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**ENVIRONMENTAL PROTECTION**

**LAND USE MANAGEMENT**

**DIVISION OF LAND USE REGULATION**

**Coastal Permit Program Rules, Freshwater Wetlands Protection Act Rules, and**

**Flood Hazard Area Control Act Rules**

**Application Fees**

**Adopted Amendments: N.J.A.C. 7:7-1.8, 2.1, 2.3, and 4.2; 7:7A-10.1; and 7:13-8.1, 14.1, and 15.1**

**Adopted Repeals and New Rules: N.J.A.C. 7:7-10, 7:7A-11, and 7:13-17**

Proposed: September 2, 2014, at 46 N.J.R. 1839(a)

Adopted: , by Bob Martin, Commissioner, Department of Environmental Protection

Filed: , **without change.**

Authority: N.J.S.A. 12:5-3, 13:1D-9, 13:1D-29 et seq., 13:9A-1 et seq., 13:9B-1 et seq., 13:19-1 et seq., 58:10A-1 et seq., 58:11A-1 et seq., and 58:16A-50 et seq.

DEP Docket Number: 06-14-08

Effective Date:

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Expiration Date:

The rule adoption can also be viewed or downloaded from the Department's website at [www.nj.gov/dep/rules](http://www.nj.gov/dep/rules).

### **Summary**

The Department is adopting amendments, repeals, and new rules concerning fees for applications for permits and determinations or approvals in the Coastal Permit Program Rules (coastal rules) at N.J.A.C. 7:7, the Freshwater Wetlands Protection Act Rules (freshwater wetlands rules) at N.J.A.C. 7:7A, and the Flood Hazard Area Control Act Rules (flood hazard rules) at N.J.A.C. 7:13. The coastal, freshwater wetlands, and flood hazard permitting programs are all administered by the Division of Land Use Regulation. The adopted amendments and new rules establish a simplified, cohesive fee structure across the three chapters of rules, and incorporate a process to adjust fees in the future for each of the three permitting programs based on their respective projected annual budgets and projected fee revenues. The adopted amendments and new rules also make uniform the fees for certain permits and determinations that are common to all three programs, which will enhance the Department's ability to implement electronic permitting in the future.

### **Summary of Hearing Officer's Recommendation and Agency Response:**

The Department held a public hearing on the proposal on October 1, 2014, at 1:30 P.M., at NJDEP Headquarters in Trenton; Kimberly Springer, Rule Manager, was the hearing officer. No members of the public attended the hearing. The hearing officer recommended that the

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amendments, repeals, and new rules be adopted with the changes described in the responses to comments below. The Department accepts the recommendation.

The hearing record is available for inspection in accordance with applicable law by contacting:

Office of Legal Affairs

Attention: DEP Docket No. 06-14-08

Department of Environmental Protection

401 East state Street, 7<sup>th</sup> floor

Mail Code 401-04L

P.O. Box 402

Trenton, NJ 08625-0402

### **Summary** of Public Comments and Agency responses

The following persons timely submitted comments on the proposal:

1. Robin Dingle, The ELM Group, Inc.
2. Elizabeth George-Cheniara, Esq., New Jersey Builders Association
3. Kimberly N. Kutzler, The ELM Group, Inc.
4. Peter L. Lomax, The Lomax Consulting Group, LLC
5. Ted Pivovarnick, Princeton Junction Engineering, PC
6. Imants Smildzins
7. Douglas Tomson, New Jersey Association of Realtors
8. Kristin F. Wildman, The Lomax Consulting Group, LLC

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The comments received and the Department's responses are summarized below. The number(s) in parentheses after each comment identify the respective commenter(s) listed above.

## **General**

1. COMMENT: The Department's efforts to make the fees and determinations uniform and simplified across the Coastal Permit Program Rules, Freshwater Wetlands Protection Act Rules, and Flood Hazard Area Control Act Rules are appreciated. (2)

RESPONSE: The Department acknowledges this comment in support of the rule.

2. COMMENT: The proposed fee increases are strongly opposed as the new fees will result in the Department's application fees being more than twice the cost to prepare the actual designs. Besides punitive, what is the justification for these increases? (5)

RESPONSE: The Department is authorized to charge reasonable fees for the filing and review of freshwater wetlands, coastal, and flood hazard area permits under the Freshwater Wetlands Protection Act and the Construction Permits Law. N.J.S.A. 13:1D-29 et seq. The Department's costs in reviewing permits include the costs of inputting the application information into the Department's computer data base (NJEMS), site inspections, determination of environmental resources potentially impacted by the proposed activity, assessments of the proposed activity on the resources present on site, and determination of compliance of the proposed activity with the

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statutes and implementing rules. After that analysis is complete, the results must be reduced to writing, either through approval of a permit including any conditions determined to be necessary to protect public safety and the environment, or in a denial of the application. In either case, the basis for the Department's decision must be drafted in a manner that is both clear and defensible. Currently, the Department is not covering all of the costs of reviewing and processing applications under these programs, as evidenced by the multi-million dollar shortfall detailed in the proposal. As explained in the economic impact statement (see 46 N.J.R. 1846 - 1847; September 2, 2014), the shortfall is attributed to the fact that the Department has not in the past fully budgeted for the costs of the program. Fringe and indirect costs were not consistently factored into the overall program costs. As a result of the increases in costs and decreases in revenues, the shortfall for the coastal, freshwater wetlands, and flood hazard area permitting programs has increased by about \$1.4 million per year or about 29 percent annually, from FY 2010 to FY 2014.

The amended application fees are not intended to be punitive or to discourage development. In the majority of cases, the amended application fees are anticipated to constitute a small percentage of the overall cost of construction and will generally not exceed the applicant's cost to prepare designs. Based on an examination of the costs associated with the review and processing of an application under the coastal, freshwater wetlands, and flood hazard area permitting programs, and the relationship of these costs to the fee revenue realized under the fee structures of the rules prior to these amendments, the Department has adjusted and simplified several fees to better reflect the effort the Department must expend to review and process applications under these programs.

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As explained in the discussion of changes to the fees assessed under the coastal rules (see 46 N.J.R. 1840; September 2, 2014), the Department has determined that construction costs, on which the fee associated with a project prior to these amendments was based, do not correspond as closely with review effort as does the area of protected resource affected. Project construction costs reflect variables not tied to likely environmental impacts, whereas the area of the site or waters impacted or disturbed better corresponds to the Department's efforts to review a project.

Accordingly, as compared with the fees charged under the prior rules, the new fees more accurately reflect the Department's current costs related to reviewing and processing applications across the three permitting programs. The Division of Land Use Regulation processes approximately 4,400 permits under the coastal, freshwater wetlands, and flood hazard area permitting programs annually. Before proposing the new fee rules, the Department reviewed its revenues and costs associated with processing and reviewing these permits.

As an example of this review, the below table presents the Department's costs associated with reviewing a typical application for an authorization under general permit 11 for the construction of an outfall structure under the freshwater wetlands permitting program. For the purposes of this example, the review of the outfall structure did not involve a stormwater review for which an additional application fee would be required.

Division Staff Title	Activities	Total Hour/Permit	Average. Wage or Salary/Hour	Wage/salary Cost
Supervising	Review of decision	1.0	\$55.82	\$55.82

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Environmental Specialist				
Supervising Environmental Engineer	Review of decision	1.0	\$55.82	\$55.82
Principal Environmental Specialist	Pre-application conference, technical completeness review, telephone calls, site visits, preparation of draft and final decisions, dispute resolution, appeals, compliance monitoring and evaluation, follow-up to permit issuance, data management.	15.0	\$48.52	\$727.80
Principal Environmental Engineer	Pre-application conference, technical completeness review, preparation of draft and final decisions	4.0	\$48.52	\$194.08
Permit Coordination Officer 2	Pre-review for application completeness	1.5	\$45.72	\$68.58
Principal MIS	Data entry	1.0	\$26.78	\$26.78

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Technician				
Principal Clerk	Mailing and scanning decisions and file management	4.0	\$25.36	\$101.44
Senior Clerk	Mailroom processing, revenue processing, mailing and scanning permit decision	2.5	\$23.14	<u>\$57.85</u>
Total Labor Cost before Fringe benefit costs				\$1,288.17
Fringe benefits (40.05 percent of labor costs)				<u>\$515.91</u>
Total Labor Cost including Fringe benefit costs				\$1,804.08
Indirect costs (20.04 percent of Total Labor Cost)				<u>\$361.54</u>
Total permit processing cost				\$2,165.62
Application fee for				<u>\$600.00</u>

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general permit (under prior rule)				
Shortfall for this permit				\$1,565.62

In the above table, the first and second columns identify the Division of Land Use Regulation staff that are involved in the processing and review of an application for an authorization under freshwater wetlands general permit 11 and the activities they perform as part of that review. The third column indicates the average processing times for respective staff to accomplish the specific activities. The fourth column indicates the average salary or wages of the respective staff per hour and the fifth column indicates the total salary cost (hours x hourly salary or wage).

The total Division review costs for labor are \$1,288.17. The standard costs associated with the fringe benefits (\$515.91) and other indirect costs (\$361.54) are added to the total Division review costs. Fringe benefits are costs associated with employee pension, health benefits, workers compensation and other personnel-related costs. Indirect costs refer to fixed administrative and managerial expenses, as well as overhead related to building rental and maintenance, construction, communications, and office supplies.

In the above example, the total hours Division staff spent on reviewing and processing the application is 30 hours, for a total permit processing cost of \$2,165.62. Under the prior fee rules, the application fee for an authorization under a general permit was \$600.00. The total permit processing costs for such an application therefore exceed the application fee (revenue) by

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\$1,565.62. Accordingly, under the prior fee rules the Department was not covering the costs associated with the processing of a general permit authorization. With the increase in the application fee for a general permit authorization from \$600.00 to \$1,000 with the new rules, the total permit processing costs still exceed the revenue generated through the application fee by \$1,165.62. Accordingly, even with the increase, the application fee will continue to fall short of covering the Division's costs for the processing of a general permit authorization.

While the Department estimates that the increased fees will result in additional revenue of approximately \$3 million annually, the increased fees adopted herein will not produce enough revenue to fully fund program costs. The revenue shortfall will continue to be funded through general fund sources.

3. COMMENT: What is the benchmark the Department used to establish efficiency of its workforce and whether employees are actually spending 100 percent of their time on reviewing applications? Rather than more accurately reflecting current costs, the fee increase is attributable to management and staff deficiencies not related to the project review time. Do the adjusted fees account for the costs incurred addressing public inquiries? (6)

RESPONSE: The need for increased fees results from a shortfall between fee revenues and program costs associated with reviewing and processing applications under the coastal, freshwater wetlands, and flood hazard area permitting programs. As discussed in response to comment 2, one of the factors contributing to the shortfall is the fact that the Department has not in the past fully budgeted for the costs of the program. Specifically, fringe and indirect costs

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were not consistently factored into the overall program costs.

The processing and review of an application under the coastal, freshwater wetlands, or flood hazard area permitting program includes costs associated with inputting application information into the Department's computer data base (NJEMS), site inspections, determination of environmental resources potentially impacted by the proposed activity, assessments of effects of the proposed activity on the resources present on site, and determination of compliance of the proposed activity with the statutes and implementing rules. After that analysis is complete, the results must be reduced to writing, either through approval of a permit including any conditions determined to be necessary to protect public safety and the environment, or in a denial of the application. In either case, the basis for the Department's decision must be drafted in a manner that is both clear and defensible.

Division of Land Use Regulation staff also perform a number of activities for which a separate fee is not charged, including answering general public inquiries (not project specific), processing requests for applicability determinations, issuing emergency authorizations, processing Open Public Records Act requests, and conducting pre-application meetings. As explained in the Economic Impact for the proposal, such indirect costs have been factored into the adopted fees.

The Division of Land Use Regulation has made strides in improving efficiency in response to the recommendations of Department's Permit Efficiency Review Task Force established under Administrative Order 2008-06 in 2008. The Department is in the process of transforming the operations of the land use permitting programs by streamlining functions, re-engineering business processes, and leveraging technology to eliminate unnecessary paperwork, share

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applications and forms across the Department, and increase the use of electronic submittals, thereby increasing its efficiency. In line with this goal, in 2011, the Division launched, on a pilot basis, an electronic permit application (“e-permitting”) system. Upon successfully completing the on-line application and certifying the truth and accuracy of the information provided, the applicant has access to the authorization from their computer. Another step in this transformation is the proposed consolidation of the Coastal Permit Program Rules and Coastal Zone Management Rules into a single chapter (see 46 N.J.R. 1051(a); June 2, 2014). As indicated in that proposal, the Department intends to propose amendments to the Freshwater Wetlands Protection Act Rules and Flood Hazard Area Control Act Rules as part of an effort to align the rules governing the permitting processes of the coastal, flood hazard area, and freshwater wetlands permitting programs to the extent the respective enabling statutes allow.

4. COMMENT: The permit fee schedule is nonsensical for rebuilds resulting from storm events as there are few or no special resources or environmental issues associated with lots that are already developed. However, the fee schedule does not reflect this. (6)

RESPONSE: Reconstruction activities after a storm event vary in scope and complexity, and when required, the type of permit needed is reflective of the Department’s level of effort to review the activity and the impacts of these activities on the environment. In some cases a permit is not required for reconstruction activities. For example, under the coastal permitting program, the reconstruction of certain developments damaged by a storm may not require a permit from the Department. Under CAFRA, the reconstruction of a development damaged by a

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storm does not require a CAFRA permit provided that such reconstruction is in compliance with existing municipal, State and Federal requirements or codes, and provided the reconstruction does not enlarge or relocate the footprint of the development, increase the number of dwelling units or parking spaces within the development, or increase the area covered by buildings and/or asphalt pavement.

Where a permit is required for a reconstruction activity, in some cases the review of such an application is more complex and requires more staff effort and review time than an application for a new activity. For example, the review of an application for the reconstruction of a bridge or culvert under the flood hazard area and freshwater wetlands permitting programs may be more complex and require a more significant amount of staff time than the review of an application for a new bridge or culvert. Because the applicant must demonstrate that the replacement bridge or culvert does not exacerbate offsite flooding both upstream and downstream of the structure, the hydrologic, hydraulic, and stormwater calculations associated with the reconstruction of a bridge or culvert are typically more complex and therefore the proposed reconstruction requires an individual permit.

5. COMMENT: The proposed fees will reduce economic growth, and will potentially affect the State's ability to attract and retain businesses, and could deter community-minded organizations from developing within the coastal zone. (6)

6. COMMENT: New Jersey is still undergoing its economic recovery and the business community, including the homebuilding industry, is struggling to maintain its foothold in the

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State. Accordingly, the timing of this proposal is not appropriate for the current and immediate future economic conditions. (2)

7. COMMENT: The increased fees will negatively impact New Jersey families, the real estate industry, and the overall economy of the State. The fee increases will have an adverse impact on those making repairs to or reconstructing their properties, some of whom may still be rebuilding after Superstorm Sandy. For example, the current fee of \$600.00 for capital repairs or reconstruction is being increased to a fee per acre of the site set at \$3,000. Such increases will negatively affect the State's recovery from Superstorm Sandy. Another example of a fee increase that will have a negative impact is the change in the application fee for a minor modification of an individual CAFRA permit associated with a single family home or duplex from \$250.00 to \$500.00 which is a 100 percent increase. This fee is in addition to the \$2,000 application fee paid when the application was filed for the permit to be modified. The fee increases should not be adopted. (7)

RESPONSE TO COMMENTS 5 THROUGH 7: As explained in response to comment 2, currently the Department is not covering the costs of reviewing and processing applications under the coastal, freshwater wetlands, and flood hazard area permitting programs, as evidenced by the multi-million dollar shortfall experienced in recent years. In previous years, the permitting program's fee revenue shortfall has been funded through general fund resources, which means that taxpayers and other funding sources rather than the regulated community have borne a large share of the cost of the permitting programs. The increased fees will help reduce

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the burden on the State's taxpayers by reducing the Department's funding shortfalls for these permitting programs, thereby reducing the need for general fund resources to cover those shortfalls. The adjusted application fees will directly affect those who engage in regulated activities that require permits and other determinations under the three permitting programs. While overall the application fees across the three programs are increased, some fees are increased and others are decreased in an effort to more closely align the fees with the current resources required to review and process applications.

The Department does not expect that the increased fees will delay the economic recovery of the State. The Department anticipates that the new fees will constitute a very small portion of the total project cost for those activities requiring a permit or determination. Furthermore, the Department does not expect that the increase in application fees will result in the loss or gain of jobs relating to the construction or environmental consulting industries as they do not affect the type or location of development that are subject to regulation or alter the requirements associated with the submission of applications.

With reference to the example provided regarding potential impacts on reconstruction activities and recovery from Superstorm Sandy, under CAFRA, the reconstruction of a development which was legally existing on July 19, 1994 and is damaged or destroyed, in whole or in part, subsequent to that date by fire, storm, natural hazard or act of God, does not require a CAFRA permit provided the reconstruction is in compliance with the existing municipal, State, and Federal requirements or codes, and provided that the reconstruction does not result in the enlargement or relocation of the footprint of the development, an increase in the number of

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dwelling units or parking spaces within the development, or an increase in the area covered by buildings and/or asphalt pavement. (See N.J.A.C. 7:7-2.1(c)3).

Further, through emergency rulemaking in response to Superstorm Sandy, the Department amended the Coastal Zone Management rules and Coastal Permit Program Rules to facilitate the expeditious rebuilding of residential and commercial developments (see 45 N.J.R. 1141(a), May 6, 2013; 45 N.J.R. 1696(a), July 15, 2013). To assist in the monumental task of rebuilding after Superstorm Sandy, the Department streamlined the permitting process through clarification of the exemption under the Waterfront Development Law for the reconstruction of replacement of structures in place at N.J.A.C. 7:7-2.3(d)6 and 7; modified the permit-by-rule at N.J.A.C. 7:7-7.2(a)7 for the reconstruction of residential or commercial development; and added a permit-by-rule at N.J.S.A. 7:7-7.2(a)8 for the expansion or relocation (with or without expansion) laterally or landward of a residential or commercial development. Activities within the clarified exemption and those that qualify for the permits-by-rule require neither application to the Department nor payment of any fee.

Under the prior rules, the application fee for development consisting solely of capital repairs or reconstruction with all work taking place above the mean high water elevation on piles or other support structures, repairs or reconstruction taking place landward of the mean high water line, or the identical structural replacement of piles or other supports in the same location was \$600.00. This application fee applied only to public infrastructure and not to a single family home. As explained previously, the new fees more accurately reflect the Department's current costs related to reviewing and processing applications across the three permitting programs. Accordingly, the fee of \$3,000 reflects the level of effort and costs associated with the

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processing and review of a development consisting solely of capital repairs. The Department may waive certain permitting requirements in response to a storm event. For example, in response to Superstorm Sandy, the Department issued Administrative Order No. 2012-13 (Reconstruction of Public Infrastructure) in which the Commissioner waived the formal permitting requirements for certain activities involving public infrastructure performed by State, county, and municipal agencies which included the submission of a coastal permit application and fee.

With reference to fees related to construction of single family homes and modification of permits issued for such structures, the fee applicable to a permit authorization and a subsequent modification to the permit for a single family home or duplex varies depending upon the type of initial permit approval and the extent of activity proposed requiring modification of the original permit.

The majority of single family homes not being constructed as part of a residential subdivision or multi-unit development are authorized under a general permit. Under the new rules, the application fee for an authorization under a general permit is increased from \$600.00 to \$1,000, and the modification of a general permit authorization is increased from \$250.00 to \$500.00.

In some cases an individual coastal permit is required for the construction or reconstruction of a single family home. If an individual coastal permit is required, under the new rules the application fee is \$2,000. Under the prior rules, the Department in certain circumstances allowed for changes to the permitted activity through the modification of the permit. Under the new fee structure, the application fee for a major modification is 30 percent of the original application fee

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(\$600.00).

A major modification is required where the proposed changes do not require a new permit and the changes to the proposed development would have any of the following results: a cumulative increase in area covered by buildings, asphalt, or concrete paving of greater than 0.25 acres, a new or increased encroachment into certain special areas; or new or relocated development within 200 feet of any property sharing a common property boundary with the property or properties on which the proposed development would occur.

The application fee for a minor modification of an individual coastal permit is \$500.00. A minor modification is required where the proposed changes do not require a new permit or a major modification as described above. It should also be noted that some modifications to a single family home such as the construction of an above ground swimming pool, shed, or gazebo may not require a permit under CAFRA.

8. COMMENT: The commenter disagrees with the statement in the housing affordability impact analysis that there is an extreme unlikelihood that the economic impacts associated with the proposed fee amendments, repeals, and new rules would evoke a change in the average costs associated with housing. The increased application fees will be passed along to the consumer (homeowner or rental occupant). (2)

RESPONSE: Under the adopted amendments and new rules, some fees will increase and some will decrease, reflecting the Department's effort to more properly align costs with benefits.

Homeowners, renters and the general public will continue to have assurance that their homes and

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rental units were subject to appropriate review of potential environmental impacts. In response to the adjusted fees, some developers may elect to absorb part or all of the increases, or they might elect to pass increases through to consumers. They may similarly pass through any fee reductions. While the Department does not have data on which increases would accrue specifically to the housing sector, the total Statewide impact on home prices and rents, even if all fee increases net of fee reductions were passed through to consumers, is likely to be very small in both absolute and percentage terms relative to the size of the housing sector of the State's economy.

9. COMMENT: Since the fee increases are proposed to facilitate the processing and review of applications, the Department should reduce and standardize the review time frames commensurate with the proposed project size, impacts, and number of authorization or approvals required. (1, 3)

RESPONSE: The Department does consider the level of effort to review certain activities as well as the impacts of these activities on the environment. Consistent with N.J.S.A. 13:1D-105, the Department to established a classification system for its various permitting programs, including the coastal, freshwater wetlands, and flood hazard area programs. The first class of permits addressing activities with the least environmental impacts is permits-by-rule. Activities authorized under a permit-by-rule do not require review by Department staff, the submittal of an application, or a fee. Examples of activities subject to a permit-by-rule are the disturbance of riparian zone vegetation for normal property maintenance under the flood hazard area permitting

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program and the placement of public safety or beach/dune ordinance signs on beaches and dunes under the coastal permitting program.

The next class of permits is general permits. In promulgating the requirements for general permits, the Department determines that the regulated activity(s) will cause only minimal adverse environmental impacts when performed separately and will have only minimal cumulative adverse impacts on the environment. Applications for authorizations under a general permit are reviewed by Department staff and require the submission of an application and fee. The application requirements are less and the fee lower than those required for an individual permit. Examples of activities subject to a general permit are the construction of an outfall under the freshwater wetlands permitting program, the construction of certain support facilities at legally existing and operating marinas under the coastal permitting program, and the placement of bridge or culvert scour protection by a public entity under the flood hazard area permitting program.

The third class of permits is individual permits. An individual permit is required where the proposed activity does not meet the requirements of a permit-by-rule or general permit. In general, the activities subject to an individual permit are larger and/or more complex, and they affect more of the protected resource and potentially have greater environmental impacts. As such, the applications for permits for these projects are by necessity more detailed and require more effort and resources to review. Accordingly, the application requirements and fee for an individual permit are commensurate with the potential environmental impacts and review of those impacts.

As explained in response to comment 3, the Department is in the process of transforming

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the operations of the land use permitting programs by streamlining functions, re-engineering business processes, and leveraging technology to eliminate unnecessary paperwork, share applications and forms across the Department, and increase the use of electronic submittals, thereby increasing its efficiency. The Department anticipates that increased efficiency in permit application review and processing will reduce future budget shortfalls and therefore minimize potential future fee increases.

10. COMMENT: Calculating the cost per acre or fraction thereof means that a fraction of an acre is rounded to the next highest whole number, such that a project disturbing 0.01 acres would have the same fee as a project disturbing one acre. The Department should revise the application fees such that they are calculated “per fraction of an acre” to account for smaller projects and impacts. (1, 3)

RESPONSE: The amended application fees are intended to be commensurate with the time and effort required by Department staff to review and process each application. For an individual permit for a project of less than one acre in size, the area of the project and/or size of the proposed disturbance does not significantly alter the Department’s cost of processing the application because from an administrative perspective these projects require the same level of effort. The information required to be submitted to, and reviewed by, the Department as part of the individual permit application is the same regardless of the size of the disturbance. For this reason, it is appropriate that projects of less than one acre in area are assessed the same application fee.

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11. COMMENT: The proposal removes the reduced application fee when multiple land use applications are submitted simultaneously. The deletion of this provision results in double-charging the applicant for review of the same project components. This provision should be retained. (1, 3)

RESPONSE: As explained in the summary of the proposed amendments to the Coastal Permit Program Rules, N.J.A.C. 7:7 (see 46 N.J.R. 1840; September 2, 2014), the intent of this provision was to recognize the potential efficiencies of the submittal by an applicant and review by the Department of several permit applications relating to a single project concurrently, and to create an incentive for doing so. However, the review of several applications received concurrently has proven to take as much time and effort as would the review of the same applications received separately, with the result that the reduced fee for the same amount of review effort marginally increases the shortfall between fee revenues and Department costs. Further, the deletion of this provision does not result in double charging the applicant for review of the same project components. Each project component is reviewed for compliance with the rules applicable to the permit or approval being sought. Each set of land use rules implements the statutory requirements of a specific permitting program, that is, coastal, freshwater wetlands, and flood hazard. For example, the review of an application for the construction of an outfall under the flood hazard area permitting program would consider the impacts of the outfall structure and its discharge on the regulated water, riparian zone, and effects on flooding, while the review of an outfall under the freshwater wetlands permitting program would consider the

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impacts of the outfall on the freshwater wetlands and transition areas.

12. COMMENT: The increase to fees to cover the costs related to employee salaries and fringe benefits is opposed. While these are factors that impact the Department's budget, they clearly are not due to the actual regulatory process. (2)

RESPONSE: The Department's direct salary costs consist of wages and salaries and fringe benefits; for certain accounting and budgeting purposes, indirect costs are sometimes also treated by the Department as part of salaries. In past years, fringe benefits and indirect costs were not consistently factored into the overall costs of the Division of Land Use Regulation for the purpose of setting the Division's permitting program fees, thereby adding to the Division's revenue shortfall and increasing the need for tax revenues from the State's General Fund to cover these costs. Benefits and indirect costs are necessary and unavoidable components of the Department's total costs. When private firms set prices for their products, they take into account employee benefits and indirect costs, since failure to do so would result in operating deficits to the extent that revenues fail to cover total costs. Within private entities (including not-for-profit entities such as many hospitals), it is therefore common practice to allocate benefits and indirect costs to operating divisions, such as divisions that manufacture and distribute different products. Such divisions are expected to generate revenues that cover their total costs, including benefits and indirect costs. The inclusion of benefits in direct costs is recognized by the Federal government, for example, 2 C.F.R. Section 200.431, Compensation - fringe benefits, which generally provides that fringe benefits are allowable costs for Federal grant making purposes and

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that such costs can be allocated among organizational units and programs based on entity-wide salaries and wages. That section states that benefits are allowable costs and can be allocated to direct or indirect costs as appropriate. The Federal government also recognizes the need to include indirect costs or “overhead” as allowable costs. The State allocates fringe benefits and indirect costs to the executive departments and agencies to help ensure that the State’s total costs are reflected in each department’s or agency’s budget. For the above reasons, these costs are properly reflected in the fees.

13. COMMENT: It is disappointing that the Department’s stakeholder process was not used in advance of this proposal, as there may have been opportunities identified through that process to streamline permitting, saving valuable time and resources for both the Department and regulated community. The Permit Efficiency Task Force should be reinstated to facilitate such discussions. (2)

RESPONSE: During the initial stakeholder meetings concerning the transformation of the Division of Land Use Regulation in 2011, aligning the application fees across the land use permitting programs to enhance the Department’s ability to implement electronic permitting in the future was discussed. However, in light of the Division of Land Use Regulation’s multi-million dollar shortfall which, as noted in the proposal’s Economic Impact Statement, continues to increase by approximately \$1.4 million per year, immediate action was determined necessary. The alignment of the fees across the coastal, freshwater wetlands, and flood hazard area permitting programs, which makes uniform the fees for certain permits and determinations that

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are common to all three programs, does help increase efficiency.

**Coastal Permit Program Rules, N.J.A.C. 7:7**

14. COMMENT: The Department is commended for the furtherance of Governor Christie's Executive Order 2 to bring "common sense" principles to the Department's rules and policies. The Department's attempt to standardize the application fee schedule for all coastal permits will improve the regulatory process without compromising the overall regulatory intent or the coastal environments. (4, 8)

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

15. COMMENT: The Department should reconsider the proposed amendments to the application fees for residential developments that exceed one single family or duplex unit. The application fee of \$3,000 per unit seems exorbitant especially when considering multi-family developments. While CAFRA fees cannot exceed \$30,000 unless the Department provides documentation that the review of such application costs more than \$30,000, it is recommended that the Department consider a hierarchy of per unit costs. For example, the application fee for a residential development consisting of two to 10 units could be calculated at \$1,000 per unit, for 11 to 20 units at \$750 per unit, and so on. (4, 8)

RESPONSE: There is a correlation between the size of a proposed residential development and the time necessary to review a permit application. The larger the potential impacts to sensitive

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resources, as reflected by the number of proposed units, the more scrutiny is required under the rules and consequently the greater the effort, time, and costs to review the application. For example, the review of an individual CAFRA or waterfront development permit application for a multi-unit residential development is complex, involving numerous special area, use, and resource rules, as well as a review of the impervious cover and vegetative cover of the site. For this reason, stepping the application fee for a residential development consisting of two to 10 units at \$1000 per unit down to \$750 per unit for 11 to 20 units, as the commenter suggests, would not cover the Department's costs in reviewing and processing these permits.

16. COMMENT: Under the prior rules, the application fee for a waterfront development permit for a dredging project included both the dredging and the upland disposal of the dredged material. However, under the new rules an additional fee will be charged for the placement of dredged material within 150 feet of the mean high water line for "upland" waterfront activities. How will the application fee for a dredging project which includes placement of the dredged material on uplands be calculated? Will there be a separate application fee for the placement of the dredged material? If so, this additional fee would add unnecessary costs for marinas and yacht clubs, thereby having a negative economic impact on these water dependent businesses. (6)

RESPONSE: Under the prior rules, the application fee for an individual waterfront development permit for dredging activities located below the mean high water line was based on the construction costs of the dredging operation. As discussed in the summary of the proposed amendments to the coastal fees (see 46 N.J.R. 1840), the Department has determined that

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construction costs do not correspond as closely with the Department's review effort as does the area of protected resource affected. Accordingly, under the new rules, the application fee for a dredging activity will be based on the area of water impacted by the dredging. Under the prior rules, the application fee for an individual waterfront development permit for dredging activities did not include a fee for the disposal or beneficial use of the dredged material and this continues to be true under the new rules. Further, if an applicant proposes to rehabilitate a dredged material management area, such as a confined disposal facility, that activity would require an individual coastal permit and the fee would be based on the area of the site impacted.

17. COMMENT: The changes adjusting the manner in which the fees for waterfront development, wetlands, and non-residential CAFRA permits are calculated are supported, as the fees are based on the area impacted by the development rather than the cost to construction the development. (2, 4, 8)

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

**Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A**

18. COMMENT: The proposed application fee for an extension or reissuance of a freshwater wetlands Letter of Interpretation and individual permit is 50 percent of the original application fee and \$500 for all other freshwater wetlands authorizations. The application fees for a permit extension are the same or higher than the proposed application fee for a modification of the same authorizations. As an extension does not include review of modified project components and

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will only be issued for one year (one-fifth of the original authorization time frame), it is recommended that the application fee for an extension of an existing freshwater wetlands letter of interpretation or individual permit be no more than 20 percent of the original application fee and that the fee for the extension of all other freshwater wetlands authorizations remain at \$240 (approximately one-fifth of the original application fee). (1, 3)

RESPONSE: Under the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-3.6(b), the term of a letter of interpretation may be extended for a period not to exceed five years from the original date of issuance provided that the information upon which the original letter was based remains valid. Similarly, under N.J.A.C. 7:7A-14.6, the Department can issue one five-year extension of a transition area waiver, general permit authorization, or individual permit provided the extension request is timely submitted and the permittee demonstrates that there have been no significant changes in the project and activities that were approved in the original permit, the rules governing the site, and the conditions on the site, including the wetlands boundary and resource classification, between the date the permit was issued and the date the application for extension is submitted. The review of an extension request for a letter of interpretation requires Department staff to confirm that the resource classification of the wetlands and the site conditions have not changed from the date the original letter of interpretation was issued. This may be accomplished through review of the site using the Department's Geographic Information System (GIS), or may require a site inspection if it is suspected based on, for example, updated soils information of threatened and endangered species information, that site conditions may have changed. A review of the site by the Department's Threatened and Endangered Species

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staff may also be required to determine that the resource classification of the wetlands has not changed. The review of an extension request for a transition area waiver, authorization under a general permit or individual permit requires an assessment by Department staff to ensure that site conditions, including the wetlands boundary and resource classification, have not changed, and that the scope of the project, its impacts, and the rules governing the site are the same as they were when the original permit was approved.

In contrast, the rules limit the types of change that may be accomplished through a modification; if the change sought is in excess of the limits contained in the rules, a new application will be required, with an application fee reflecting the level of review necessary for a significantly different proposed activity. Taking into account the limited nature of the types of changes that qualify as a modification and the fact that the modification does not extend the term of the permit, a site visit to confirm that conditions have not changed since the original approval was granted is not generally necessary for review of a modification request.

Accordingly, because of the significantly different level of review required, the Department believes that the fees for the extension of a letter of interpretation, transition area waiver, general permit authorization, and individual permit and those applicable to modification of a Department approval are commensurate with the level of Department review required.

19. COMMENT: No fee is charged for the transfer of a coastal permit or flood hazard area control approval to another party. However, the Freshwater Wetlands Protection Act Rules treat the transfer of a freshwater wetlands approval as a permit modification and impose a \$500.00 application fee. For consistency with the other land use rules, this fee should be eliminated. (1,

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3)

RESPONSE: The Department's goal is to make the application fees consistent across the coastal, freshwater wetlands, and flood hazard area permitting programs. The Department agrees that the transfer of a freshwater wetlands approval should not be subject to an application fee. As part of the transformation of the land use permitting program discussed in response to comment 3 above, the Department will be proposing amendments to the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13 and the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A. As part of that rulemaking, the Department will propose to eliminate the provision in the Freshwater Wetlands Protection Act Rules that treats the transfer of a permit as a permit modification and eliminate the associated fee.

**Flood Hazard Area Control Act Rules, N.J.A.C. 7:13**

20. COMMENT: The proposed fee changes indicate that the additional review fees for an individual flood hazard permit are not applicable to construction of a private residence or other structures appurtenant to a private residence. The additional fees for project elements should also not be applicable to the reconstruction and/or repair of other structures appurtenant to a private residence. (1, 3)

RESPONSE: With the exception of reconstruction activities authorized under flood hazard general permit 6, for which there is no application fee, the Department charges the same fee for an authorization to reconstruct a structure as is applicable to the authorization to construct a new

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structure. Similarly, the exemption from additional review fees for construction of a private residence not constructed as part of a residential subdivision or multi-unit development or construction of an addition or other structure appurtenant to a private residence is equally applicable to the reconstruction or repair of structures appurtenant to a private residence.

21. COMMENT: Under the existing Flood Hazard Area Control Act Rules, remediation projects require an individual permit. Because these projects typically result in impacts greater than those allowed within the riparian zone but are temporary, improve the environment, and are protective of public health and safety, a hardship waiver is required to eliminate the need for mitigation. Under the proposed rules, the application fee for an individual permit for a remediation project would be \$6,000 (\$1,000 for the individual permit plus \$5,000 for the hardship waiver). Given that remediation projects are conducted for the benefit of the environment and public, the fee associated with the request for a hardship waiver should not apply to remediation projects. (1, 3)

RESPONSE: The Department agrees that undertaking site remediation projects can result in a variety of environmental and public benefits. However, undertaking a site remediation project in a riparian zone often requires clearing, cutting, and/or removal of large areas of riparian zone vegetation, which can be of temporary or permanent nature depending on the remediation method, which necessitates a review of detailed alternatives analyses as well as onsite or offsite riparian zone mitigation plans. Since the review of such projects in the context of a hardship exception request can involve a significant investment of staff time, the revised adopted

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application review fee of \$7,000 (\$3,000 base fee plus \$4,000 for review of the hardship exception request) is necessary to more fully reflect the Division's costs to review the application. However, in recognition of the benefits provided by site remediation plans, the Department anticipates, as part of the transformation of the land use permitting program discussed in response to comment 3 above, proposing amendments to the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13 to provide for clearing, cutting, and/or removal of riparian zone vegetation for a site remediation project under an individual permit without the need for a hardship exception request in a majority of circumstances.

**Additional fees associated with the review of stormwater calculations for major developments**

22. COMMENT: The Department should ensure that there are no duplicate fees charged for the review of stormwater calculations by any other Department division. (2)

RESPONSE: Only the Division of Land Use Regulation reviews stormwater calculations in the context of applications for permits for major developments. The fee for the review of stormwater calculations is charged only once for major development regardless of whether more than one land use permit is required.

**Adjustment of fees by notice of a fee report and administrative changes published in the New Jersey Register**

23. COMMENT: Are the changes allowing the Department to adjust the application fees by

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notice in the New Jersey Register based on budget considerations? This is contrary to the rulemaking process. (4, 8)

24. COMMENT: Changes to the application fees should be made through the rulemaking process and be subject to public comment. In the event that the Department adopts the process for adjusting the fees by notice, the fee increase should be capped at a percentage of the current year's fee. For example, the fee increase could be no more than 10 percent of the cost of living increase in New Jersey for the current year. (1, 3)

RESPONSE TO COMMENTS 23 AND 24: Under N.J.A.C. 7:7-10.2, N.J.A.C. 7:7A-11.2, and N.J.A.C. 7:13-17.2, the Department will, through publication in the New Jersey Register of a notice of fee report and administrative changes, adjust the application fees where the Department determines a fee increase is necessary to address a calculated fee revenue shortfall between projected costs for the permitting program and projected funds available to cover those costs. A similar adjustment process through notice for flood hazard permit fees has been part of those rules, and their predecessor 90-day permit rules, for decades.

The fee adjustment process is budget based. The rules establish the calculation that would be utilized in determining the adjusted fees, including the specific factors that will be considered in projecting costs and projecting the amount of other available funds to help cover those costs. The fee report explains the basis for the adjusted fees and will be available for the public to review on the Department's website. Because the future costs to implement these permitting programs are unpredictable, as the Department cannot predict future salaries, staffing,

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permit volume, or appropriations, the Department cannot set a limit on any potentially necessary fee increase.

Through this rulemaking, the public was provided the opportunity to comment on the process and calculations that will be used by the Department in adjusting the fees and, therefore, these rules are not contrary to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. Should the Department determine it necessary to adjust fees to address factors other than those contemplated in the fee adjustment provisions at N.J.A.C. 7:7-10.2, 7:7A-11.2, and 7:13-17.2, or to add new fees, the Department will undertake formal rulemaking to do so.

The Department notes that in recent years the annual increase in the cost of living in New Jersey has been between two percent and three percent as measured by the Consumer Price Index for All Urban Consumers (CPI-U) published by the U.S. Bureau of Labor Statistics. Ten percent of that amount would be between 0.2 percent and 0.3 percent, and increases in that range would be completely inadequate to cover the Department's costs to administer the land use permitting program. Once the costs to administer the permitting program are fully supported by permit fees, the Department might consider instituting, through rulemaking, a cap on annual fee increases to account for cost of living increases.

### **Federal Standards Statement**

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65) require State agencies which adopt, readopt, or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards analysis.

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The Federal Coastal Zone Management Act (P.L. 92-583) does not set specific regulatory standards for development in the coastal zone; rather, it provides broad guidelines for states developing coastal management programs. The State's Coastal Management Program meets the guidelines established under the Federal Coastal Zone Management Program, and the State of New Jersey has obtained approval from the National Oceanic and Atmospheric Administration (NOAA) to implement its program under the Federal Act. These guidelines are found at 15 C.F.R. Part 923. They include the basic components that must be included in a state's coastal zone management plan but do not set forth procedures by which individual activities within a state's coastal zone are to be regulated. Since there are no established Federal standards for permitting or the establishment of application fees, there is no basis for comparison. Therefore, the Department has concluded that the proposed amendments, repeals, and new rules for coastal application fees do not exceed any Federal standards or requirements.

New Jersey has assumed the Federal Clean Water Act Section 404 program (33 U.S.C. § 1344) throughout most of the State through the freshwater wetlands permitting program as mandated by the Freshwater Wetlands Protection Act (FWPA). The basic structure of the Department's freshwater wetlands permitting program and much of its substance are essentially the same as the Federal 404 program. Both provide for individual and general permits. Both use similar key concepts and definitions, and apply similar standards in approving both general and individual permits. However, while the New Jersey Legislature used the Federal 404 program as the basis for the FWPA, it also tailored the FWPA to meet the needs of New Jersey and to more strictly limit activities in and around wetlands in order to avoid excessive wetlands losses in New Jersey. As a result, the New Jersey program regulates more types of activities in freshwater

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wetlands than the Federal 404 program does, regulates the upland “transition area” around each wetland, and requires a more involved process to obtain approval from the Department for regulated activities. The Department’s freshwater wetlands permitting program is fee-supported. Application fees are established for each type of review activity, including letters of interpretation, general and individual permits, and transition area waivers. The Federal government operates the U.S. Army Corps of Engineers (ACOE) program using an annual appropriation instead of assessing permit fees sufficient to support its operations. Consequently, the ACOE charges nominal fees for a minor subset of its review activities, with the actual operating costs supported through the Federal budget. There are no fees for nationwide permit authorizations, for jurisdictional determinations, or for transition area waivers (since transition areas are not regulated features pursuant to the Federal program). The ACOE charges individual homeowners \$10.00 for the review of an individual permit application. For commercial entities, the individual permit review fee is \$100.00.

The State of New Jersey is required to balance its budget each year, whereas there is no corresponding obligation for an annually balanced Federal budget. The State Legislature has determined that application fees should be charged to those who will receive the major benefit from developing environmentally sensitive lands. Therefore, the Department has concluded that the proposed amendments, repeals, and new rules for the freshwater wetland application fees do not exceed any Federal Standards or requirements.

With respect to the Department’s Flood Hazard Area Control Act Rules, although the Federal Emergency Management Agency (FEMA) delineates some flood hazard areas in the State for the purposes of the Federal flood insurance program, there is no Federal agency or

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program that directly regulates activities in flood hazard areas based on their potential flooding impacts. The FEMA rules at 44 CFR Part 60 provide that municipalities that participate in the National Flood Insurance Program (NFIP) must adopt certain flood hazard reduction standards for construction and development in 100-year flood plains. However, a community's participation in the NFIP is voluntary, and FEMA does not otherwise regulate land uses in flood hazard areas. Furthermore, the Federal flood reduction standards at 44 C.F.R. Part 60 are administered by local governments. Therefore, the Department has determined that the proposed amendments, repeals, and new rules for the flood hazard application fees do not exceed any Federal standards or requirements.

**Full text** of the adopted amendments and new rules follows:

**(No change from proposal.)**