even years after the permit was issued. This would leave an applicant who obtains a permit open to appeals long after the start of the permitted project, and does not merely continue the substance of the previous rules. Implementing the provision as proposed would also present a proof problem in determining when a person other than the applicant has received notice of the Department decision (other than through the DEP Bulletin), because the Department notifies only the applicant and the municipality of the issuance of a permit.

The second problem with the provision requiring submittal of a hearing request within 30 days of the later of these two dates is that it adds complexity with no real benefit. Because the permit decision will almost always appear in the DEP Bulletin after the applicant receives notice of the decision, there is no reason to include both dates. Upon making a final decision on an application, the Department sends a letter informing the applicant of the decision. Within a day or so after this, the Department sends notice of the final decision to the DEP Bulletin, which is published twice a month. It is very unlikely that the decision will appear in the DEP Bulletin before the applicant receives the letter from the Department. In the unlikely event that this does happen, the difference between the two dates will be negligible. Therefore, there is no need for two dates and the rule has been simplified on

adoption to indicate that the hearing request must be submitted within 30 days after the decision on the application is published in the DEP Bulletin.

6. A sentence is added on adoption at N.J.A.C. 7:7A-1.7(d), indicating that the DEP Bulletin is available through the Department's website.
7. N.J.A.C. 7:7A-4.2(h) has been clarified to use the term "individual transition area waiver," in order to distinguish from a general permit transition area waiver.
8. N.J.A.C. 7:7A-4.3(b)4 is clarified to indicate that the National Park Service (NPS) approval for a general permit authorization for a project in a wild and scenic river area must be obtained through a procedure approved by EPA in accordance with EPA regulations. EPA requested this change.
9. N.J.A.C. 7:7A-4.3(c), which contains timing restrictions on the use of general permits in fishery resource waters, has been clarified by replacing the term "is prohibited" with the phrase "shall not be performed."
10. At N.J.A.C. 7:7A-4.3(d), "six months" is changed to "183 days" for precision.
11. General permit 4 has been modified at N.J.A.C. 7:7A-5.4(b) to provide that the amount of disturbance allowed shall be the minimum necessary for compliance with the Department's technical requirements for site remediation. This clarifies the Department's current practice, and is consistent with general permit 5 at N.J.A.C. 7:7A-5.5(b)1, which also has no acreage limit, but does not allow disturbance beyond that which is necessary to comply with the requirements of the Department-approved landfill closure plan.
12. N.J.A.C. 7:7A-5.2A, which provides for a combined general permit 2 and flood hazard area permit, has been modified to require a letter of interpretation for a site in order to allow for faster review of combined permits. An LOI is required for a combined general permit 10A authorization and flood hazard area permit at N.J.A.C. 7:7A-5.10C, but the requirement was inadvertently omitted from N.J.A.C. 7:7A-5.2A. Without the LOI, the application for a combined general permit and flood hazard area permit will take much longer to review, and the streamlining benefits of the combined permits will be lost. For the same reason, this change was also made (with format modifications) at N.J.A.C. 7:7A-5.11A, requiring an LOI for a combined general permit 11 authorization and flood hazard area permit.
13. The Department added the phrase "activities in freshwater wetlands, transition areas, and State open waters as necessary for" at N.J.A.C. 7:7A-5.18(a), in order to make the general permit language clearer and consistent with the other general permits.
14. Portions of proposed N.J.A.C. 7:7A-5.18(b) have been recodified on adoption at N.J.A.C. 7:7A-5.18(c) for clarification.
15. The Department has corrected an erroneous cross reference in N.J.A.C. 7:7A-5.19(a)1.
16. The word "authorization" is added to N.J.A.C. 7:7A-5.20A(a) to make it consistent with other provisions regarding approvals under general permits.
17. Throughout N.J.A.C. 7:7A-5.26, the term "stream" is changed to "channel or stream." The Department is preparing a proposal regarding the Flood Hazard Area Control Act rules. The Department plans to include in the flood hazard area rules provisions identical to those in general permit 26 herein. However, the Department does not plan to use the term "stream" in those rules and instead plans to use the term "channel," to more precisely identify the area which is subject to these provisions. This change of terminology will allow the freshwater wetlands rules to be consistent with this planned rulemaking.
18. Text has been added at N.J.A.C. 7:7A-5.26(f)1 to provide that the Department may require a full application review for an application for default approval under the

general permit. This is consistent with the application review procedure for the other three general permit activities that can be authorized through a default process, found at N.J.A.C. 7:7A-5.1(c) and (d), and N.J.A.C. 7:7A-5.25. Without this provision, the Department must deny the general permit and require an individual permit. However, in many cases the activity may meet the conditions of the general permit but the Department may not be able to determine this within the review period required for a default issuance. Rather than denying an authorization for such a project, this will allow the Department to stop the clock and perform a full application review similar to that which would be performed for other general permits.

19. The Department has made minor clarifying changes to N.J.A.C. 7:7A-6.1(a)6, deleting two redundant phrases, and substituting "regulated activities" for "encroachment."
20. At N.J.A.C. 7:7A-6.1(d)4 and 6.1(h), the Department has added a time frame within which a deed restriction required by a transition area waiver must be executed. This will increase compliance with the requirement that conservation restrictions under N.J.A.C. 7:7A-6 be recorded, and will provide a date certain by which the Department may take enforcement action if the conservation restriction is not recorded.
21. N.J.A.C. 7:7A-6.2(b) has been reorganized on adoption so that it is clear which additional limits apply to transition areas adjacent to exceptional resource value wetlands (recodified to (d)) and which to transition areas adjacent to intermediate resource value wetlands (recodified to (c)).
22. N.J.A.C. 7:7A-6.4(a) has been clarified to indicate that a matrix transition area waiver will be issued only when a project is proposed on a site.
23. N.J.A.C. 7:7A-10.1(b)1 has been clarified to indicate that subchapter 10 includes application requirements for extensions or modifications to issued LOIs.
24. N.J.A.C. 7:7A-10.2(b)4 and 5 have been clarified on adoption to require visual materials "as necessary to accurately portray" the site, in order to ensure that the application checklist can require visual materials of appropriate types and levels of detail.
25. A specific reference to a requirement for State plane coordinates for each site that is the subject of an application has been added to N.J.A.C. 7:7A-10.2(b)5, in order to ensure that geographically based data are submitted in a format consistent with the Department's geographic information system (GIS) standards. The Department will assist applicants in determining the State plane coordinates for a particular site.
26. A comma has been added at N.J.A.C. 7:7A-10.9(f) to clarify that the provision applies only to projects longer than ½ mile long, whether the project is a trail or boardwalk or a linear development.
27. Portions of N.J.A.C. 7:7A-10.9(g) are deleted and recodified at new N.J.A.C. 7:7A-10.9(h) for clarity.
28. The Department has corrected a typographical error at N.J.A.C. 7:7A-12.1(c). "Or" is changed to "for".
29. Upon request by EPA, the Department has added general permits 10A, 10B, 17, 20, 22, 24, 26 and 27 to the list of general permits for which application review by the U.S. Fish and Wildlife Service is required. Such review is necessary for the Department to retain its assumption of the Federal 404 program. The proposal included a list of general permits under which applications are subject to USFWS review, but the Department inadvertently omitted six additional general permits. In addition, the proposed list included "general permit 10." This is corrected on adoption to instead refer to general permits 10A and 10B.

30. Cross references to N.J.A.C. 7:7A-15.21 and N.J.A.C. 7:7A-15.22 are added to N.J.A.C. 7:7A-15.2(c) 5 and 6, N.J.A.C. 7:7A-15.5(f), and N.J.A.C. 7:7A-15.6(f) for clarity.
31. N.J.A.C. 7:7A-15.3(c) has been clarified on adoption to address the performance of mitigation by in-house staff at public agencies.
32. Throughout Figures 4 and 5 in N.J.A.C. 7:7A-15.5, the term "watershed" is replaced on adoption with the tem "HUC-11," to make the figures consistent with the rule text.
33. The language of N.J.A.C. 7:7A-15.13(a) is clarified regarding mitigation proposals submitted by a government agency.