ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

DIVISION OF LAND USE REGULATION

Freshwater Wetland Protection Act Rules

Flood Hazard Area Control Act Rules

Coastal Zone Management Rules

Adopted Recodifications with Amendments: N.J.A.C. 7:7A-1.4 as 1.3; 1.7 as 21.1; 2.3, 2.4, and 2.5 as 3.1, 3.2, and 3.3; 2.6 as 2.3; 2.7 as 3.4; 2.8 as 2.4; 2.9 as 2.5; 2.10 as 2.6; 2.11 as 2.7; 3.1, 3.2, 3.3, and 3.4 as 4.2, 4.3, 4.4, and 4.5; 3.6 as 4.6; 4.1 as 5.2; 4.2 as 5.3; 4.3 as 5.7; 4.4 as 5.4; 5.1 through 5.21 as 7.1 through 7.21; 5.23 through 5.27 as 7.22 through 7.26; 6.1, 6.2, and 6.3 as 8.1, 8.2, and 8.3; 6.5 as 8.4; 7.1 and 7.2 as 10.1 and 10.2; 7.4 as 10.3; 11.1 as 18.1; 12.1 as 19.2; 12.2 as 19.5; 12.3 as 19.6; 12.5 as 19.7; 13.1 as 20.2; 13.2 as 20.3; 13.4 as 1.2; 14.3 as 20.6; 14.4 as 20.8; 14.5 as 20.9; 14.6 as 20.4; 15.1, 15.2, 15.3, and 15.4 as 11.1, 11.2, 11.3, and 11.4; 15.5 as 11.9; 15.6 as 11.10; 15.7 as 11.8; 15.9 as 11.13; 15.10 as 11.5; 15.11 as 11.6; 15.13 as 11.17; 15.15 as 11.7; 15.16 as 11.12; 15.18 as 11.16; 15.19 as 11.15; 15.20 as 11.22; 15.23 as 11.25; 15.25 as 11.26; 15.26 as 11.11; 16.1, 16.2, and 16.3 as 22.1, 22.2, and 22.3; 16.4 as 22.14; 16.5 through 16.9 as 22.4 through 22.8; 16.12, 16.13, and 16.14 as 22.11, 22.12, and 22.13; 16.15 as 22.15; 16.17 through 16.20 as 22.17 through 22.20; and 17 as 13

Adopted New Rules: N.J.A.C. 7:7A-1.5, 4.1, 4.7, 5.1, 5.5, 5.6, 6, 8.5, 9, 11.14, 11.18 through 11.21, 11.23, 11.24, 12, 14 through 17, 19.1, 19.3, 19.4, 19.8 through 19.11, 20.1, 20.5, 20.7, 21.2, 21.3, and 21.4

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE DECEMBER 18, 2017 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

Adopted Recodifications: N.J.A.C. 7:7A-1.5 as 1.6, 16.10 and 16.11 as 22.9 and 22.10, and 16.16 as 22.16

Adopted Amendments: N.J.A.C. 7:7-9.27, 17.11, 17.14, 24.3, and 24.4; 7:7A-1.1, 1.3, 2.1, 2.2, and 15.12, and 7:7A Appendix 1; and 7:13-2.1, 9.1, and 19.3

Adopted Repeals: N.J.A.C. 7:7A-1.2, 1.6, 2.12, 3.5, 4.5, 5.17, 5.22, 6.4, 6.6, 7:7A-6 Appendix, 7.3, 8, 9, 10, 12.4, 12.6, 12.7 13.3, 13.5 through 13.9, 14.1, 14.2, 15.8, 15.14, 15.17, 15.21, 15.22, and 15.24

Proposed: May 1, 2017, at 49 N.J.R. 834 (a).

Adopted: November 16, 2017, by Bob Martin, Commissioner, Department of Environmental Protection.

Filed: November 21, 2017, as R.2017 d.242, with **non-substantial changes** not requiring additional public notice (see N.J.A.C. 1:30-6.3).

Authority: As to N.J.A.C. 7:7: N.J.S.A. 12:3-1 et seq., 12:5-3, 13:1D-1 et seq., 13:1D-9 et seq., 13:1D-29 et seq., and 13:9A-1 et seq.;

As to N.J.A.C. 7:7A: N.J.S.A. 13:9B-1 et seq., and 58:10A-1 et seq.; and

As to N.J.A.C. 7:13: N.J.S.A. 13:1D-1 et seq., 13:1D-29 et seq., 13:20-1 et seq., 58:10A et seq., 58:11A-1 et seq., and 58:16A-50 et seq.

DEP Docket Number: 06-17-03.

Effective Date: December 18, 2017.

Expiration Dates: N.J.A.C. 7:7, November 15, 2021;

N.J.A.C. 7:7A, August 5, 2022;

N.J.A.C. 7:13, October 6, 2021.

The rule adoption can also be viewed or downloaded from the Department's website at www.nj.gov/dep/rules.

The Department of Environmental Protection (Department) is adopting comprehensive changes to the Freshwater Wetland Protection Act (FWPA) Rules, N.J.A.C. 7:7A, which implement the Freshwater Wetlands Protection Act (the Act), N.J.S.A. 13:9B-1 et seq., in order to protect the purity and integrity of the State's inland waterways and freshwater wetlands from random, unnecessary, or undesirable alteration or disturbance, and to provide predictability in the protection of freshwater wetland resources. Specifically, the adopted amendments, repeals, recodifications, and new rules consolidate similar provisions, simplify language, incorporate additional detail and description regarding the substantive standards that must be met to undertake regulated activities, harmonize certain procedural provisions with the Department's other land use rules, and create consistency with statutory amendments. The Department is also adopting related amendments to the Coastal Zone Management (CZM) Rules, N.J.A.C. 7:7, and the Flood Hazard Area Control Act (FHACA) Rules to ensure consistency between the three chapters.

In response to public comment on the May 1, 2017 notice of proposal, and to ensure consistency between the land use rules, the Department has made a number of changes on adoption. These changes are described below in responses to comments and in the Summary of Agency-Initiated Changes.

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

The Department held two public hearings on the notice of proposal on Wednesday, May 24, 2017, at 6:00 P.M. at the Batso Visitor Center Auditorium, Hammonton, and on Thursday, June

1, 2017, at 9:30 A.M. at the New Jersey Department of Environmental Protection Public Hearing Room, Trenton. Ms. Virginia Kop'kash, Assistant Commissioner, Land Use Management, was the hearing officer for the May 24th hearing and Ms. Kim Springer, Manager, Office of Policy Implementation, was the hearing officer for the June 1st hearing. Eight persons provided written and/or oral comments at the hearings. The hearing officer recommended that the rulemaking be adopted with the changes described in the responses to comments and summary of agency-initiated changes below. The Department accepts the recommendation. The hearing records are available for inspection in accordance with applicable law by contacting:

Office of Legal Affairs

Attention: DEP Docket No 06-17-03.

Department of Environmental Protection

401 East State Street, 7th floor

Mail Code 401-04L

PO Box 402

Trenton, NJ 08625-0402

Summary of Public Comments and Agency Responses:

The following persons timely submitted comments on the notice of proposal:

1. Sarah Abowitz
2. Karleen Aghevli
3. Grace Agnew

4. Cheri Alexander
5. Sue Altman
6. Margaret Amelia
7. Erik Anderson
8. Nora Anderson
9. Gloria Antaramian
10. Sherry Apgar
11. Beth April
12. Carroll Arkema
13. Gail Ashley
14. Alice Artzt
15. Jean Avins
16. Rudy Avizius
17. Margaret Babcock
18. Laurie Babicki
19. Patricia Baird
20. Joseph Balwierczak
21. Susan Barnes
22. Joe Basralian
23. Tom Beatini
24. Allison Beesley
25. Barbara Belasco
26. William Beren

27. Nick Berezansky

28. Edward Bennett

29. Jeannette Bergeron

30. Rohan Bhargava

31. June Bilenky

32. Cori Bishop

33. Susan Blubaugh

34. Kevin Bolembach

35. Ryan Bolton

36. Kenneth Bonte

37. Jane Books

38. Jennifer Books

39. Judy Books

40. George Bourlotos

41. Toni Bowman

42. Lorraine Brabham

43. Martha Brennen

44. Julie Brenner

45. Frank A. Brincka

46. Robert Broderick

47. Phyllis Brown

48. Scott Bruinooge

49. Ada Brunner

50. Reid Bryant

51. Joseph Buchanan

52. Terese Buchanan

53. Joe Budelis

54. Andrew Budwig

55. Jean Burnett

56. Bruce Bush

57. Rog Byn

58. Anthony Cacciapuoti

59. Mark Canright

60. Rebecca Canright

61. Carolyn Cantor

61A. Anne Carroll

62. Margaret Casagrande

63. David Case

64. Dorothy Cassimatis

65. Brian de Castro

66. Rosemarie Ceaser

67. D. Cerniglia

68. Helen Chaitman, HALT PennEast

69. David Charette, Langan Engineering

70. Tyler Christensen

71. Linda Christman, HALT PennEast

72. Morgan Clark

73. Josephine Coakley

74. Christine Coari

75. Barbara Cochrane

76. Susan Coen

77. Jennifer Coffey, ANJAC

78. Martin Cohen

79. Sheila Cort

80. Norman Coryell

81. Julia Cranmer

82. Ellen Cronan

83. William Crosbie

84. Patricia Cronheim, Rethink Energy New Jersey and Hopewell Township Pipeline Taskforce

85. Barbara Cuthbert

86. William J. Cutts, Amercian Cranberry Growers Association

87. Joseph Darlington, Joseph J. White, Inc.

88. Mike De Blasi

89. Rudolph De Vries

90. Isabella DeAnglis

91. Sari DeCesare

92. Michael Dee

93. Jeremy Delaney

94. Michael DeLozier

95. Gloria DeSalvo

96. Joan Detyna

97. Kathleen Dezottis

98. Richard DiBianca

99. Sarina DiBianca

100. Vincent DiBianca, HALT PennEast

101. William Doan

102. Richard Dodds, Lower Delaware Wild & Scenic Management Council

103. Jennifer Downing

104. Ken Dolsky

105. Carolyn Dorflinger

106. Roger Dreyling, Monroe Township

107. Lesley de Dufour

108. Hogan Dwyer

109. Elaine Dzeima

109A. George Eckelmann

110. Stephanie Eckert

111. Thomas Eckert

112. Catherine Eiref

113. Janet Eisenhauer

114. Styra Eisinger

115. Alan Epstein

116. Naomi Epstein

117. Dean Escue

118. Jacqueline Evans, HALT PennEast

119. Katherine Evans, HALT PennEast

120. Lloyd Evans, HALT PennEast

121. Sharon Fadini

122. Judy Fairless

123. Rosemary Farr

124. Erika Feaster

125. Heather Fenyk, Lower Raritan Watershed Partnership

126. Christiana Foglio, HALT PennEast

127. Kathy Fox

128. Lawrence Franz

129. Lorraine Franz

130. Gary Frederick

131. Jackie Freedman

132. Gregory Frick

133. Eleanor Friedl

134. Denise Frullo

135. Mary Gallagher

136. Victoria Galow

137. Maria Geiselhart

138. Sally Jane Gellert

139. Maryjane Genestra

140. Elizabeth George-Cheniara, New Jersey Builders Association

141. Ann Gillespie

142. Jule Girman

143. Alan S. Godber, Lawrence Brook Watershed Partnership, Inc.

144. Gregory Goellner, Coalition Against Pilgrim Pipeline

145. Steve Golin

146. Marfy Goodspeed

147. Bruce Gordon

148. Katalin Gordon

149. Sherry Gordon

150. Eugene Gorrin

151. Joyce Grant

152. Melanie Gray

153. Wendy Greenspan

154. Nancy Griffeth

155. Steve Gross

156. Martine Gubernat

157. Adele Gugliotta

158. David Haas

159. David Hall, New Jersey Audubon Society

160. Amy Hansen, New Jersey Conservation Association

161. Lois Hansen

162. Brian Hanson-Harding

163. Kimberly Haren

164. Guy Harris

165. Louis C. Harris Jr.

166. Sarah Hartman

167. John Hawkshead

168. Kerry Heck

169. Michael Heffler

170. Mary Heinz

171. Donna Henry

172. Robert Hofstrom

173. Nicholas Homyak

174. Wanda Homyak

175. Gurdon Hornor

176. Al Hough

177. Andrew Howard

178. Georgina Hricak

179. Fairfax Hutter, Hopewell Township Citizens Against PennEast

180. Melinda Illingworth

181. Howard Iwahashi

182. Dorothy Jackson

183. Michelle Jacob

184. Alana Jamieson

185. Susan Jamieson

186. Erica Johanson

187. Eric Johnson

188. Diane Jones

189. Lisa Jordan

190. Edward Jurenka

191. Dennis L. Kager, Sr.

192. Joan Kager

193. Caroline Kane

194. Adam Karas

195. Angela A. Karas

196. Daria M. Karas

197. Richard Karas

198. Barbara Karolski

199. Freda Karpf

200. Rajani Karuturi

201. Jessica Keener

202. Karen Kelleher

203. Robert Keller

204. Ann Kelly

205. Edward M. Kelly

206. Carla Kelly-Mackey

207. Laurel Kempe

208. Brian Kempf, New Jersey Association for Floodplain Management

209. Julie Kirsh

210. Philip Klimek

211. Mark Kneece

212. Suzanne Knudsen

213. Denise Kobylarz

214. Christine Koehler

215. Boris Kofman

216. Liz Kohler

217. Eddie Konczal

218. Patricia Kortjohn

219. Thomas Koven

220. Greg Krawczyk

221. Susan Krista, Franciscan Response to Fracking

222. Kevin Kuchinski, Mayor, Hopewell Township

223. Carol Kuehn

224. Robb Kushner

225. Arnold Kushnick

226. Marion M. Kyde

227. Joseph Labuda

228. Norbert Langer

229. Loretta Larkin

230. Joseph Latore

231. Marilyn Latore

232. Mary Lauko

233. David Lavender

234. Mary A. Leck

235. Mary-Michael Levitt

236. John Lezak

237. Shawn Liddick

238. Doris Lin

239. Patricia Linard

240. Dan Longhi

241. Catherine Longi

242. Howard Lopshire

243. Michael Lucas

244. Janet Lyons-Fairbanks

245. Denise Lytle

246. James Macaluso

247. Linda Mack, Trustee, Monmouth County Audubon Society

248. C. Sharyn Magee

249. Jacqueline Majorossy

250. Kenneth Malkin

251. Kathy Manese

252. Cate Manochio

253. Debbie Mans, NY/NJ Baykeeper

254. Valerie Marks

255. Walter Marks, McCormick Taylor

256. Jay Marowitz

257. Ann Marshall, HALT PennEast

258. Jennifer Martinez

259. Michael Masley

260. Alexandra Mathews

261. Michael McCune

262. Michael McGuinness, NAIOP New Jersey

263. Margaret C. McHugh

264. Colleen McKee

265. Lonette McKee

266. Linda McKillip

267. Susan Meacham

268. Nicolo Messina, HALT PennEast

269. Jennifer Meyer

270. Liz Mikre

271. Barbara Miller

272. Jim Miller

273. Lorraine Miller

274. Mary Miller

275. Tara Miller

276. Robin Millis

277. Alison Mitchell, New Jersey Conservation Foundation

278. Marianne Moessner

279. Robert Moore

280. Margaret Monks

281. Brian Morgan

282. Lauren Morse

283. Susan Mullins

284. Peter Mulshine

285. Virginia Murchison

286. Tara Murphy

287. Debra Neher

288. Heather Nemeth

289. Mike Neuhaus

290. Janine Nichols

291. Andrew Nurkin

292. Doug O'Malley, Environment New Jersey

293. Patricia Oceanak

294. Karen J. Ohland

295. Tullis Onstott

296. Alice Orrichio

297. Peter Orsini

298. Patricia Palermo

299. Joanne Pannone

300. Jennifer Pantow

301. Janice Papenberg

302. Judy Papiez

303. C.W. Parker

304. S. Pasricha

305. Carol Pastushok

306. Nimesh Patel

307. Diana Patton

308. Michael F. Paul, Mohawk Canoe Club

309. Paul Payton

310. Jacquelyn Pedersen

311. Suzanne Pelkaus

312. Ruth Pennoyer

313. Claire Perrault

314. Hilary Persky

315. Diane Peters

316. Teresa Petersen

317. Ellen Piascik

318. Kathryn Pierro

319. Michael L. Pisauro, Jr., Stony Brook Millstone Watershed Association, Lower Raritan Watershed Partnership, Bergen SWAN, Rahway River Watershed Association, Save Barnegat Bay, Raritan Headwaters Association, Cohansey

River Watershed Association, Musconetcong Watershed Association, Passaic River Coalition, Whippany River Watershed Action Committee, Lawrence Brook Watershed Partnership, New Jersey Audubon Society, New Jersey Council of Watershed Associations

320. Mike Pisauro, Stony Brook-Millstone Watershed Association

321. Renard Pongrac

322. Nancy Ponter

323. Maureen Porcelli

324. Linda Powell

325. Suzan Preiksat

326. David Pringle

327. Jean Publieee

328. Noemi de la Puente, New Jersey Environmental Lobby

329. Rebecca Rabinowitz

330. Donna Racik

331. Rev. Susan Joseph Rack, Christ Presbyterian Church

332. Robert Rader

333. Joann Ramos

334. Gregory Recine

335. Mark Renna, Evergreen Environmental

336. Mrs. Bruce Revesz

337. Mr. Bruce Revesz

338. Mary Rickards

339. Anthony Rizzello

340. Sarah Roberts

341. Elizabeth A. Roedell

342. Stewart Rosen

343. Maurice Rosenstraus

344. Elliott Ruga, New Jersey Highlands Coalition

345. Vera Rushmer

346. Barbara Sachau

347. George Sarle

348. William Sanderson

349. Ellen Sandin

350. Eric Sandrow

351. Michelle Sandrowsey

352. Cynthia Sanford

353. Leslie Sauer

354. Robert Scardapane

355. Ryan Scerbo, DeCotiis, FitzPatrick, Cole & Giblin LLP

356. Marjorie Schmidt

357. Douglas Schneller

358. John Schucker

359. Vicki Schwartz

360. Martin Seigel

361. Donald Sena

362. Stephanie Seymour

363. Georgina Shanley, Citizens United for Renewable Energy (CLUE)

364. Bill Sheenhan, Hackensack Riverkeeper

365. Robert Sherwood

366. Cynthia Shevelew

367. Vikram Sikand

368. Sandra Simpson

369. Frank Sinden

370. Grace Sinden

371. Geri Siwulic, HALT PennEast

372. Charles Slonsky

373. Charles Slotkin

374. Ludlow Smethurst

375. Brandi Smith

376. Katherine Smith, Pinelands Preservation Alliance

377. Matthew Smith

378. David Snope

379. Elizabeth Anne Socolow

380. Aniko Somogyi

381. Lotte Sonnenschein

382. Katherine Sparrow

383. Aurelle Sprout

384. Howard Steinberg

385. Faith Steinfort

386. Robert Steinfort

387. Teresa Stimpfel

388. Fred Stine, Delaware Riverkeeper Network

389. Daniel Stopfer

390. Clarence Stone

391. Gloria Stone

392. Sharon Stoneback

393. Barbara Stomber, Franciscan Response to Fracking

394. Constance Stroh

395. Pamela Sturt

396. Mary Sullivan

397. Lisa Suydam

398. Ronald Sverdlove

399. Eric Sween

400. C. Brant Switzler

401. Maureen Syrnick, HALT PennEast

402. Maureen Syrnick, Kingwood Township Planning Board

403. Victor Sytzko

404. Zofia Szebiotko

405. Patricia Sziber

406. Sasha Taner

407. Sherry Taylor

408. John Teevan

409. Karin Tekel, EcolSciences, Inc.

410. Dena Temple

411. Russell Tepper

412. Paul Teshima

413. Samantha Thompson

414. Kathi Thonet

415. Jeff Tittel, New Jersey Sierra Club

416. Taylor Todd

417. Mary Tolmie

418. Patricia Tomeske

419. Kierstyn Toth

420. Rich Toth, Jr.

421. Norman Torkelson

422. Daphne Townsend

423. Rosanne Traficante

424. Minh Chau Tran

425. Debra Troy

426. Mary Tulloss

427. Daniel Tumpson

428. R. Vanstrien

429. Ruth H. Varney

430. Sebastiaan de Voogd

431. Lois Voronin, Kingwood Township Environmental Commission

432. William David Wagenblast

433. Jonathan Wall

434. Kirsten Wallenstein

435. Sally Warner

436. Aaron Warren

437. Mary Watkins

438. Yael Webber

439. Zorina Weber

440. Kimi Wei

441. Peddrick Weis

442. Piper Weldy

443. Rosalind Westlake, HALT PennEast

444. Donna Wharton

445. Barbara White

446. Anne Whitehurst

447. Suzanne Wilder

448. Linda Williams

449. Lisa Williams

450. Martin Wissig

451. Tim Worts

452. Jessica Wortsmann

453. Marian Young

454. G. Yuzawa

455. Jane Zeff

456. Brook Zelcer

457. Barbara Ziemian

458. Andrew Zimmerman

459. Christine Zon

460. Laura Zurfluh

461. The Sierra Club submitted an identical comment letter on behalf of 367 individuals. The Department has designated this standard letter as commenter 461. Where individuals added comments in addition to those appearing on the form letter, their name is listed separately in the commenter list above.

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 Comments

General

1. COMMENT: Amending the FWPA Rules for consistency and alignment with other land use regulatory programs while also protecting wetlands and waters of the State is supported. (140)

2. COMMENT: The Department is commended for its efforts to reduce unnecessary regulatory burden, add appropriate flexibility and predictability, and provide consistency with Federal, local, and other State requirements. Procedural consistency with the FHACA Rules is a great

step forward for the Department. The notice of proposal also addresses many longstanding implementation issues. (262)

RESPONSE TO COMMENTS 1 AND 2: The Department acknowledges these comments in support of the rules.

3. COMMENT: Please provide a table of contents including a page directory similar to the FHACA Rules. (255)

RESPONSE: The courtesy copy of the adopted FWPA Rules posted on the Department's website will include a full table of contents with page numbers.

4. COMMENT: Diagrams or exhibits should be included whenever possible in the FWPA Rules to illustrate and clarify the requirements, such as the difference between disturbance in a transition area that must be counted under a general permit and disturbance that is allowed separately for access. (140)

RESPONSE: The Department agrees that in some cases illustrations, diagrams, and figures help to clarify the requirements of the rule text. The figures depicting scenarios under general permits 10 and 10A, for example, have been retained in the adopted rules to aid understanding. While the Department believes the plain language of the rules, as further explained in the notice of proposal Summary, is sufficient to understand their substance, the Department will consider suggestions to further clarify requirements through a visual aid within the rules themselves or in a guidance document.

5. COMMENT: Work is needed for water and power infrastructure but is not allowed. (173)

RESPONSE: The adopted rules discourage any development in wetlands and transition areas that has an alternative location outside of regulated areas. However, the Department recognizes that there are some situations where there are not suitable sites outside of wetlands or transition areas, and, therefore, permits development that sufficiently minimizes impacts to freshwater wetlands and their transition areas, and the environment. Several general permits authorize appropriately constructed infrastructure. For example, general permit 2 authorizes underground utility lines and general permit 21 authorizes above-ground utility lines. For work in transition areas, water and power infrastructure projects may be authorized under a special activity waiver for linear development. Finally, projects may be authorized under an individual permit, provided the stringent environmental standards can be met. Individual permits allow activities at a larger scale than general permits, provided the activity is in the public interest and meets a number of other environmental requirements.

Public comment period, notice of proposal logistics

6. COMMENT: The online comment submission portal should allow longer comments, considering the length of the notice of proposal. (327)

RESPONSE: The electronic submission portal located at: http://www.nj.gov/dep/rules/comments/index.html, allows for comments up to 20,000 characters. For comments longer than 20,000 characters, or approximately 10 pages, the commenter is directed to send an email to rulemakingcomments@dep.nj.gov and attach all comments as a Word document. These two options provide sufficient opportunity for a commenter to submit as many comments as necessary.

7. COMMENT: The notice of proposal, including the table of recodifications, is too confusing to be useful. (327)

RESPONSE: The notice of proposal Summary, including, in this case, the "table of citations and recodifications" referenced by the commenter, is designed to explain the rationale for all the proposed changes within the notice of proposal. Because this rulemaking included the relocation of many existing sections to new locations within the rules as part of the Department's effort to make its land use rules as uniform as possible to make the rules more user-friendly, the Department included a table of citations and recodifications. The list identified the then-existing citations of the sections of the rule that were proposed to be relocated and the corresponding proposed new citation of that same provision, to assist the reader in more easily locating discussion of the proposed changes to that provision. Using the table, the reader would be more easily able to determine how the rulemaking might impact sections of the rules most important to them. The Department believes that the use of such a table can be a valuable tool in allowing a reader to understand both how the rules are being rearranged and in finding information in the Summary explaining the purpose behind any proposed changes in addition to the relocation.

8. COMMENT: Due to the extensive nature of the proposed changes, 60 days is an inadequate period for comment. (415)

RESPONSE: As indicated by the commenter, a 60-day public comment period was provided, consistent with the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. (APA). In addition to publication of the notice of proposal in the New Jersey Register, the Department provided additional notice of the notice of proposal on its website, to media outlets in the Statehouse, by e-mail to the Department's rulemaking listserv, and publicized the

rulemaking by press release. Further, the Department conducted extensive stakeholder outreach in developing this notice of proposal.

A total of 829 individuals and agencies submitted comments within the 60-day comment period on a variety of topics related to the rulemaking. Based on the extensive comments timely submitted during the 60-day comment period, the Department believes that there was ample opportunity to provide comments and discuss the rulemaking. An additional period for public comment would not likely result in the Department receiving comments relevant to the proposed rulemaking that raise issues or provide new information, data, or findings that were not previously raised or provided during the development of the proposed rule or during the 60-day comment period.

Stakeholder process

9. COMMENT: The rule development process was corrupt. The stakeholder meetings only included a select few who were biased in favor of the Department and are motivated by profits. The public, as taxpayers, should have been invited to the meetings held to prepare the notice of proposal. In past rulemakings, public comments did not seem to have an effect on whether a notice of proposal would be adopted. The flawed rulemaking process results in a lack of confidence in the contents of the notice of proposal. (327)

10. COMMENT: The Department should withdraw the current notice of proposal until more thorough scientific review and input from local governments and environmental stakeholders can be gathered. Nearly all of the changes proposed weaken New Jersey's more stringent wetland protections, which are necessary in the face of additional stresses on the State's water resources due to increased development pressures. (84, 160, 179, and 222)

RESPONSE TO COMMENTS 9 AND 10: Stakeholder involvement is an important component of rule and policy development. The purpose of the stakeholder process is to convene representatives of all affected interests to seek their experiences and perspectives on a given topic, so that well-informed and balanced decisions are made when drafting rules. In this case, stakeholders invited to participate in the process included a wide range of interests, as outlined in the Response to Comments 18 and 19, including representatives of municipal governing bodies and environmental stakeholders. The purpose of the stakeholder process is not to reach a consensus or to draft a rule that is supported by one interest over another, but to generate an informed rulemaking that reflects the Department's determination as to how to best satisfy its statutory mandates. The Department posted on its stakeholder webpage the sign-in sheet of all stakeholder meeting attendees, as well as audio recordings of all meetings. This information is available from the Department's website at http://www.nj.gov/dep/transformation/landuse/landuse_rules.html. Many of the amendments adopted herein reflect the suggestions and recommendations of the subcommittees and stakeholders. The purpose of the rulemaking is to seek comments from the public, including both those who participated in the stakeholder process and those that did not, on the rule that was developed following the stakeholder process. The Department reviews and considers all timely submitted comments concerning the notice of proposal received during the comment period and responds to those comments in the comment/response section of the rule adoption.

Public comments often lead the Department to make corrections and changes on adoption, and/or to address commenters' concerns in future rulemakings. For example, several comments were received on the amendments to the FHACA Rules asking the Department to establish a hierarchy of mitigation alternatives, similar to that in the FWPA Rules, for different

riparian zone mitigation alternatives, and asserting that on-site mitigation should be the most preferable alternative (see 48 N.J.R. 1067(a), particularly the Response to Comments 781 through 786). In response to those comments, the Department proposed, and recently adopted, a mitigation hierarchy for riparian zone mitigation that prioritizes on-site creation, restoration, or enhancement (see 48 N.J.R. 1014(a); 49 N.J.R. 2246(a)).

11. COMMENT: The rule changes have been proposed without adequate input from the environmental community; without scientific data, analyses, or legal justification; and without careful drafting and detail regarding the scope of proposed definitions and language changes. (59, 115, 236, 277, and 398)

RESPONSE: As explained in the Response to Comments 9 and 10, the Department conducted a robust stakeholder process involving a number of internal and external stakeholders, including representatives from the environmental community. The notice of proposal Summary details the scientific and legal reasons the Department has determined the adopted changes are necessary and appropriate. As demonstrated in the notice of proposal Summary, the Department has analyzed the probable effects of the amendments, including social impacts, economic impacts, environmental impacts, impacts on jobs, agricultural industry impacts, effects on small businesses, impacts on housing affordability, and impacts on the State's smart growth goals. The adopted amendments are the result of five years of internal discussions, stakeholder engagement, and a robust review process to ensure that the amendments achieve the Department's transformation goals.

General opposition

12. COMMENT: Development should not occur in areas that are protected. Economic progress can be made by investing in wind and solar energy rather than pursuing development in wetlands. (139)

13. COMMENT: The proposed rules will have serious negative consequences to New Jersey's wetlands because they permit filling of wetlands. (153)

14. COMMENT: The FWPA recognized that wetlands are among the most valuable and fragile natural resources in the State and put restrictions in place to ensure wetlands are safe from pollution, intrusion, and development. However, the new rules would permit pipelines, highways, and other projects to destroy the characteristics that make wetlands unique and valuable. The proposed rules sacrifice irreplaceable natural resources to development pressure and are a step backwards. (18)

15. COMMENT: New Jersey is already the most densely populated state with resources already suffering from the impacts of development, including flooding, which leads to runoff flowing into stressed rivers and streams, and damage to property. Wetlands are an essential part of New Jersey's ecosystem. The proposed amendments will allow development of the State's limited remaining wetlands, which will harm the environment and public health. These rules should not be adopted; no development or pollution should be allowed in any wetlands. (3, 8, 20, 39, 42, 43, 67, 80, 95, 106, 108, 117 through 121, 130, 134, 143, 153, 157, 166, 168, 169, 187, 191, 207, 212, 216, 221, 224, 231, 232, 233, 235, 250, 254, 260, 263, 267, 268, 270, 283, 286, 295, 298, 307, 318, 348, 363, 369, 370, 371, 373, 379, 380, 389, 396, 400, 404, 411, 423, 426, 452, 454, and 457)

RESPONSE TO COMMENTS 12 THROUGH 15: The FWPA recognizes the many important functions and values of freshwater wetlands and their role in the natural and built environments.

The Department has created and implemented the freshwater wetlands permitting program in consideration of these functions and values. The FWPA specifies that "it is in the public interest to establish a program for the systematic review of activities in and around freshwater wetland areas designed to provide predictability in the protection of freshwater wetlands" and "that it shall be the policy of the State to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance." However, the FWPA does not prohibit development in or near wetlands. Instead, the FWPA required the Department to establish a permitting program for such activities and establishes the criteria for approving activities in freshwater wetlands. The FWPA does not specifically prohibit any type of development from occurring in or near wetlands as long as the criteria for approval in the Act are met. The adopted rules fulfill the FWPA's mandate by maintaining the Act's strict standards for development in wetlands and by only providing for approval of activities with either a *de minimis* impact, individually and cumulatively, or those activities which, among other requirements, do not have a feasible alternative location, result in the minimum feasible alteration or impairment of the aquatic ecosystem, and are in the public interest.

16. COMMENT: The proposed rules raise significant environmental justice concerns for the most urban communities in New Jersey and will compromise the ability of future generations to benefit from the ecosystem services provided by wetlands. (125)

RESPONSE: The adopted rules maintain the stringent protection of wetlands, transition areas, and State open waters in the prior rules while aligning the permitting process in the FWPA Rules with that in the CZM and FHACA Rules. As explained in more detail in the Response to Comments 20 through 32, the notice of proposal does not weaken protections and will, therefore,

not compromise the ability of future generations to benefit from the many ecosystem services provided by wetlands. The FWPA Rules apply equally to all areas of the State, from wilderness to the most densely populated cities. All of the rules recognize potential hardships in certain circumstances, which may be used, as appropriate to facilitate redevelopment.

17. COMMENT: The Department must withdraw these proposed regulatory changes and, based on sound science, data, and analyses, enforce New Jersey's existing regulations more aggressively to protect the public's remaining irreplaceable natural resources. (59, 114, 236, 277, and 399)

RESPONSE: The adopted rules create a more efficient permitting process, allowing the Department to focus efforts on the activities with the greatest potential environmental impact while maintaining the stringent protection of wetlands, transition areas, and State open waters present in the prior rules. The adopted rules align the enforcement provisions of the FWPA Rules with those in the CZM and FHACA Rules, which will facilitate enforcement actions against violations of the rules. The adopted changes will allow the Department to more effectively manage development in and near freshwater wetlands throughout the State and improve enforcement of these protective requirements.

18. COMMENT: Wetlands provide significant economic and environmental benefits. However, studies show that New Jersey has been losing wetlands, including a report by the United States Geological Survey showing that the State lost 39 percent of its wetlands between the 1780s and the 1980s and a study by Lathrop and Hasse showing that an additional 56,703 acres of wetlands were lost between 1986 and 2012. Therefore, at least 45 percent of New Jersey's wetlands have

been lost. Other studies, such as New Jersey's Integrated Water Quality Monitoring and Assessment Report, show that there have not been significant improvements in water quality. Therefore, it is vital that New Jersey, through its regulations and permitting decisions, protect its remaining wetlands from degradation. As such, the Department should not adopt the rules as proposed, but should convene a true stakeholder process with relevant groups to develop a new proposal that will strengthen the protections to our remaining wetlands. (319)

19. COMMENT: What is the science behind these proposed rule changes? (179)

RESPONSE TO COMMENTS 18 AND 19: The Department recognizes past wetlands losses and has, therefore, maintained stringent protections of freshwater wetlands, transition areas, and State open waters in the adopted rules. The improvements to the permitting process will allow the Department to more effectively administer the freshwater wetlands permitting program and will direct Department time and resources to reviewing projects with the greatest potential for environmental impact. In developing these rule changes, the Department evaluated successes and limitations of the prior rules and, through analysis and collaboration with internal and external stakeholders, identified changes that will allow the Department to more efficiently effectuate the purposes of the FWPA through the FWPA Rules.

As explained in the notice of proposal Summary, the Department sought input from local governments, the development community, the environmental community, and State and Federal agencies through three stakeholder meetings held on April 11, 2011, April 29, 2011, and March 24, 2014. Issues discussed with stakeholders included potential changes to the application process, the standards governing development within freshwater wetlands, State open waters and transition areas, and mitigation standards. In addition to local, State, and Federal agency participants, organizations, and companies participating in the stakeholder process included

Evergreen Environmental, DuBois Environmental, PSE&G, the New Jersey Audubon Society, Amy Greene Environmental Consultants, EcolSciences, Inc., Sokol, Behot & Fiorenzo, Maser Consulting, and the New Jersey Builders Association. A number of environmental organizations, including the American Littoral Society, the Association of New Jersey Environmental Commissions (ANJEC), New Jersey Conservation Foundation, and Stony Brook Millstone Watershed Association, were invited to participate in the process. The Department also held several meetings with members of the agricultural community including representatives from the New Jersey Department of Agriculture, the New Jersey Farm Bureau, and the American Cranberry Growers Association (ACGA) in order to address amendments intended to clarify the existing exemptions of certain agricultural activities from the FWPA Rules.

20. COMMENT: Weakening wetlands protections will only hurt water quality and cause other issues in the Lower Delaware. (102 and 226)

21. COMMENT: Negative impacts of wetlands loss can be better managed with a landscape plan that prioritizes protection of remaining wetlands. However, the proposed rules reduce those protections. Many of New Jersey's waters do not meet Federal water quality standards; it is important to not reduce existing protections. (125)

22. COMMENT: The proposed rules are opposed. New Jersey has some of the strongest wetlands protections in the nation; these protections must be upheld. (48, 59, 60, 75, 114, and 161)

23. COMMENT: Wetlands are critical for the environment. Wetlands protect against flooding, improve water quality, recharge aquifers, and provide important habitat. Over half of New Jersey's wetlands have been lost in the last 200 years and a couple thousand acres continue to be

lost every year. The State cannot afford to lose more wetlands. (5, 6, 13, 15, 16, 19, 22, 27, 29, 33, 35, 36, 37, 38, 39, 41, 45, 55, 57, 59, 65, 67, 73, 74, 76, 78, 82, 83, 92, 93, 97, 103, 121, 122, 123, 124, 127, 133, 137, 138, 142, 148, 162, 165, 167, 170, 171, 173, 175, 182, 183, 204, 206, 212, 217, 219, 220, 229, 237, 238, 239, 241, 242, 244, 245, 249, 256, 259, 265, 266, 271, 274, 275, 280, 282, 283, 289, 294, 301, 312, 314, 316, 321, 326, 329, 330, 332, 349, 360, 374, 382, 383, 387, 394, 395, 406, 407, 410, 414, 427, 429, 435, 437, 442, 446, 448, 449, 456, 458, and 461)

24. COMMENT: The State is already overdeveloped, which increases risk for natural disasters. There are also already many oil and gas pipelines, with plans to increase the number of pipelines. These man-made threats make wetlands protections essential. (223)

25. COMMENT: The notice of proposal to weaken the FWPA is opposed. The proposed changes would extend permits for pipeline projects, could fragment wildlife habitat, leave communities vulnerable to flooding, and make waterways more susceptible to pollution. (334)

26. COMMENT: Weakening the FWPA Rules is inconsistent with the goals and objectives of the Lower Delaware Wild and Scenic Council Management Plan. (102 and 226)

27. COMMENT: The notice of proposal is an example of how the current administration has not used its power wisely in regard to the environment. (139)

28. COMMENT: Protect the precious resource that is New Jersey's wetlands to avoid creating environmental tragedy that is all too common in the State's history. (256)

29. COMMENT: Do not move forward with this notice of proposal. (5, 6, 12, 34, 75, 109, 130, 166, 173, 174, 207, 214, 223, 228, 274, 313, 323, 411, and 455)

30. COMMENT: The proposed rules seem contrary to the Department's previous work to protect the environment against unnecessary development. (21, 28, 50, 68, 71, 80, 98, 99, 100, 109A,

118, 119, 120, 126, 131, 157, 169, 194, 195, 196, 197, 201, 216, 235, 254, 257, 267, 268, 293, 295, 315, 350, 351, 371, 390, 391, 400, 401, and 443)

31. COMMENT: The proposed rules are a retrenchment of the policy commitments made in the FWPA and will establish barriers to successful conservation, restoration, and enhancement of the Lower Raritan Watershed. (125)

32. COMMENT: Wetlands are important to the health of humans, wildlife, and the environment in general. Benefits provided by wetlands cited by commenters include wildlife habitat (including habitat for threatened and endangered species and economically valuable fish species, which has decreased significantly over the last 20 years), water filtration and storage, flood control/protection, water quality benefits like aquifer recharge that ensure the availability of safe drinking water, and public open space and enjoyment. Wetlands provide these benefits at no cost, while saving billions in potential costs from flood damage, water treatment, and more. Accordingly, wetlands must be protected. The proposed amendments reduce protections and will have a negative impact on present and future generations and the environment by, for example, increasing water pollution, flooding, and wildlife habitat fragmentation. Once wetlands are lost, they are difficult or impossible to recreate. The amendments should not be adopted. (1, 2, 3, 6, 7, 9, 10, 11, 12, 14, 13, 15, 16, 18, 19, 20, 21, 22, 23, 24, 27 through 39, 41, 44, 45, 46, 47, 48, 50 through 59, 61 through 68, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 82, 83, 85, 89, 90, 91, 92, 93, 94, 96 through 103, 107, 108, 109A, 110, 111, 112, 113, 115, 116, 118 through 127, 130 through 139, 141, 142, 143, 145, 147, 148, 149, 150, 152, 153, 155, 156, 157, 158, 159, 162, 163, 164, 165, 167, 169 through 175, 177, 178, 181, 182, 183, 184, 186, 187, 188, 192, 193, 194, 195, 196, 197, 198, 200, 201, 202, 203, 204, 205, 206, 209 through 220, 223, 225, 226, 227, 229, 231, 232, 233, 235, 237, 238, 239, 241 through 254, 256, 257, 258, 259, 260,

264 through 272, 274 through 283, 285, 286, 287, 289, 291, 292, 293, 294, 295, 296, 299, 301, 302, 303, 304, 305, 306, 307, 309, 310, 311, 312, 314, 315, 316, 317, 318, 321, 322, 323, 324, 325, 326, 327, 329, 330, 331, 332, 333, 334, 339, 341, 342, 343, 345, 349, 350, 351, 352, 353, 354, 356, 357, 358, 359, 360, 362, 364, 365, 366, 367, 368, 369, 370, 371, 372, 374, 375, 376, 377, 378, 380, 382, 383, 385, 386, 387, 388, 390, 391, 392, 394, 395, 397, 398, 399, 400, 401, 402, 403, 405, 406, 407, 408, 410, 412, 413, 414, 416, 418, 419, 420, 421, 422, 424, 425, 426, 427, 429, 430, 431, 432, 434, 435, 436, 437, 438, 439, 440, 442, 443, 444, 446, 448, 449, 450, 451, 452, 453, 454, 456, 457 458, 460, and 461)

RESPONSE TO COMMENTS 20 THROUGH 32: The adopted amendments do not weaken the Department's wetlands protections, which represent a legacy of strong environmental protection dating back to the enactment of the FWPA and implementing rules during the Kean administration. The Department recognizes the many essential functions and values of wetlands, including their role in maintaining water quality, managing stormwater, and providing wildlife habitat. The recognition of these functions and values guided the adoption of the FWPA Rules in 1989 and continues to guide the freshwater wetlands permitting program today.

The amendments, repeals, and new rules adopted herein align the permitting processes of the FWPA Rules with the CZM and FHACA Rules to the extent the respective enabling statutes allow following previous amendments to the CZM Rules (see 47 N.J.R. 1392(a)) and FHACA Rules (see 48 N.J.R. 1067(a)). This alignment streamlines permitting without sacrificing the substantive protections that are essential to maintaining freshwater wetland functions and values. Aligning the structure of the rules and the permitting process across the three land use programs promotes understanding of, and compliance with, the protective standards contained within each rule chapter. The proposed new general permits-by-certification and proposed amendments to

existing general permits and transition area waivers contain specific acceptability standards and requirements that will ensure the environmental impact of new development and activities authorized under these permits is minimized. While in some cases amendments provide more flexibility, increasing flexibility is not equivalent to weakening protections. The Department embraces a results-based approach in balancing the need to locate certain activities in or near wetlands with the public's interest in preserving freshwater wetlands and State open waters; additional flexibility is acceptable if the result remains minimization of impacts to the State's freshwater wetlands and State open water resources. The FWPA Rules continue to set a high bar for development in and around wetlands even while increasing flexibility and streamlining processes.

33. COMMENT: Landowners of New Jersey have dedicated millions of tax dollars to farmland and open space preservation because they believe it is important to keep the State as "green" as possible. New Jersey landowners understand the connections between open space, which is vital to creating water recharge areas, and the protection of wetlands and their buffers, in ensuring the State's economic health and future. Any effort to loosen regulatory requirements that keep water standards high run counter to the public's commitment to the State's environmental future. (8, 21, 28, 50, 68, 71, 80, 98, 99, 100, 109A, 117, 118, 119, 120, 126, 131, 157, 169, 194, 195, 196, 197, 201, 212, 216, 235, 254, 257, 267, 268, 293, 295, 315, 350, 351, 371, 390, 391, 400, 401, 417, and 443)

34. COMMENT: New Jersey's preserved open space is an important asset for such a densely populated State and essential to quality of life in the State. The Department, therefore, must continue to protect wetlands. (19, 39, 198, 199, 219, 349, 418, 439, 441, and 455)

RESPONSE TO COMMENTS 33 AND 34: The Department recognizes the value of open space and wetlands to the quality of life in communities across the State. As explained in the Response to Comments 20 through 32, the Department is not weakening freshwater wetlands protections by adopting the amendments, repeals, and new rules in the FWPA Rules. The adopted rules require minimization of impacts in and adjacent to wetlands and in many cases require applicants to consider alternative locations and configurations for proposed regulated activities to minimize or eliminate adverse impacts to wetlands, transition areas, and State open waters. General permits-by-certification and general permits authorize activities with only very minor individual and cumulative impacts and are strictly limited in their size and scope to ensure minimal impact on the quality and character of a wetland. Individual permits authorize activities that the Department cannot predetermine will have minimal impacts, and are accordingly subject to more rigorous review standards. Among other requirements, activities authorized by individual permits must be in the public interest, in recognition of the many public benefits that wetlands provide.

In addition to maintaining the protective standards of the prior rules, it is anticipated that the adopted amendments improve the Department's protections of wetlands. The administrative alignment with other land use rules and reorganization and consolidation of provisions facilitates understanding of, and compliance with, the protective standards in the rules. Furthermore, amendments to general permit 16 that replace the requirement that activities are sponsored or substantially funded by a Federal or State agency or other approved entity with the requirement that activities are only approved by such an entity, expand the activities authorized under the permit to include alteration of hydrology to enhance wetlands conditions, and remove the conservation restriction requirement, encourage the creation, restoration, or enhancement of water quality and habitat functions and values by improving organization and aligning the

requirement to be approved by a government agency or charitable conservancy with a similar general permit in the FHACA Rules.

35. COMMENT: Wildlife, particularly threatened and endangered species, are suffering from continued habitat fragmentation. Simplifying the process to fill or degrade wetlands will result in more fragmentation of habitat, to the detriment of New Jersey's wildlife. (14, 18, 53, 54, 77, 85, 90, 91, 102, 107, 143, 163, 177, 178, 200, 205, 226, 248, 251, 253, 258, 264, 267, 269, 291, 292, 307, 322, 331, 339, 364, 372, 421, 426, 432, and 450)

36. COMMENT: Wetlands must be protected to ensure continued survival of many species. (59, 188, 230, 265, 284, 397, 412, 419, 420, and 456)

37. COMMENT: New Jersey is already overdeveloped and losing wetlands and open space, leading to a reduction in bird species. Protecting the birds' feeding, resting, breeding, and migration habitats is, therefore, especially critical. There must be a high barrier against filling or degrading wetlands. The notice of proposal to weaken regulations goes in the entirely wrong direction and is opposed. (159 and 241)

RESPONSE TO COMMENTS 35 THROUGH 37: As explained in the Response to Comments 20 through 32, the Department recognizes the important role that freshwater wetlands, transition areas, and State open waters serve as wildlife habitat. The adopted rules will not have a negative impact on wildlife. First, general permits-by-certification and general permits strictly limit the amount of disturbance allowed in wetlands, transition areas, and State open waters to ensure activities under these permits have a minimal impact individually and cumulatively. These permits, as well as individual permits, are additionally subject to the condition that "the activities shall not destroy, jeopardize, or adversely modify a present or documented habitat for threatened

or endangered species; and shall not jeopardize the continued existence of any local population of a threatened or endangered species" to provide additional protection for the most vulnerable species and their habitats (see N.J.A.C. 7:7A-5.7(b)3, in Conditions that apply to all general permits-by-certification and general permits and N.J.A.C. 7:7A-10.2(b)3 in Standard requirements for all individual permits).

The Department's Threatened and Endangered Species Unit routinely conducts site inspections to confirm the presence of threatened or endangered species habitat and assess the potential impacts on that habitat from proposed regulated activities. In addition, the FWPA Rules prescribe a 150-foot transition area around a wetland of exceptional resource value. This classification of freshwater wetlands includes wetlands that are either present habitat of threatened or endangered species habitat and wetlands that are documented habitat for threatened or endangered species that remains suitable for breeding, resting, or feeding by these species during the normal period they would use the habitat. Impacts to protected transition areas are only allowed through transition area waivers, which are issued only when the Department determines that the activity, when performed in accordance with any conditions added to the waiver, does not result in a substantial impact on the adjacent wetlands, and does not impair the purposes and functions of transition areas (see N.J.A.C. 7:7A-8.1(b)). For a special activity waiver for stormwater management and a special activity waiver for linear development, the applicant must also demonstrate that there is no alternative feasible location for the activity (see N.J.A.C. 7:7A-8.3(d) and (e)). The purposes of a transition area listed at N.J.A.C. 7:7A-3.3 that may not be impaired include the rule's recognition that wetlands function as a habitat area for activities, such as breeding, spawning, nesting and wintering for migrating, endangered, commercially and recreationally important wildlife, and that they perform other functions

important to wildlife and the environment in general (see adopted N.J.A.C. 7:7A-3.3(a) and (b)). For transition area averaging plan waivers, the Department presumes that an activity in a transition area would have a substantial impact on the adjacent wetland and will not issue a transition area waiver if the wetlands adjacent to the transition area in question is breeding or nesting habitat for a threatened or endangered species, unless the applicant demonstrates that the activity would qualify for an individual permit. Under the individual permit standards at N.J.A.C. 7:7A-10.2, the Department will only issue an individual permit if the proposed activities "will not destroy, jeopardize or adversely modify a present or documented habitat for threatened or endangered species; and shall not jeopardize the continued existence of a local population of a threatened or endangered species." The Department may issue a transition area waiver for an activity that does not fit any of the types of transition area waivers listed at N.J.A.C. 7:7A-8.1(a) if, in accordance with N.J.A.C. 7:7A-8.1(d), the applicant documents that the activity will have no substantial impact on the adjacent wetlands (including impacts on sediment, nutrient, and pollutant transport and removal, impacts on sensitive species, and surface water quality impacts), which may include wildlife habitat suitability studies and other scientific documentation. In no case will the Department approve an activity that would result in a transition area of less than 75 feet wide adjacent to a wetland of exceptional resource value and, in accordance with N.J.A.C. 7:7A-8.1(g), a transition area waiver for an activity adjacent to an exceptional resource value wetland must be conditioned on a transition area averaging plan that provides an average transition area width of at least 100 feet.

In the case of transition area waivers, the rules allow the Department to add equivalent protections through conditions that ensure that an activity does not result in a substantial impact

on the wetlands and does not impair the functions and values of transition areas, which, as specified above, includes habitat functions. (see N.J.A.C. 7:7A-8.1(b)).

To be issued an individual permit, an applicant must also demonstrate that the proposed activity "will result in the minimum feasible alteration or impairment of the aquatic ecosystem including existing contour, vegetation, fish and wildlife resources, and aquatic circulation of the freshwater wetland and hydrologic patterns of the HUC 11 in which the activity is located," among several requirements. The combination of the restrictions and protections in the FWPA Rules are, therefore, protective of wildlife, including both threatened or endangered species, and species not so designated.

38. COMMENT: Considering the history of wetland losses and water quality degradation caused by inconsistent application of existing standards, only standards that would more stringently protect the remaining wetlands should be allowed. (59, 75, 114, 236, 277, and 399)

ESPONSE: The adopted rules are intended to create a more efficient and predictable permitting process. The adopted amendments, repeals, and new rules will allow the Department to more effectively and efficiently administer the freshwater wetlands permitting program. The chapter has been reorganized for clarity and substantially improves the freshwater wetlands permitting process by relocating sections, consolidating similar provisions, simplifying language, and harmonizing administrative requirements with other Department rules. The adopted amendments improve consistency between the Department's land use rules and within the FWPA Rules themselves, which will facilitate understanding and compliance among applicants and promote consistency in land use regulatory decisions by the Department.

39. COMMENT: Water quality regulations should not be "easy"; what the regulations protect is precious and irreplaceable. While those seeking relaxed standards are motivated by profit, those fighting to keep strict standards have no financial agenda and only want to ensure the environmental health and water quality of the State. Do not implement changes that relax the existing protections. (8, 21, 28, 50, 68, 71, 80, 98, 99, 100, 109A, 118, 119, 120, 117, 126, 131, 157, 169, 185, 194, 195, 196, 197, 201, 212, 216, 235, 254, 257, 267, 268, 293, 295, 315, 350, 351, 371, 390, 391, 400, and 443)

40. COMMENT: The proposed rules promote short-term economic gain but will have long-term negative consequences. (22, 36, 44, 65, 92, 173, 347, 385, 386, 433, 449, and 458)

41. COMMENT: The proposed amendments place economic development and financial profit above protection of wetlands. The environmental resources of the State, including its wetlands and the environmental and public health benefits they provide (including drinking water, flood control/stormwater absorption, carbon storage, water and air pollution removal, local climate regulation, wildlife habitat, viewsheds, and recreation), are more important and valuable than private gain. The State is already overdeveloped; once its remaining environmental resources are destroyed, they cannot be replaced. The Department should not give in to political or development pressures and greed; the proposed rules should not be adopted. (2, 4, 8, 24, 88, 33, 35, 37, 50, 51, 52, 55, 65, 104, 106, 124, 125, 144, 160, 173, 174, 176, 181, 187, 190, 206, 237, 239, 260, 270, 273, 282, 285, 288, 289, 297, 306, 309, 311, 312, 314, 324, 346, 348, 352, 347, 358, 361, 374, 381, 382, 384, 397, 407, 417, 428, 433, 446, 448, 451, and 459)

42. COMMENT: The rules should not be weakened to benefit various economic interests at the expense of the environmental resources the rules are designed to protect. Interests cited by commenters as benefiting from the proposed amendments include gas pipeline and energy

interests, construction companies and developers, and heavy industry. (31, 56, 123, 173, 190, 321, and 366)

43. COMMENT: Through New Jersey's recent history, there have been environmental changes that make the State a less desirable place to live. While there is a need to reduce regulatory burden to attract companies to the State and invigorate the economy, the consequences of environmental deregulation must be carefully considered. Serious environmental changes are very difficult, if not impossible, to reverse. (424)

44. COMMENT: New Jersey has placed economic gain ahead of environmental protection for too long, with the destruction of natural resources and the economy as the result. However, there is still plenty left to protect. Do not weaken protections under the misguided belief that it will improve the economy. (88)

RESPONSE TO COMMENTS 39 THROUGH 44: This rulemaking is intended to increase clarity through the consolidation of redundant provisions, the simplification of language or, conversely, the incorporation of additional detail and description where necessary, and the alignment of procedural requirements across the Department's land use permitting programs. These changes will simplify the permit process and facilitate greater compliance by prospective applicants. The Department summarized rule amendments, repeals, and new rules in the notice of proposal Summary, which discussed changes in the context of several major topic areas. The Department also summarized the stakeholder process that guided the notice of proposal, which included local governments, the development community, the environmental community, and State and Federal agencies across three meetings in 2011 and 2014.

The Department recognizes the importance of a healthy environment in promoting a healthy economy. New Jersey's environment continues to recover from a history of industrial

misuse, even in the face of immense development pressure. The Department's mission statement recognizes the role that the Department must play in balancing economic growth with environmental protection, stating that "it is crucial … to recognize the interconnection of the health of New Jersey's environment and its economy, and to appreciate that environmental stewardship and positive economic growth are not mutually exclusive goals." The adopted FWPA Rules reflect the Department's continued commitment to protection of this important environmental resource and accomplishment of its mission.

The adopted rules are intended to reduce unnecessary regulatory burden; add appropriate flexibility; provide better consistency with Federal, local, and other State requirements; and address implementation issues identified since the last readoption with amendments of the rules in October 2008. In addition to increasing the amount of monetary contribution required to compensate for activities that qualify for general permits under the rules to ensure that the compensation required reflects current mitigation costs, the adopted amendments, repeals, and new rules consolidate similar provisions, simplify language, and harmonize certain procedural provisions with the Department's other land use rules. While there will be a positive economic impact associated with the streamlining of land use permitting processes because time and money spent preparing applications is anticipated to decrease, the Department does not anticipate any major economic benefit for any particular interest. Further, the Department does not anticipate a positive economic impact generated by more new development in and near wetlands because the adopted rules do not facilitate development nor do they provide for activities that would not have been authorized by the prior rules.

The adopted FWPA Rules continue to recognize the public's interest in protecting wetlands and State open waters. Accordingly, the rules provide that the Department will only

issue an individual permit if the Department determines, after consideration of a number of factors (including the public interest in preservation of natural resources, the interest of the property owners in reasonable economic development, and the functions and values provided by the freshwater wetlands and probable individual and cumulative impacts of the regulated activity on public health and fish and wildlife), that the activity is in the public interest.

As demonstrated above, the adopted amendments and new rules do not prioritize economic growth over environmental protection. Instead, the rules continue to reflect the Department's commitment to satisfy its role in protecting the State's resources in the most efficient and successful manner possible.

45. COMMENT: The proposed rules include an extended time period for temporary impacts, an expansion to stream cleaning distances, and the extension of pipeline permits from five years to 10 years. On what scientific evidence are these changes based? Or are they merely an industry wish list? (84)

46. COMMENT: The proposed rules facilitate development in and around wetlands, but reduce the Department's oversight over developers. (26, 141, 173, 174, and 296)

47. COMMENT: Please ensure that wetlands protections are not watered down by efforts to streamline the permitting process. (447)

48. COMMENT: The proposed FWPA Rules do not provide sufficient regulation to hold developers accountable as the State continues to be developed. The proposed rules should be rescinded in order to maintain New Jersey's environmental integrity for future generations. (406)

49. COMMENT: Many of the proposed changes would harm the protection of vital wetlands resources (which belong to the public) by lowering the standard of review that has previously

been determined, based on policy and science, essential to the protection of water resources. No changes should be made to the implementation of the FWPA at this time. (59, 114, 236, 277, and 399)

50. COMMENT: Developers and industries who seek to weaken or "streamline" regulations have proven they are more concerned with profit than with environmental stewardship. Calls by these interests for longer permit durations or relaxed regulations clearly demonstrate that profit motivation. In the face of global environmental changes and worldwide assault on the environment, maintaining or strengthening regulations benefits all rather than provide profit for the few. The Department must stand strong in its defense of existing protections by rejecting the implementation of new exemptions and ways to circumvent the current rules. (8, 21, 28, 50, 68, 71, 80, 98, 99, 100, 109A, 118, 119, 120, 126, 131, 157, 169, 194, 195, 196, 197, 201, 212, 216, 235, 254, 257, 267, 268, 293, 295, 315, 350, 351, 371, 390, 391, 400, 401, and 443)

51. COMMENT: The proposed amendments to streamline and expedite permitting processes for the benefit of the regulated community will compromise the efficacy, accountability, transparency, inclusiveness, and openness of land use decision making. (125)

RESPONSE TO COMMENTS 45 THROUGH 51: As explained in the Response to Comments 39 through 44 above, the adopted rules are intended to increase the efficiency of the freshwater wetlands permitting program by aligning it with the flood hazard area and coastal permitting programs. While appropriate flexibility is incorporated into some rule provisions, the stringent protections of freshwater wetlands, transition areas, and State open waters present in the prior rules are maintained in the adopted rules. The clarifications proposed are anticipated to reduce the number of violations of the FWPA Rules by facilitating the public's understanding of the requirements. Much of the adopted amendments, repeals, and new rules serve to align the

organization, structure, and processes in the FWPA Rules with those in the CZM and FHACA Rules to increase efficiency and predictability in the permitting process.

The three specific changes referred to by the commenter are intended to align the requirements across the three land use permitting programs and, in the case of stream cleaning activities, ensure consistency with amendments to the Stream Cleaning Act that became effective on January 11, 2016 (see P.L. 2015, c. 210). See the Response to Comments 147 through 156 for more explanation of how the Department will implement amendments to the definition of "temporary disturbance" and the Response to Comments 366 and 367 for more detail on amendments related to stream cleaning. As explained in more detail in the Response to Comments 99 through 112, the adopted rules do not substantively change the Department's regulation of utility line projects. With reference to the concerns about extended permit duration, the rules have for many years provided for the potential extension of the original five-year permit duration upon application to the Department with the total term of the extended permit limited 10 years. The Department had proposed to allow some particular permits to be valid for up to 10 years without the need for application for extension. While a maximum term, including the duration of the original permit and an extension, will still be 10 years, as explained in the Response to Comments 227 through 234, the Department has not adopted the proposed change and will continue to require that applicants seeking to continue activities past the initial five-year term of the permit seek Department approval of an extension of the original approval prior to expiration of the initial permit duration.

The adopted rules will continue to effectively regulate activities in and near freshwater wetlands and State open waters and in many cases more effectively protect these important resources. The adopted rules continue to provide transparency in the permitting process by

requiring public notice of all applications, publishing notice of each application throughout the permit review process, providing public comment periods on applications, and providing for public fact-finding meetings for applications with significant interest from the public.

52. COMMENT: The notice of proposal states that the purpose of the amendments is to align various aspects of the FHACA, CZM, and FWPA Rules to the extent the enabling statutes allow. However, each of the enabling statutes regulates separate aspects of the development approval process and separate ecosystems. The regulatory necessity or benefit to aligning standards is not evident in the text of the notice of proposal. The Department should provide justification in public safety and environmental contexts for why alignment is desirable beyond ease of permitting. (208)

RESPONSE: While the commenter is correct that the enabling statutes of the Department's land use rules are focused on different resources, it is incorrect to state that they are concerned with separate aspects of the development approval process. The enabling statutes of the three land use rule chapters all identify the spatial boundaries of the Department's jurisdiction and the activities that require Department approval within those boundaries. The enabling statutes all provide for the Department to establish and carry out a permitting program to grant or deny permission to conduct regulated activities within regulated areas, and provide for enforcement of the requirements of the statutes and rules promulgated pursuant thereto. While the different statutes define their jurisdictions differently, in many cases the areas regulated under different statutes overlap. In the past, this overlap has caused considerable confusion where the processes of the various rules did not align, creating an inefficient and, in the view of applicants, unpredictable permitting experience. The Department has previously amended the CZM Rules (see 47 N.J.R.

1392(a)) and the FHACA Rules (see 48 N.J.R. 1067(a)) to align these chapters and address various inefficiencies and inconsistencies. The adoption of amendments to the FWPA Rules now ensures the rules governing the process for obtaining a permit will be standardized across all three chapters as much as possible and will be organized in a uniform order and format. This transformation is not intended to make permitting "easier" in the sense that there is a lower bar for demonstrating compliance with all applicable rules, but is intended to streamline the administrative aspects of the permitting process to more efficiently implement the freshwater wetlands, flood hazard area, and coastal permitting programs. Creating consistent, clear, and uniformly organized regulations facilitates compliance with the protective requirements of the three land use rule chapters on the part of applicants and facilitates a consistent and timely review on the part of Department staff. Improved efficiencies in the Department's review of activities carefully circumscribed to ensure only minor impact allows Department resources to be dedicated to the review of other proposed activities that could potentially have greater impacts to environmental resources. The result is a more efficient and navigable permitting process that does not sacrifice the stringent resource protections unique to each rule chapter.

53. COMMENT: Considering recent efforts by the United States Environmental Protection Agency (USEPA) to roll back the Waters of the United States rule and its wetlands protections, New Jersey's wetlands need the strong level of protection provided by the Department for generations. (292)

54. COMMENT: The State is trying to weaken the FWPA Rules at the same time as the Federal government weakens its regulations. (46, 51, 52, 59, 189, 193, 227, 259, 271, 276, 352, 360, 394, 395, 403, and 425)

55. COMMENT: The Department must maintain or strengthen its wetlands protections as the Federal government is seeking to reduce its regulations. (220, 290, 324, and 460)

56. COMMENT: The Freshwater Wetlands Protection Act became law under Governor Kean. To weaken this act would be a detriment to New Jersey's environment, especially as current Federal policy has been to cut funding to wetlands and water quality protection. (308)

RESPONSE TO COMMENTS 53 THROUGH 56: The Department's authority for regulating development within freshwater wetlands and State open waters is derived from both Federal and State law. Since March 2, 1994, in accordance with Section 404(g) of the Federal Water Pollution Control Act (also known as the Clean Water Act), 33 U.S.C. §§ 1344(g), New Jersey's freshwater wetlands program has operated in place of the Federal wetlands permitting program in most of New Jersey. In waters where the United States Army Corps of Engineers (USACE) has retained its jurisdiction to implement the Federal 404 program, both the USACE and the State permitting programs apply. In addition to the authority assumed under the Federal Clean Water Act, the FWPA establishes the Department's authority to establish a permitting program for activities in freshwater wetlands, transition areas, and State open waters. The FWPA Rules include definitions that explain the areas regulated by the Department under these rules, including definitions of "waters of the United States" and "waters of the State." "Waters of the United States" are those waters subject to the requirements of the Clean Water Act, which, pursuant to the assumption discussed above, are regulated in New Jersey under the FWPA Rules. The definition of "waters of the State" has historically encompassed more wetlands and waters than the definition of "waters of the United States." For example, the USACE, in implementing the Clean Water Act, does not take jurisdiction over isolated wetlands, while the Department does. Therefore, any waters in an area regulated under the FWPA Rules that meet the definition

of "waters of the United States" will also be protected as "waters of the State." In cases where the water does not meet the definition of "waters of the United States" and, therefore, would not be regulated under Federal law, but does meet the definition of "waters of the State," activities would be regulated under the FWPA Rules. For the waters listed above that are jointly regulated by the State and the USACE, a change in the USACE's jurisdiction will not affect the Department's jurisdiction. The activities in those waters would continue to be regulated under the FWPA Rules or CZM Rules. In sum, any change to the USEPA's definition of "waters of the United States" will not change the Department's authority to regulate activities in freshwater wetlands, transition areas, and State open waters in New Jersey.

The adopted rules add flexibility, where appropriate; address implementation issues; provide consistency with other Federal, local, and State requirements; align procedures with flood hazard and coastal permitting procedures, where possible; and simplify language to improve the permitting process and reduce the cost of compliance. The proposed changes retain the appropriate level of stringency to ensure compliance with Federal law and, in many cases, continue to be more stringent than the Federal permitting program to ensure sufficient protection of the State's freshwater wetlands resources.

57. COMMENT: Because the Federal government is in the process of developing sweeping changes to section 404 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., and of the delegation of authority under § 1344(g) to implement and enforce a New Jersey Freshwater Wetlands program, it is premature and unwise to adopt sweeping changes in the State's freshwater wetlands regulations before understanding the impact on New Jersey and the State's ability to adequately protect the ecological values of wetlands and the public benefits

derived therefrom. In response to Federal law changes, the Department may be required to significantly increase its jurisdiction in order to maintain the current level of protection against impairments to water quality and quantity provided today, which are directly linked to quality of life and economic stability. It is in the best interest of the people of New Jersey, and of the Department in preventing an unnecessary and burdensome challenge to Department resources, to delay amending the FWPA Rules until changes to section 404 of the Federal Water Pollution Control Act are made. (344)

RESPONSE: The adopted rules reduce unnecessary regulatory burden; add appropriate flexibility; provide better consistency with Federal, local, and other State requirements; and address implementation issues identified since the readoption with amendments of the rules in October 2008. The adopted rules also consolidate similar provisions, simplify language, and harmonize certain procedural provisions with the Department's other land use rules. These changes will positively impact the freshwater wetlands permitting program and the public regardless of any changes that may or may not occur on the Federal level. The Department does not believe that there is any reason to delay the adoption of these rules pending potential Federal law changes. While the President has recently directed the USEPA and USACE to review and rewrite the 2015 "Clean Water Rule," amendments to the Federal rule will not have any impact on New Jersey's assumption of wetlands permitting authority under the Federal Act, as explained in the Response to Comments 53 through 56 above.

58. COMMENT: Wetlands provide $150,000 per acre in environmental and flood control benefits according to the Department's own report. In addition, one acre of wetlands can hold back more than a million gallons of water during a heavy rain. These benefits must be

recognized and protected. (12, 22, 35, 46, 51, 52, 62, 63, 76, 81, 85, 131, 143, 218, 232, 233, 243, 244, 261, 281, 294, 306, 323,327, 329, 334, 338, 343, 362, 392, 395, 399, 408, 414, 427, 430, 431, 445, 451, 454, and 460)

59. COMMENT: New Jersey has been affected and will continue to be affected by sea level rise and climate change, including increasingly heavy and frequent rains and resultant flooding. In light of these current and future changes, protection of wetlands and the functions they provide is even more important. Protections should be increased, not weakened. (12, 14, 18, 22, 25, 35, 46, 48, 51, 52, 53, 55, 62, 63, 74, 76, 77, 81, 82, 85, 90, 91, 102, 107, 130, 131, 138, 141, 143, 163, 177, 178, 180, 188, 193, 200, 205, 218, 223, 226, 232, 233, 243, 244, 248, 251, 253, 258, 261, 264, 267, 269, 281, 291, 292, 294, 306, 307, 322, 323, 327, 329, 331, 334, 338, 339, 343, 362, 364, 369, 370, 372, 392, 395, 399, 408, 414, 421, 426, 427, 430, 431, 432, 433, 445, 450 451, and 454)

60. COMMENT: Amending the FWPA Rules provides an opportunity to incorporate climate change into the regulatory process, as has been done with great success in other states like New York, which has a law requiring the New York Department of Environmental Conservation to adopt sea-level rise predictions into regulation. For example, mitigation proposals are required to have a high probability of success, but it is impossible for a regulator to make that determination without considering climate-related events known to be occurring in the short-term and to be likely to accelerate in the long-term. (277)

61. COMMENT: Climate change is already affecting agriculture and is increasing the spread of insects and fungi that affect trees. Wetlands and other open space need to be protected as insurance against climate change. (137)

62. COMMENT: Wetlands are flood-prone, which leads to damage to homes and infrastructure built within and near them. (340)

63. COMMENT: Protecting freshwater wetlands is especially important because of climate change and sea level rise. The infiltration of saltwater into freshwater wetlands is inevitable, so freshwater wetlands will already be lost even without these misguided new rules. (56 and 108)

64. COMMENT: Proposed amendments concerning development in and around wetlands will have important implications for floodplain management. The notice of proposal will encourage wetlands disturbance and weaken New Jersey's robust protection of wetlands and waters. While New Jersey's most high-profile flooding events result from coastal storm surge, freshwater wetlands perform indispensable floodplain management functions. (208)

RESPONSE TO COMMENTS 60 THROUGH 64: The adopted amendments will have no effect on flooding. The Department recognizes that New Jersey has substantial and persistent flooding problems and that unchecked development can exacerbate both local and regional flooding. The Department regulates development in wetlands under the FWPA and in flood hazard areas and riparian zones under the FHACA Rules to ensure development proceeds in an environmentally sound manner to minimize these impacts. As explained in the Response to Comments 20 through 32, the adopted amendments do not reduce wetlands protections and will, therefore, not increase the effects of storms or flooding due to increased wetland loss. Furthermore, the impact of development proposed in the flood hazard area and/or riparian zone on flooding is assessed via a review of a flood hazard area permit under the FHACA Rules, which are not substantially changed by the adopted amendments. The FHACA Rules recognize that the extent of flooding within the State can increase over time due to a variety of factors and that New Jersey's communities need to adapt to changing conditions. The Department regulates, through the

FHACA Rules, a 100-year design flood of all non-delineated streams in accordance with N.J.S.A. 58:16A-55.2 and includes a 25 percent factor-of-safety to account for potential future increases in flood discharges. The Department also regulates flood hazard areas of certain streams under delineations adopted in accordance with N.J.S.A. 58:16A-52 and may, as appropriate, revise or otherwise update those delineations in the future.

The Department also recognizes that development and redevelopment in the State must adapt to changing conditions. The 2013 emergency amendments to the FHACA Rules ensure that the best available flood elevation data is used to determine the flood hazard area design flood elevation for a given site, including the Federal Emergency Management Agency's advisory flood maps and subsequently released preliminary maps for New Jersey's coast, which include revised A- and V-zone limits (see 45 N.J.R. 360(a) and 1104(a)). Recent amendments to definitions and building standards in the FHACA Rules to address discrepancies in elevation requirements, flood-proofing standards, and standards for construction in V zones and coastal A zones between the FHACA Rules and the Uniform Construction Code (UCC) ensure that the building requirements under the FHACA Rules are at least as stringent as the UCC standards in all circumstances (see 48 N.J.R. 1014(a) and 49 N.J.R. 2246(a)).

These flood-specific protections in the FHACA Rule are incorporated into the FWPA Rules in several ways. In many cases, the area regulated under the FWPA Rules and the area regulated under the FHACA Rules overlaps. When this occurs, the Department often reviews applications for both a freshwater wetlands permit and a flood hazard area permit, separately evaluating the proposed activity's effect on freshwater wetlands, transition areas, and/or open waters, as well as the effect on flooding and the riparian environment. In addition, the conditions that apply to all freshwater wetlands general permits-by-certification and general permit

authorizations at N.J.A.C. 7:7A-5.7 include the requirement that any activities authorized will not result in a violation of the Flood Hazard Area Control Act or the FHACA Rules (see N.J.A.C. 7:7A-5.7(b)8), which requires compliance with the provisions of the FHACA Rules that protect people and property from flooding, even when the Department is not directly reviewing the activity (for example, if the activity is authorized under a permit-by-rule or general permit-by-certification in the FHACA Rules).

In addition to these flood protection measures contained in the FHACA Rules, the Department's Blue Acres Program and the New Jersey Coastal Management Program both focus on flood protection by removing families from harm's way while creating natural buffers against future severe weather events and returning flood carrying capacity to vital areas, and by ensuring that communities have consistent and comprehensive guidance to assess their vulnerability to coastal hazards and capacity for resilience.

65. COMMENT: Wetlands are important in filtering water from all of the combined sewer overflows in New Jersey (62)

RESPONSE: Wetlands are a promising component of the solution to combined sewer overflow (CSO) pollution. A combined sewer system is one designed to carry sanitary sewage at all times that is also designed to collect and transport stormwater from streets and other sources, thus serving a combined purpose. CSO refers to excess flow from a combined sewer system that is not conveyed to the domestic treatment works for treatment, but transmitted by pipe or other channel directly to waters of the State. The stringent standards in the FWPA Rules ensure that disturbance to wetlands in any community are minimized and, in many cases, mitigated. The Department is currently working with CSO communities to reduce or eliminate combined

systems and, in the interim, reduce the frequency and extent of discharges. The Division of Water Quality within the Department issued 21 CSO permits in 2015 to meet the requirements of the Clean Water Act and the National CSO Policy by reducing or eliminating the remaining CSO outfalls in New Jersey. A major component of reducing CSO discharges is improved stormwater management. The Division provides many resources to advise municipalities on stormwater improvements and encourages "green infrastructure" wherever possible. See http://www.nj.gov/dep/dwq/cso.htm for more information on the Department's CSO program.

66. COMMENT: The proposed rules do not consider wetland losses resulting from impacts outside the regulated area. When a road is built, it can prevent water from flowing into a wetland, resulting in the wetland drying out. Cutting a road or building below ground can also drain a wetland. (415)

RESPONSE: The FWPA provides the authority for the Department to regulate specified activities in freshwater wetlands and in the transition areas to freshwater wetlands. In accordance with the FWPA at N.J.S.A. 13:9B-16, the width of transition areas is specified as "[n]o greater than 150 feet nor less than 75 feet for a freshwater wetland of exceptional resource value" and "[n]o greater than 50 feet nor less than 25 feet for a freshwater wetland of intermediate resource value." The FWPA Rules implementing this statutory provision establish the transition areas at the maximum allowed by the Act; 150 feet for a freshwater wetland of exceptional resource value, and 50 feet for a freshwater wetland of intermediate resource value (see N.J.A.C. 7:7A-3.3) with provision for allowance of transition area averaging specified at N.J.A.C. 7:7A-8.2 consistent with the Act at N.J.S.A. 13:9B-18. While the Department may, in some instances, review an entire project where only a portion of the project falls within regulated

areas, the Department does not have the authority to review activities that occur entirely outside of its jurisdiction. When road construction, below ground development, or other activities occur within a freshwater wetland or transition area, the Department does evaluate the potential impact on wetlands hydrology and regulates accordingly.

67. COMMENT: No consideration is given in the notice of proposal for cumulative impacts or cost avoidance scenarios. (173)

RESPONSE: The adopted rules maintain the prior rules' consideration of cumulative impacts and avoidance of impacts, both in determining what permitting options are available under the rules and in reviewing applications.

With reference to determination of what permitting options will be available, the rules continue to require consideration of cumulative impacts when considering potential amendments to the rules to incorporate new general permits and make that consideration equally applicable to general permits-by-certification. Particularly, the rules provide that the Department will only promulgate a general permit-by-certification or a general permit if, among other things, the Department determines that the regulated activity covered by the general permit-by-certification or general permit will cause only minimal impacts when performed separately and only minimal cumulative impacts (see N.J.A.C. 7:7A-5.2(b)1).

When reviewing an application under the FWPA Rule, the Department considers all potential impacts of the proposed activity with the rules including several safeguards designed to ensure that permitting cannot be pursued in a manner that frustrates the consideration of cumulative impacts. While a general permit may be used more than once on a single site, N.J.A.C. 7:7A-5.4(a)1 requires that the total disturbance caused by all activities at all locations

onsite under that general permit be summed to determine if the limits in the general permit are not exceeded. This requirement specifically avoids a situation where multiple minor impacts under a general permit authorization cumulatively add up to a significant impact. This provision also prohibits the combination of general permits, or a general permit and a general permit-by-certification, for the same activity to avoid situations where the cumulative disturbance that would result exceeds the disturbance limits for any one of the general permits. N.J.A.C. 7:7A-5.3(f) and 10.1(c) prohibit the segmentation of a project by applying for combinations of individual permits and/or authorizations under general permits-by-certification or general permits, which would avoid an analysis of cumulative impacts. Cumulative impacts are also part of the analysis of individual permit applications through the requirement that an individual permit will only be issued if the regulated activity is in the public interest. Particularly, in determining whether an activity proposed in an individual permit application is within the public interest, the Department specifically considers the functions and values provided by the freshwater wetlands to be affected and the probable individual and cumulative impacts of the regulated activity on public health and fish and wildlife (see N.J.A.C. 7:7A-10.2(b)12vii; previously codified at N.J.A.C. 7:7A-7.2(b)vii).

Avoidance of impacts is required by the FWPA Rules to the maximum extent practicable. Where disturbance of wetlands is allowed under the FWPA Rules, impacts must be mitigated either through the minimization of disturbance or through restoration, creation, enhancement, or other mitigation alternatives under N.J.A.C. 7:7A-11. The strict disturbance limits on general permit and general permit-by-certification activities limit the potential impacts, while several general permits additionally require an applicant to demonstrate that there are no other more feasible locations onsite that avoid impacts to wetlands. For the general permits that require

mitigation, mitigation of impacts less than 0.1 acre according to the requirements in N.J.A.C. 7:7A-11 is required, unless the applicant demonstrates that all activities have been designed to avoid and minimize impacts to wetlands.

To be issued an individual permit, an applicant must demonstrate that there are no practicable alternatives that would have a less adverse impact on the aquatic ecosystem or would not involve a freshwater wetland or State open water and that the proposed regulated activity would not have other significant adverse environmental consequences. An alternative is considered practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes. In addition, an alternative is not excluded from consideration under this provision merely because it includes or requires an area not owned by the applicant that could reasonably have been or be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity. Every individual permit application must include an alternatives analysis demonstrating compliance with these provisions.

Consistency with FWPA and Federal Act

68. COMMENT: The Department should not adopt the proposed FWPA Rules. The proposed rules are not in the spirit of the Freshwater Wetland Protection Act and the Federal Clean Water Act. (8,14, 18, 53, 54, 56, 77, 85, 90, 91, 102, 107, 143, 163, 177, 178, 191, 200, 205, 212, 226, 248, 251, 253, 258, 264, 267, 269, 291, 292, 307, 322, 331, 339, 353, 364, 372, 421, 426, 432, and 450)

69. COMMENT: Proposed N.J.A.C. 7:7A-1.5 states that the FWPA Rules should be “liberally constructed to effectuate the purposes of the act.” The purpose of the FWPA is clearly stated in

the statute, which says, "it shall be the policy of the State to preserve the purity and integrity of freshwater wetlands." The proposed rules do not implement this goal. (14, 18, 21, 28, 50, 53, 54, 68, 71, 77, 80, 85, 90, 91, 98, 99, 100, 102, 107, 109A, 118, 119, 120, 125, 126, 131, 143, 157, 163, 169, 177, 178, 194, 195, 196, 197, 200, 201, 205, 212, 216, 226, 235, 248, 251, 253, 254, 257, 258, 264, 267, 268, 269, 291, 292, 293, 295, 307, 315, 322, 331, 339, 350, 351, 364, 371, 372, 390, 391, 400, 401, 421, 426, 432, 443, and 450)

70. COMMENT: The goal of the FWPA Rules was to preserve the purity and integrity of freshwater wetlands. The proposed revisions to these rules, in many instances, do not implement that goal. (8)

71. COMMENT: The proposed rules violate the FWPA. (5, 209, 359, 366, 394, and 460)

72. COMMENT: The proposed rules will have a significant adverse effect on the Department's ability to uphold the intent of the FWPA. (106)

73. COMMENT: The proposed rules violate existing laws. (110, 111, and 345)

74. COMMENT: The rules will destroy wetlands, increase development, threaten water quality, and violate the FWPA in many ways. (15, 22, 27, 29, 33, 37, 38, 39, 41, 55, 65, 67, 73, 76, 82, 92, 93, 97, 103, 122, 123, 124, 127, 133, 137, 138, 142, 148, 165, 170, 171, 173, 183, 204, 206, 217, 219, 220, 229, 237, 238, 239, 241, 242, 244, 256, 265, 266, 280, 282, 283, 287, 301, 312, 314, 321, 326, 329, 349, 374, 382, 383, 387, 407, 410, 435, 437, 442, 446, 448, 449, 456, and 461)

RESPONSE TO COMMENTS 68 THROUGH 74: As explained in the Response to Comments 20 through 39, the adopted FWPA Rules do not weaken wetland protections. The FWPA, at N.J.S.A. 13:9B-2, specifies that "it is in the public interest to establish a program for the systematic review of activities in and around freshwater wetland areas designed to provide

predictability in the protection of freshwater wetlands" and "that it shall be the policy of the State to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance." The adopted rules improve the efficiency and predictability of the freshwater wetlands permitting program by consolidating similar provisions, simplifying language, and harmonizing certain procedural provisions with the Department's other land use rules. The main goals of the amendments are to reduce unnecessary regulatory burden; add appropriate flexibility; provide better consistency with Federal, local, and other State requirements; and address implementation issues identified since the readoption with amendments of the rules in October 2008. In addition, several amendments were necessary to adopt to ensure consistency with statutory amendments to the FWPA and the Stream Cleaning Act.

The FWPA Rules continue to contain stringent protections for freshwater wetlands and State open waters and additionally incorporate protections for transition areas surrounding freshwater wetlands in order to protect wetlands from the impacts of adjacent development. The protection of transition areas to the maximum width allowed by the FWPA not only complies with the State act, but exceeds protections provided by the Federal Clean Water Act, which do not include equivalent protections. The adopted amendments, while providing flexibility in some cases, will not facilitate unnecessary or inappropriate development, and do not permit activities to occur in wetlands that were not permitted under the prior rules. For these reasons, the adopted rules are not contrary to, but are entirely consistent with both the explicit terms and the intent of the FWPA and the Clean Water Act.

75. COMMENT: The stated policy of the FWPA is "to preserve the purity and integrity of freshwater wetlands." The proposed rules at N.J.A.C. 7:7A-1.5 indicate that the chapter should be "liberally constructed to effectuate the purposes of the Act," but the proposed rules do not implement the goal expressed in the Act. The rules should be narrowly constructed to ensure that New Jersey's wetlands are preserved and protected. (253 and 364)

RESPONSE: To the extent the commenters are suggesting that the rules should be drafted in a manner that attempts to address every eventuality in a manner designed to ensure protection of the State's freshwater wetlands consistent with the intent of the FWPA, the Department agrees. The liberal construction provision at N.J.AC. 7:7A-1.5 does not in any way suggest otherwise. Instead, this provision specifically recognizes that there may be situations where application of a particular rule provision to a specific factual situation may not result in a clear "thumbs up" or "thumbs down" determination. In such a situation, the provision makes clear that the requirements set forth in the rules are to be "liberally construed to effectuate the purposes of the Acts under which it was adopted." This provision reinforces the Department's intent to protect freshwater wetlands, transition areas, and State open waters in a way that is consistent with the purposes of these enabling statutes.

76. COMMENT: The Department should strictly interpret the requirements of N.J.S.A. 13:9B-9b to truly avoid unnecessary impacts to wetlands and transition areas. Given the benefits of wetlands to the surrounding area, the Department should not grant permits for avoidable degradation of wetlands. (319)

RESPONSE: The FWPA Rules include many requirements that implement the FWPA goal of avoiding unnecessary impacts to wetlands and transition areas as stated in the Act at N.J.S.A.

13:9B-2. The FWPA Rules incorporate the findings specified in N.J.S.A. 13:9B-9b at N.J.A.C. 7:7A-10.2(b) (previously codified at N.J.A.C. 7:7A-7.2(b)) with an individual freshwater wetlands or open water fill permit to be issued only if those standards are satisfied. Consistent with N.J.S.A. 13:9B-9b, among other requirements that must be met before an individual permit may issue, the applicant is required to demonstrate that the proposed regulated activity has no practicable alternative that would have a less adverse impact on the aquatic ecosystem or would not involve a freshwater wetland or State open water, and which would not have other significant adverse environmental consequences (see N.J.A.C. 7:7A-10.2(b)1; previously codified at N.J.A.C. 7:7A-7.2(b)1). Transition area waivers, provided for in the FWPA at N.J.S.A. 13:9B-12 (access waiver) and 13:9B-18 (all other transition area waivers), require that activities do not substantially impact adjacent wetlands and, depending on the type of waiver, may additionally require that alternative locations for the activity be considered.

The adopted rules implement requirements beyond the letter of the FWPA in order to effectuate its protective functions. One example is the robust mitigation requirements at N.J.A.C. 7:7A-11. The FWPA, at N.J.S.A. 13:9B-13a, generally requires the Department to "require as a condition of a freshwater wetlands permit that all appropriate measures have been carried out to mitigate adverse environmental impacts, restore vegetation, habitats, and land and water features, prevent sedimentation and erosion, minimize the area of freshwater wetland disturbance and insure compliance with the Federal Act and implementing regulations." N.J.S.A. 13:9B-13b and c establish that the Department may require creation, restoration, or enhancement onsite or, if that is not feasible, creation, restoration, enhancement offsite, uplands preservation, or a monetary contribution, or, if those options are not feasible, a land donation. The FWPA Rules expand upon these general requirements and general hierarchy in order to effectuate the purpose

of the FWPA, including requirements for choosing a suitable site, provisions elaborating on the mitigation hierarchy in the FWPA by, at N.J.A.C. 7:7A-11.9 and 11.10, requiring offsite mitigation to occur in the same watershed management area as the disturbance, financial assurance requirements for creation, restoration, and enhancement activities at N.J.A.C. 7:7A-11.17 through 11.21 to ensure mitigation is successfully completed, and clear success criteria for each mitigation alternative. The requirements at N.J.A.C. 7:7A-11 go beyond the literal language of N.J.S.A. 13:9B-13 in order to accomplish Act's stated purpose of mitigating for adverse environmental impacts.

The Department considers the many protective provisions of the adopted rules an effective interpretation of the stated goals of the Legislature in enacting the FWPA.

77. COMMENT: The proposed rules violate both the FWPA and the Clean Water Act because they are not tied to the Water Quality Certifications, such as the 401 certification. This means that a permittee can fill in a wetland without looking at water quality impacts. (12, 13, 20, 22, 23, 35, 51, 52, 62, 63, 76, 85, 173, 174, 189, 202, 215, 218, 232, 233, 237, 243, 244, 266, 294, 306, 324, 327, 329, 334, 343, 362, 377, 392, 395, 399, 408, 414, 427, 431, and 454)

78. COMMENT: Allowing developers to fill in wetlands without 401 certification is opposed. (130)

79. COMMENT: The proposed rules are not tied to water quality certificates, nor do they require an applicant to certify to compliance with the Surface Water Quality Standards. Therefore, the rules allow applicants to discharge fill into a wetland without assessing the water quality impacts, which is a violation of the Freshwater Wetlands Protection Act and the Clean Water Act. (240 and 415)

80. COMMENT: The proposed rules are deliberately not connected to the Surface Water Quality Standards. (104, 144, and 361)

81. COMMENT: The rules need to consider the impact of development on water quality standards, such as those in the FWPA and the Federal Clean Water Act. (354)

82. COMMENT: The proposed rules put water quality at risk by weakening protections set in the FWPA and the Clean Water Act. (136)

83. COMMENT: Under Federal law, New Jersey's program may not be weaker or less protective than the Federal program. According to the Federal regulations at 33 CFR 320.4(d), "Applications for permits for activities which may adversely affect the quality of waters of the United States will be evaluated for compliance with applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity." New Jersey's water quality standards have a similar provision at N.J.A.C. 7:9B-1.5(d). Yet, the proposed rules fail to reference and utilize New Jersey's water quality standards. The proposed rules cannot be less stringent or protective than Federal law, yet they are. (319 and 320)

84. COMMENT: The proposed rules violate the law under which New Jersey assumed delegation of Section 404 of the Clean Water Act authority and have no factual or scientific justification. (59, 60, 161, and 179)

85. COMMENT: The notice of proposal unduly weakens wetlands protections essential for water supply and, in some cases, violates New Jersey's delegation powers under the Federal Clean Water Act. (84 and 222)

RESPONSE TO COMMENTS 77 THROUGH 85: A water quality certificate is required to be obtained by any applicant for a Federal license or permit under 33 U.S.C. § 1341 for any activity that may result in a discharge into the navigable waters of the United States. The water quality

certificate constitutes a finding by the state within which the proposed discharge is to occur that the discharge will comply with specified provisions of the State's water quality standards, which standards have been approved by USEPA, as well as comply with the Federal Clean Water Act. With reference to discharges of dredged or fill material into the waters of the United States in New Jersey, as indicated at N.J.A.C. 7:7A-2.1(d), a permit issued under the FWPA Rules includes a finding by the Department that the applicable sections of the Federal Act have been met and constitutes a water quality certificate for discharges covered by these rules. For discharges of dredged or fill material that do not require a permit under the FWPA Rules, but do require a water quality certificate, depending upon the location of the proposed discharge, the standards and procedures contained in either the FWPA Rules or in the CZM Rules are utilized to determine whether the proposed activity qualifies for a water quality certificate. This process is fully compliant with both the Federal and State acts.

The assertion that the FWPA Rules do not reference or require compliance with water quality standards is not correct. Several of the standard requirements for all individual permits, recodified from N.J.A.C. 7:7A-7.2 to 10.2, specifically require compliance with State and Federal water quality standards for an activity to be authorized under an individual permit. N.J.A.C. 7:7A-10.2(b)5 requires that an activity "will not cause or contribute to a violation of any applicable State water quality standard." N.J.A.C. 7:7A-10.2(b)6 requires that an activity "will not cause or contribute to a violation of any applicable toxic effluent standard or prohibition imposed pursuant to the Water Pollution Control Act." N.J.A.C. 7:7A-10.2(b)7 requires that an activity "will not violate any requirement imposed by the United States government to protect any marine sanctuary designated pursuant to the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401 et seq." N.J.A.C. 7:7A-10.2(b)8

requires that an activity "will not cause or contribute to a significant degradation, as defined at 40 CFR 230.10(c), of ground or surface waters." N.J.A.C. 7:7A-10.2(b)13 requires that activities "will not involve a discharge of dredged material or a discharge of fill material, unless the material is clean, suitable material free from toxic pollutants in toxic amounts, which meets Department rules for use of dredged or fill material." N.J.A.C. 7:7A-10.2(b)14 requires that activities "are consistent with the applicable approved Water Quality Management Plan (208 Plan) adopted under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq." as applicable, and N.J.A.C. 7:7A-10.2(b)15 requires any activity to be "part of a project that in its entirety complies with the Stormwater Management rules at N.J.A.C. 7:8."

In accordance with N.J.A.C. 7:7A-5.2(b)1, activities authorized under general permits-by-certification and general permits have been evaluated by the Department and determined to have minimal environmental impact when performed individually and cumulatively. Accordingly, these activities will not violate any water quality standards. Even so, several additional conditions protective of water quality apply to general permits-by-certification and general permits. N.J.A.C. 7:7A-5.7(b)2 requires that regulated activities authorized under a general permit-by-certification or general permit shall not occur in the proximity of a public water supply intake. N.J.A.C. 7:7A-5.7(b)6 requires that "any discharge of dredged or fill material shall consist of clean, suitable material free from toxic pollutants (see 40 CFR 401) in toxic amounts, and shall comply with all applicable Department rules and specifications regarding use of dredged or fill material." In addition, the Department is required to add, under N.J.A.C. 7:7A-20.3(b)3, "any requirements necessary to comply with water quality standards established under applicable Federal or State law," and, under N.J.A.C. 7:7A-20.3(b)4,

"requirements necessary to comply with any applicable toxic effluent standard or prohibition under section 307(a) of the Federal Act or applicable State or local law."

The requirements explained above, which have not been substantially changed by the adopted amendments, repeals, and new rules, ensure compliance with applicable State and Federal water quality requirements and maintain the State's freshwater wetlands permitting program's stringency in accordance with the Clean Water Act.

86. COMMENT: Many regions of the State rely on groundwater for wells from low storage capacity aquifers that are already under considerable stress. Wetlands play a critical role in the hydrological cycle by storing water from storm events and reducing the sediment being transported into the Delaware Rivers and Delaware Raritan Canal system. Increasing aquifer recharge and reducing runoff is critical to the future of these regions. (8)

87. COMMENT: The environmental repercussions of the proposed changes are very concerning. New Jersey's streams are shrinking, groundwater supplies are being depleted or degraded, and water deficits are looming. New Jersey can ill afford further degradations to finite drinking water sources that must service more and more people. Wetlands regulations should be strengthened; this notice of proposal weakens New Jersey's standards for wetlands. (179)

88. COMMENT: Many townships in New Jersey rely on clean and protected wetlands to maintain drinking water wells. Hydrological studies indicate that some townships are using groundwater at a deficit compared to how quickly aquifers are replenished. In consideration of a shrinking water supply, which is already threatened by naturally occurring arsenic and radium, any weakening of wetland protections leaves many at risk. (402)

89. COMMENT: The proposed amendments have the potential to affect New Jersey's drinking water supply. With the Statewide Water Supply Plan now available, the future of the State's drinking water supply is of critical importance. (410)

90. COMMENT: Good land use policy must address clean water issues. (173)

91. COMMENT: Wetlands reduce pollution and maintain water quality of drinking water sources. The proposed weakening of the FWPA Rules will not protect water supplies from pollution. (40, 49, 64, 108, 103, 292, and 300)

92. COMMENT: Please document how the proposed rules strengthen or weaken existing State and national protections for water quality. (189)

RESPONSE TO COMMENTS 86 THROUGH 92: As explained in the Response to Comments 53 through 56, New Jersey's freshwater wetlands program has operated in place of the Federal wetlands permitting program in most of New Jersey since 1994. In accordance with the Department's assumption of the wetlands permitting program, the standards contained in the Department's FWPA Rules must remain at least as stringent as the Federal wetlands permitting program. However, under the Clean Water Act, the Department may, and in many cases has, established standards pursuant to its authority under New Jersey law that exceed those contained in the Federal program. For example, the Department continues to regulate transition areas adjacent to wetlands to prevent nearby development from negatively impacting freshwater wetlands under the authority of the State FWPA while the Federal program does not regulate development in these areas.

While the adopted amendments improve the permitting procedures and in some cases add appropriate flexibility to existing standards, no substantive changes have been made to the water quality protections in the FWPA Rules. The FWPA Rules continue to require compliance with

State and Federal water quality standards, as detailed in the Response to Comments 77 through 85 above.

93. COMMENT: The results of the Integrated Reports demonstrate the failure of current regulations (including the FWPA Rules and other regulations) to protect and restore water quality as required by the Clean Water Act. What changes are proposed to address this fact and prevent the destruction and degradation of wetlands? (431)

94. COMMENT: The Department needs to defend clean water and not weaken the FWPA Rules. The rules are necessary to protect wildlife habitat from fragmentation; protect communities that are vulnerable to flooding; and protect waterways from pollution, especially since there are virtually no bodies of water in New Jersey from which fish can be harvested and safely eaten by all. (234)

95. COMMENT: Wetlands act as filters by removing pollutants from stormwater, which may include asbestos, oil, antifreeze, pesticides, and other chemicals. Because many of New Jersey's waters are not clean enough to meet water quality standards, it is important to not reduce wetlands protections. The proposed rules, however, do reduce protections. (14, 18, 53, 54, 77, 85, 90, 91, 102, 107, 143, 163, 177, 178, 200, 205, 226, 248, 251, 253, 258, 264, 267, 269, 291, 292, 307, 322, 331, 339, 364, 372, 421, 426, 432, and 450)

96. COMMENT: The proposed amendments are not in the best interest of New Jersey, and the Department should not adopt them as proposed. They weaken the FWPA Rules, which is contrary to both the Clean Water Act and the Freshwater Wetlands Protection Act. The FWPA declared that freshwater wetlands protect and preserve drinking water supplies by serving to purify surface water and groundwater resources, provide a natural means to flood and storm

damage protection and thereby prevent the loss of life and property through the absorption and storage of water during high runoff periods in the reduction of flood costs, and provide essential habitat for State wildlife, fish, birds and, importantly, threatened and endangered species. The Federal Clean Water Act reinforces this. Yet, according to the integrated water reports released every two years, the vast majority of New Jersey's waters are not meeting one or more water quality standards. Also, flooding is increasing with climate change bringing more severe storm events. So, the goal of the FWPA Rules should be to better protect wetlands to provide water quality and flood protection benefits, not to make it easier to impact wetlands. (320)

RESPONSE TO COMMENTS 93 THROUGH 96: The commenters appear to base their conclusion that "the current rules fail to protect and restore water quality" on an assumption that most of the waters of the State are impaired. Section 303(d) of the Federal Clean Water Act (CWA) (33 U.S.C. § 1313(d)) requires states to biennially prepare and submit to the USEPA, a list of all waters of the state that currently do not meet, or are not expected to meet, applicable surface water quality standards after the implementation of technology-based controls. The Department reports this information in the New Jersey 303(d) List of Water Quality Limited Waters or "303(d) List." CWA Section 305(b) requires states to submit to the USEPA a biennial report on the quality of all state waters, including support of designated uses. The Department presents this information in the New Jersey Integrated List of Waters, or "Integrated List." These two lists, the 303(d) List and the Integrated List, along with strategies to maintain and improve water quality and other pertinent information, comprise the New Jersey Integrated Water Quality Assessment Report (Integrated Report).

The success of the Department's water quality management programs is supported by the results of the water quality trends analysis provided in the 2014 Integrated Report, which shows

improving and stabilizing conditions over time. According to the 2014 Integrated Report, water quality trend analyses conducted using data collected as far back as 1975 indicate that overall water quality has generally improved since the mid 1970's, particularly with respect to total phosphorus and total nitrogen (nutrients); however, declining water quality trends for nitrate, total dissolved solids (TDS) and chlorides were also observed. Ammonia reduction measures implemented at waste treatment plants oxidize ammonia to form nitrate, resulting in increased nitrate concentrations over time. Runoff from urban and agricultural areas, including runoff of salt used to control ice on roadways, are the likely cause of increased TDS and chloride concentrations over time. Biological trends analysis shows a correlation between biological impairment and anthropogenic factors, such as land use, total urban land, total upstream wastewater flow, increase in impervious surface, and decrease in forests and wetlands in a stream's drainage basin. Biological data for fish communities also showed a correlation between impairment and human activity, such as increased impervious cover, siltation, and increased run-off from stormwater outfalls. The standards adopted in the FWPA Rules are intended, in part, to protect waters and aquatic communities from these negative impacts.

While the 2014 Integrated Report found that only a small percentage of New Jersey's 958 subwatersheds fully support all applicable designated uses, the report also found that 55 percent of these subwatersheds fully support at least one designated use. The 2014 Integrated Report instead shows that many subwatersheds have insufficient information to assess designated use support, especially the fish consumption and recreation use. In 2014, 64 percent of all 958 subwatersheds had insufficient information to assess the fish consumption use and 35 percent had insufficient information to assess the recreation use. This is significant because, even if all other applicable designated uses were fully supported, if insufficient information existed to

assess one applicable designated use, the subwatershed was not counted as fully supporting all applicable designated uses. Accordingly, focus on such a statistic is misleading and does not provide an accurate assessment of the condition of the State's waters or compliance with any applicable regulatory or statutory mandate. It does not mean that fish cannot be harvested and safely eaten in these waters. In fact, many of the fish consumption advisories in effect in the 36 percent of waters that do not fully support the fish consumption use are limited to specific species and amounts of fish consumed by certain sensitive populations. The existence of a fish consumption advisory does not mean no amount of any fish can be safely consumed in these waters. It should also be noted that most waters in the U.S. do not fully support the fish consumption use due to the presence of "legacy" pollutants in one or more species of fish that bioaccumulate such toxins in their fatty tissues. That does not mean that there are no bodies of water in the entire country from which fish can be harvested and safely eaten by all; only that fish consumption advisories should be heeded in deciding how much and how frequently certain species of fish should be consumed, especially by sensitive populations. (For more information on fish consumption advisories, please see the Department's "Fish Smart, Eat Smart NJ" website at http://www.nj.gov/dep/dsr/njmainfish.htm.)

While the Integrated Reports demonstrate that overall Statewide water quality has improved or remained stable over time, localized changes in land use can effectuate local water quality decline, which is why the Department is continuing its stringent protection of freshwater wetlands, State open waters, and transition areas in the adopted FWPA Rules. As explained in the Response to Comments 77 through 85, the adopted rules continue the many stringent water quality protections from the existing rules to ensure regulated activities in or near wetlands do not negatively impact the State's water quality and, as detailed in the Response to Comments 20

through 32 do not weaken the protections in the FWPA Rules. In addition, recently adopted amendments to the FHACA Rules more stringently restrict development in riparian zones adjacent to streams, rivers, and other regulated waters, with particular focus on protecting Category One waters from the negative impacts of development (see 49 N.J.R. 2122(a)). Additional information about water quality assessment is available on the Department's website at http://www.state.nj.us/dep/wms/bears/assessment.htm.

97. COMMENT: The notice of proposal Summary sets out the following statement:

> "In 1993, the Department entered into an assumption agreement with the USEPA to administer the permit program established pursuant to Section 404 of the Federal Clean Water Act. The assumption agreement obligates the State to maintain program compatibility, which means the State's freshwater regulatory program must be as strict as the Section 303 Federal Program."

However, this statement is misleading. The Department's freshwater wetlands program cannot be any less protective than the Federal program but may be more stringent or protective. Further, the Memorandum of Agreement between the Department and the USEPA specifically provides that "nothing precludes the State from adopting or enforcing requirements which are more stringent or from operating a program with greater scope than that required by 40 C.F.R. Parts 230 and 233." (319)

98. COMMENT: The Department has acknowledged that the State freshwater wetlands program is in many ways more stringent than the Federal 404 Program. The Department stated that this stringency is mandated by the FWPA and is appropriate considering the development pressure in

New Jersey, as well as the role of the State's wetlands in the Atlantic migratory flyway (see 33 N.J.R. 3045(a)). The FWPA Rules must retain this stringency and remain more stringent than the Federal program. (59, 114, 179, 236, 277, and 399)

RESPONSE TO COMMENTS 97 AND 98: The statement in the notice of proposal Summary referenced by the commenter was intended to briefly explain the minimum requirements of the assumption agreement and was not intended to imply that maintaining a program as strict as the Federal program precluded the Department from developing a more stringent permitting program. Under the State's assumption of the freshwater wetlands permitting authority from the USEPA, the State is mandated to maintain standards at least as stringent as the Federal permitting program. The commenter is correct that the State may adopt requirements more stringent than the Federal permitting program; as indicated in several other responses, the FWPA Rules include numerous instances where freshwater wetland protections have been incorporated that exceed those contained in the Federal program. For example, while the Federal permitting program does not have the authority to regulate activities in transition areas around freshwater wetlands, the FWPA and its implementing rules contain robust requirements restricting activities within 50 or 150 feet of freshwater wetlands to prevent adjacent upland development from degrading freshwater wetlands.

Commenters correctly identify the critical role of New Jersey's wetlands in the Atlantic migratory flyway. The FWPA Rules continue to be more stringent than the Federal permitting program. For example, the FWPA Rules regulate activities in isolated wetlands (which often serve as important waterfowl habitat) while the USACE does not have jurisdiction over isolated wetlands. As detailed in the notice of proposal Environmental Impact statement, the amendments, repeals, and new rules adopted at this time are anticipated to result in a positive

environmental impact, by facilitating compliance with the protective standards of the rules, encouraging environmentally beneficial activities, and ensuring timely and successful mitigation projects.

Pipelines

99. COMMENT: The proposed rules are opposed because they will remove protections and allow pipelines to be constructed through environmentally sensitive areas. Constructing pipelines through wetlands will destroy habitat, weaken mitigation efforts, allow surface waters to be polluted, and destroy the aesthetic appeal of wetlands. (105)

100. COMMENT: Do not adopt the proposed rules. The proposed amendments will weaken environmental protections by approving pipelines and increasing flooding and water pollution. (336 and 337)

101. COMMENT: The notice of proposal is opposed. Wetlands protect fresh water sources for human use and act as a “sponge” by absorbing flood waters that would otherwise flood communities all along a pipeline route. Destroying wetlands will impact the entire State with increased flooding. (129)

102. COMMENT: The rules should focus on keeping water clean and not on facilitating unneeded pipelines. (104, 144, and 361)

103. COMMENT: The proposed rules will remove important protections and allow construction of pipelines through environmentally sensitive wetlands. (5, 104, 144, 151, and 361)

104. COMMENT: The FWPA Rules should not permit pipeline construction. (58)

105. COMMENT: The proposed rules allow for utility crossings and maintenance, which facilitate the construction of utility lines and power lines, which in turn destroys wetland habitat.

(13, 22, 23, 35, 51, 52, 63, 76, 85, 104, 144, 173, 174, 189, 202, 232, 233, 237, 240, 243, 244, 266, 294, 306, 324, 327, 329, 334, 343, 361, 362, 377, 392, 395, 399, 408, 414, 415, 427, 431, and 454)

106. COMMENT: The proposed rules make it easier to build pipelines. (6, 13, 15, 16, 19, 22, 23, 27, 29, 32, 33, 35, 36, 37, 38, 39, 41, 45, 46, 55, 57, 59, 62, 63, 65, 67, 73, 74, 76, 78, 82, 83, 85, 92, 93, 97, 103, 122, 123, 124, 127, 133, 136, 137, 138, 142, 148, 165, 167, 170, 171, 173, 174, 175, 183, 202, 204, 206, 212, 215, 217, 218, 219, 220, 229, 232, 233, 237, 238, 239, 241, 242, 243, 244, 245, 249, 256, 260, 265, 266, 271, 274, 280, 282, 283, 287, 289, 294, 301, 306, 312, 314, 316, 321, 324, 326, 327, 329, 332, 349, 360, 362, 374, 377, 380, 382, 383, 387, 392, 394, 395, 399, 406, 407, 408, 410, 414, 427, 429, 431, 435, 437, 442, 446, 448, 449, 454, 456, 458, and 461)

107. COMMENT: The notice of proposal is so biased in favor of pipelines that it should not be considered for adoption. Leave the wetlands alone. (435)

108. COMMENT: The proposed rules will encourage the construction of new pipelines that will endanger wildlife, the environment, and New Jersey residents. (460)

109. COMMENT: People buy property containing wetlands and adjacent to wetlands with the knowledge that those areas cannot be developed. However, these important rules are proposed to be relaxed at a time when pipeline projects are proposed. Allowing pipelines to be built in wetlands area will lead to further water contamination, including potentially arsenic, which would require impacted people to install new filtration systems in their wells to address such contamination. These rules should not be amended. (419 and 420)

110. COMMENT: New Jersey cannot afford to weaken protections to facilitate pipelines, which have a record of leaks, spills, and explosions. (3)

111. COMMENT: New Jersey leads the nation in the number of Superfund sites. This leads one to think that a top priority for the Department would be to protect natural resources. Wetlands are more important than ever and must be safeguarded from pollution, especially from pipelines. (393)

112. COMMENT: New Jersey has successfully protected its water after a history of abuse, neglect, and pollution. However, the proposed rules would lower the current high standards to facilitate pipelines. (290)

RESPONSE TO COMMENTS 99 THROUGH 112: The adopted amendments, repeals, and new rules do not change the regulation of utility line construction (including pipelines) in regulated areas. The Department recognizes the potential environmental impact of constructing new utility lines through freshwater wetlands, transition areas, or State open waters and is, therefore, maintaining the stringent standards for authorization under general permit 2 for underground utility lines and for authorization under general permit 21 for above-ground utility lines. These conditions limit the amount of permanent disturbance to 0.5 acre and generally limit the width of disturbance to 20 feet. Mitigation is required for all permanent disturbance of freshwater wetlands and State open waters greater than 0.1 acre, and is required for permanent disturbance less than 0.1 acre unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. The remaining conditions in the general permits serve to minimize the scope of activities in regulated areas and direct activities to upland areas wherever possible to avoid impacts to freshwater wetlands, transition areas, and State open waters. In addition, should the Department determine other conditions are necessary to effectuate the purposes of the FWPA and FWPA Rules, the Department can add additional conditions on a case-by-case basis in accordance with N.J.A.C. 7:7A-20.3. Under N.J.A.C. 7:7A-

20.3(b), the Department shall add "any requirements necessary to comply with water quality standards established under applicable Federal or State law" and "requirements necessary to comply with any applicable toxic effluent standard or prohibition under section 307(a) of the Federal Act or applicable State or local law," among other conditions as necessary.

If a utility line project proposed within freshwater wetlands cannot meet the stringent standards of a general permit, it will be reviewed under an application for an individual permit. In this case, the applicant must demonstrate compliance with N.J.A.C. 7:7A-10.1 and 10.2, as well as the additional requirements for a non-water dependent activity at N.J.A.C. 7:7A-10.3 and, in some cases, the additional requirements at N.J.A.C. 7:7A-10.4. The substance of these requirements is unchanged from the prior rules. These requirements apply to activities with potential impacts beyond the minimal impacts authorized under general permits or general permits-by-certification, and require the applicant to demonstrate that the activity has no practicable alternative, does not result in adverse impacts to the ecosystem, wildlife, water quality, or historic resources, or violate other State and Federal requirements (see N.J.A.C. 7:7A-10.2(b)2 through 10 and 15), and that the activity is in the public interest. In order to determine that an activity is in the public interest, the Department will consider the factors listed at N.J.A.C. 7:7A-10.4(b)12i through vii. In determining if an activity has practicable alternatives, the Department will consider the factors listed at N.J.A.C. 7:7A-10.2(c), including if the activity could instead be located on other property not owned by the applicant that reasonably have been or be obtained, utilized, expanded, or managed in a manner that would fulfill the basic purpose of the proposed activity while resulting in impacts to regulated areas being minimized or avoided. In accordance with N.J.A.C. 7:7A-10.3(b), non-water dependent activities, which include utility lines, are also subject to the rebuttable presumption that there is a practicable

alternative to locating a non-water dependent activity in wetlands or in a special aquatic site. Activities in exceptional resource value wetlands or trout production waters are subject to additional requirements that further limit what can occur in the most naturally valuable aquatic ecosystems of the State.

Considering the stringent standards in the general permits that minimize the impacts of utility lines and the robust individual permit standards for projects with more than minimal impact, the adopted rules do not serve to facilitate utility line projects. As explained above, the Department is not removing or changing any requirements for utility line projects.

113. COMMENT: The proposed rule change allows drilling under a stream or wetland, which threatens New Jersey's water supply and could cause mudslides. Thermal pollution from the resulting pipelines will damage streams. The notice of proposal should not be adopted. (154)

114. COMMENT: The rules allow certain activities because they do not consider horizontal directional drilling (HDD) to have any impact on water quality, while in fact this practice uses a lot of chemicals and drilling mud, which could impact water quality. This practice could collapse the stream or create a hole under the wetlands filled with chemicals and mud, which will kill all life and potentially pollute any waters downstream. In addition, the drilling process could fail and bring all the mud and chemicals to the surface. HDD causes siltation, erosion, and even mudslides. Not considering HDD to have an impact on water quality means that the Department can more easily approve 401 Water Quality Certificates for pipelines. These changes will give the Department an excuse to approve more pipeline projects. (104, 144, and 361)

115. COMMENT: The proposed rules will have serious negative consequences to New Jersey's wetlands because they allow horizontal directional drilling under streams and wetlands, which

can result in siltation, erosion, and mudslides, and approve the construction of pipelines through environmentally sensitive wetlands (153)

116. COMMENT: By declaring that HDD does not have an impact on water quality, the Department does not need to consider its impact on Category One waters. (104, 144, and 361)

117. COMMENT: While no substantive amendments were proposed at this time, general permit 2 should be revised to acknowledge the growing body of evidence that HDD is not a consistently safe method to avoid impacts to regulated areas. Existing N.J.A.C. 7:7A-5.2(b) should be revised to include provisions requiring applicants to submit geologic evaluations to determine the suitability of a proposed route for HDD and a contingency plan in case of inadvertent release. Current provisions provide no mechanism to require relevant information concerning HDD, which may jeopardize threatened and endangered species and Category One waters. The current provisions are insufficiently protective under the FWPA. (277)

118. COMMENT: Drilling, including horizontal directional drilling, and blasting, should not be allowed in or near wetlands or transition areas under any general permits and should never be permitted in exceptional resource value wetlands or their associated transition areas. These activities alter surface water flow and groundwater and increase leaching of both natural elements and manmade pollutants into wetlands and eventually into wellwater, posing an environmental and public health risk. (431)

RESPONSE TO COMMENTS 113 THROUGH 118: The Department regulates many utility line activities in recognition that these activities may have an environmental impact. As explained in the Response to Comments 99 through 112, the substantive requirements applicable to utility line activities are unchanged from the prior rules.

With reference to suggested amendment of general permit 2 and assertions that the Department does not have requirements for directional drilling, some version of general permit 2 has been in the FWPA Rules since their original adoption in 1989. Several amendments over the years have further refined the requirements of the permit and added the requirement to mitigate for permanent impacts. Should proposed directional drilling include elements that are required to obtain a permit under the FWPA Rules, all requirements of the general permit would be applicable to the proposed directional drilling project. In addition to the limitations within general permit 2 itself, the conditions that apply to all general permits at N.J.A.C. 7:7A-5.7 already include added protection for water quality, threatened and endangered species, and aquatic life. The Department, under N.J.A.C. 7:7A-20.3, can add any special conditions needed to ensure compliance with the requirements of the FWPA, FWPA Rules, or Federal Act. This includes, but is not limited to, specifications for silt fencing or other erosion and sediment control measures, timing restrictions to avoid impacts to threatened and endangered species or fisheries resources, and any other special conditions to ensure that the construction and/or activity has a minimal environmental impact. Further, if under N.J.A.C. 7:7A-5.3(e), the general permit requirements and additional conditions cannot ensure that compliance with the FWPA Rules (including only minimal environmental impact), the Department can require an individual permit. Similarly, if special circumstances make an individual permit necessary to comply with the FWPA, the FWPA Rules, any permit or order issued thereto, or the Federal Act, the Department will deny an application for authorization under general permit 2 and require an individual permit. To obtain an individual permit, an activity must meet the stringent requirements at N.J.A.C. 7:7A-10, which include ecological and water quality protections and the requirement that the activity is in the public interest.

119. COMMENT: Under the proposed rules, pipelines will not need individual permits, and will instead be approved through a permit-by-rule, which allows project proponents to avoid looking at cumulative impacts. (104, 144, and 361)

RESPONSE: There are no permits-by-rule in the FWPA Rules. Non-exempt regulated activities may be authorized under general permits-by-certification, general permits, transition area waivers, or individual permits. As explained in the Response to Comments 99 through 112, there are no general permits-by-certification that authorize utility line activities. Underground utility lines, including pipelines, may be authorized under a general permit (general permit 2), transition area waiver, or individual permit, which all require the submittal of an application to the Department for direct staff review. During this review, the Department considers all potential impacts of the proposed activity. General permits authorize those activities which, individually and cumulatively, are determined to have minimal impacts on the environment. While a general permit may be used more than once on a single site, N.J.A.C. 7:7A-5.4(a)1 requires that the total disturbance caused by all activities at all locations onsite under that general permit shall be summed in order to ensure that the applicable disturbance limits of the general permit are not exceeded. This requirement specifically avoids a situation where multiple minor impacts under a general permit authorization cumulatively add up to a significant impact. Finally, N.J.A.C. 7:7A-5.3(f) and 10.1(c) prohibit the segmentation of a project by applying for combinations of individual permits and authorizations under general permits-by-certification or general permits, which would avoid an analysis of cumulative impacts.

120. COMMENT: Allowing pipelines to run through multiple streams in New Jersey, especially in the Highlands, will put drinking water sources at risk. There is no replacing the waterways, forests, wildlife, and soils that will be affected. (434)

RESPONSE: As explained in the Response to Comments 99 through 112, the provisions concerning utility line development have not changed from the prior rules. General permits authorize only activities with minimal impacts, while individual permits are issued only after demonstrating compliance with the robust standards at N.J.A.C. 7:7A-10.2. As explained in the Response to Comments 77 through 85, the FWPA Rules contain a number of requirements to protect water quality. Activities that cross streams are likely to require a permit under the FHACA Rules, which contain protections for water quality, and riparian ecosystems while ensuring development does not exacerbate flooding. In addition, development in the area under the jurisdiction of the Highlands Water Protection and Planning Rules is subject to additional standards under N.J.A.C. 7:38, to protect the unique and essential resources of the Highlands region.

121. COMMENT: The FWPA Rules should encourage renewable energy over fossil fuel infrastructure. (173, 174, and 270)

RESPONSE: The FWPA Rules do not encourage any type of development or energy infrastructure over any other type. The Department evaluates applications for their compliance with all applicable requirements of the FWPA Rules and its enabling statutes, including the size and location of disturbance and potential impacts to threatened and endangered species and water quality. It is beyond the scope of the FWPA Rules to promote one type of energy infrastructure over another. However, the Department's Bureau of Energy and Sustainability supports the

Board of Public Utilities (BPU; the lead State agency for renewable energy efforts) in their initiatives to create a sustainable and energy-efficient New Jersey. The Department and BPU have partnered in developing the New Jersey Energy Master Plan (see http://nj.gov/emp/docs/pdf/New_Jersey_Energy_Master_Plan_Update.pdf). For more information on the State's clean energy initiatives, see http://www.njcleanenergy.com/.

N.J.A.C. 7:7A-1.3, Definitions

122. COMMENT: The proposed rules lack specificity of language, which, instead of streamlining the process, opens the rules to individual interpretations that will not accurately guide applicants. The lack of competent definitions makes the rules confusing, violations hard to enforce, and the potential for mitigation failures even more probable. (84)

RESPONSE: It is unclear where the commenter considers the adopted rule language to be unspecific. In the adopted amendments, repeals, and new rules, the Department has deleted or amended definitions to achieve consistency with definitions found in the FHACA Rules and/or CZM Rules in order to clarify terms that are applied the same way throughout all three chapters. In addition, the Department amended and added definitions relating to the permitting process to aide in the alignment of the land use rules and facilitate the readers' understanding of the adopted permitting procedures. Definitions were also relocated from the section of mitigation-specific definitions to the general definitions in the beginning of the chapter to facilitate understanding as those terms are used in several subchapters. Amendments and new definitions provide additional clarity to the mitigation-specific terminology at N.J.A.C. 7:7A-11.1 to facilitate understanding of mitigation requirements and processes. Without specific examples of which definitions are

considered to be confusing or lacking in specificity, the Department cannot determine if additional amendments are necessary in response to this comment.

123. COMMENT: The reference to the application checklist in the definition of "administratively complete" at N.J.A.C. 7:7A-1.3 should be deleted. Only the letter of interpretation (LOI) application materials listed in N.J.A.C. 7:7A-16.3 should be required for administrative completeness. If the checklist is referenced in the rule, it should be adopted as part of the rule. (69)

RESPONSE: As indicated at N.J.A.C. 7:7A-16.2, application checklists identify all submissions required under the rules to be part of an application, and also the appropriate level of detail and the format of the information required to be submitted for the type of application covered by the checklist. Application checklists are available for each type of application, including LOI applications referenced by the commenter.

The purpose of the checklists is to ensure that the submissions are sufficient to demonstrate the proposed development meets the requirements of the particular permit and to limit the amount of "back and forth" needed between an applicant and the Department to ensure the application can proceed through review as quickly and efficiently as possible. The submissions specified on the application checklists are those specified in the rules; application checklists do not add new or additional submission requirements. By way of example, as noted in N.J.A.C. 7:7-16.2(a), where the rules require, as part of an application, the submittal of a site plan or photographs showing certain types of information, the corresponding checklist will indicate the number of copies of the plan to be submitted, the scale and details of the information to be illustrated on the plan or drawing, and the number and orientation of photographs of the

site. Checklists are available for download from the Department's website at www.nj.gov/dep/landuse or by contacting the Department at the address set forth at N.J.A.C. 7:7-1.4.

In the case of an application for an LOI, N.J.A.C. 7:7A-16.3 specifies the required components of an LOI application. As indicated in the lead-in language at N.J.A.C. 7:7A-16.3(a) with reference to the list of materials required to be submitted for all LOI applications, and in the lead-in language at N.J.A.C. 7:7A-16.3(b) with reference to the list of additional materials that must be provided if the application is for a line verification LOI issued under N.J.A.C. 7:7A-4.5, rather than expanding the types of information required, an application checklist for an LOI, consistent with the checklists available for all other applications for Department approval under the FWPA Rules, identifies the appropriate level of detail and the format of the information required to be submitted for each category of material specified in the rules to ensure the application can proceed through review. In the case of an application checklist for an LOI, the checklist provides that information with reference to those materials required to be submitted as part of the application in accordance with N.J.A.C. 7:7A-16.3(a)1 through 5 for all applications and the additional materials required at N.J.A.C. 7:7A-16.3(b)1 through 4 for a line verification LOI.

Accordingly, while the commenter is correct that the submission requirements for an LOI are those specified in N.J.A.C. 7:7A-16.3, as the application checklist referenced in that section includes identification of each of the requirements specified in the rules, as well as the level of detail and format necessary for the application to proceed through review, reference to the checklist in defining when an application is administratively complete is appropriate.

124. COMMENT: The existing definition of "architectural survey" is specific to an "intensive-level historic architectural survey." The Department should consider a broader definition that also includes a "reconnaissance-level" survey effort, which is a screening level effort that may be sufficient to determine that no historic properties exist or will be affected in accordance with procedures established by the New Jersey Historic Preservation Office. (255)

RESPONSE: An architectural survey is only required to be submitted when the Department determines that a proposed project has a high probability of affecting properties that are listed, or are eligible for listing, on the New Jersey or National Register of Historic Places as determined in accordance with N.J.A.C. 7:7A-19.5(l)1 through 5. Projects exhibiting the characteristics listed at N.J.A.C. 7:7A-19.5(l), including the presence of known historic or archaeological resources, the availability of information on historic resources in the area of the proposed project or proposed conduct of activities in areas that have historically been areas of elevated human activity or in a manner affecting underground resources increases the likelihood of the presence of historic or archeological resources on the site are deemed by the Department to have a high probability of the presence of historic and archeological resources and so require an intensive survey for the Department and the USEPA to evaluate any effects on such resources. The level of detail in an architectural survey as defined at N.J.A.C. 7:7A-1.3 is appropriate for this circumstance. The results of "reconnaissance-level" surveys may be included within an application to demonstrate that the activity will not affect historic properties; however, an intensive level survey is required when the Department determines that there is a high probability of affecting such a property.

125. COMMENT: The existing definition of "best management practices" includes an obsolete reference to the "Department's Technical Manual for Stream Encroachment." (255)

RESPONSE: The Department is changing this definition on adoption to reflect the title of the current Technical Manual on the FHACA Rules.

126. COMMENT: The existing definition of "Category One water" should be amended to read "a water designated as such in the Department's Surface Water Quality Standards at N.J.A.C. 7:9B," for consistency with the FHACA Rules' definition. In addition, the existing definition erroneously refers to N.J.A.C. 7:9B-1.15 instead of N.J.A.C. 7:9B-1.4, and to N.J.A.C. 7:9B-1.15(h) instead of N.J.A.C. 7:9B-1.15(c) through (i). It is also suggested that the existing definition of "FW1 waters" be limited to "waters designated as FW1 waters in the Department's Surface Water Quality Standards at N.J.A.C. 7:9B-1.15(j)." The additional detail, from "As of September 4, 2001" to the end of the definition, appears redundant and contains an incorrect reference to N.J.A.C. 7:9B-1.15 when the relevant information is found at N.J.A.C. 7:9B-1.4. (255)

RESPONSE: The Department did not propose amendments to the definitions of "Category One waters" and "FW1 waters" as part of this rulemaking. However, with reference to the definition of "Category One waters," the definition was amended as part of the readoption of the Surface Water Quality Standards in 2009 to read as follows: "'Category One waters" means waters designated as such in the Department's Surface Water Quality Standards at N.J.A.C. 7:9B." (see 41 N.J.R. 1565(a); 4735(a)). Accordingly, no change is needed. With reference to the definition of "FW1 waters," the Department agrees that the informational cross-reference to the wording of the definition of the same term in the Surface Water Quality Standards as of September 4, 2001, is no longer accurate and replacement of this reference with an indication as to the wording of the definition in Surface Water Quality Standards at N.J.A.C. 7:9B as of the date of adoption of these amendments is unnecessary and potentially confusing should the definition in the Surface

Water Quality Standards change at some point in the future. Accordingly, consistent with the existing definition of "FW2 waters," the Department is changing the definition of "FW1 waters" on adoption to simply cross-reference the Surface Water Quality Standards at N.J.A.C. 7:9B.

127. COMMENT: The definition of dredging does not clearly differentiate "dredging" from "excavation," which is inconsistent with the CZM Rules. It is suggested that the definition of dredging in the FWPA Rules be amended to clarify that dredging is the removal of sediments below the ordinary high water mark or spring high water line of a waterway or waterbody. (255)

128. COMMENT: The definition for "excavation" should be consistent with the definitions of "excavation" in the FHACA and CZM Rules. The FHACA Rules state that excavation applies "whether the land surface is exposed or submerged," while the CZM Rules specify that excavation only applies landward of the spring high water line. The FWPA Rules go beyond both definitions by adding the qualifier "resulting in a change in site elevation." (255)

RESPONSE TO COMMENTS 127 AND 128: While the Department has made efforts to align the FWPA Rules with the CZM Rules wherever possible, the use of the term "dredging" in the FWPA Rules does not lend itself to the same definition as in the CZM Rules. The CZM Rules regulate tidally-influence areas, such that distinguishing between excavation landward of the spring high water line and dredging below the spring high water line is appropriate. However, "dredging" is used in the FWPA Rules primarily in the context of lake dredging. The spring high water line datum is not relevant in this context. For the same reasons, the definition of "excavation" in the CZM Rules is not appropriate to include in the FWPA Rules. The qualifier "resulting in a change in site elevation" is intended to refer to any disturbance of sediment that could affect the growth of wetlands vegetation or wetlands hydrology.

129. COMMENT: The definition of "fill" contains the qualifier "so as to change the ground elevation in relation to surface water or groundwater level." "Ground elevation" should be clarified with respect to the term "site elevation" used in the definition of "excavation." (255)

RESPONSE: The definition of "fill" is intended to encompass any addition of material that could affect the growth of wetlands vegetation or wetlands hydrology. Wetlands hydrology, and, as a consequence, wetlands vegetation, can be influenced by surface water or groundwater, or both. "Ground elevation" in the definition of "fill" is intended to be synonymous with "site elevation" in the definition of "excavation."

130. COMMENT: There is currently no definition of "lawfully existing" in the FWPA Rules, but the term is used several times in the chapter. The Department should provide a definition of the term similar to the definition in the FHACA Rules. (255)

RESPONSE: The use of "lawfully existing" in the FWPA Rules has not, in the Department's experience, caused confusion for applicants. Additional detail is provided in the surrounding language to help applicants understand what is meant by the term. For example, general permit 1, at N.J.A.C. 7:7A-7.1, authorizes normal property maintenance of lawfully existing features. The general permit specifically applies to maintenance of features that were lawfully existing prior to July 1, 1988. The definition in the FHACA Rules defines whether a feature is lawfully existing in part based on the date it was constructed; to define the term in the FWPA Rules in this manner would be redundant with the adopted rule language.

131. COMMENT: The current definition of "project" is unclear because it emphasizes exemptions. Consistent language connecting the definition of "project" and "property as a whole" would more clearly define the scope of a "project." (277)

132. COMMENT: In the definition of "project," the portion of the definition identified as paragraph 1.i is incorrectly shown as 1.1 in the existing rules. Additionally, it is unclear why the definition of "project" only applies to transition area exemptions. It is suggested that a general definition of project, similar to the FHACA Rules' definition (that is, "project" means all regulated activities occurring and proposed on a site, whether undertaken concurrently or in phases), be added and that the distinction between "project" and "site" be explained. (255)

RESPONSE TO COMMENTS 131 AND 132: The definition of "project," which is amended only to reflect changes in codification of cross-referenced sections and to italicize the term "*de minimis*," was originally intended to clarify the transition area exemptions at previous N.J.A.C. 7:7A-2.8(f), which is recodified as a result of this adoption as N.J.A.C. 7:7A-2.4(f). However, the Department does recognize the desire for additional clarification and a more general definition for "project" in the FWPA Rules and will consider developing such a definition in the future. The numbering in the definition of "project" is correct in the official New Jersey Administrative Code version of the FWPA Rules, but was incorrect in the courtesy copy provided on the Department's website. The Department has corrected the error in the unofficial web version of the FWPA Rules.

As used in the FWPA Rules, a "project" refers to proposed regulated activities, while "site" refers to the location of the proposed activities and all contiguous land owned or controlled by the same entity. The meaning of these terms is clear when they are used in context throughout N.J.A.C. 7:7A.

133. COMMENT: The existing definition of “property as a whole” is cut off. The remainder of the final sentence should read “… investment or development plan. In determining the property as a whole in a particular case, the Department shall consider existing legal precedent regarding what constitutes "property as a whole" at the time of the determination,” to match the CZM Rules. (255)

RESPONSE: The existing definition of “property as a whole” contains the language referenced by the commenter. The definition is correct in the official New Jersey Administrative Code version of the FWPA Rules. The courtesy copy on the Department’s website did not contain the full definition; this has been corrected in the current courtesy copy on the Department’s website.

134. COMMENT: The Department should add definitions for “reconstruct” and “repair” consistent with the definitions in the FHACA Rules. (255)

RESPONSE: The definitions of “reconstruct” and “repair” are necessary in the FHACA Rules because they relate to whether an activity is a “substantial improvement” to a structure under that chapter, which affects eligibility for certain permits and subjects the activity to additional requirements to meet current building requirements. The FWPA Rules do not use the terms for this purpose; it is, therefore, inappropriate to apply the same definitions. The plain language of the terms is sufficiently clear for their use in the FWPA Rules.

135. COMMENT: The definition of “transition area” states that a transition area is adjacent to freshwater wetlands. However, recent guidance and regulation by the Department suggests that a regulated transition area includes all upland area within 50 or 150 feet of a wetland boundary,

regardless of adjacency. For example, upland areas separated from wetlands by a stream or other water body do not appear to meet the definition of "transition area" but are regulated as such. The Department should clarify this definition or the general transition area provisions at N.J.A.C. 7:7A-2.5 to address this issue. (69)

RESPONSE: The presence of a stream or other water body within a transition area between the upland boundary of the transition area and the wetland boundary does not preclude the area from being a transition area. The term "adjacent" is used in the definition of "transition area" in the FWPA, and is further clarified in the substantive standards establishing transition area width. Under the FWPA at N.J.S.A. 13:9B-16a, a transition area serves as "an ecological transition zone from uplands to freshwater wetlands which is an integral portion of the freshwater wetlands ecosystem, providing temporary refuge for freshwater wetlands fauna during high water episodes, critical habitat for animals dependent upon but not resident in freshwater wetlands, and slight variations of freshwater wetland boundaries over time due to hydrologic or climatologic effects" and as "a sediment and storm water control zone to reduce the impacts of development upon freshwater wetlands and freshwater wetlands species." The Act further directs the Department to establish the width of the transition area as no greater than 150 feet nor less than 75 feet for a freshwater wetland of exceptional resource value and no greater than 50 feet nor less than 25 feet for a freshwater wetland of intermediate resource value, with no mention of adjusting or eliminating a transition area if it contains a water feature that physically separates the upland transition. Land separated from a wetland by a stream or other feature that is within the widths prescribed by the FWPA and the FWPA Rules also still performs the functions enumerated in the FWPA and is properly regulated as a transition area. For example, water features next to wetlands are likely to be hydrologically connected to the wetlands. The effects of

impacts to the transition area, such as an increase in polluted stormwater runoff caused by destruction of vegetation, will likely effect the wetlands despite an intervening water feature. As another example, the function of transition areas as habitat for species dependent on, but not residing in, freshwater wetlands, also is not affected by an intervening water feature; any impact to transition areas could jeopardize this function. Because transition areas containing a water feature separating uplands from wetlands still perform many of the same functions as transition areas that are immediately next to wetlands, consistent with the direction provided by the FWPA, the Department interprets the term “adjacent” used in the context of the definition of “transition area” to mean near or close to, and does not intend to imply that all parts of a transition area must be contiguous with the wetlands boundary. The use of the term “adjacent” in this manner has not caused confusion in the Department’s implementation of the rules; clarifying amendments are not necessary.

136. COMMENT: A reference to NJ GeoWeb (Tidelands Layer) would be helpful to add to the definition of “tidal waters” for determining the location of the head of tide. (255)

RESPONSE: The Tidelands Layer available on NJ GeoWeb is intended for guidance purposes only and may not accurately reflect the actual head of tide or location of the Tidelands claim line. It would be inappropriate to include a non-regulatory guidance tool in a regulatory definition.

137. COMMENT: The amendments to the definition of “utility line” are opposed. A tower transmitting electromagnetic transmission is a utility line and should be so considered. A stormwater pipe is a utility line and should remain as a utility line. Such a pipe is artificially changing the status of a wetland, too, and is not natural. (327)

RESPONSE: The definition of "utility line" is amended to more closely align with the definition of the same term in the FHACA Rules. The adopted amendment serves to clarify the previously existing definition that specified that a tower or pole that only transmits waves through the air is not a utility line. The amendment makes clear that this exception also applies to towers or poles that only receive electromagnetic waves. This clarification is important in distinguishing activities that may be eligible for general permit 21 for an above-ground utility line from those that are not eligible for this general permit. These activities are regulated under other provisions in the adopted FWPA Rules. Because towers that only transmit or receive electromagnetic waves are single, discrete structures, they are not appropriately considered utility lines under general permits 2 and 21 and must obtain an individual permit to be constructed.

The Department is retaining in the adopted definition the indication that a utility line does not include a stormwater pipe or a pipe that drains a wetland, which was included in the previous definition to clarify what activities are authorized under general permits 2 and 21. Because these types of pipes are not considered to be utility lines, they do not qualify for these general permits. General permit 2, for underground utility lines, specifies requirements for pipes laid through wetlands, transition areas, or State open waters to ensure that wetlands hydrology is not affected and to allow free passage of surface and ground water. General permit 21, for above-ground utility lines, requires activities under this general permit to not interfere with the natural hydrological characteristics of the wetland, transition area, or State open water in which the project will take place. Diverting stormwater or draining a wetland by design alters the hydrology of an area, so these activities are not considered utility lines for the purposes of both the FWPA and FHACA Rules. Alterations to hydrology due to stormwater diversions or draining a wetland have greater potential environmental impacts that are not appropriately reviewed in the

context of utility line general permits. Accordingly, any proposal to conduct such an activity in wetlands will only be reviewed under the more stringent individual permit process.

138. COMMENT: In the notice of proposal Summary, the Department describes amending the definition of "water dependent development" to add examples, but does not list out the examples to be added. This seems like an attempt to confuse the public and sneak through significant changes. The public needs a sound understanding of what is being proposed; omitting the examples makes it difficult for the public to understand the reasoning behind the amendments. (327)

RESPONSE: The Department believes the commenter is referring to the changes made to the definition of "water dependent activity." In the notice of proposal Summary, the Department states that changes are being made to clarify that uses or portions of uses that can function on sites not adjacent to the water are not considered water dependent, regardless of the economic advantages that may be gained from a waterfront location, and that only portions of activities that require direct access to the water are water dependent. The notice of proposal Summary is to be read in conjunction with the proposed rule text. The discussion of the proposed changes to the definition identified the addition of examples and the rule text contains those examples. Examples of water dependent uses include: docks, piers, marina activities requiring access to the water, such as commissioning and decommissioning new and used boats, boat repairs and short-term parking for boaters, storage for boats that are too large to be feasibly transported by car trailer (generally greater than 24 feet), rack systems for boat storage, industries, such as fish processing plants and other commercial fishing operations, port activities requiring the loading and unloading of vessels, and water-oriented recreation.

139. COMMENT: Dams, bridges, culverts, pipes, stormwater outfalls, and stormwater pump stations that require direct access to a body of water should be added as examples to the definition of "water dependent activity." (255)

RESPONSE: The adopted definition provides examples of water dependent activities, but these are not intended to be an exhaustive list of all activities that could possibly be considered water dependent. The examples provided in the adopted definition of "water dependent development" are all related to the use of the water body itself by humans, whether for navigation, recreation, or commerce. Whether any activity is water dependent depends on whether the activity can or cannot physically function without direct access to the body of water along which it is proposed. The Department will evaluate whether specific activities not listed in the definition are water dependent when reviewing a permit application.

140. COMMENT: Why is the definition of water quality certificate being changed? Water quality certificates are a Federal requirement, and other than the reference to the appropriate Federal regulations, this definition should not be in the FWPA Rules, and the FWPA Rules have no authority over this definition. (415)

RESPONSE: As explained in the notice of proposal Summary, the Department amended the definition of "water quality certificate" to align with the definition of the term in the CZM Rules without changing the meaning of the term. The definition has been expanded to include examples of Federal licenses and permits for which water quality certificates are issued. As provided by N.J.A.C. 7:7A-2.1(d) and explained in the Response to Comments 70 through 87, a permit issued under the FWPA Rules constitutes the water quality certificate required under the

Federal Act at 33 U.S.C. § 1341 for any activity covered by the chapter. If a discharge of dredged or fill material into waters of the United States does not require a permit under the FWPA Rules but does require a water quality certificate, the Department will use the standards and procedures in N.J.A.C. 7:7A to determine whether to issue the water quality certificate, except for in the coastal zone in which case the standards in the CZM Rules at N.J.A.C. 7:7 will be used.

141. COMMENT: The proposed definition of "water quality certificate" creates confusion because it does not include permits issued under N.J.A.C. 7:7A in the examples of those activities requiring water quality certifications. (277)

RESPONSE: Permits issued under N.J.A.C. 7:7A do not require a separate water quality certificate. Rather, as stated in N.J.A.C. 7:7A-2.1(d) and explained in the Response to Comment 142, a permit issued under the FWPA Rules includes the analysis required by the Federal Act and itself constitutes the water quality certificate required under the Federal Act.

"Degraded wetlands"

142. COMMENT: Please clarify if the definition of "degraded wetlands" at N.J.A.C. 7:7A-1.3 encompasses the term "ecological value." "Ecological value" is used throughout the proposed rules, but should be replaced with "degraded wetlands" since currently the determination of whether there is "little ecological value" is highly subjective. (140)

143. COMMENT: The change from "value" to "function" in the definition of "degraded wetlands" suggests that the term "ecological value" in other parts of the rule are separate from

this definition. Therefore, the Department should provide a definition of "ecological value" and a methodology for determining and measuring the value of a wetland. (69)

RESPONSE TO COMMENT 142 AND 143: Ecological functions in part determine a wetland's ecological value. "Ecological value" refers to the benefit to society provided by a wetland and is based on the functions those wetlands provide. As summarized by the USEPA in its 2002 fact sheet Functions and Values of Wetlands, "Wetland functions include water quality improvement, floodwater storage, fish and wildlife habitat, aesthetics, and biological productivity. The value of a wetland is an estimate of the importance or worth of one or more of its functions to society. For example, a value can be determined by the revenue generated from the sale of fish that depend on the wetland, by the tourist dollars associated with the wetland, or by public support for protecting fish and wildlife." The values provided by a wetland are possible because of the underlying ecological functions.

In determining if a wetland is degraded for the purposes of the FWPA Rules (mainly, if general permit 26 for redevelopment can be used to authorize activities in the wetland, and in determining the cost to restore a wetland to calculate a monetary contribution to the In-Lieu Fee Program), focusing on ecological functions is most appropriate and most conducive to evaluation. Furthermore, the terms "degraded wetlands" and "ecological value" are clear in general permit 26 at N.J.A.C. 7:7A-7.26, which requires that "[t]he freshwater wetlands, transition areas, and/or State open waters to be disturbed are significantly degraded by human disturbance or alteration and are of little ecological value." Including "ecological value" in the definition of "degraded wetlands" would be redundant in this context. For these reasons, replacing the term "ecological value" with "degraded wetlands" will not provide additional clarity.

In other areas of the rule that refer to "ecological value," the term is to be interpreted as it was in the prior rule. As stated above, the ecological value or values of a wetland are influenced by the ecological functions of that wetland. A degraded wetland, with diminished ecological functions, will logically have diminished ecological value.

The Department describes, at N.J.A.C. 7:7A-11.2(a), how to demonstrate that a proposed mitigation option provides both ecological functions and ecological values at least equal to those provided by the disturbed or lost wetlands. This provision states, in part, "[i]n order to demonstrate equal ecological functions and values, the mitigator shall provide current scientific literature concerning wetlands, aquatic resources, and mitigation; as well as survey the conditions on the site of disturbance and on the proposed mitigation area and provide written documentation regarding the existing and proposed soil conditions, type and density of vegetation, any existing contamination or other degradation, sediment and pollution removal ability and flood storage capacity of the wetland resources, all proposed soil erosion protection measures, and existing, as well as any anticipated, wildlife habitat conditions." Additional guidance on determining ecological value is unnecessary and risks inappropriately restricting legitimate methodologies.

144. COMMENT: The Department should have a guidance document that outlines and recognizes the different methodologies for assessing whether wetlands are degraded. (140)

RESPONSE: In accordance with N.J.A.C. 7:7A-1.3, "degraded wetlands" means a wetland in which there is impaired surface water flow or groundwater hydrology, or excessive drainage; a wetland that has been partially filled or excavated, contaminated with hazardous substances, or that has an ecological function substantially less than that of undisturbed wetlands in the region.

Determining if a wetland meets this definition involves the collection of facts concerning the conditions existing at a particular site and not necessarily a formal assessment of the function or values provided by the wetland. Therefore, it would be misleading to recommend a methodology for assessing wetlands functions and values in this context when the applicant must spend time documenting on-site conditions to make this determination.

"Temporary disturbance"

145. COMMENT: Large projects and projects that require temporary access roads or work platforms can have temporary disturbances that last beyond six months. The definition of "temporary disturbance" should be modified to more generally refer to "certain regulated activities" and to include the type of construction project as a factor that would cause an activity, by its very nature, to cause a temporary disturbance that persists for greater than six months. (69)

146. COMMENT: The proposed definition of "temporary disturbance" is ambiguous as it only references hazardous substance remediation or solid waste facility closure" as types of regulated activities that are intended to be temporary, but will exceed six months in duration because of the nature of the activity. There are potentially many types of regulated activities that are intended to be temporary but will exceed six months. Additional examples should be provided. (255)

RESPONSE TO COMMENT 145 AND 146: The adopted definition of "temporary disturbance" continues to include regulated activities that occupy, persist, and/or occur on a site for no more than six months, which is similar to the prior definition. However, the adopted definition is expanded to include flexibility in the designation of an activity as a temporary disturbance for activities that are temporary, but that justifiably exceed six months in duration because of the nature of the activity. As evidenced by the two examples listed in the definition and the notice of proposal Summary (that is, hazardous substance remediation or solid waste facility closures) this

flexibility is applied to environmentally beneficial activities that by their very nature may result in disturbance that persists longer than six months, but after the completion of which the disturbed regulated area can be restored to its prior, or an improved, condition, such that the longer persistence of the disturbance is ultimately justified. The Department intends the additional flexibility provided in the definition to be applied on a case-by-case basis and will not add additional examples or include the type of construction project as a factor in making the determination of whether a disturbance is temporary.

147. COMMENT: The rule change that allows for "temporary disturbances" will weaken protections for wetlands. Temporary disturbance in wetlands does not exist. Destroying vegetative cover, soil, or anything in a wetland is not temporary, but will have long-lasting effects on the wetland. (13, 20, 22, 23, 35, 51, 52, 63, 74, 76, 85, 131, 173, 174, 189, 202, 218, 232, 233, 237, 240, 243, 244, 266, 294, 306, 324, 327, 329, 334, 343, 362, 377, 392, 395, 399, 408, 414, 415, 427, 431, and 454)

148. COMMENT: Do not allow temporary disturbance in any wetlands. (168)

149. COMMENT: The proposed changes to the definition of "temporary disturbance" could result in significant adverse impacts to water quality. Only the most minimal hand-trimming of grasses in a wetland should be considered a "temporary disturbance." (84, 179, 222, and 402)

150. COMMENT: Amendments to the definition of "temporary disturbance" are opposed because they inappropriately expand the scope of activities eligible to be considered "temporary." Wetlands are virtually always degraded by even minimal disturbance, whether by soil compaction, modification of hydrology, or introduction of invasive species. Only the most minor activities, such as hand-trimming of vegetation, should be considered temporary. While

the examples provided in the proposed definition include site remediation projects, which in many cases may be appropriate for differential treatment, revising the definition to address one limited situation would result in significant adverse impacts in different scenarios that could fall within the ill-defined new parameters. The Department should either leave the existing definition unchanged or revise the definition to specifically omit certain types of projects, such as major site remediation projects, and continue to hold all others to the six-month limit. (160 and 277)

151. COMMENT: The notice of proposal does not take the cumulative impacts of temporary disturbances to wetlands into account. (160 and 277)

152. COMMENT: Creating an open-ended definition for temporary disturbances is opposed. Scientific research and studies show that there are no such thing as temporary disturbances to wetlands. Once the hydrology has been damaged, the wetland has been permanently damaged. The Department's own wetlands research shows that the restoration of temporary impacts has a high rate of failure. Given the requirements of the FWPA, temporary impacts cannot be allowed to continue. (320)

153. COMMENT: The new definition for temporary disturbance would allow an activity to remain in place for years since no duration limit is provided. An upper limit on the timeframe for a temporary disturbance must be provided in the definition or the disturbance is not truly temporary. (415)

154. COMMENT: Recent amendments to other land use rules should not drive substantial amendments to the FWPA Rules. These changes are not universally applicable. For instance, the change to the definition of "temporary disturbance" such that a disturbance can extend longer than six months is not applicable to a wetland. Temporary impacts to wetlands can spiral into

permanent loss. Expanding the definition of "temporary disturbance" puts existing wetlands at risk. (376)

155. COMMENT: At proposed N.J.A.C. 7:7A-1.3, the Department is relaxing the six-month limit in the definition of temporary disturbance. Further, the notice of proposal Summary only discusses restoration of the original topography and vegetative cover, not the restoration of the hydrology. The Department's own wetlands research demonstrates that the restoration of wetlands fails, meaning that temporary impacts are, in reality, permanent impacts. Any activity that may have a permanent impact on a wetland, regardless of its duration, should not be considered temporary. This change will result in the degradation of wetlands. (319 and 328)

156. COMMENT: Please explain why the definition of temporary disturbance is being expanded. (179)

RESPONSE TO COMMENTS 147 THROUGH 156: The changes relating to temporary disturbance will not weaken protections for wetlands. The FWPA Rules previously have allowed for temporary disturbances. The adopted changes align the definition with the CZM Rules at N.J.A.C. 7:7-17.1 and the FHACA Rules at N.J.A.C. 7:13-1.2 as part of the Department's initiative to align the three land use permitting programs to the maximum extent allowed by their respective enabling statutes and, as explained in the Response to Comments145 and 146, allow the Department flexibility to facilitate certain beneficial activities that by their nature result in disturbance that may last longer than six months, but is ultimately restored to a prior or, in many cases, improved condition. The Department believes it is appropriate to apply a consistent definition of "temporary disturbance" across the three land use rule chapters. The definition of "temporary disturbance," as adopted, applies to regulated activities that occupy, persist, and/or occur on a site for no more than six months, which is similar to the prior definition. However, the

adopted definition is expanded to include flexibility in the designation of an activity as a temporary disturbance for activities that are temporary, but that exceed six months in duration because of the nature of the activity (for example, hazardous substance remediation or solid waste facility closure). Disturbances that exceed six months in duration will only be considered "temporary disturbance" if the disturbed areas are restored to their original topography, and all necessary measures are implemented to ensure that the original vegetative cover onsite is restored to its previous (or an improved) condition. With reference to restoration of hydrology, as indicated in the definition of "restoration" at N.J.A.C. 7:7A-11.1, in the context of temporary disturbances wetlands restoration means "[t]he reversal of a temporary disturbance and the reestablishment of the functions and values of the wetlands and/or State open water that was temporarily disturbed." This would include hydrologic functions. While the amended definition of temporary disturbance emphasizes that activities that persist for more than six months may be considered temporary provided topography and vegetation are restored, this is not meant to represent the entirety of requirements for restoration of temporary disturbance, which are established at N.J.A.C. 7:7A-11.8, Mitigation for a temporary disturbance. The Department does not intend to allow very long-term projects to be considered "temporary"; the general timeframe remains six months with flexibility afforded to projects on a case-by-case basis as outlined above and in the Response to Comments 145 and 146. If a disturbance is significant or persistent enough, such that the area will not be able to be returned to pre-disturbance conditions, the disturbance will not be considered temporary.

With respect to the success of restoration of wetlands that have been temporarily impacted, these wetlands can be restored to pre-existing conditions within a relatively short period of time and such restoration has a high likelihood of success. Indeed, N.J.A.C. 7:7A-

11.2(a) requires all mitigation to fully compensate for any ecological loss. Until this requirement is met, the Department will not consider a mitigation obligation (including the obligation to restore a temporarily disturbed area) satisfied. The commenters did not indicate which Department publication concludes that the restoration of temporary impacts is not likely to succeed. To the extent that the commenters are referring to the results of the 2002 report "Creating Indicators of Wetland Status (quantity and quality): Freshwater Wetland Mitigation in New Jersey," prepared by Amy S. Greene Environmental Consultants, Inc., that report did not address restoration of temporary impacts. This report only evaluated wetlands creation sites and concluded that, based on an evaluation of 90 freshwater wetland mitigation sites in New Jersey between 1988 and 1999, wetland creation projects were likely to fail mainly due to lack of appropriate monitoring and follow-up. Since that time, amendments to the FWPA Rules and CZM Rules have addressed the issues that caused mitigation projects to fail, as explained further in the Response to Comments 397 through 401. The 2002 report that the commenters are presumably referring to did not focus on temporary impacts and made no finding that restoration of temporary impacts was likely to fail.

157. COMMENT: The proposed rules are too lax on temporary impacts. Applicants claim temporary impacts are minimal, but in practice these impacts are often permanent and always entail landscape degradation. Recent pipeline projects have destroyed large areas with excessive rights-of-way, which are claimed as temporary disturbance. Amendments concerning temporary impacts are especially alarming since the proposed rules make it easier to permit pipelines and related infrastructure. (353)

RESPONSE: As explained in the Response to Comments 147 through 156, restoration of temporary disturbances has a high probability of success and must be performed in accordance with N.J.A.C. 7:7A-11.8. Until "the reversal of a temporary disturbance and the reestablishment of the functions and values of the wetlands and/or State open water that was temporarily disturbed" is achieved, the applicant's mitigation responsibility is not satisfied. The Department does not anticipate that the amendment to the definition of "temporary disturbance" will have any effect on proposed utility line projects. As explained in the Response to Comments 99 through 112, the adopted rules do not change the regulation of utility line activities under the FWPA Rules from the prior rules.

158. COMMENT: At N.J.A.C. 7:7A-2.5(a), the proposed amendment reflects the fact that "Hackensack Meadowlands Development Commission" is renamed "New Jersey Sports and Exposition Authority." N.J.A.C. 7:7 and 7:13 both currently refer to "New Jersey Meadowlands Commission" and so should be updated as part of this rulemaking. (255)

RESPONSE: The Department proposed to update the CZM Rules to replace all occurrences of "Hackensack Meadowlands Development Commission" with "New Jersey Sports and Exposition Authority" in a notice of proposal published after the publication of the proposed amendments, repeals, and new rules adopted herein (see 49 N.J.R. 2122(a)). N.J.A.C. 7:13-2.1(c)3 is changed on adoption to refer to the "Meadowlands District" rather than the "Hackensack Meadowlands District" and to clarify that the New Jersey Meadowlands Commission has been renamed the "New Jersey Sports and Exposition Authority."

Applicability and Jurisdiction

Regulated areas

Identifying freshwater wetlands and transition areas; freshwater wetlands resource value classification (N.J.A.C. 7:7A-3)

159. COMMENT: The reference to the 1988 plant list in the definition of "hydrophyte" and at N.J.A.C. 7:7A-3.1(c) is obsolete. The 1988 plant list was not amended, but was replaced with the currently-maintained USACE list. (255)

RESPONSE: In 2006, USACE assumed the responsibility for administering national and state-specific lists of wetlands plants, including the periodic update of those lists, from the U.S. Fish and Wildlife Service (USFWS). As indicated on the USACE website, the 1988 list was revised in 1996, with webpages of the USFWS capturing those and other updates of the 1988 list transferred to the USACE website with administrative changes in 2006 (see http://wetland-plants.usace.army.mil/nwpl_static/index.html). The current National Wetlands Plant List is an extension of the 1988 plant list. The Department and the regulated public understand the currently-published National Wetlands Plant List as incorporating amendments to the 1988 plant list, as does the USACE. Accordingly, there is no need to change the reference to the list in the definition of "hydrophyte," which includes the 1988 list, as well as amendments thereto.

160. COMMENT: The proposed amendment at recodified N.J.A.C. 7:7A-3.2(c), to replace the reference to the Division of Land Use Regulation's freshwater wetlands technical manual with a reference to the report "New Jersey's Landscape Project" warrants further study because the Landscape Project materials do not contain information about hydrology. Wildlife habitat mapping for land use planning is an important consideration but should not necessarily be the sole determinant or even the preferential determinant of the capacity of urban landscapes to

sustain freshwater wetlands. Historical hydrology should be considered, especially in urban areas. (125)

RESPONSE: The amendment referred to by the commenter is only intended to apply to the Department's analysis of threatened and endangered species habitat when determining the resource value classification of a wetland. Department staff delineate or verify delineations of freshwater wetlands based on the three-parameter approach. An area must have wetlands soils, wetlands vegetation, **and** wetlands hydrology in order to be considered a wetland and, therefore, subject to the requirements of the FWPA Rules. Once it has been determined that an area does meet the definition of a wetland, the Department makes a resource value classification. An area with documented or present threatened or endangered species is assigned an "exceptional" resource value classification and a 150-foot transition area surrounding the wetland. N.J.A.C. 7:7A-3.2 simply explains the Department's process for determining if an area will be assigned an exception resource value classification based on threatened and endangered species data.

161. COMMENT: Please confirm that determining the classification of exceptional resource value wetlands based on Landscape Project mapping or pursuant to proposed N.J.A.C. 7:7A-3.2(d) requires a finding that the species of concern is critically dependent upon the wetlands habitat for survival for the purpose of advancing the goal of achieving consistency among regulatory programs, particularly the FHACA Rules, which require such a finding in the context of establishing the width of riparian zones. (140)

RESPONSE: Unlike the determination of a 150-foot riparian zone in the FHACA Rules, a classification of exceptional resource value wetlands under N.J.A.C. 7:7A-3.2 does not require a finding that a species is critically dependent upon the wetland habitat for survival. The FWPA, at

N.J.S.A. 13:9B-7, directs the Department to classify wetlands as exceptional resource value wetlands when such wetlands "are present habitats for threatened or endangered species, or those which are documented habitats for threatened or endangered species which remain suitable for breeding, resting, or feeding by these species during the normal period these species would use the habitat." The FWPA contains no qualifying statement that the species must be critically dependent on the wetlands in order for this determination to be made. Requiring a finding that a species is critically dependent on particular wetlands to assign an exceptional resource value classification is, therefore, contrary to the FWPA and Department policy.

162. COMMENT: Further clarification of the term "proximate to a site" is needed at N.J.A.C. 7:7A-3.2(d) to explain what the Department must demonstrate to prove that a site is suitable for a species and what a property owner must demonstrate to prove that the site is not suitable for that species. (140)

RESPONSE: The term "proximate to a site" is intended to capture situations where an occurrence of a species is near enough to the site in question that the threatened or endangered species would be anticipated to utilize the site as well. The Department will make the determination that the site might be suitable habitat based upon site characteristics and known information about the identified species' habitat requirements and dispersal abilities. Such information is available in the Department's "Protocols for the Classification of Wetlands as being of Exceptional Resource Value based on Documentation of State or Federal Endangered or Threatened Species," found at http://nj.gov/dep/landuse/guidance.html. An applicant may rebut this presumption in the same way they would request that a documented habitat not result in a classification of exceptional resource value under N.J.A.C. 7:7A-3.2(e) based upon the long-term

loss of one or more habitat requirements of the specific documented threatened or endangered species, including, but not limited to, wetlands size or overall habitat size, water quality, or vegetation density or diversity.

163. COMMENT: N.J.A.C. 7:7A-3.2 should provide the opportunity for an applicant to submit site-specific information documenting that a threatened or endangered species no longer uses the site or to show via surveys that there is no use of the site. (262)

RESPONSE: Under N.J.A.C. 7:7A-3.2(b), an exceptional resource value wetland is classified as such based upon threatened or endangered species considerations, if it is a present habitat for threatened or endangered species or is a documented habitat for threatened or endangered species which remains suitable for breeding, resting, or feeding by these species during the normal period these species would use the habitat. The presence on site or use of the site by the species in question at the time of the application is not necessary to determine that a site is threatened or endangered species habitat. If an applicant can demonstrate that the habitat on the site does not remain suitable for breeding, resting, or feeding of the threatened or endangered species that has been associated with the site, the rules provide the applicant with a means to present any information supporting that demonstration at N.J.A.C. 7:7A-3.2(e).

164. COMMENT: A minimum width of 150 feet for a transition area adjacent to a freshwater wetland of exceptional resource value, classified as such based upon the use of the Landscape Project and other sources, is supported. (431)

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

165. COMMENT: Under the existing rules, when a roadway crosses through a transition area, the portion of the transition area on the opposite side of the roadway from the wetland remains regulated as a transition area. However, this portion of the transition area is physically separated from the wetland and, therefore, does not necessarily function as a buffer or ecotone for the wetland itself. It is suggested that the "truncated" portion of the transition area not be regulated or otherwise not be counted in the calculation of disturbance acreage because it may not provide a transition area function. The "truncated transition area" could be defined as an area that is separated from a regulated wetland by a lawfully existing public roadway, railroad, or similar structure. (255)

RESPONSE: Transition areas may still perform protective functions when physically separated from a wetland. These areas may still serve as refuge for freshwater wetlands fauna during high water episodes or critical habitat for animals dependent upon, but not resident in, freshwater wetlands depending on the species in question. For example, bird species that depend on wetlands may fly over a barrier like a roadway to seek refuge or nesting habitat in a transition area. Transition areas separated from the wetland by a roadway or railroad still serve as a sediment and storm water control zone to reduce the impacts of development upon freshwater wetlands and freshwater wetlands species. While the separation of a transition area from a wetland by a roadway, railroad, or similar development is not an ideal arrangement, the Department does not agree that the "truncated" portion of the transition area provides no function as a buffer for the wetlands.

N.J.A.C. 7:7A-4, Letters of Interpretation

166. COMMENT: Clarification is needed concerning the addition of "other" at recodified N.J.A.C. 7:7A-4.2(d). Does the addition imply that the provision now applies to land drained for any purpose that may have hydric soils, or will it still only apply to areas drained for farming purposes? (255)

RESPONSE: Adopted N.J.A.C. 7:7A-4.2(d) applies to areas with hydric soils that have been drained, not limited to those areas that have been drained for farming purposes. While areas with hydric soils that have been drained are most commonly associated with farming operations, other areas, such as golf courses, may have drainage structures present that affect an area with hydric soils. In all cases where an area with hydric soils has been drained, the Department will presume that wetlands hydrology is present, absent compelling scientific information to the contrary. As was the case prior to adoption of these amendments, an applicant can rebut the presumption of hydrology by removing or disabling the drainage structures for one normal rainfall year, after which the Department will evaluate the area for the presence or absence of wetlands in accordance with the Federal Manual.

167. COMMENT: The LOI issued by the Department should discuss whether any wetland features delineated on a site meet the rule definitions of “isolated,” “ditch,” “swale,” and “stormwater management facility,” in addition to the resource value classification. Current Department practice is to determine if any wetland features on the site meet the above definitions during the subsequent review for a general permit application, which requires a second site inspection. The Department should add this determination to N.J.A.C. 7:7A-4.2(e), in the list of what an issued LOI will specify. (69)

RESPONSE: The adopted rules at N.J.A.C. 7:7A-16.3(b)3 provide an applicant for a line verification LOI with the opportunity to provide information supporting a request that the Department verify that a wetland is an isolated wetland; such a determination need not await the submittal of a general permit application. In regard to ditches, swales, and detention facilities in uplands, in accordance with adopted N.J.A.C. 7:7A-3.2(f) all are classified as ordinary resource

value wetlands unless they discharge to FW-1 or FW-2 trout production waters or their tributaries, or they are present or documented habitat for threatened or endangered species. Beyond the resource value classification, there is little value in distinguishing between these features. If a wetland is identified as ordinary resource value in the LOI, the recipient of the LOI can assume the wetland meets one of the criteria of N.J.A.C. 7:7A-3.2(f), that is, it is an isolated wetland less than 5,000 square feet that has one of several uses covering over 50 percent of the area within 50 feet of the wetland boundary; a drainage ditch; a swale; or a detention facility created in uplands. The term "stormwater management facility" is defined at N.J.A.C. 7:7A-1.3 as "a facility which receives, stores, conveys or discharges stormwater runoff and is designed in accordance with applicable local, county and State regulations. These facilities may include retention basins, detention basins, infiltration structures, grassed swales, rip-rap channels and/or stormwater outfalls." The Department believes that the definition adequately describes the types of facilities that fall under the term "stormwater management facility," so as to make the classification of such features under an LOI unnecessary.

With reference to the suggested change potentially eliminating the need for the Department to conduct a second site inspection, it is not current Department practice to make the above-described determination during a general permit review, which would necessitate a second site inspection. If an LOI has already been issued, and a ditch, swale, or detention facility is present on the site, Department staff have already noted the presence of these features on their review copy of the site plans that are part of the LOI file. The presence of any other stormwater management facility will also be noted. The prior site visit notes would be referred to during the general permit review; very rarely would a second site visit be necessary for the purposes of defining these features. The LOI contains the most useful information concerning regulated areas

on the site; in this case, the resource value classification combined with the definition of "stormwater management facility" described above clearly represent the regulated features on the site.

168. COMMENT: The requirement, at N.J.A.C. 7:7A-4.2(h), to provide a survey after an LOI is issued seems to conflict with other rule provisions. (69)

169. COMMENT: Proposed N.J.A.C. 7:7A-4.2(h) requires the submission of a survey of the approved delineated wetlands and/or State open waters boundary line after an LOI is issued. While this requirement is appropriate, who is going to ensure that the survey is submitted? Will this be the responsibility of Coastal and Land Use Enforcement? (415)

170. COMMENT: The proposed change to N.J.A.C. 7:7A-4.2(h) states that a survey must be provided to the Department "after the [Letter of Interpretation (LOI)] is issued." Is this proposed change intended to mean that a final survey of the delineated wetlands boundary and/or State open water boundary is only required to be submitted after the LOI is issued and that a final survey submission is not required prior to the issuance of the final LOI letter by the Department? If the original survey, which is required to be submitted pursuant to N.J.A.C. 7:7A-16.3(a)4, is consistent with the LOI letter, does another identical survey need to be submitted to the Department after the LOI is issued as proposed in the rule? (140)

RESPONSE TO COMMENTS 168 THROUGH 170: The primary intent of the proposed amendments to previous N.J.A.C. 7:7A-3.1(i) (adopted N.J.A.C. 7:7A-4.2(h)) was to remove application requirements in light of the consolidation of application requirements in N.J.A.C. 7:7A-16 and to simplify the procedures addressed in this subsection of the rules. In this vein, the proposed subsection was simplified to require an applicant to provide an updated survey of

flagged field points delineating a wetland boundary where the Department moves flags in the field during its review of an LOI application to accurately depict the actual extent of wetlands on the site, with that updated survey to be submitted after the LOI was issued. As indicated in the notice of proposal Summary, if there were no changes to the survey submitted as part of the application in accordance with adopted N.J.A.C. 7:7A-16 as a result of the Department's review of the application, a new survey would not be required. However, upon further consideration, the Department has determined that the notice of proposal to not require that the updated survey be provided until after the LOI is issued could create inefficiencies in the LOI process by requiring the Department to reissue LOIs after the final survey is provided. Therefore, the Department is not adopting that proposed change, but is instead continuing language that was part of previous N.J.A.C. 7:7A-3.1(i), which specifies the process to be followed if adjustments to the initial survey are required as a result of the Department's review. As the initial survey referenced in the prior version of this subsection (previous N.J.A.C. 7:7A-3.1(i)) is now required to be submitted as part of the application in accordance with adopted N.J.A.C. 7:7A-16.4(e), the Department is not continuing the portion of the previous subsection that referenced timing options for submission of the survey, but is instead including a cross-reference to the adopted application requirement.

To respond to commenter 415's concern about the responsibility for ensuring a final survey is submitted, the Division of Land Use Regulation project manager is responsible for ensuring all required materials, including a final survey, are submitted to the Department. Under the rules as adopted, this submission must occur prior to the Department issuing the LOI.

171. COMMENT: If the Department wants a survey of the approved wetlands boundary as required in N.J.A.C. 7:7A-4.2(h), more than 90 days should be provided to record the LOI survey at N.J.A.C. 7:7A-4.7. The processing of adding metes and bounds and plan changes requested by the Department can take longer than 90 days. (69)

RESPONSE: The Department considers 90 calendar days to be sufficient time to complete all requirements. The Department routinely requires plan changes and other revisions during the review of an application and often prescribes a timeframe shorter than 90 calendar days in which to provide the information. In the Department's experience, quick turnaround is not only possible but routine for these types of changes. Under the FHACA Rules, a metes and bounds description of flood hazard area and floodway boundaries is required to be recorded for a verification. The Department has not seen issues with completing these requirements within the 90-calendar day timeframe.

172. COMMENT: Proposed N.J.A.C. 7:7A-4.7(a) requires the submission of certain information to the Office of the County Clerk or the registrar of deeds and mortgages in which the site is located within 90 calendar days of the issuance of a delineation or verification LOI on a privately-owned lot or on a publicly owned lot other than a right-of-way. Who will ensure that this information is submitted? Will this be the responsibility of Coastal and Land Use Enforcement? What are the ramifications if this information is not submitted? This requirement appears as if it may go unenforced and be unenforceable. (415)

RESPONSE: The project manager in the Division of Land Use Regulation who reviewed the LOI application is responsible for ensuring the LOI is recorded. Failure to submit a survey could result in enforcement action in accordance with N.J.A.C. 7:7A-22. The FHACA Rules require an

issued verification to be recorded; like letters of interpretation, verifications do not authorize regulated activities and depict delineations of regulated areas. The Department has not experienced significant compliance or enforcement issues concerning the recording requirement in the FHACA Rules and does not anticipate significant issues with the comparable requirement in the FWPA Rules.

173. COMMENT: The Department should only require the issued LOI and the approved survey to be recorded on the property deed, similar to the current recording requirements for other Division of Land Use Regulation permits and approved plans. The LOI itself would include the items in N.J.A.C. 7:7A-4.7(a)1, 2, 4, and 5, while the approved plan would include the metes and bounds description required at N.J.A.C. 7:7A-4.7(a)3. (69)

RESPONSE: The information required allows prospective property owners to become aware of the regulated areas on their property in a standard format. The recording requirements at N.J.A.C. 7:7A-4.7(a) parallel those required for a verification in the FHACA Rules at N.J.A.C. 7:13-5.6(a). The goal of this rulemaking was to align the administrative processes across the three land use chapters. Verifications are similar to LOIs in that both can delineate the extent of regulated areas on a property but do not authorize regulated activities. The recording requirements for both should, therefore, be the same to present all information about areas regulated by the Department's land use regulations in a uniform and easy to understand format. Furthermore, the metes and bounds description required to be recorded at N.J.A.C. 7:7A-4.7(a)3 is not always present on approved plans; recording the plans themselves would, therefore, not provide the required information in every case.

174. COMMENT: In addition to including the specific filing requirements for the metes and bounds description of the wetland line and the LOI, as required at N.J.A.C. 7:7A-4.7(a)5 and (b), in the FWPA Rules, it would also be beneficial to include them in the LOI letter that is issued by the Department. (140)

RESPONSE: The Department agrees that the metes and bounds description of wetlands boundaries is a value piece of information and will consider including it as a standard component of LOIs in the future. Such descriptions can currently be attached to an issued LOI. However, the Department is moving towards fully electronic submissions and is in the process of building a platform to allow all applications to be received in a single electronic portal, including LOI applications. As part of this process, the Department is exploring methods of communicating wetlands or other regulated area boundaries, including GIS methods. While not currently part of the standard issued LOI (either through the conventional application process or adopted E-LOI process) the Department will consider the inclusion of the metes and bounds description of the wetlands boundary, or of a more accurate GIS representation of the wetlands boundary, in the issued LOI in the future; however, the current contents of LOIs set forth in the adopted rules are the most appropriate for the application and approval processes currently in place.

175. COMMENT: Can a contract purchaser, rather than the permit recipient, who may be the property owner, file the recording of the metes and bounds description of the wetland line and the LOI, as required at N.J.A.C. 7:7A-4.7(a)5 and (b)? (140)

RESPONSE: N.J.A.C. 7:7A-16.2(c) establishes who may submit an application under the FWPA Rules. A contract purchaser designated by the current property owner who seeks a permit or LOI on their behalf is included in this list under N.J.A.C. 7:7A-16.2(c)2. While a contract purchaser

could apply for an LOI under this provision, N.J.A.C. 7:7A-4.7(a) requires the "recipient of the delineation or verification" to record the required information. If a contract purchaser is the recipient of the LOI, then they may record the required information. However, recordation would, in all instances, be the right of the property owner who must consent to the application. The contract purchaser should negotiate the LOI recordation with the owner when it enters into the contact.

176. COMMENT: While the effort to create consistency across permitting programs is recognized, the requirement to record an LOI is inconsistent with the limited term of LOIs and will cause confusion for title report users viewing a document that has expired. LOIs have a five-year duration, with the possibility of one five-year extension, because the Department recognizes that external forces can alter the conditions of a site. Transition area boundaries may also change if a transition area averaging plan waiver is obtained for the site. Given these realities, an LOI may need to be re-recorded a number of times, leading to a burden for the applicant and confusion for title review. The procedure to record a conservation restriction for transition area revisions is sufficient to effectuate the purposes of the FWPA. (262)

RESPONSE: The Department does not believe that the adopted recording requirements will cause confusion. The required information includes the approval and expiration date of the LOI in accordance with N.J.A.C. 7:7A-4.7(a)2. Should multiple LOIs be issued for a site, the most recent LOI will be obvious from this information. LOI-related information will need to be re-recorded a maximum of once every five years, assuming that a property owner applies for a new LOI every time the current LOI expires. Under adopted N.J.A.C. 7:7A-8.1, not every transition area waiver will require a conservation restriction, so this mechanism is not sufficient to inform

prospective property owners of regulated areas on the property. In addition, transition area boundaries may also change based on new information on the presence of threatened or endangered species on, or proximate to, the property changing the resource value classification, or as a result of changes in the associated wetlands boundaries, both of which would occur regardless of the issuance of a transition area averaging plan waiver. For these reasons, the Department does not anticipate the LOI recording requirements will cause confusion or pose a burden to an applicant and considers them necessary to properly inform prospective purchasers of the property of the presence of regulated areas on the property and potential limits on the use of the property.

177. COMMENT: A freshwater wetlands LOI is not directly comparable to a flood hazard area verification because wetlands delineations are more likely to change and do not entail the life and property hazards or flood insurance issues that relate to flood hazard areas. If the goal of the requirement to record an LOI is intended to protect property owners, the Department should note that an LOI is among the top priorities of a prospective property purchaser, either obtained from the seller or obtained by the purchaser in their due diligence review. Therefore, the requirement for an LOI to be recorded should be deleted. (262)

RESPONSE: Freshwater wetlands boundaries may also be dynamic, which is why LOIs are not valid in perpetuity. While the commenters' experience suggests that most prospective purchasers of a property are aware of the possibility of wetlands existing on a property and of the need to obtain an LOI before substantially investing in that property, it is the Department's experience that many prospective property owners are not aware of the potential for wetlands on a property or how wetlands may impact the activities they may wish to conduct on the property. The

recording requirement ensures that any prospective property owners are on notice that the property contains wetlands and is, therefore, subject to all applicable requirements of the FWPA Rules.

Regulated Activities and Exemptions

N.J.A.C. 7:7A-2.4, Agricultural and Silvicultural Exemptions

Temporary farm structures; hoophouses and polyhouses

178. COMMENT: Hoophouses and polyhouses should never be permitted in wetlands. (327)

RESPONSE: The adopted changes relating to hoophouses and polyhouses are directly in response to P.L. 2014, c. 89, which amended N.J.S.A. 13:9B-4a to exempt certain temporary farm structures from the wetland permit and transition area requirements of the FWPA and are necessary to ensure that the FWPA Rules remain consistent with the statute. The changes do not entirely exempt all hoophouses and polyhouses from regulation under the FWPA Rules. Instead, the amendments allow construction of temporary farm structures on farmed wetlands that were actively cultivated on or before July 1, 1988, and that are in active agricultural use at the time the structures are to be erected. The construction of these temporary farm structures, including hoophouses and polyhouses, will have a *de minimis* impact on the environment, as they are not permanent developments and will occur in wetlands that have been actively disturbed for farming for decades.

179. COMMENT: Although proposed N.J.A.C. 7:7A-2.4(c)6 reflects a recent amendment to the FWPA, this standard invites violation because hoophouses and polyhouses typically include permanent footings. Once constructed, these structures usually remain in place in perpetuity, yet applicants can claim they are not permanent to qualify for exemption. Will the Department's

Bureau of Coastal and Land Use Enforcement be checking to ensure that these structures are removed each autumn? (415)

RESPONSE: The exemption at N.J.A.C. 7:7A-2.8(c)6 is limited to the installation of temporary farm structures with only a dirt or fabric floor without foundations on land that has been in active agriculture use since July 1, 1988 or earlier. Hoophouses and polyhouses are examples of eligible structures. As specified in the definition of "hoophouse" or "polyhouse," such structures cannot have permanent footings. There is no specific timeframe in which a farmer may install or maintain a hoophouse or polyhouse, or other temporary farm structure, such as a run-in shed or pole barn, within an established and ongoing farming operation, and, therefore, no exact date on which the period of temporary disturbance would expire. The construction of a structure that includes permanent footings or a foundation requires a permit. Failure to obtain a permit for this activity is subject to enforcement action. No particular time of year is specified to install hoophouses, polyhouses, or similar temporary farm structures, so the Bureau of Coastal and Land Use Enforcement staff will not regularly be inspecting established, ongoing farming operations each fall to ensure temporary farm structures are removed. However, Enforcement staff will continue to respond to and investigate any notification of a potential violation.

Normal Maintenance of Cranberry Bogs and Blueberry Fields and Renewal or Rehabilitation of Cranberry Bogs

180. COMMENT: Changes to implement A1958/S1848 concerning exemptions for certain cranberry and blueberry agricultural activities are supported. The prior rule specified that if a commercial crop had not been harvested from a bog or field for five years that the land would be considered "abandoned" without regard for any ongoing activities, such as maintenance or

replanting. This provision ignored the nature of cranberry and blueberry crops, where replanting can take at least five, and more commonly eight years before a true "commercial harvest." The proposed rule removes the unreasonable five-year window and provides that farming activity is enough to keep the land in active agriculture. This change will help ensure that these historic and culturally important crops remain viable to grow in New Jersey. The proposed changes clearly articulate the legislative intent of A1958/S1848. (87)

181. COMMENT: The extensive efforts to make the FWPA Rules consistent with recent amendments to the FWPA at N.J.S.A. 13:9B-4 are recognized. These essential amendments are generally supported. (86)

RESPONSE TO COMMENTS 180 AND 181: The Department acknowledges these comments in support of the rules.

182. COMMENT: The example provided in N.J.A.C. 7:7A-2.4(c)1ii that states "the construction of ditches within the confines of an established cranberry bog is an exempt activity. However, the construction of ditches in wetlands or waters located outside of the established cranberry bog requires a permit," should be deleted or modified for clarity. The statement that "any discharge of material into wetlands or waters, excavation of wetlands, or draining of wetlands or waters, that are not in established use for such agricultural and silvicultural wetlands crop production requires a permit" is supported, but the cranberry bog example that follows implies a change in regulation. The cranberry bog example seems to imply that a permit will be required for any discharges, excavation, or drainage activities in wetlands that are in established use for wetlands crop production but not located within the confines of an established cranberry bog itself, such as reservoirs, dams, and upstream and downstream water control facilities. Such a result would

increase regulatory burden and costs on long-established cranberry farming operations, which does not seem to be the Department's intent. There is nothing in the notice of proposal Summary or impact statements to suggest that the Department considered these potentially devastating effects on cranberry growers. The final two sentences of N.J.A.C. 7:7A-2.4(c)1ii should be deleted or else modified to reference the "area of established agricultural or silvicultural use" instead of cranberry bogs. (86)

183. COMMENT: While the proposed amendments are overly restrictive concerning activities outside a blueberry field or cranberry bog, but within the same farm complex, the rules are supported, provided the corrections suggested by the American Cranberry Growers Association are implemented. (87)

RESPONSE TO COMMENTS 182 AND 183: The example in N.J.A.C. 7:7A-2.4(c)1ii was intended to illustrate an example of a new ditch in wetlands that are not part of established, ongoing crop production activities that would not be considered "minor drainage" under N.J.A.C. 7:7A-2.4(c)2v (for example, drainage associated with the conversion of a wetland to an upland or one wetland use to another) and would, therefore, require a permit despite proximity to an established, ongoing crop production activity. The example is not intended to imply that activities exempt from the requirement to obtain a permit under the prior rules are no longer exempt. As stated at N.J.A.C. 7:7-2.4(c)1ii, the discharge of material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries, or other wetland crop species, where the farming activities and the discharge occur in wetlands and waters that are in established use for such agricultural and silvicultural wetlands crop production is considered "minor drainage" and does not require a permit. The cranberry bog example is only intended to provide an easily-recognizable

visualization of how these provisions may manifest in farming operations, and is not intended to establish any new requirement or regulation. The Department is clarifying the example at N.J.A.C. 7:7A-2.4(c)1ii on adoption to refer to new ditches.

184. COMMENT: Proposed N.J.A.C. 7:7A-2.4(c)3iv is overly broad and lacking the clarifying statement that the provision is referring to dams within the confines of cranberry bogs in established use. As proposed, this regulation could be read to inappropriately allow the addition of dams/dikes on parts of the farm external to the active cranberry bog that are not already under agricultural manipulation to be exempted. (277)

RESPONSE: N.J.A.C. 7:7A-2.4(c)3i through iv specifies activities that are exempt from the requirement to obtain a permit only when part of an established, ongoing farming, ranching, or silviculture operation, on properties that have received or are eligible for a farmland assessment under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq. (see N.J.A.C. 7:7A-2.4(c)). As defined at N.J.A.C. 7:7A-1.3, an “established, ongoing farming, ranching, or silviculture operation” is limited to activities on areas subject to a farming, ranching, or silviculture use as of June 30, 1988, which use has been pursued continuously since June 30, 1988. Activities listed at N.J.A.C. 7:7A-2.4(c)3 on land that has not been in active agricultural use are not exempt from the requirement to obtain a permit. In accordance with N.J.A.C. 7:7A-2.4(b)3 (which was recodified from N.J.A.C. 7:7A-2.8(b)3 with no change in text), exemptions in this section only apply to the portion of the property that meets all the requirements for the exemption. The following example is provided, “For example, if half of a 20-acre property has been actively farmed since June 30, 1988 and half has not, the half that has been actively farmed would be considered to be part of an established, ongoing farming operation and would therefore

be eligible for the farming exemption. The remainder would not be eligible for the farming exemption." To the commenter's concerns, this provision ensures that new dams or dikes cannot be installed in an area that is not already actively farmed without applying for a receiving a permit from the Department.

185. COMMENT: Do proposed N.J.A.C. 7:7A-2.4(c)2 and 3 allow for the removal of trees? Because the Department is proposing to delete the requirement that a crop be produced to demonstrate that an agricultural operation is ongoing, a cranberry bog could be abandoned for 50 years before being "repaired" through the removal of all vegetation. Cranberry bogs attract wildlife species, such as tree frogs. When a bog is abandoned for several years, it reverts to natural forested wetlands, which should not be converted back to a cranberry bog. (415)

RESPONSE: The activities listed at N.J.A.C. 7:7A-2.4(c)2 and 3 are only exempt from the requirement to obtain a permit under the FWPA when they are "part of an established, ongoing farming, ranching, or silviculture operation, on properties which that have received or are eligible for a farmland assessment under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq." (See N.J.A.C. 7:7A-2.4(c)). In accordance with N.J.A.C. 7:7A-1.3, while the amended rules no longer require that a crop be harvested within the last five years for a cranberry bog to be considered "ongoing," the bog will only be considered an ongoing operation if "any of the activities listed at N.J.A.C. 7:7A-2.4(c)2 and 3 have occurred within the prior five years." Accordingly, activities subject to the FWPA Rules on a bog that has not maintained in any manner for over five years, including those on which no activity has been conducted for 50 years, as in the commenter's example, could not be conducted without a permit.

Minor Drainage Related to Wetland Crops

186. COMMENT: At proposed N.J.A.C. 7:7A-2.4(c), the definition of "minor drainage" has been broadened such that the construction of new canals, ditches, dikes, and other structures meets that definition and may not require a permit. The Department's assertion that the meaning of "minor drainage" within the existing FWPA Rules contradicts the meaning of the term as defined in 40 CFR 232 is misleading. The definition within the FWPA Rules is currently more restrictive than the Federal definition, which leads to more protections for wetlands in New Jersey. New Jersey's wetlands program should not be weakened to match the less stringent Federal regulations. (376)

187. COMMENT: Amendments to the definition of "minor drainage" and provisions concerning the construction of canals, ditches, dikes, and other water control projects create the potential to exacerbate drainage and flooding issues for waters connected to agricultural or silvicultural crop areas. Rather than delete the requirement that ditches and water control features do not alter the bottom elevation of any watercourse because it is "unclear," the Department should instead clarify the requirement. Altering the bottom elevations of watercourses in established agricultural areas creates potential for flooding outside the boundaries of the operation. (208)

RESPONSE TO COMMENTS 186 AND 187: The prior exemption language concerning new ditches and alterations to the bottom elevations of watercourses did not come from the FWPA and did not accurately reflect the scope of the exemption for minor drainage activities. The FWPA exempts "minor drainage" with no limitation on altering the bottom elevation of a watercourse. The adopted language does not weaken the wetlands protections in the FWPA Rules and will not exacerbate flooding. The adopted exemption for minor drainage at N.J.A.C. 7:7A-2.4(c)1 continues to apply only to activities in areas that are part of an established, ongoing

farming, ranching, or silviculture operation, on properties that have received or are eligible for a farmland assessment under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq. Drainage of or affecting areas outside of an established farming or silvicultural operation is not exempt from the requirement to obtain a freshwater wetlands or open water fill permit, or transition area waiver. In addition, drainage activities associated with the immediate or gradual conversion of a wetland to a non-wetland, or conversion from one wetland use to another, are not considered "minor drainage" and require a permit under the adopted rules.

Exemptions for Silviculture Activities

188. COMMENT: Amendments concerning forestry are opposed. Any logging operations should be subject to public input. The State Forester is subject to political pressure to allow actions that the public may not find acceptable and should not be allowed unfettered authority. Logging can cause erosion, changes in the climate in the logged area, flooding, and changes to the character of surrounding neighborhoods. The public pays for preservation of open space through tax dollars, but then those areas of open space become subject to logging operations to allow others to profit.

Silviculture is not logging; the proposed amendments are, therefore, opposed. What is being referred to as "stewardship" is exploiting natural resources for profit. Best management practices (BMPs) for forestry should be for the good of all of New Jersey, not just those with political power or those who can profit. Replacing the term "harvesting" with "silviculture" is an effort to mislead the public; the word "logging" should be used because that is what will occur. (327)

RESPONSE: The FWPA and its implementing rules, including the provisions that pertain to forestry, are designed to protect New Jersey's freshwater wetlands. They do not authorize landowners to carry out logging operations that would degrade freshwater wetlands.

As noted by the commenter, silviculture is not logging. Silviculture is the art and science of sustainably managing woodlands and forests, so that they both meet the diverse needs and values of current landowners and society, and are conserved for future generations. The harvesting of trees and forest products can be an aspect of silviculture, but only if conducted in a sustainable manner and only as part of an overall program of management that ensures the sustainability of the forest.

The previous rules provided, at prior N.J.A.C. 7:7A-2.4(b)4, that the normal harvesting of forest products, including the clear cutting of a non-cultivated, wooded wetland area, must be part of a forest management plan reviewed and approved by the State Forester or the activities would not qualify for the exemptions specified in N.J.A.C. 7:7A-2.4(c) and (d). The replacement of "harvesting" with "silviculture" at N.J.A.C. 7:7A-2.4(b)4 and (d) and at 2.6(c) has been included in the amendments to it make clear that a broader array of silvicultural activities can qualify for exemption from the permitting requirements in the FWPA Rules, not just harvesting. However, to qualify for exemption under N.J.A.C. 7:7A-2.4(c) or (d), all silviculture activities, including harvesting of non-cultivated, wooded wetland areas, continue to be required to be set forth in a forest management plan reviewed and approved by the State Forester that addresses wetlands. To clarify what must be found in order for such a forest management plan to be determined to "address wetlands," the rule has been amended to specify that only a plan protecting wetland resources through BMPs will be found to be sufficient to qualify the activity for exemption. BMPs are those practices that are protective of wetlands. The New Jersey

Forestry and Wetlands Best Management Practices Manual may be accessed at:

http://www.state.nj.us/dep/parksandforests/forest/nj_bmp_manual1995.pdf.

189. COMMENT: Proposed amendments to silviculture exemptions offer weaker requirements. The rulemaking broadens the scope of the exemption to "normal silviculture activities," which may include road construction or other appurtenant activities. (208)

RESPONSE: The amendments to the silviculture exemption provisions serve to appropriately clarify the breadth of the exemption to include activities not related to the harvest of forest products, such as stewardship activities. Activities necessary to achieve the harvest of forest products, such as temporary road construction, were exempt under prior N.J.A.C. 7:7A-2.8(d). The amended exemption, which clarifies that only activities that are part of a forest management plan that "address wetlands" through the application of BMPs will qualify for exemption, is intended to be inclusive of environmentally beneficial stewardship activities, as well as harvesting activities. The adopted amendments do not weaken wetland protections.

190. COMMENT: The rulemaking weakens the existing rules by replacing the requirement that a forest management plan "addresses wetlands" with the requirement that a plan "conforms to best management practices." Relying on forestry BMPs is not sufficient for management of impacts to wetlands. Without explicitly addressing wetlands, impacts may not be fully quantified or mitigated. This creates uncertainty and decreases accountability with regard to possible wetland and floodplain impacts of forestry activities, including sedimentation, erosion, and inhibited wetland function. (208)

191. COMMENT: At proposed N.J.A.C. 7:7A-2.4(b)4, the Department is proposing to delete "addresses wetlands" from the requirement at existing N.J.A.C. 7:7A-2.8. Merely having a forest management plan does not guarantee that the plan adequately addresses and protects wetlands and adjacent transition areas. The Department should retain the requirement to address wetlands to make clear that only those silviculture activities undertaken under a forest management plan that incorporates wetlands protections qualify for a permit exemption. (319)

RESPONSE TO COMMENTS 190 AND 191: The Department replaced "addresses wetlands" with "conforms to Best Management Practices (BMPs)" to more clearly define the nexus between forest management plans and the requirements of the FWPA Rules. While the first sentence of N.J.A.C. 7:7A-2.4(b)4 is amended to clarify that the forest management plan must incorporate BMPs in order to be considered sufficient for the activity to be considered to qualify for exemption, the rule continues to make clear that any plan must address wetlands to be considered sufficient to qualify for exemption. The BMPs referred to minimize impacts to wetlands as a result of forest management activities. The State Forester reviews forest management plans and will not approve a plan in wetlands that does not address how impacts to wetlands will be minimized. The State Forest Service's woodland management plan checklist directs applicants to address the wetlands requirements in the FWPA Rules in order to receive State Forester approval of a Woodland Management Plan and directs applicants to the New Jersey Forestry and Wetlands Best Management Practices Manual, 1995, which identifies BMPs to minimize impacts to wetlands and flood plains. The BMP manual can be found at: http://www.state.nj.us/dep/parksandforests/forest/nj_bmp_manual1995.pdf.

Presumption of Hydrology

192. COMMENT: Amendments concerning the presumption of wetlands hydrology in areas with hydric soils that have been drained for farming purposes are opposed. First, one year is not a significant amount of time to determine if an area contains wetlands or not, as drought conditions can often persist beyond one year. Changing to a one-year period is ineffectual. Second, relying on "sound professional judgement" is flawed as professionals can be paid to provide an analysis favorable to the person paying. Many different experts should be consulted to ensure an unbiased conclusion. (327)

193. COMMENT: The change to recodified N.J.A.C. 7:7A-4.2(d) to reduce the applicant's burden of proof to show that a wetland's hydrology has been effectively altered, such that it is no longer a wetland is concerning. The proposed amendments introduce ambiguity to the process where the existing rule is clear. If these circumstances are as rare as the notice of proposal Summary indicates, this change is not necessary from a regulatory standpoint, could be misapplied in cases with unique hydrology, and shifts the burden of proof from the applicant to the Department. (376 and 277)

194. COMMENT: The proposed changes to N.J.A.C. 7:7A-4.2 allowing applicants to rely on models rather than direct monitoring for one year to ascertain changes to wetland status are less restrictive than allowed by the Clean Water Act and, thus, inconsistent with the Department's mandate to satisfy the minimum Federal standards. (84, 179, 222, and 402)

195. COMMENT: The 1989 Manual directs the user to rely on "sound professional judgement" when interpreting field data and observations. However, identification of wetland hydrology is difficult. The proposed amendments at N.J.A.C. 7:7-2.4(b)5 and 4.2(d) would require the Department to rely on predictions and extrapolations rather than giving the Department the opportunity to review site-specific field data and make observations, as is currently required.

Moreover, the inclusion of the phrase "compelling scientific information" is meaningless in the absence of direct reference to appropriate sections of the Federal Manual or the relevant Regional Supplement to the Corps of Engineers Wetland Delineation Manual. The current Federal Standard set forth in the Regional Supplements states, "[o]n sites where the hydrology has been manipulated by man (e.g., with ditches, subsurface drains, dams, levees, water diversions, land grading) or where natural events (e.g., downcutting of streams) have altered conditions such that hydrology indicators may be missing or misleading, direct monitoring of surface and groundwater may be needed to determine the presence or absence of wetland hydrology." This indicates that direct monitoring should be the first step in the process to determine whether the hydrology of an area with hydric soils has been modified, such that the area is no longer a wetland. Allowing any less would be less restrictive than the Clean Water Act allows and, therefore, inconsistent with the Department's mandate to satisfy the minimum Federal standard. The proposed language for exemption also expands the availability of the potential exemption by clarifying that the site could have been drained for purposes other than farming and makes no exception to state that areas drained for the purpose of avoiding regulations will be subject to enforcement action. (277)

RESPONSE TO COMMENTS 192 THROUGH 195: The 1989 Federal Manual, which the FWPA and the FWPA Rules require the Department to use to identify and delineate wetlands, provides for the presumption of wetlands hydrology when hydric soils are present in an area with altered hydrology, regardless of the presence or absence of other hydrologic indicators. In contrast, the USACE manual and supplements do not provide for the presumption of hydrology. The prior rules, as well as the adopted rules, allow for the rebuttal of the presumption of wetlands hydrology by disabling draining structures for one normal rainfall year and observing

resulting hydrological conditions. The prior rules, as well as the adopted rules, specifically require the disabling of drainage structures and subsequent observation to occur during a normal rainfall year to acknowledge that prolonged drought conditions could prevent the observation of wetlands hydrology on a site that, under normal rainfall conditions, would have wetlands hydrology.

The adopted amendment to specify that the presumption of hydrology is limited to situations where there is an absence of compelling scientific information has the effect of expanding the options for rebutting the presumption of hydrology. While it is correct that an applicant could conceivably submit information that is less than factual in an effort to obtain a favorable decision, Department staff are not required to accept information without question. With reference to the information that may be required to satisfy the "compelling scientific evidence" standard, the adopted rules do not indicate that modeling submitted by an applicant would be sufficient to overcome the usual presumption of wetlands hydrology (and, therefore, eliminate the need for the disabling of drainage structures and yearlong monitoring prescribed to rebut the presumption of hydrology). Instead, as indicated in the notice of proposal Summary, the determination would necessarily involve case-by-case analysis. The adopted rules allow the Department to consider any information submitted to determine if it is "compelling scientific evidence" that would preclude the requirement to disable drainage structures. However, as further indicated in the notice of proposal Summary, when faced with an assertion that, despite the presence of hydric soils, wetlands hydrology is not present, Department staff will supplement any information submitted by the applicant with site investigations and careful review of all available data to determine whether that assertion is correct. Department staff are experienced in implementing the FWPA Rules, are trained in identifying and delineating wetlands, and always

conduct site inspections to verify the information submitted in an LOI application. While there is a possibility that applicants may try to take advantage of the amended provision, the Department will carefully consider the information provided to ensure it is based on sound science. Furthermore, knowingly submitting false or inaccurate information is cause for the cancellation of a Land Use application and enforcement action.

196. COMMENT: Changing regulations just because a farmer or rancher has changed the use of the land on a temporary basis or because drought or climate conditions have resulted in an area that does not meet the definition of a wetland is opposed. Temporary use of a dry wetland does not change its characterization as a wetland and such lands should not be exempt from the requirements of the FWPA Rules. (327)

RESPONSE: The Department delineates wetlands pursuant to the 1989 Federal Manual, which requires three parameters to be present in order to classify an area as a wetland: wetlands hydrology, hydrophytic vegetation, and hydric soils. Farm fields are disturbed areas where human activities have obscured one or more parameters. The Federal Manual provides a procedure for delineating these disturbed areas. The adopted amendment at N.J.A.C. 7:7A-4.2(d) allows the Department to determine that an area has no wetlands hydrology based on scientific evidence other than observations after disabling drainage structures. This amendment is not intended to result in areas temporarily altered or areas not exhibiting wetlands hydrology due to natural drought conditions being incorrectly identified as uplands. In addition, the Federal Manual, in establishing the requirements to meet the hydrology criterion, states that "[a]n area has wetland hydrology when saturated to the surface or inundated at some point in time during an average rainfall year …" A prolonged drought, therefore, will not lead the Department to

determine that an area that would otherwise display wetlands hydrology is not a wetland solely due to drier-than-normal conditions.

197. COMMENT: Agricultural land (prior converted crop land) that was being farmed as of July 1, 1988 (when the FWPA became effective) should not be regulated or considered as a wetland since the land did not meet the three-parameter approach (that is, hydrology, soils, and vegetation) enumerated in the 1989 Federal Manual. In fact, the Manual specifically states that, "In cases where recent human activities have … [modified an area's hydrology], it may be necessary to determine the date of the alteration or conversion for legal purposes." If the activity occurred prior to the effective date of regulation or other jurisdiction, it may not be necessary to make a wetland determination for regulatory purposes. (262)

RESPONSE: Agricultural land regulated under the FWPA Rules continues to meet the definition of a wetland under the 1989 Manual. If an area with hydric soils has been drained for farming, there is a rebuttable presumption that the area has wetlands hydrology, despite the presence of drainage tiles or other water control features. If the applicant presents compelling scientific evidence confirmed by the Department, or the result of disabling drainage structures for one normal rainfall year indicates that wetlands hydrology is not present, the agricultural land in question will not be regulated as a wetland under N.J.A.C. 7:7A.

Forms of FWPA Rules Approval

N.J.A.C. 7:7A-5, General Provisions for General Permits-By-Certification and General Permits

General

198. COMMENT: At 40 CFR 233.21(b), the Clean Water Act provides that general permits may only be adopted and implemented if they have a *de minimis* impact on the environment, which must be scientifically grounded through study analysis. However, nothing in the proposed rules suggests or demonstrates which scientific analyses or studies the Department has relied upon. The rules allow multiple general permits for a single project, but there is no scientific analysis to show that this will have a *de minimis* impact. The Department presumes that it will, which is not in accordance with the law. For example, the Department claims that the deletion of existing N.J.A.C. 7:7A-4.4(a)3, which prohibits disturbance exceeding a half acre under general permit 6 from being combined with any other general permit, is not necessary to protect freshwater wetlands or open waters, but has not provided any analyses, studies, or peer-reviewed studies to support that position. Such a blanket statement is contrary to the law. (320)

RESPONSE: The adopted general permits, which do not substantively differ from the general permits in the prior rules, have previously been determined to have only minimal (that is, *de minimis*) impacts when performed separately and only minimal cumulative adverse impacts in accordance with prior N.J.A.C. 7:7A-4.1(b) (recodified at N.J.A.C. 7:7A-5.2(b)); this determination was previously approved by the USEPA and was again reviewed and approved by the USEPA, which relies on its experience nationwide, prior to the Department proposing the adopted amendments. The Department's process for adopting and issuing authorizations under general permits and general permits-by-certification is as stringent as the USACE's process for adopting and issuing Nationwide Permits as part of the Federal wetlands permitting program.

The adopted rules, as in the prior rules, allow the combination of multiple general permits on the same site for different activities provided the limits of each general permit are observed and, for most activities, the total disturbance on the site does not exceed one acre. Except for the

combination of general permits 6 and 6A, two different general permits cannot be combined for a single activity to prevent the use of multiple general permits from exceeding the tightly defined disturbance limits of each general permit. Finally, a general permit may be used more than once on a single site, but the cumulative disturbance cannot exceed the disturbance limit defined in the general permit. See N.J.A.C. 7:7A-5.4 for more information and examples of the limits applicable to the use of more than one general permit on a site.

In regards to the amendments concerning the use of general permit 6, the respective limits on each general permit, the conditions of each general permit, the conditions that apply to all general permits, and the ability to add additional conditions as necessary all ensure that the use of general permit 6 in combination with other general permits has only a minimal impact on freshwater wetlands, rendering the half-acre limit when combining general permit 6 with another general permit unnecessary to effectuate the purposes of the FWPA. The prior rules allowed general permit 6 to be combined with general permit 6A for up to one acre of disturbance. In issuing authorizations under general permits 6 and 6A, the Department has not observed more than minimal environmental impact from authorized activities.

Standards for Issuance, By Rulemaking, of General Permits-By-Certification and General Permits (N.J.A.C. 7:7A-5.2)

199. COMMENT: The deletion of the phrase “after conducting an environmental analysis” at N.J.A.C. 7:7A-5.2(b)1 is concerning because it reduces scientific input. Scientific input is needed from all stakeholders. (84, 179, 222, and 402)

200. COMMENT: Removing the phrase “after environmental analysis” from recodified N.J.A.C. 7:7A-5.2(b)1 calls into question the basis upon which the Department determines that regulated activities will cause only minimal adverse impacts. The notice of proposal Summary asks the

public to ignore the change because the rulemaking process includes an analysis of environmental impacts, but the Department does not provide specific standards or records that must be developed to assess impacts. Since the Department contends that the rulemaking process includes environment analysis, there is no reason to delete the phrase. (277)

RESPONSE TO COMMENTS 199 AND 200: In accordance with adopted N.J.A.C. 7:7A-5.2(a), general permits-by-certification and general permits are promulgated through rulemaking in accordance with the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq. In accordance with the mandates of the APA, the notice of proposal Summary includes a discussion of anticipated effects and the reasoning behind proposed amendments and/or new rules. In addition, the Department includes in its rule proposals an environmental impact statement, in which the Department further analyzes anticipated impacts, both positive and negative, from proposed rule amendments and/or new rules. The rulemaking process under the APA includes an opportunity for input, both from stakeholders interested in submitting scientific input, and from any other interested person or entity. All comments and any submitted information received is considered by the Department before any change is adopted and the Department responds in the adoption document to relevant comments timely received explaining the outcome of its consideration of the input received. Both the rulemaking process and USEPA review of the Department's analysis ensures that the promulgation of general permits-by-certification and general permits includes an environmental analysis supporting the Department's determination that the activities allowed to be conducted under the general permit-by-certification or the general permit will cause only minimal separate and cumulative impacts.

Use of an Authorization Pursuant to a General Permit-By-Certification or a General Permit to Conduct Regulated Activities (N.J.A.C. 7:7A-5.3)

201. COMMENT: Preventing public participation in applications for general permits and general permits-by-certification by not holding public hearings is unacceptable. Hearings that elicit stakeholder input are essential to prevent environmental destruction and to safeguard the public's natural resources. (84, 179, 222, and 402)

202. COMMENT: Prohibiting public hearings on applications for authorization under promulgated general permits-by-certification or general permits silences stakeholders by precluding them from providing information at hearings that would demonstrate that a proposed project would cause significant environmental damage. Many circumstances could lead a project authorized under one of these permits to cause environmental damage, including unchecked applicant errors in design, data, or analysis, to an applicant's misunderstanding of an ecosystem. Removing the public's ability to directly engage with the Department at a public hearing would allow such mistakes to go unchecked by overburdened agency staff and unduly limit the public's ability to communicate concerns. (277)

RESPONSE TO COMMENTS 201 AND 202: The prior rules did not provide for a public hearing to be held on an application for an authorization under a promulgated general permit. Prior N.J.A.C. 7:7A-12.4 only provided for public hearings on applications for individual permits and transition area waivers. The scope of applications on which a hearing may be held is not changed in this rulemaking. The process to hold a hearing (now referred to as a fact-finding meeting) has been amended to streamline the process, but the result remains that an in-person public meeting will only be held concerning applications for individual permits and transition area waivers. Consistent with the rulemaking provisions of the APA, the public will be able to

submit written comments on any proposed changes to the rules governing general permits and general permits-by-certification, and the Department will have the flexibility to hold a public hearing on the rulemaking in the appropriate circumstance.

All applications for authorization under general permits-by-certification and general permits require public notice to be provided in accordance with N.J.A.C. 7:7A-17 (except for an application for an authorization under general permit 15 for mosquito control activities, which is subject to separate public notice requirements contained in the general permit itself). Documentation of public notice must be provided to the Department at the time of the application, either by uploading a document to the online permitting portal for a general permit-by-certification application or by including the documentation in the paper application for a general permit authorization. The public notice provisions at N.J.A.C. 7:7A-17, as well as the public comment period on every LOI and permit application per N.J.A.C. 7:7A-19.6, ensure meaningful input prior to Department determination on a general permit application and help ensure that activities conducted under either a general permit-by-certification or a general permit are not conducted in violation of the permit or based upon any misunderstanding or other error by the person conducting the activity. Should what appears to be inappropriate activities be observed, the Department should be notified at 1-877-WARN-DEP (1-877-927-6337).

Use of More than One General Permit or General Permit-By-Certification on a Single Site (N.J.A.C. 7:7A-5.4)

203. COMMENT: It is unclear why a general permit-by-certification does not include an access transition area waiver if one is needed to access the regulated activity. (255)

204. COMMENT: Why can no general permit-by-certification be combined with any type of transition area waiver? (255)

RESPONSE TO COMMENTS 203 AND 204: The general permit-by-certification authorization process does not involve Department review of the jurisdictional boundaries on each site where activities are proposed. Therefore, activities authorized under these permits are subject to strict total disturbance limits. Any transition area disturbance necessary to complete the activity must fall within the overall disturbance limit set forth in the permit. If the activity cannot be completed under these conditions, the applicant will need to apply for an authorization under a general permit, which will include an access transition area waiver.

205. COMMENT: Why can a general permit not be combined with a special activity transition area waiver for stormwater management? (255)

RESPONSE: The special activity transition area waiver for stormwater management authorizes stormwater management facilities, such as stormwater management basins, where there is no feasible onsite location for the facility. No adopted general permits at N.J.A.C. 7:7A-7 authorize the construction of a stormwater management facility. Therefore, it is not appropriate to reference special activity transition area waivers for stormwater management in the list of transition area waivers that may be combined with a general permit for a single activity on the same site.

206. COMMENT: At recodified N.J.A.C. 7:7A-5.4(a)2, please specify whether the “total combined area” includes both permanent and temporary modifications on the site. (255)

RESPONSE: "Total combined area of wetlands, State open waters, and transition areas disturbed or modified" referenced at N.J.A.C. 7:7A-5.4(a)2 includes the disturbance limits applicable to the respective general permits to be combined. For most general permits, the area of disturbance to be considered under N.J.A.C. 7:7A-5.4(a)2 includes both temporary and permanent disturbance. However, some general permits only prescribe a strict disturbance limit for permanent disturbance and direct the applicant to minimize temporary disturbance (for example, general permit 2 at N.J.A.C. 7:7A-7.2). The total combined disturbance includes all disturbance that would be counted toward each general permit's disturbance limit, which depends on the general permits themselves.

207. COMMENT: The amendments to allow the combination of a general permit with a transition area averaging plan or with a special activity waiver for redevelopment for a single activity are supported. (262)

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

208. COMMENT: The proposed amendments to N.J.A.C. 7:7A-5.4(a)1 are supported as they allow applicants to combine a general permit and certain transition area waivers. However, the proposed language, "shall not authorize the combination of a general permit or general permit-by-certification with a transition area waiver for a single activity," should be amended to more clearly state which of the listed transition area waivers can be used in combination with general permits and general permits-by-certification. As proposed, it is unclear whether the restriction prohibiting such combination applies only to the combination of general permits and transition area waivers or if it also applies to the combination of general permits and transition area waiver

averaging plans and the combination of general permits and transition area waivers for access.

N.J.A.C. 7:7A-5.4(a)1 is also not entirely consistent with N.J.A.C. 7:7A-8.1(h), which also allows a transition area waiver for access to be used with a general permit and seems to allow the combination of a transition area waiver and a general permit, provided the general permit limits are not expanded beyond those allowed. (140)

RESPONSE: Proposed N.J.A.C. 7:7A-5.4(a)1, included amendment to identify the forms of transition area waiver that the Department may authorize in combination with a general permit or general permit-by-certification. As indicated in the notice of proposal, the general rule is that the Department will not authorize the combination of a general permit or a general permit-by-certification with a transition area for a single activity. However, as indicated in the proposed language, there are three exceptions to the general prohibition against Department authorization of combining a general permit or general permit-by-certification with a transition area waiver for a single activity. Those three exceptions are combination of a transition area waiver averaging plan with a general permit, combination of a special activity transition area waiver for linear development with a general permit, and combination of a special activity waiver for redevelopment with a general permit. With the exception of those three combinations, as indicated by the commenter, the rules indicate that "the Department shall not authorize the combination of a general permit or general permit-by-certification with a transition area waiver for a single activity." Accordingly, the Department will not authorize the combination of a general permit with other types of transition area waivers, and no transition area waiver can be combined with a general permit-by-certification for the same activity.

With respect to access transition area waivers, as specified in both adopted N.J.A.C. 7:7A-5.3(d), with reference to authorizations under a general permit, and in the general

provisions applicable to transition area waivers at adopted N.J.A.C. 7:7A-8.1(a)5, each general permit authorization includes a limited transition area waiver to allow access to the authorized activity, provided the conditions specified at N.J.A.C. 7:7A-8.1(a)5i and ii are complied with. The area of the limited access transition area waiver is not counted in calculating the amount of disturbance allowed under the general permit authorization (that is, the area covered by the access waiver is in addition to that allowed under the applicable general permit authorization). As pointed out by the commenter, this transition area waiver that is included in all general permit authorizations is specifically mentioned in adopted N.J.A.C. 7:7A-8.1(h), but is not separately listed in N.J.A.C. 7:7A-5.4(a)1.

While the rules already specifically provide an access transition area waiver as part of all general permits, making it unnecessary for the Department to authorize the combination of this form of waiver in combination with a general permit, the Department agrees that not listing this form of waiver as one that can provide for an area of disturbance in addition to the area allowed by the general permit authorization in N.J.A.C. 7:7A-5.4(a)1 could be confusing. Accordingly, the Department is changing N.J.A.C. 7:7A-5.4(a)1 on adoption to make clear that this provision is not intended to eliminate the allowance of an access waiver without specific Department authorization as part of all general permits as provided at N.J.A.C. 7:7A-5.3(d), and referenced in N.J.A.C. 7:7A-8.1. Similarly, N.J.A.C. 7:7A-8.1(a)5 qualifies the prohibition on combining transition area waivers and general permits for the same activity with the phrase, "if the combined effect of the transition area waiver and general permit authorization would be to expand the general permit activity beyond the limits set forth in the general permit." However, in proposing to include the statement concerning combination of transition area waivers and general permits in N.J.A.C. 7:7A-5.4(a)1 in addition to its presence at N.J.A.C. 7:7A-8.1(a)5, that

qualifying phrase was omitted, which has evidently led to some confusion and lack of clarity. On adoption, the Department is including the language, "if the combined effect of the transition area waiver and general permit authorization would be to expand the general permit activity beyond the limits set forth in the general permit," at N.J.A.C. 7:7A-5.4(a)1 to align with N.J.A.C. 7:7A-8.1(h). These two rules both describe the requirements for combining a general permit authorization and transition area waiver; the change on adoption does not change any rule requirement (as the language as amended at N.J.A.C. 7:7A-5.4(a)1 was already proposed at N.J.A.C. 7:7A-8.1(h)) but simply aligns the language to facilitate readers' understanding.

209. COMMENT: The amendment to recodified N.J.A.C. 7:7A-5.4(a)2iv to exempt the use of general permit 17 on land dedicated for conservation and/or recreation purposes from the one-acre combined disturbance limit is supported because it is favorable for certain local government projects. (255)

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

210. COMMENT: The proposed deletion of N.J.A.C. 7:7A-5.4(a)3, which inexplicably did not allow a general permit 6 that exceeded a half-acre to be combined with any general permit authorization except for a general permit 6A, is supported. (140)

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

211. COMMENT: At recodified N.J.A.C. 7:7A-5.4, the Department is proposing to delete the prohibition on disturbance exceeding 0.5 acres under general permit 6 from being combined with any other general permit, in which case total disturbance is limited to one acre. The notice of

proposal Summary states that the "Department has determined that this limit on general permit 6 is not necessary to protect freshwater wetlands and State open waters" but no data or analysis is provided to support this determination. Absent any justification, the Department has failed to show that this change will satisfy its obligations to protect resources under the FWPA. This example highlights the importance of maintaining the phrase "after conducting an environmental analysis" in the rules for promulgating a general permit because it lays bare the absence of any such analysis. (277)

212. COMMENT: At proposed N.J.A.C. 7:7A-5.4, increasing the amount of disturbance allowed from a half-acre to one acre without any scientific basis or explanation is unacceptable. (84, 179, 222, and 402)

RESPONSE TO COMMENTS 211 AND 212: The FWPA at N.J.S.A. 13:9B-23b requires the Department to permit up to one acre of impacts to a wetland that is not a surface water tributary system discharging into an inland lake or pond, or a river or stream. The Department has considered the potential impacts of allowing of the use of general permit 6 to authorize one activity to be combined with the use of any other general permit to authorize a separate activity for up to one acre of disturbance, rather than the 0.5-acre cap under the prior rules. The Department has concluded that the limits and conditions of each general permit at N.J.A.C. 7:7A-7, the conditions that apply to all general permits at N.J.A.C. 7:7A-5.7, the conditions that apply to all permits at N.J.A.C. 7:7A-20.2, and the ability to add additional conditions as necessary in accordance with N.J.A.C. 7:7A-20.3 all ensure that the use of general permit 6 in combination with other general permits has only a minimal impact on freshwater wetlands when the total disturbance of freshwater wetlands, transition areas, and State open waters is limited to one total acre, rendering the half-acre limit when using general permit 6 and another general

permit on the same site to authorize different activities unnecessary to effectuate the purposes of the FWPA. In accordance with N.J.A.C. 7:7A-5.4(a)1, general permit 6 can still only be combined with general permit 6A for a single activity, ensuring that the use of more than one general permit on the site does not inappropriately expand the disturbance authorized under general permit 6 beyond that which has only minimal environmental impacts. Furthermore, the prior rules allowed general permit 6 to be combined with general permit 6A for up to one acre of disturbance. In issuing authorizations under general permits 6 and 6A, the Department has not observed more than minimal environmental impact from activities authorized under a combination of these two permits.

Duration of an Authorization under a General Permit-By-Certification (N.J.A.C. 7:7A-5.5)

213. COMMENT: The justification for limiting authorizations under general permits-by-certification to a one-time duration of five years is equally appropriate for authorizations under general permits. The rationale set out for general permits-by-certification not having a five-year extension is that they are “intended to authorize discrete, simple activities with very minimal environmental impacts that should be able to be completed within the five-year duration of the authorization.” The Department offers authorizations under general permits with minimal review and no public hearings with the justification that such projects “will cause minimal individual and cumulative environmental impacts,” so such projects should also be able to be completed within five years. The only explanation for treating the two permit types differently is that the Department is aware of the potential destruction that could result from applicant error in the automated general permit-by-certification process. (277)

RESPONSE: The Department does not authorize activities under a general permit after only "minimal review"; while it is generally simpler to demonstrate compliance with the strictly defined requirements of a general permit, Department staff review all applications for completeness and compliance with applicable rules and, in many cases, conduct a site inspection to verify site conditions before issuing a permit. While there are no public hearings for individual uses of a general permit, there is a 30-day public comment period following the publication of notice of each application in the DEP Bulletin and public notice must be provided to local agencies and property owners in accordance with N.J.A.C. 7:7A-17. Adopted general permit-by-certification 8 authorizes a strictly circumscribed subset of activities authorized under general permit 8, while general permit-by-certification 24 provides a faster medium for authorizing the repair or modification of a failing septic system, an activity with environmental benefit and which is in the applicant's and the public's best interest to complete expeditiously. Applying for, and receiving, a general permit-by-certification authorization through the Department's online permitting portal creates a complete, enforceable record of the activity.

While general permit-by-certification activities are very narrowly defined, some general permits offer alternatives in the configuration of an activity (for example, whether an addition is attached or detached from an existing house under general permit 8) that requires direct staff review. While many of these activities can, and are, completed within five years, the Department allows for one five-year extension where the activity and the site conditions are not changed to accommodate circumstances where that is not the case. For example, general permit 8 allows an addition to be located up to 100 feet away from a lawfully existing dwelling. A detached addition may require additional local review concerning required setbacks and use of the addition, which could delay the construction of the dwelling, such that completion of construction will not occur

within the five-year term of the State permit authorization. In these cases, an extension may be appropriate.

Conditions Applicable to an Authorization Pursuant to a General Permit-By-Certification or General Permit (N.J.A.C. 7:7A-5.7)

214. COMMENT: The proposed rules allow general permits with conditions. General permits are supposed to have *de minimus* impact, and should not need conditions. Having conditions allows applicants to get around the law. (13, 20, 23, 32, 35, 46, 50, 51, 62, 63, 76, 85, 143, 173, 174, 189, 202, 215, 218, 232, 233, 237, 243, 244, 266, 294, 306, 324, 327, 329, 334, 343, 362, 377, 392, 395, 399, 408, 414, 427, 431, and 454)

215. COMMENT: The impact of building on wetlands should be enforced without allowing special conditions. (354)

216. COMMENT: Allowing general permit authorizations to be issued with conditions facilitates the construction of pipelines through and under wetlands. (50, 51, and 189)

217. COMMENT: The changes to general permits in the proposed rules violate the FWPA. These permits are supposed to have a *de minimis* impact; however, the proposed rules permit impacts that are more than *de minimis* by allowing conditions to be added to general permits. Conditions represent an attempt to circumvent the law. The rules also allow multiple general permits to be obtained for a single project with no cap on the number that may be approved. A single pipeline could cross 40 wetlands, and each crossing would receive a general permit. The cumulative and secondary impacts of all of the crossings will not be considered under such a scenario. (240 and 415)

RESPONSE TO COMMENTS 214 THROUGH 217: In some cases, conditions may be placed on a general permit in addition to the requirements and conditions promulgated in the general permit itself. These additional conditions do not replace the requirements and conditions in the adopted general permits, but instead allow the Department to uphold all applicable requirements of the FWPA in cases where the requirements of the general permit itself do not fully address all issues. The placement of additional conditions on a specific permit ensures that all general permits are conducted in accordance with the requirements of the FWPA Rules. The ability to add conditions comes directly from the FWPA. Specifically, N.J.S.A. 13:9B-5 states that, "[t]he Department may, on the basis of findings with respect to a specific application, modify a general permit issued pursuant to this section by adding special conditions." The ability to add special conditions does not allow for more than *de minimis* impacts; rather, the ability to add special conditions ensures that general permits will only authorize activities with *de minimis* impacts even in uncommon situations not directly addressed by the requirements in the promulgated general permits.

The FWPA Rules do not permit multiple general permit authorizations to be used to segment a project. While the FWPA Rules do allow for the use of multiple different general permits on one site, the rules at N.J.A.C. 7:7A-5.4(a)1 do not allow one general permit to be used in multiple locations on the same site, if doing so would exceed the limits set forth in the general permit. Underground utility line activities under general permit 2 need to comply, as a whole, with the limits set forth in N.J.A.C. 7:7A-7.2. If the project as a whole, including all wetlands crossings or impacts, does not meet the limits set forth in the general permit, the applicant would need to seek an individual permit. The individual permit application would likewise need to address wetland and State open water impacts from the entire project, as the entire right-of-way

or proposed area of disturbance is considered a single site (see N.J.A.C. 7:7A-10.1(c) and the definition of "site" at N.J.A.C. 7:7A-1.3).

218. COMMENT: An applicant for a general permit-by-certification will not have the resources or knowledge to determine if they are in compliance with the standards as required at proposed N.J.A.C. 7:7A-5.7(a). Will the Department take enforcement action if a project approved under a general permit-by-certification is not in compliance? (415)

RESPONSE: The Department does not agree that applicants will be unable to determine compliance with the standards at N.J.A.C. 7:7A-5.7(a), that is, with the conditions listed in the general permit-by-certification itself, the standard conditions that apply to all general permits-by-certification and all general permits, the conditions that apply to all permits at N.J.A.C. 7:7A-20.2, and the limits on the use of multiple general permit-by-certification or general permits. The rules identify specific requirements that must be met in order for an activity to qualify for the particular general permit-by-certification and require that the applicant certify that those requirements have been met. The applicant must certify that their activity meets the disturbance and other limits in the general permit-by-certification, and also certify compliance with applicable conditions from N.J.A.C. 7:7A-5.7(b). The conditions that apply to all permits at N.J.A.C. 7:7A-20.2, as well as all requirements to which the applicant certifies compliance, are included in the authorization issued upon completion of the general permit-by-certification application. The certification process requires the applicant to certify to the truth and accuracy of any information provided in the application. To the extent an applicant is not able to determine compliance with the requirements applicable to the general permit-by-certification on their own, it is the applicant's responsibility to retain qualified professionals to assist in the

application to ensure only complete and accurate information is submitted. If it is subsequently determined that activities are conducted that are not in compliance with the authorization under the general permit-by-certification, the Department will take appropriate enforcement action.

In addition to the certifications discussed above, the online permitting system requires the submission of information and documentation to ensure activities proposed are compliant with the requirements for the general permit-by-certification. In the case of general permit-by-certification 8, submitting the total disturbance proposed to construct an addition allows the online permitting system to check all issued permits in the New Jersey Environmental Management System (NJEMS) to ensure that the proposed addition does not exceed the 750-square foot cumulative area allowed for an addition under general permit 8 and general permit-by-certification 8. The online permitting system checks the amount of disturbance proposed by the applicant when applying for either general permit-by-certification to ensure that the amount of disturbance proposed in conjunction with past disturbance authorized onsite does not exceed cumulative area impact limits. Once a general permit-by-certification is issued, a complete record of the activity is created and logged into NJEMS, which ensures that future activities under general permits-by-certification or general permits will comply with the limits on the use of multiple general permits at N.J.A.C. 7:7A-5.4 (as referenced at N.J.A.C. 7:7A-5.7(a)). In addition, under general permit-by-certification 24, the applicant must obtain a letter from the board of health with jurisdiction over the septic system that is the subject of the application stating that the activities proposed are authorized under, and in compliance with, the Department's Standards for Individual Subsurface Sewage Disposal Systems at N.J.A.C. 7:9A, are not caused by an expansion of the facility the septic system serves or a change in use, and that there is no suitable alternative location on the site. This letter must be uploaded to the online

permitting system prior to receiving authorization under general permit-by-certification 24. General permits-by-certification also limit the total area of disturbance in freshwater wetlands, transition areas, as well as non-regulated areas, to ensure that inappropriate disturbance does not occur because of inaccurate wetlands delineation or transition area identification. Further, applicants undertaking activities authorized under a general permit-by-certification must provide the public notice of the proposed activity, which is the same as a general permit or individual permit. Therefore, local government entities and landowners proximate to the development will be aware of the activities, can provide comments to the Department, and can inform the Department of any suspected noncompliance.

The Department believes that the above-described requirements and processes ensure applicants for a general permit-by-certification understand the requirements of the authorization and will be able to perform the authorized activities in accordance with the FWPA Rules. Should a permittee perform activities in violation of an issued authorization under a general permit-by-certification or any provision of the FWPA Rules, the Department can bring enforcement action in accordance with N.J.A.C. 7:7A-22 to remedy the violation.

219. COMMENT: A grammatical change at proposed N.J.A.C. 7:7A-5.7(b)5 is incorrect. The proposed change is, “Any permit for an activity which may adversely [affect] **effect** a property listed or eligible for listing on the New Jersey or National Register of Historic Places shall contain conditions to ensure that any impact to the property is minimized to the maximum extent practicable and any unavoidable impact is mitigated.” The correct word is “affect.” (415)

RESPONSE: As noted by the commenter, while an earlier reference in N.J.A.C. 7:7A-5.7(b)5 to compensating for an “adverse affect” was correctly amended to replace the word “affect” with

"effect," in the sentence referenced by the commenter the notice of proposal incorrectly included a similar change. Accordingly, the Department is not adopting this change.

220. COMMENT: The proposed amendments to N.J.A.C. 7:7A-5.7(b)8, which ensure consistency with the FHACA Rules in that the Department proposes to eliminate monitoring for the presence of acid-producing deposits in all excavations, are supported. (140)

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

221. COMMENT: The case-by-case determination at proposed N.J.A.C. 7:7A-5.7(b)15 is contrary to the New Jersey Supreme Court case law that precludes the Department from not issuing a general permit 6 for vernal ponds. See *In re Freshwater Wetlands Act Rules*, 180 *NJ* 478 (2004). (140)

RESPONSE: The adopted addition clarifies Department authority under the FWPA and its rules. In the cited decision, *In Re Freshwater Wetlands Act Rules*, 180 *NJ* 478 (2004), the New Jersey Supreme Court ruled that the Department exceeded its statutory authority under the FWPA by adopting a blanket prohibition on the use of general permits in vernal habitats. However, while finding that such a blanket prohibition would not comply with general permit 6 as described in the FWPA at N.J.S.A. 13:9B-23.b, the Court also acknowledged the Department's authority pursuant to N.J.S.A. 13:9B-23.d to modify or rescind a statutory general permit. The Court noted that "Pursuant to N.J.S.A. 13:9B-23.d, DEP may modify or rescind a general permit only upon proper findings on a case-by-case basis." *In Re Freshwater Wetlands Act Rules* at 180 *NJ* 493. The adopted rule amendment merely informs applicants that, while no activities in vernal habitats will be authorized by the Department under other general permits, or under a general

permit-by-certification, activities may be authorized under general permits 1, 6, 6A, or 16 following an individualized review of the specific site and proposed activities for compliance with the chapter and other applicable laws. The Department is effectuating the purposes of the FWPA on an "individual basis," as it does in all decisions on applications for general permit authorizations, transition area waivers, and individual permits.

222. COMMENT: Proposed N.J.A.C. 7:7A-5.7(b)15 allows activities under general permits 1, 6, 6A, and 16 to take place in vernal habitats and associated transition areas, subject to a case-by-case review. This continues a problematic rule. While the inclusion of general permit 16 and, to a lesser extent, general permit 1 is understandable, continuing to allow activities under general permits 6 and 6A in and near vernal habitats (when the purpose of those permits is to eliminate regulated resources) continues to endanger populations dependent on those habitats without the extensive review required under an individual permit application. Although the rule provides for a case-by-case review by the Threatened and Endangered Species Unit of the Division of Land Use Regulation, the nature of this decision making is unclear. In the absence of some level of detail regarding how the case-by-case determination is to be made by the Department, general permits 6 and 6A should be excluded. The individual permit process is the best option for activities proposed in vernal habitats because it mandates an alternatives analysis that would seek to avoid and minimize impacts to the resource. (277)

223. COMMENT: Vernal pools must be protected for amphibians, turtles, and wetland plants and birds. (340)

224. COMMENT: Vernal pools are uniquely beautiful, serve as habitat for species that cannot breed in any other type of habitat, and provide greater ecological services than their small size

would suggest. Vernal pools are irreplaceable and any damage or destruction diminishes the value of open space in New Jersey. (359)

RESPONSE TO COMMENTS 222 THROUGH 224: The Department prohibits the use of a general permit to authorize activities in or adjacent to a vernal habitat, except for general permits 1, 6, 6A, and 16. As referenced in the Response to Comment 221, the New Jersey Supreme Court's decision in *In re Freshwater Wetlands Act Rules*, 180 *NJ* 493 (2004) specifically overturned a previous rule altogether prohibiting the use of general permits 6 in or adjacent to a vernal habitat, relying upon N.J.S.A. 13:9B-23.b. The Court ruled that any Department modification or rescission of a general permit issued pursuant to N.J.S.A. 13:9B-23.b may only occur on the basis of a case-by-case analysis of an individual application. Accordingly, the case-by-case analysis reflected in N.J.A.C. 7:7A-5.7(b)15 of activities associated with general permit 6 reflects the Department's appreciation of the significance of vernal habitat and desire to protect it from inappropriate impacts to the maximum extent possible while complying with the Court's interpretation of the FWPA statutory language.

With reference to one commenter's assertion that the purpose of general permits 6 and 6A is to eliminate regulated resources, neither these two general permits nor any other general permit or general permit-by-certification can be used for the sole purpose of eliminating a regulated resource. Instead, as indicated at N.J.A.C. 7:7A-5.7(b)1, the rules specifically require that all activities performed under a general permit-by-certification or general permit must be associated with a proposed project and make clear that in no case will the Department "authorize activities under a general permit-by-certification or general permit for the purpose of eliminating a natural resource in order to avoid regulation." Activities under general permits 6 and 6A are

not excepted from this requirement; the Department will not authorize the use of these permits for the sole purpose of eliminating a natural resource, such as a vernal habitat.

Regarding the other general permits whose use is not automatically prohibited in or near vernal habitats, the activities authorized are either very minor or are environmentally beneficial. General permit 1 authorizes activities to carry out the repair, rehabilitation, replacement, maintenance, or reconstruction of a previously authorized, currently serviceable feature. The type of activities that qualify for this general permit are very minor activities that do not warrant the intensity of review required by an individual permit application and which may, in appropriate cases, be able to proceed in or near a vernal habitat without significantly affecting the vernal habitat or vernal species. General permit 16 authorizes activities necessary to implement a plan for the creation, restoration, or enhancement of habitat and water quality functions and values of wetlands. Activities under this permit in or adjacent to vernal habitats may have a positive environmental impact on the habitat; the Department does not seek to discourage environmentally beneficial projects and, so, does not automatically prohibit the use of this general permit in or near vernal habitats.

For the reasons above, activities under one of the four listed general permits are reviewed by the Department on a case-by-case basis. N.J.A.C. 7:7A-5.7(b)15, as adopted, specifically points to N.J.A.C. 7:7A-5.3(e) for the criteria the Department will use to determine if an activity in a vernal habitat or in a transition area adjacent to a vernal habitat should be reviewed under an individual permit application rather than a general permit application. In accordance with N.J.A.C. 7:7A-5.3(e), the Department will require an individual permit application when "additional permit conditions added under N.J.A.C. 7:7A-20.3 would not be sufficient to ensure compliance with this chapter and other applicable laws" or when "special circumstances make an

individual permit necessary to ensure compliance with the Freshwater Wetlands Protection Act, this chapter, any permit or order issued pursuant thereto, or the Federal Act."

225. COMMENT: N.J.A.C. 7:7A-5.7(b)15 refers to the "transition area adjacent to a vernal habitat." The Landscape Project generally assigns a 300-meter/1,000-foot circular buffer around a vernal habitat, with the actual vernal pool presumed to be at the center of the circular buffer. The buffer assigned by the Landscape Project is not a regulatory buffer under the terms of N.J.A.C. 7:7A, which provides a 150-foot maximum transition area for a wetland of exceptional resource value. This ambiguity between N.J.A.C. 7:7A and the Landscape Project concerning vernal habitat and transition areas/buffers should be clarified, where applicable, throughout the rules. (255)

RESPONSE: N.J.A.C. 7:7A-3.3 clearly establishes how to identify the location and width of a transition area under the FWPA Rules. In N.J.A.C. 7:7A-5.7(b)15, the Department purposefully used the defined term "transition area" instead of buffer to refer to the area regulated under this chapter (the FWPA Rules) and not any other buffer identified by other sources. Under N.J.A.C. 7:7A-3.3(d), the only possible widths of a transition area are 150 feet for a transition area adjacent to an exceptional resource value wetland and 50 feet for a transition area adjacent to an intermediate resource value wetland.

Pursuant to the definition of "vernal habitat" at N.J.A.C. 7:7A-1.3, an area regulated as a vernal habitat under the FWPA Rules is a wetland that meets all of four specified criteria. First, the wetland must occur in or contain a confined basin depression without a permanent flowing outlet. Second, the wetland must feature evidence of breeding by one or more species of fauna adapted to reproduce in ephemeral aquatic conditions, which are identified in N.J.A.C. 7:7A,

Appendix 1. Third, the wetland must maintain ponded water for at least two continuous months between March and September of a normal rainfall year. Finally, the wetland must be free of reproducing fish populations throughout the year, or dry up at some time during a normal rainfall year. Nowhere in this definition does the Department reference the Landscape Project as a representation of the location of a vernal habitat or the applicable transition area to a vernal habitat.

The Department believes that it is sufficiently clear that references to transition areas throughout the FWPA Rules, including the reference to transition areas to vernal wetlands referenced in N.J.A.C. 7:7A-5.7(b)15, are to the transition areas established in the FWPA and implemented in the FWPA Rules at N.J.A.C. 7:7A-3.3 and not to any transition area or buffer established in some other context.

226. COMMENT: Recodified N.J.A.C. 7:7A-5.7(f) appears to delete the existing prohibition against proceeding with activities under general permits prior to obtaining written approvals, or subject to permit-specific notice and application requirements. The deleted language must remain to allow the Department to verify that all conditions and requirements of each general permit have been met. (277)

RESPONSE: The deleted provision, prior N.J.A.C. 7:7A-4.3(f), states that no activity under a general permit is authorized without a written approval to highlight the exceptions. That is, activities under general permits 1, 24, and 25 may in some cases proceed before a written authorization is provided. The substance of the prior subsection was relocated to N.J.A.C. 7:7A-19.1(f) to consolidate and clarify the application review requirements for all permits in new Subchapter 19. Adopted N.J.A.C. 7:7A-19.1(f) states:

"(f) If a person submits an application and does not receive a response from the Department within the deadlines imposed in this subchapter, the person shall not be entitled to assume that the application is approved, except if the application is for authorization of the following activities and complies with the applicable general permit:

1. Ongoing maintenance of an off-stream stormwater management facility created in uplands, including a wetland constructed in uplands for stormwater management purposes, under general permit 1;

2. Repair of a malfunctioning individual subsurface sewage disposal system under general permit 24, or general permit-by-certification 24; or

3. Minor channel or stream cleaning activities under general permit 25."

Adopted N.J.A.C. 7:7A-5.3(b) states that "an activity that meets the requirements of a general permit may be conducted *when the person proposing to conduct the activity receives authorization from the Department* in accordance with N.J.A.C. 7:7A-19" (emphasis added). In addition, adopted N.J.A.C. 7:7A-2.1(a) generally states that no regulated activities can occur without a permit or authorization from the Department, and conducting regulated activities without prior Department approval is identified as a "non-minor" violation at N.J.A.C. 7:7A-22.10, Table 22.10, which means that there is no grace period in which the violator may avoid a penalty by remedying the violation.

N.J.A.C. 7:7A-9, Individual Freshwater Wetlands and Open Water Fill Permits

Duration of an Individual Permit (N.J.A.C. 7:7A-9.2)

227. COMMENT: The proposed rules will make it easier for large projects, such as quarries, pipelines, highways, and other damaging projects to receive permits. Given the sensitivity of wetlands and their importance to the ecosystem, this policy is opposed. (104, 144, 153, and 361)

228. COMMENT: The notice of proposal extends the duration of individual permits for pipeline projects to 10 years without providing any justification. This change appears to violate the Federal Clean Water Act, which established a time limit of five years for these permits. (7, 34, 58, 72, 84, 96, 113, 150, 152, 155, 156, 164, 179, 184, 186, 203, 211, 214, 222, 245, 247, 250, 270, 278, 279, 313, 317, 323, 333, 357, 367, 378, 387, 398, 402, 419, 420, and 436)

229. COMMENT: The proposed rules allow for large projects such as quarries, pipelines, highways, and other damaging projects. They allow permits to last for 10 years, which under the law should only be five years before renewal. (12,13, 20, 22, 23, 32, 35, 46, 51, 52, 62, 63, 76, 74, 85, 173, 174, 179 189, 202, 215, 218, 232, 233, 237, 243, 244, 266, 294, 306, 324, 327, 334, 343, 362, 377, 392, 395, 399, 408, 414, 427, 431, and 454)

230. COMMENT: The FWPA does not give the Department the authority to issue 10-year permits, which are particularly inappropriate for pipelines, quarries, highways and other large, damaging projects. Does the Federal program allow road permits to extend for 10 years? The provision at N.J.A.C. 7:7A-9.2(b) will result in a State program that is less stringent than the Federal program. (240, 376, and 415)

231. COMMENT: Individual permits should only be valid for five years as circumstances can change significantly in that amount of time. For example, threatened and endangered species could enter the area, new areas may be designated as historic, or the surface water classification or fisheries classification may be modified. After five years, the Department should require an application for a permit extension to ensure that any such changes have been considered. (415)

232. COMMENT: Permit durations should be shorter than five years and should not be extended. (72)

233. COMMENT: At proposed N.J.A.C. 7:7A-9.2(b), a 10-year term is provided for an individual permit "for a linear activity or project that is greater than 10 miles in length, a flood control project, or a quarry or mining operation." Ten-year permits are a violation of the Federal Clean Water Act (CWA). Under the CWA, a state's authority to issue permits is limited to permits "for fixed terms not exceeding five years (33 U.S.C. 1344(h)(1)(A)(ii)." Under Federal law, the FWPA Rules cannot be less protective than the Federal requirements, and this 10-year permit is impermissible under the memorandum of understanding with the EPA. (59, 60, 114 161, 277, 319, 320, and 328)

234. COMMENT: In the notice of proposal Summary, the Department asserts that "[b]ased on its observations that site conditions generally did not change significantly over time where activities were approved under freshwater individual permits that were subsequently extended by the Permit Extension Acts of 2008, 2010, and 2012, the Department has determined that providing for one five-year extension for most individual permits … while not undermining protections against adverse impacts to wetlands and State open water functionality." However, the Department has provided no reference to an actual analysis of these sites. Further, the Department has not provided any reference to the number of permits that were extended under the Permit Extension Acts that involved wetlands or to the scientific studies that were performed to determine that there were no changes in the sites. Please provide references to all permits that were extended for which the Department has studied the impacts of the extensions on freshwater wetlands and provide references to all scientific literature that the Department relied upon to determine that there were no impacts. (319 and 328)

RESPONSE TO COMMENTS 227 THROUGH 234: The FWPA Rules have for many years provided for the potential extension of a five-year permit duration upon application to the Department, with the total term of the extended permit limited 10 years. The Department had proposed to allow some permits to be valid for up to 10 years without the need for application for extension at N.J.A.C. 7:7A-9.2(b) in an effort to align the permitting processes of the FWPA, CZM, and FHACA Rules, where possible, to streamline permitting while maintaining existing stringent protection of the environment. Upon further consideration, and in response to public comment summarized above, the Department is not adopting proposed N.J.A.C. 7:7A-9.2(b). The unique ecology of freshwater wetlands necessitates an additional review, through the application for an extension, after five years. Activities may extend beyond five years following the review and approval of an extension request in accordance with N.J.A.C. 7:7A-20.4, with a maximum term, including the duration of the original permit and the extension, of 10 years, as in the prior rules.

Conditions Applicable to an Individual Permit (N.J.A.C. 7:7A-9.3)

235. COMMENT: At N.J.A.C. 7:7A-9.3(a)1, the phrase “the conditions set forth in the individual permit itself” is misleading. The statement suggests that that there is a specific list of individual permits (IPs) and that each has specific conditions associated with it, similar to general permits-by-certification, general permits, or transition area waivers, but this is not the case. This statement also seems to conflict with N.J.A.C. 7:7A-9.3(b). The “conditions set forth in the individual permit itself” would be the same as the “conditions established in a specific individual permit as required on a case-by-case basis” (255)

RESPONSE: The "conditions set forth in the individual permit itself" are conditions concerning compliance with N.J.A.C. 7:7A-10. The "conditions established in a specific individual permit" are those included in accordance with N.J.A.C. 7:7A-20.3, which the Department applies on a case-by-case basis to ensure compliance with all applicable requirements of the Federal Act, the Freshwater Wetlands Protection Act, the Water Pollution Control Act, this chapter, and other applicable rules or regulations, which may go beyond those requirements in N.J.A.C. 7:7A-10.

N.J.A.C. 7:7A-14, Emergency Authorizations

236. COMMENT: Who is responsible for following up on emergency authorizations, and how are they tracked for compliance? After a significant weather event, there may be a large number of emergency authorization requests and approvals, and while most may be appropriate, violations could occur without proper follow-up. (415)

237. COMMENT: Please amend proposed N.J.A.C. 7:7A-14.3(b) to clarify who (that is, the Department) is responsible for publishing and mailing notice of the issuance of an emergency permit. (255)

RESPONSE TO COMMENTS 236 AND 237: The Department is responsible for following up on emergency authorizations. The Department does this by logging emergency authorizations into the New Jersey Environmental Management System (NJEMS) just like any other authorization or permit. In accordance with N.J.A.C. 7:7A-14.3(f), the person to whom an emergency authorization is issued must submit a complete permit application for the activities conducted under the emergency authorization within 90 days after the Department's verbal decision on an application for an emergency authorization, or another timeframe established by the Department. The applicable timeframe is logged into NJEMS. The assigned project manager

will receive the subsequent application and confirm that activities were conducted appropriately and, under N.J.A.C. 7:7A-14.3(j), require design changes, restoration, and/or stabilization measures as necessary to ensure the requirements of the FWPA Rules are met to the maximum extent practicable. Under N.J.A.C. 7:7A-14.3(k), the Department can modify or terminate an emergency authorization at any time, when necessary, to protect public health, safety, and welfare, and/or the environment. Under N.J.A.C. 7:7A-14.3(l), conducting any activities not authorized under the emergency authorization or subsequent permit constitutes a violation subject to enforcement action under N.J.A.C. 7:7A-22.

The Federal Act, the Federal rules at 40 CFR 124.10 and 124.11, and the FWPA, all referenced in N.J.A.C. 7:7A-14.3(b), do not require an applicant to provide notice of the issuance of an emergency authorization and indicate that it is the Department who will publish and mail the notice required by N.J.A.C. 7:7A-14.3(b). No clarifying amendments are required.

Permit Process

N.J.A.C. 7:7A-15, Pre-Application Conferences

238. COMMENT: While acknowledging that any discussion or guidance offered by the Department at a pre-application conference shall not constitute a commitment by the Department to approve or deny an application, does the Department retain discretion to make decisions on rule interpretations that applicants can then rely upon regarding specific issues that are raised in the pre-application process, assuming that the permit application is consistent with that presented at the pre-application meeting? Basic principles of equity, good faith, and fair dealing dictate that the Department has such discretion consistent with procedural due process considerations. (140)

RESPONSE: The pre-application conference is intended to be an informal forum where the Department and potential applicant can frankly discuss the positives and negatives of a proposed application, and what may need to change in a formal application for Department approval. As formal detailed plans are not required for a pre-application conference, because any material submitted by the potential applicant does not undergo complete and thorough Department review to confirm its accuracy and relevance, and because a project is likely to change between the time it is conceptually presented at a pre-application conference and when it is proposed for approval in a permit application, it would be inappropriate for the Department to be bound by guidance provided in this context.

N.J.A.C. 7:7A-16, Application Requirements

Purpose and Scope; General Application Requirements (N.J.A.C. 7:7A-16.1 and 16.2)

239. COMMENT: The Department should end the practice of allowing an applicant to seek an LOI concurrently with an application for an individual permit or general permit authorization. This practice allows for over-investment in designing projects for sites that are ultimately unsuitable. Applicants must provide information concerning the total acreage of regulated areas on the site and the acreage of those areas that are proposed to be disturbed, but without an LOI, this information is the applicant's best guess. All analyses and calculations based on approximated acreages or incorrectly assumed resource value classifications are subject to revision. Establishing the resource value, location, and extent of on-site wetlands and regulated areas prior to full project design is also necessary to allow for the fullest extent of public input and the direction of projects towards environmentally sustainable locations. (277)

240. COMMENT: The Department should not allow an LOI application to be submitted contemporaneously with an individual permit application. (179)

RESPONSE TO COMMENTS 239 AND 240: As indicated by the commenters, submission of an LOI application and permit application concurrently is an option available to an applicant. Where an applicant is concerned that wetlands impacts may significantly affect a desired project, the applicant may submit an LOI application to seek Department determination as to the areas affected prior to any permit application or any investment in design of a project, thereby eliminating any potential for over-design of a project that will ultimately be determined to not be compliant with the rules. Further, even where an applicant chooses to seek an LOI and permit approval concurrently, in most cases before investing in project design on properties containing wetlands or transition areas, applicants seek the input of appropriately qualified professionals to determine the extent of wetlands and/or wetlands transition areas on the property in question. While it is true that there are occasions where the Department's review of submitted plans and site conditions results in the need for project designs to be adjusted because of an applicant's inaccurate determination of the extent of the wetlands and corresponding transition area or the classification of the wetlands, the Department believes that the rules provide sufficient mechanisms to reduce or eliminate the possibility of unrealistic designs being pursued, making concerns about applicant over-design of projects insufficient to warrant elimination of the option to seek an LOI and permit concurrently.

When applying for an LOI concurrently with a permit or authorization, an applicant must provide all of the information that would have been included in a standalone verification or delineation LOI application. Allowing the combination of these two applications creates a more efficient permitting process; the extent of wetlands, transition areas, and State open waters on a site are determined immediately before the review of impacts to those areas. Many permit applications require a site inspection, while all LOIs require a site inspection; combining both

applications allows the Department to determine the extent of regulated areas on the site and then evaluate the impacts of the proposed activity in one site inspection.

Allowing an applicant to apply for an LOI and a permit at the same time does not affect the ability of the public to provide input on a proposed project. All permit and LOI applications require public notice in accordance with N.J.A.C. 7:7A-17 (with the exception of general permit 15, which has separate public notice requirements in the permit itself). This notice includes sending a complete application to the municipal clerk of each municipality in which the proposed project is located, as well as providing notice of the application to other governmental entities with jurisdiction over the municipality and county in which the proposed activity is to occur, and to property owners within 200 feet of the site of the proposed activity (see N.J.A.C. 7:7A-17.3). N.J.A.C. 7:7A-19.1 requires any revisions to an application (such as those necessary to revise plans, project designs, or analyses of impacts in response to the Department's determination of the extent and resource value classification of wetlands on the site) to be sent to the municipal clerk of each municipality in which the site is located and requires the applicant to provide notice explaining the revisions to any person listed at N.J.A.C. 7:7A-17.3(b) whom the Department determines would likely be affected by the revised application.

241. COMMENT: The phrase "only requiring essential materials and information" at N.J.A.C. 7:7A-16.1 concerning permit modifications is too vague and only serves to weaken the rules. (84, 179, 222, and 402)

242. COMMENT: Proposed N.J.A.C. 7:7A-16.1 would require less information to be submitted by applicants seeking minor and major modifications and extensions, by "only requiring

essential materials and information." This change, and the entire rulemaking, should not be adopted. (277)

RESPONSE TO COMMENTS 241 AND 242: The phrase "only requiring essential materials and information" does not appear in the rule text at N.J.A.C 7:7A-16.1. This phrase was used in the notice of proposal Summary to make the distinction between the prior rules' requirements and the adopted rules. The actual requirements for extensions are set forth at N.J.A.C. 7:7A-20.4, which requires the information necessary for the Department to determine that an extension is appropriate, rather than the prior requirement to provide the same information and materials required in an initial permit application. Because an applicant for an extension already has a recent permit application on file with the Department, only the information necessary to determine that the site or activities have not changed is required to be submitted. For example, a reproduction of the site plans submitted as part of the permit application is unnecessary for the review of an extension request because the Department already has the site plan on file. In order to be approved for an extension, the site and activity cannot have changed; a site plan submitted as part of an extension would, therefore, be identical to the plans already on file with the Department and, thus, not an essential material to review.

As explained in the notice of proposal Summary, the general application requirements apply to permit modifications, in addition to the modification-specific application requirements at N.J.A.C. 7:7A-20.7. The adopted application requirements simplify applications where appropriate to improve the efficiency of the permitting process for applicants and Department staff and reduce redundant paperwork, while continuing to provide the Department with the information necessary for it to determine if the modification or extension application complies with the FWPA Rules.

243. COMMENT: Clarification is needed at N.J.A.C. 7:7A-16.2(c) as to who may submit as an applicant. That is, may a contract purchaser submit on behalf of the applicant? (140)

RESPONSE: A contract purchaser may submit an application for activities on a property they do not currently own provided the current property owner gives written consent on the application form or, in the case of a general permit-by-certification, by signing the property owner's certification form available on the Department's website and submitting a scan of that certification through the permitting portal.

244. COMMENT: The rulemaking may expand who may apply for a permit. While an applicant is a person who has the "legal authority to perform the activities," the rules should clarify at proposed N.J.A.C. 7:7A-16.2(c)4 that this does not mean that the applicant has the legal right to the property. Specifically, the issuance of a Federal Energy Regulatory Commission Certificate of Public Convenience and Necessity alone does not provide the applicant any legal right to the property. The holder of the certificate must file an eminent domain action in court and be awarded an easement. Without an award of access/easement from a court, the applicant has no right to the property. (319 and 328)

RESPONSE: Prior N.J.A.C. 7:7A-10.1(d) stated, "An application shall be submitted by the owner of the site which is the subject of the application, or by a person who has the legal authority to perform the activities proposed in the application on the site, and to carry out all requirements of this chapter. Others may assist the owner in preparing an application, and may submit reports or other information in accordance with N.J.A.C. 7:7A-10.9." Therefore, adopted N.J.A.C. 7:7A-16.4(c)4 does not expand who may submit an application under this chapter and

is instead intended to encompass generally any person who has legal authority to perform activities under the chapter not otherwise captured specifically by N.J.A.C. 7:7A-16.2(c)1, 2, and 3.

The adopted rules do not inappropriately imply property rights where none exist. N.J.A.C. 7:7A-20.2(c) specifically states, as a condition of all permits, that issuance of a permit does not convey any property rights or any exclusive privilege. This condition is included in every permit or authorization issued by the Department. The clarification proposed by the commenter within the application requirements at N.J.A.C. 7:7A-16.2(c)4 is unnecessary in light of this standard condition.

Additional Application Requirements for an LOI (N.J.A.C. 7:7A-16.3)

245. COMMENT: While the existing rules require any survey submitted under the rules to be performed by a New Jersey licensed surveyor, proposed N.J.A.C. 7:7A-16.2(h) creates an exception if "the proposed regulated activity or project is one for which no survey, topography, or calculations are necessary to determine the requirements of this chapter are met, in which case the applicant may elect to prepare his or her own site plan." This exception is ill-defined and contains no objective criteria or standards. It will obliterate the rule. The Department must continue to require scientifically defensible data and analysis to be submitted. This provision essentially leaves whether an application is in compliance with the requirements of the FWPA Rules to the discretion of private developers. If the Department is seeking to exempt some applications for specific project categories from the requirement to use licensed professionals, those should be clearly specified. (277)

246. COMMENT: The notice of proposal includes an exception to the existing requirement that surveys be performed by licensed professionals. There should be no ill-defined exceptions that nullify the regulations. (179)

RESPONSE TO COMMENTS 245 AND 246: Certain applications for very minor projects do not require information that necessitates the services of a licensed surveyor. For example, a general permit-by-certification does not require the submittal of a survey to demonstrate compliance with the chapter because these permits limit disturbance of both regulated and non-regulated areas and do not contain required setbacks from property lines or other features. In another example, applications for presence/absence LOIs for an entire site do not require a survey because the issued LOI only establishes if there are any wetlands, transition areas, and State open waters on the site and not the exact location or extent of those regulated areas.

All other applications require a survey or site plan prepared by a licensed professional, as elaborated within the more specific requirements in N.J.A.C. 7:7A-16.3 through 16.10. The general statement at N.J.A.C. 7:7A-16.2(h) is not intended to supersede these specific requirements for applications that require surveys or site plans prepared by licensed surveyors or professional engineers. If an application which, under the specific application requirements described above, requires a survey or site plan prepared by a professional is submitted without a professionally-prepared survey or plan, the application will be determined administratively incomplete and returned to the applicant without further Department review. The Department will not use incomplete or inappropriate information to review and decide on a permit. This requirement, therefore, does not weaken the FWPA Rules.

247. COMMENT: The survey requirements for an LOI should be included at N.J.A.C. 7:7A-16.3(a)4. The reader should not need to turn to a separate set of Department regulations to determine what is required for a survey plan. (69)

RESPONSE: The survey and documentation requirements at N.J.A.C. 7:36 apply to other surveys in the State of New Jersey, such as surveys prepared on behalf of local governments and non-profits as part of Green Acres land acquisitions, not only surveys prepared for the purposes of an application for an LOI. Accordingly, these standards are familiar to many surveyors. The Department believes that it is much more efficient and practical for surveyors drafting a survey to cross-reference those known standards rather than repeat verbatim the requirements in the FWPA Rules. To avoid a situation where the FWPA Rules contain requirements at odds with N.J.A.C. 7:36 should that chapter be amended, the Department will continue to cite N.J.A.C. 7:36 Appendix 2 for survey requirements. As indicated at N.J.A.C. 7:7A-16.3(a)4, the requirements applicable to an LOI application will be listed on the appropriate application checklist.

248. COMMENT: The term “top of bank,” which is referenced at N.J.A.C. 7:7A-16.3(b)1 for the delineation of State open waters, may cause confusion when delineating both the State open waters limit and the top of bank for a regulated water under the FHACA Rules since the same terminology is used in those rules. A definition of “top of bank” should be included at N.J.A.C. 7:7A-1.3 of the FWPA Rules to ensure consistency in practical application between the FWPA Rules and FHACA Rules. (69 and 140)

RESPONSE: A definition of “top of bank” is not appropriate to include in the FWPA Rules. In general, the top of bank for the purposes of the FWPA Rules will be the upper limit of the bank

of the State open water, which is typically characterized by an observable change or break in the slope of the land. Similarly, when there is no clearly observable top of bank, the centerline of the watercourse is used. The definition of "State open waters" includes all waters of the State, with a number of types of waters listed as not typically considered State open waters. The definition provides that final determination as to whether the water is considered to be a "State open water" in the case of a particular watercourse falling within one of the listed types of water will be made by the Department on a case-by-case basis.

The term "top of bank" of a State open water is only used in limited contexts within the FWPA Rules and has not proven to create any confusion. As indicated above, case-by-case guidance from the Department is necessary to determine if many watercourses or water bodies are considered to be State open waters for the purposes of the FWPA Rules. Should there be any question as to the appropriate top of bank for those or any other waters, guidance is available from Department staff. The definition of "State open waters" at N.J.A.C. 7:7A-1.3 and case-by-case guidance from Department staff to address unusual features are sufficient for applicants to delineate State open waters under N.J.A.C. 7:7A-16.3(b)1.

249. COMMENT: The addition of the option to request Department verification that a wetland is an isolated wetland as part of the LOI process at N.J.A.C. 7:7A-16.3(b)3 is supported. (255)

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

<u>Additional Application Requirements for an E-LOI (N.J.A.C. 7:7A-16.4)</u>

250. COMMENT: The electronic Letter of Interpretation process is supported. (69)

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

251. COMMENT: Encouraging the electronic filing of permit and LOI applications is a positive step forward. The Department should require the electronic submission of site plans, both GIS shape files and PDF copies, so that this information is available to the public electronically. This increases transparency and reduces impacts to the OPRA office. (320)

252. COMMENT: The Department's electronic filing requirements at N.J.A.C. 7:7A-16.4(e) are supported. All documents, including surveys, should be filed electronically, so that the Department can more efficiently provide copies of documents to the public when requested. The Department should also provide a portal for the public to access the filed documents, so that the public can more quickly review files and engage in the public consultation process. This also will reduce the burden on the Department's resources in responding to Open Public Records Act (OPRA) requests. (319 and 328)

RESPONSE TO COMMENTS 251 AND 252: The Department acknowledges these comments in support of the E-LOI process. The Department is actively engaged in expanding the electronic submission system for land use permit applications. Until further electronic availability of records is achieved, in order to provide transparency and increase access, the rules currently require applicants to send complete applications and any significant revisions to the municipal clerk in each municipality in which the site is located to allow members of the public to review the application. Failure to provide documentation of public notice, including the submission of the complete application to the municipal clerk, will result in the Department declaring an application administratively incomplete and returning the application. In addition, pending applications are available for public review in the Department's office in Trenton during normal business hours. The Department also publishes in the DEP Bulletin notice of receipt of each

administratively complete application, the status of the application during review, and the decision to approve or deny the application. These notice processes ensure that the public has the opportunity to review and provide comments on application within the confines of existing permit review systems and processes.

253. COMMENT: At N.J.A.C. 7:7A-16.4(d)3, which fields are required for the GIS shapefiles? (140)

RESPONSE: The Department has developed a series of webpages to walk applicants through all aspects of the E-LOI process, beginning at http://www.nj.gov/dep/landuse/eservices/loi00.html, which readers can navigate through by clicking on links labeled "next" or choosing specific areas of interest from the sidebar on the left side of the webpage. Specific guidance for uploading shapefiles is provided at http://www.nj.gov/dep/landuse/eservices/cs00.html and subsequently linked pages.

The fields required for GIS shapefiles depend on the type of application. The E-LOI service supports the submittal of Presence/Absence, Footprint of Disturbance, Line Delineation, and Line Verification LOI applications. Each of these types of LOI application has differing requirements for the types of mapped features that need to be submitted as feature shapefiles. The feature shapefiles are: Site, Footprint of Disturbance, Wetlands, and Transition Areas. All LOI types require a site shapefile. A Footprint of Disturbance LOI also requires a Footprint of Disturbance shapefile indicating the location(s) onsite that are subject to the LOI application. Line verification LOIs may require a Wetlands shapefile and/or a Transition Area shapefile depending on what features are present on the site. The linked guidance materials include

shapefile templates for each feature shapefile type to facilitate the preparation of shapefiles for E-LOI applications.

Any additional questions not addressed by this response or in the linked guidance materials can be directed to Technical Support Center staff via the contact form at http://www.nj.gov/dep/landuse/contact.html or by telephone at (609) 777-0454.

254. COMMENT: N.J.A.C. 7:7A-16.4(b)5 requires a number of certifications. However, a completed and signed application form should provide all of the necessary certifications for submitting electronically. (69)

RESPONSE: An applicant for an E-LOI is not required to submit a completed and signed application form. Rather, the online application system requires the submission of information required by the land use application form and requires the applicant to enter a PIN to certify compliance with certain requirements. The required information and certifications are similar to those required on a paper application form, but are provided to the portal in a different format than a signed paper application form.

Additional Requirements Specific to an Application for an Individual Permit (N.J.A.C. 7:7A-16.9)

255. COMMENT: The proposed rules specify that an alternatives analysis be included in an environmental report but do not define “alternatives analysis” or require an applicant to apply the 404(b)1 Guidelines at 40 CFR Part 230 when conducting an alternatives analysis. These guidelines are the minimum standard of the Federal permit program and should, therefore, be clearly identified and defined in the FWPA Rules. There should also be clear language

indicating that the alternatives analysis required in the environmental report is that triggered by the existing rules and that the analysis must be prepared in accordance with the requirements in existing N.J.A.C. 7:7A-7.2. (179 and 277)

RESPONSE: N.J.A.C. 7:7A-16.9(b)4v requires an alternatives analysis as part of an environmental report, specifically requiring an analysis "that allows the Department to evaluate whether the requirements at N.J.A.C. 7:7A-10.2 are met." This statement provides the clear language linking the application requirements to the substantive individual permit requirements at N.J.A.C. 7:7A-10.2, which was recodified with minor changes from N.J.A.C. 7:7A-7.2. Immediately following the directive to provide an alternatives analysis, N.J.A.C. 7:7A-16.9(b)4v(1) and (2) establish what information must be provided in the alternatives analysis for the Department to review compliance with N.J.A.C. 7:7A-10.2. The adopted requirements clearly establish the requirements for an alternatives analysis. The requirements for an alternatives analysis in the FWPA Rules meet the applicable Federal standards.

N.J.A.C. 7:7A-17, Requirements for an Applicant to Provide Public Notice of an Application

Contents and Recipients of Public Notice of an Application (N.J.A.C. 7:7A-17.3)

256. COMMENT: The current standard to notify property owners within 200 feet is no longer acceptable. Increasingly common and significant storm events cause stormwater impacts of development to be experienced well beyond 200 feet from the site of development. The rules should require all owners of real property within 1,000 feet of the project location to be notified of proposed activities via paper notice. N.J.S.A. "55S-12.B" requires 1,000 feet notice. (346)

RESPONSE: The public notice standards adopted in the FWPA Rules are intended to match those in the FHACA Rules and CZM Rules. The Department has determined that the adopted

requirement to notify property owners within 200 feet of the site of a regulated activity (or, for certain activities, within 200 feet of a proposed above-ground structure) and other adopted public notice requirements provide adequate notice and opportunity for comment on individual applications for authorizations and letters of interpretation under the FWPA Rules. The Department was not able to determine from the provided citation which requirement the commenter asserts mandates that notice be provided to property owners within 1,000 feet of a development activity.

257. COMMENT: Proposed N.J.A.C. 7:7A-17.3(c), which allows a broader range of applications to qualify for alternative public notice to property owners only within 200 feet of any proposed above-ground structure, in addition to newspaper notice, is supported. (255)

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

258. COMMENT: N.J.A.C. 7:7A-17.3(b), (c), and (d) appear to contain a circular reference that may require clarification of the public notice requirements for individual permits listed in N.J.A.C. 7:7A-17.3(b)6. (255)

RESPONSE: It is unclear what references in the cited paragraph of the rules are considered to be circular. N.J.A.C. 7:7A-17.3(b) requires notice to entities and individuals identified at paragraphs (b)1 through 6. In addition to the governmental entities and representatives identified in paragraphs (b)1 through 5, the rules, at N.J.A.C. 7:7A-17.3(b)6, require that notice be provided to owners of real property in the vicinity of the regulated activity proposed in the application. Particularly, N.J.A.C. 7:7A-17.3(b)6 specifies that notice must be provided to all owners of real property within 200 feet of the site of the proposed activity, unless the regulated activity is one

identified in N.J.A.C. 7:7A-17.3(c). If the proposed regulated activity is one subject to N.J.A.C. 7:7A-17.3(c), N.J.A.C. 7:7A-17.3(b)6 directs applicants for a regulated activity listed at N.J.A.C. 7:7A-17.3(c) to provide notice to property owners in the manner described at subsection (c), rather than that contained at paragraph (b)6. N.J.A.C. 7:7A-17.3(c) identifies the five categories of regulated activities or projects that are subject to the alternate notice process to nearby property owners for regulated activities or projects subject to that subsection, and specifies what that process entails (as described in the Summary of Agency-Initiated Changes, the Department is correcting a cross-reference in the notice of proposal of N.J.A.C. 7:7A-17.3(b)6 to the types of activities that are subject to the notice requirements of N.J.A.C. 7:7A-17.3(c), which incorrectly identified the list as being provided at N.J.A.C. 7:7A-17.3(c)1 through 4 to instead reference N.J.A.C. 7:7A-17.3(c)1 through 5). Finally, N.J.A.C. 7:7A-17.3(d) specifies notice requirements, in addition to those specified in N.J.A.C. 7:7A-17.3(b), as applicable to all applications listed in N.J.A.C. 7:7A-17.1(a) if the application is for an individual permit. These additional notice requirements for individual permit applications recognize that, because of the more significant potential impacts involved in proposed regulated activities requiring an individual permit, it is appropriate to additionally require notice to the public through newspaper notice to ensure that the notice reaches a larger area.

Finally, it is noted that the public notice requirements contained in the adopted rules have been aligned with similar requirements in the CZM and FHACA Rules to streamline the permitting process. The Department has not observed any confusion in the application of these requirements under the other two rule chapters.

259. COMMENT: Although a seemingly innocuous procedural change in the proposed rules, the alterations to the public notice requirements may lead to unintended environmental impacts by creating loopholes for some linear development projects. For example, notice is not required to be mailed to neighbors within 200 feet of the property for linear projects that do not include aboveground structures. Many projects that pose risk to neighboring properties, such as pipelines, have few or no aboveground structures along their routes. Maintaining the existing public notice requirement is essential for public participation and awareness. (376)

260. COMMENT: Large-scale pipeline infrastructure proposals threaten wetlands and water quality in general throughout the State. Because of the scale and magnitude of the adverse impacts that can result from these massive developments, the Department should not change the notification requirements for such a project from notifying all residents within 200 feet of the project for individual permit applications to notifying only those residents within 200 feet of any proposed aboveground structure associated with the project. Linear projects requiring individual permits may result in negative impacts to property values, as well as the environment even if the structure is below ground. Therefore, property owners adjacent to below-ground structures should not be excluded from receipt of individual notices. Limiting public notice for pipelines shifts the burden from the applicant to landowners who will need to constantly scan newspapers to determine whether projects that may directly impact their ability to enjoy their property have been proposed or are being reviewed by the Department. (160)

261. COMMENT: The notification procedures at N.J.A.C. 7:7A-17.3(c) are unacceptable as they allow major projects, like pipelines, to avoid providing notice to the actual property owners and neighboring property owners of the sites where the line is to be installed. With the current state of newspapers, very few reach the number of people that would require notification of a large

linear project. Newspaper notice should be required in addition to individual notice, as required by the FWPA. (415)

262. COMMENT: At N.J.A.C. 7:7A-17.3(c), this rulemaking eliminates an applicant's obligation to provide notice to property owners for several types of projects, including pipelines longer than one-half mile. To enhance public transparency, notice of the permit application should be provided to property owners when the construction of a pipeline is proposed on their property or in such proximity that the property may be impacted from the construction, allowing them the opportunity to comment. The notice of proposal could leave impacted homeowners in the dark until such time as the project actually begins construction. (319)

263. COMMENT: Public notice should be provided to all stakeholders within 200 feet of a proposed linear development regardless of whether infrastructure is above or below ground. Anything less is unacceptable and blatantly disregards property owners' rights. (84, 222, and 402)

264. COMMENT: For individual permit applications for linear projects, public notice must be provided to all stakeholders within 200 feet regardless of whether infrastructure is above or below ground. Anything less shows an unacceptable disregard for property owners at risk for significant losses, whether real estate, aesthetic, or worse. (179)

265. COMMENT: The change to allow notification of linear projects only to residents within 200 feet of an above-ground structure is opposed. Linear projects can greatly modify property values and can have significant environmental impacts. The process serves to avoid landowner input rather than encourage comments from adjacent property owners. (277)

RESPONSE TO COMMENTS 259 THROUGH 265: The adopted public notice requirements serve to align the public notice requirements in the FWPA Rules with those in the CZM and FHACA Rules. The amendments are not intended to reduce public input.

The prior rules, at N.J.A.C. 7:7A-10.8(f), provided that notice of proposed linear development greater than one-half mile long that did not require an individual permit may satisfy notice requirements to land owners near the proposed disturbance by sending notice to owners of land within 200 feet of any proposed above ground structure (with limited exceptions for things such as suspended conveyance lines or small utility support structures, such as telephone poles) and publishing notice in the newspaper of record for each municipality within the proposed site is located and in a regional newspaper for the affected area. The adopted rules continue to require these forms of notice for applications for linear development greater than 0.5 miles long and apply these notice requirements to several other types of development, provided the regulated activity or project does not require an individual permit. The public notice requirements specified at N.J.A.C. 7:7A-17.3(c) are also not applicable to an application for approval of a mitigation proposal to create, enhance, or restore wetlands, State open waters, and/or transition areas that is not submitted as part of a permit application.

Large linear projects have a broader audience of interested parties and are often of regional concern, which makes newspaper notice in a newspaper in general circulation in the municipality or municipalities in which the project will be located the most appropriate means of public notice. In addition, the Department publishes notice throughout its review of an application in the DEP Bulletin. Notice is provided to a number of county or municipal entities, and an entire copy of the application must be submitted to the municipal clerk in each municipality where the project is proposed. Requiring newspaper notice encourages community

review of projects that may be of interest to the entire community, rather than just individual property owners within 200 feet of the proposed regulated activity.

It is important to note, however, that adopted N.J.A.C. 7:7A-17.3(c) does not apply to applications for individual permits or mitigation proposals not submitted as part of a permit application. Consistent with the FWPA at N.J.S.A. 13B:9B-9a(2), applicants for individual permits must provide notice to all property owners within 200 feet of the site of the proposed regulated activity.

With reference to the suggestion that notice of the permit application should be provided to property owners when the construction of a pipeline is proposed on their property, in order to submit an application, the applicant must have permission or legal authority to perform the regulated activities on the properties subject to the application (see N.J.A.C. 7:7A-16.1(c)). Property owners will already be aware of a planned application for activities on their property before it is reviewed by the Department. Neighboring property owners will be notified in accordance with N.J.A.C. 7:7A-17, either by direct mailed notice or through newspaper notice.

266. COMMENT: N.J.A.C. 7:7A-17.3(e)iii sets out the requirements for the contents of public notice, including that the notice must inform the recipient that comments are due within 15 days of receipt of the notice. This is insufficient time for the public, especially if the Department or municipality requires the filing of an OPRA request to obtain a copy of the application or if an interested third party wishes to hire experts to review it. The Department should allow for at least 60 days unless a public hearing is held. Increasing the time for the public to provide comments will also be consistent with N.J.A.C. 7:7A-19.1(g)1i, which allows a request for a public hearing to be filed within 30 days of the notice. It has been the Department’s practice to allow written

comments for an additional period of time after the close of a public hearing. Extending the public comment period to a reasonable timeframe will increase transparency and allow the public to adequately review the application, hire experts, and provide meaningful comments. (319)

RESPONSE: While the form public notice letter directs recipients to submit information to the Department within 15 days of receipt of the letter, N.J.A.C. 7:7A-19.6(c) establishes a 30-day comment period following the publication of notice of an administratively complete application in the DEP Bulletin. The form notice letter directs submission of comments within 15 days to account for lag time in mail delivery and encourage submission of timely comments. The Department will accept comments on applications for 30 calendar days following the publication of notice in the DEP Bulletin.

267. COMMENT: Notification of applications in the DEP Bulletin is not sufficient. The public must be able to easily find notices online. (346)

RESPONSE: The Department used the DEP Bulletin to provide notification of the receipt of complete applications and the status of applications under the previous FWPA Rules, and similarly utilizes the DEP Bulletin to notify the public of coastal permit and flood hazard area permit applications. The DEP Bulletin is published on the Department's website twice each month and contains a list of construction permit applications recently filed or acted upon by the Department, including applications for permits under the FWPA Rules. The DEP Bulletin is accessible from the Department's website at http://www.nj.gov/dep/ by clicking the "DEP Bulletin" link under the "Information Tools" section of the navigation bar on the left-hand side of the main page. The direct link to the DEP Bulletin page is: http://www.nj.gov/dep/bulletin/index.html. From this page, current and previous issues of the

Bulletin can be viewed, downloaded, and searched. This page also provides the publication dates of future issues of the Bulletin.

COMMENT: The public needs to be given the opportunity to weigh in on proposed projects. (270)

RESPONSE: The robust public notice requirements at N.J.A.C. 7:7A-17 require applicants seeking an authorization under a general permit-by-certification, an authorization under a general permit, a Letter of Interpretation, a transition area waiver, an individual permit, or a major technical modification, to provide public notice of an application to several municipal and county entities and adjacent property owners, and in some cases notice to the community through publication of newspaper notice. The Department additionally provides notice throughout the application process through the DEP Bulletin. N.J.A.C. 7:7A-19.6 provides for a 30-day public comment period on every application following publication of notice of each administratively complete application in the DEP Bulletin.

N.J.A.C. 7:7A-18, Application Fees

268. COMMENT: It is appreciated that the Department is not proposing to increase application fees. (140)

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

269. COMMENT: With the current condition of the State’s budget, the Department should not be waiving fees for any applications. (415)

RESPONSE: It is unclear what fees are being referred to by the commenter. The adopted amendments, repeals, and new rules do not include any provisions about waiving fees. Applications for authorization under general permits 16, 17, and 24 do not require an application fee in the adopted rules as in the prior rules because they authorize activities that are environmentally beneficial or, in the case of general permit 17, have a public benefit and encourage appreciation of nature. Because general permit-by-certification 24 authorizes the same activities as general permit 24, which have an environmental benefit, no fee is charged for an authorization under general permit-by-certification 24.

270. COMMENT: While the fact that the rulemaking does not include any fee increases is supported, the Department is requested to add a fee cap for Letters of Interpretation, similar to how application fees for Waterfront Development permits in the CZM Rules are capped at $30,000. (262)

RESPONSE: Presence/absence, footprint of disturbance, and delineation LOIs all require a flat fee of $1,000. Line verifications require a fee of $1,000 plus $100.00 per acre of the site. Presence/absence LOIs only require the Department to confirm the presence or absence of wetlands anywhere on the site. Footprint of disturbance and delineation LOIs only involve discrete portions of a site not to exceed one acre. Line verification LOIs, however, identify the boundaries of any freshwater wetlands, transition areas, and/or State open waters on an entire site, and the resource value classification of any freshwater wetlands on the site. This type of LOI creates significant work on the part of Department staff that only increases with the size of the site. As opposed to the other LOI types, Department staff time and resources scales directly with the size of the site (which is not limited by the rules) when reviewing a line verification

LOI. The Department believes it is appropriate to continue the current fee structure for letters of interpretation.

N.J.A.C. 7:7A-19, Application Review

General

271. COMMENT: The establishment of specific timeframes to accomplish different LOIs and permit actions is supported. (69)

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

272. COMMENT: The proposed rules do not make it clear that the Department must do an independent study of data, studies, and conclusions submitted by applicants and their consultants in order to determine compliance with the FWPA. The Department cannot defer to, or rely upon, applicants. (179 and 277)

RESPONSE: The Department does not believe it is necessary to include such a clarification in the adopted rules. Department staff review all submitted materials for accuracy and compliance with all applicable provisions of N.J.A.C. 7:7A and, in many cases, conduct site inspections to verify site conditions or other information submitted as part of an application. The Department may also hold a fact-finding meeting on applications for a transition area waiver or individual permit to gather more information before deciding to approve or deny a permit application. The rules make clear that it is the Department, not the applicant, that determines whether any application or permittee action under an issued permit complies with the rules; further reiteration that that is the case is unnecessary.

273. COMMENT: Please clarify that applicants do not have to file an OPRA request to obtain comments submitted by third parties to the Department during the application review process. (140)

RESPONSE: The Department will not require applicants to file an OPRA request to obtain comments on the applicants' own applications. An OPRA request is required to obtain comments submitted on an application not submitted by the one requesting the comments.

General Application Review Provisions (N.J.A.C. 7:7A-19.1)

274. COMMENT: Proposed N.J.A.C. 7:7A-19.1(f) retains the stipulation from existing N.J.A.C. 7:7A-12.1(f), that an applicant is not entitled to assume that an application is approved if they do not receive a response from the Department within the deadlines imposed in this subchapter (which is in contrast to the parallel sections of the CZM and FHACA Rules). This point is restated in N.J.A.C. 7:7A-19.7(d). In such a situation, what recourse does an applicant have? (255)

RESPONSE: While permits issued under the CZM and FHACA Rules are subject to the timeframes of the Construction Permits Law, N.J.S.A. 13:1D-29 et seq., permits under the FWPA Rules are not. While the adopted rules reflect that the Department will make a decision to approve or deny a permit application within the same 90-day timeframe, the Department recognizes that the unique and complex ecology of freshwater wetlands, as well as requirements to consult with the USEPA on some permit applications, and the practical constraints on delineating or verifying freshwater wetlands boundaries that may preclude issuance of an LOI pending a seasonally dependent site inspection, may at times preclude a 90-day review. The Legislature also recognized this fact when not applying the requirements of N.J.S.A. 13:1D-29 et seq., to permit decisions under the FWPA Rules. While all efforts are made to ensure a timely permit review, if application-

specific conditions preclude a 90-day review, the applicant must wait to begin regulated activities until a permit decision has been made. Application review times can be minimized by submitting complete applications that demonstrate compliance with all applicable requirements of the FWPA and providing timely responses to requests for additional information.

275. COMMENT: Please clarify the purpose of N.J.A.C. 7:7A-19.1(c)1, which is unclear given that there is no deemer clause pertaining to the Department's review and approval of applications. (140)

RESPONSE: While the commenter is correct that, with the exception of applications for authorization under general permits 1, 24, and 25, which provide that an application shall be deemed approved if the Department does not act to require further review and/or approve or deny the application within the review deadline, applications under the FWPA Rules cannot be deemed approved without a written authorization or issuance of a permit from the Department, the Department believes that, as part of its effort to align similar requirements and processes in the FWPA Rules, CZM Rules, and FHACA Rules to streamline the permitting process, the rules should reflect that the Department will make every effort to follow the process put in place under the other rules, including making decisions within a 90-day timeframe from the application being deemed complete for review. The Department included the consent to extension provision at N.J.A.C. 7:7A-19.1(c)1, as well as the related provision referencing the possibility of extension of the 90-calendar day target decision deadline at N.J.A.C. 7:7A-19.7(c), to reflect that the Department intends to process permit applications under the three rules in the same manner and with the same goal from a timing perspective. However, as expressly indicated at N.J.A.C. 7:7A-19.7(d), should it not be possible to meet that goal with reference to an application under

the FWPA Rules, the rules make clear that no regulated activity may proceed without Department approval.

276. COMMENT: Since there is no N.J.A.C. 7:13-19.7(c) in the FHACA Rules as published on the Department's website, should the provision at N.J.A.C. 7:7A-19.1(c)1 refer to N.J.A.C. 7:7A-19.7(b)? (140)

RESPONSE: The commenter is correct that the notice of proposal included a typographical error, which resulted in the reference being to the FHACA Rules, N.J.A.C. 7:13, when the reference was intended to be to the FWPA Rules, N.J.A.C. 7:7A. However, while there is no N.J.A.C. 7:7A-19.7(c) in the FHACA Rules, that is the correct reference within the FWPA Rules. This citation is corrected on adoption.

277. COMMENT: There are no standards provided for the Department to determine when a revised application so substantially differs from the original application that the public notice process must be repeated. There should be restrictions on what kind of information applicants can submit on a rolling basis without officially declaring an application "revised." (277)

RESPONSE: Under N.J.A.C. 7:7A-19.1(c), any revisions to an application during the review period must be sent to the municipal clerk of each municipality in which the site is located and an applicant must provide notice of the changes to any recipients of the original public notice whom the Department determines would likely be affected by the revised application. There is no determination that differentiates between information and an "official" revision.

278. COMMENT: Applications should not be received on a rolling basis. (84, 179, 222, and 402)

RESPONSE: By receipt of applications on a rolling basis, the Department assumes the commenters are referring to accepting and reviewing applications when they are submitted, rather than designating specific dates or deadlines for the acceptance of applications. The acceptance of applications on a "rolling" basis is not a new procedure and has always been the Department's process for reviewing proposed activities in freshwater wetlands, transition areas, and State open waters. It is necessary to receive applications on a rolling basis to ensure a manageable workload for Department staff and best serve the regulated public. Designating a specific period in which the Department will accept applications each year would inconvenience applicants and overwhelm the current staffing levels of the Department during the review period. In such an arrangement, the target 90-day permit review timeframe would be virtually impossible to observe.

279. COMMENT: Public review for an application should only begin after the Department deems the application complete for review under the statute. (84, 179, 222, and 402)

280.COMMENT: While it is appropriate to have a clear definition of "complete for review" to define when the Department will begin to review an application to determine if the proposed project could meet the requirements of the FWPA, determining an application is "complete for review" should be the trigger for the beginning of the public's review and the comment period. It is unreasonable to allow the public comment period to begin prior to having an application that the Department itself deems "reviewable." Publishing notice of each administratively complete application only exacerbates the current issue of the comment period closing before the public can review a complete application. (277)

RESPONSE TO COMMENT 279 AND 280: While the FWPA Rules prescribe a standard 30-day comment period starting from the publication of an administratively complete application in the DEP Bulletin, N.J.A.C. 7:7A-19.6(d) specifies that the Department may exercise its discretion by accepting comments after the close of the 30-day comment period. Where a significant revision is made to an application after notice of the administratively complete application has been published in the DEP Bulletin, that would be taken into consideration by the Department in determining whether to accept comments that would otherwise be considered late in accordance with N.J.A.C. 7:7A-19.6(d). In addition, N.J.A.C. 7:7A-19.1 requires any revisions to an application to be sent to the municipal clerk of each municipality in which the site is located and requires the applicant to provide notice explaining the revisions to any person listed at N.J.A.C. 7:7A-17.3(b) whom the Department determines would likely be affected by the revised application.

281. COMMENT: While replacing the extensive and cumbersome requirements for a public hearing on an application with the provision that interested persons may request a “fact-finding meeting” is supported, the Department should provide, in N.J.A.C. 7:7A-19.1(g), a basic procedure that the Department will follow in scheduling and conducting fact-finding meetings, and an explanation of how the outcome of such meetings may affect applicants. (255)

282. COMMENT: The Department is proposing to transform the public hearing process into a fact-finding meeting in violation of the Clean Water Act. Under the Act, the public hearing process requires the Department to provide a forum for the “exchange of views,” which is more expansive than allowing the public to provide facts. The Department should not be restricting this exchange of views as proposed. (319 and 328)

283. COMMENT: “Fact-finding meetings” are meant to exclude the public from the Department decision-making. All meetings that are held by the Department should be open to the public. In addition, while the Department states that documents of interest are available for review, getting these documents can take years. (346)

284. COMMENT: The proposed rules allow the Department to hold fact-finding meetings instead of public hearings. Public hearings are defined in the existing rules at N.J.A.C. 7:7A-1.4 (proposed N.J.A.C. 7:7A-1.3) and regulated as per the New Jersey Administrative Code. Fact-finding meetings, however, are not defined or described in the notice of proposal. Therefore, it is unclear whether these meetings will reach the public involvement standard set by public hearings, which are essential to capture the opinions and concerns of New Jersey residents. Removing this well-established practice poses a serious threat to the transparency and accountability of the Department. (160 and 376)

285. COMMENT: Does the Department have jurisdiction to replace the USEPA hearing with a fact-finding meeting? (160)

286. COMMENT: The proposed rule changes should be withdrawn. The Department should not act in haste and enact changes, including providing for rushed reviews and discouraging meaningful public input, that will jeopardize environmental security, especially without fully evaluating the potential consequences of the host of pipeline proposals that threaten wetlands, streams, and groundwater, which are all integral components to the State’s drinking water system. Pipeline projects carry a lot of risk, and strong regulatory review, including peer review, is essential to preventing environmental damage from pipelines. Abbreviating public hearings to undefined fact-finding meetings raises questions about the quality of public involvement that is an essential part of a robust project review. Citizens might feel disenfranchised without the

ability to provide meaningful comments from the beginning of any permit review process, especially one as potentially harmful to them as a pipeline proposal. (84)

287. COMMENT: When performing a Google search for the proposed changes to this rule, the only reference appeared on a consultant's website. It will be even more difficult for the public to find out about relatively private fact-finding meetings as opposed to public hearings. (179)

RESPONSE TO COMMENTS 281 THROUGH 287: As indicated in the notice of proposal Summary, fact-finding meetings will serve the same basic purpose as what was provided by public hearings under the prior rules; they will provide a forum for the exchange of information and ideas related to the issue(s) to be addressed at the meeting. The factors considered in determining whether a fact-finding meeting will be held remain essentially the same as the factors considered in determining if a public hearing should be held under the prior rules. Specifically, prior N.J.A.C. 7:7A-12.4(b) and adopted N.J.A.C. 7:7A-19.1(g)1 both specify that a public hearing/fact-finding meeting is not necessary for the Department to issue or deny an individual permit or transition area waiver, but that a public hearing/fact-finding meeting will be held if the Department determines that there is a significant degree of public interest in the application, as manifested by written requests for a public hearing/fact-finding meeting within the 30 day hearing/meeting request period (considering whether the issues raised in the requests are relevant to the review of the application), or a public hearing/fact-finding meeting is requested by the USEPA. Further, the prior rules provided that a public hearing will be held if the Department determines that the public interest would be served by holding a hearing. The adopted rules similarly factor in public interest by providing that a meeting will occur if the Department determines, based upon either public comment received or its own review of the scope and potential environmental impact of the proposed project, that additional information is

necessary for the evaluation of the potential impacts of the proposed project, which can only be obtained through a fact-finding meeting. Finally, the timing within which a fact-finding meeting may be requested is the same 30-day period provided for request of a public hearing under the prior rules. Accordingly, it is not anticipated that the change from public hearings to fact-finding meetings will have a significant impact on the number or content of the meetings held under the adopted rules as compared to the prior rules.

As indicated in the notice of proposal Summary, fact-finding meetings will serve the same purpose as the prior public hearings, but will accomplish that purpose through a simpler and more efficient process. The Department will invite the public to attend, will note comments received and consider them in the review of the application. Rather than require the applicant to mail notice of the public hearing and publish a display advertisement, the Department will notify the public of the planned meeting through its website, which may reach a wider segment of the public. Placing the responsibility for notifying the public with the Department rather than applicants ensures a more streamlined process for both the applicant and the Department while providing for the same or better opportunity for the public to speak on an application. The fact-finding meeting also provides a less formal setting for the Department to consider public comments than a public hearing, as Department staff can ask commenters clarifying questions to ensure that they understand the issues and concerns raised. There is also no court reporter required for a fact-finding meeting, saving the applicant and the Department resources. The Department's notes of what was discussed at the fact-finding meeting, as well as any written comments received on the application, will be kept in the application file maintained by the Department. The previous provisions regarding timing and other requirements for public hearings were deleted to allow more flexibility for holding fact-finding meetings.

The adopted changes align the permit review processes of the FWPA Rules with those of the CZM Rules and FHACA Rules and are not intended to exclude the public from the permitting process. In addition to holding fact-finding meetings, where appropriate, the Department will also accept written comments from the public on any application for at least 30 days following the publication of the notice of the application in the DEP Bulletin. To facilitate public review of applications, applicants are required to send a complete copy of the application to the municipal clerk of each municipality in which the proposed project is located, and applications are made available for public review in the Department's Trenton office. Between holding fact-finding meetings, where appropriate, and accepting written public comments, the Department believes that the public continues to have the opportunity to provide meaningful comment and information concerning applications received under the FWPA Rules.

Completeness Review (N.J.A.C. 7:7A-19.2)

288. COMMENT: Proposed N.J.A.C. 7:7A-19.2(a) through (g) are concerning because they reduce oversight of the regulated community. Determination of "completeness" of an application should only be provided to a complete application and not automatically after 20 days. (125)

RESPONSE: The adopted completeness procedures are intended to align the permitting process in the FWPA Rules with that in the CZM and FHACA Rules to the extent the enabling statutes allow. The prior rules, at N.J.A.C. 7:7A-12.1(a), established a 20-working-day period to determine administrative completeness. The adopted rules, at N.J.A.C. 7:7A-19.2(b), continue the 20-working-day review period specified in prior N.J.A.C. 7:7A-12.1(a), amending the prior subsection to clarify when the 20-working-day period begins. The 20-working-day timeframe for administrative completeness is designed to catch major issues, such as a lack of site plans or an

application for the wrong type of permit, early in the process to allow the Department and the applicant to avoid wasted time and resources.

While the completeness procedures in the FWPA Rules reflect the Department intention to conduct its application review within the timeframes provided by the rules, N.J.A.C. 7:7A-19.7(d) makes clear that, even if an application is complete for review, in no case will an applicant be able to take any action without final Department approval (similar to prior N.J.A.C. 7:7A-12.1(f), which provides that non-response by the Department shall not be considered Department approval of the application). Accordingly, the adopted procedure does not reduce oversight but ensures timely review of the administrative aspects of an application to streamline the permitting process and allow applicants timely notice of missing components of an application. However, the Department retains ultimate authority to determine whether a proposed regulated activity complies with the FWPA Rules and will only authorize those projects that do comply with the rules.

289. COMMENT: The rulemaking cuts the review period for an individual permit in half, from 180 days to 90 days, which may not be sufficient to conduct a thorough analysis. The Department should not rush review of complex wetland development projects that could threaten New Jersey's irreplaceable water resources. (7, 34, 58, 72, 84, 96, 113, 150, 152, 155, 156, 158, 160, 164, 179, 184, 186, 203, 211, 214, 222, 245, 247, 250, 270, 277, 278, 279, 313, 317, 323, 333, 357, 367, 368, 378, 398, 402 419, 420, 436, and 453)

290. COMMENT: The proposed amendments to shorten the application review timeframe fail to recognize that much of the delay in environmental permitting review is due to an applicant's failure to submit a complete application. The rulemaking states that if the Department fails to

respond in a timely manner, the application will be deemed complete for review by default, which will lead to the Department having to reject more applications for their failure to demonstrate that the legal standards of the Freshwater Wetlands Protection Act and the Clean Water Act have been met. The burden of proving avoidance and minimization, as well as the burden of overcoming the presumption that there are better ways to construct pipelines that do not threaten New Jersey's water resources should belong to the applicant. A rule should not be passed that will pressure the Department to expedite a review. (160)

291. COMMENT: While the timeframe reductions for review and approvals will be helpful to applicants, the Department must have enough staff to implement all requirements and avoid approvals based on limited staff time and not on environmental protection, fairness, and consistency with the Clean Water Act. The purpose of the Clean Water Act is not to expedite wetlands destruction and water quality degradation, but to protect water quality. Strict time limits circumvent Federal laws to the permanent detriment of environmental and human health. (431)

RESPONSE TO COMMENTS 289 THROUGH 291: The adopted review time aligns the permitting procedures in the FWPA Rules with those in the FHACA and CZM Rules to the extent the enabling statutes allow and does not violate the Clean Water Act. In most cases, an application submitted under the FWPA Rules can be reviewed within the same 90-day timeframe as other types of permit applications. Department staff routinely complete freshwater wetlands permit reviews within a 90-day review period when those applications are submitted concurrently with a flood hazard or coastal permit application. Accordingly, the Department does not anticipate difficulty or pressure to expedite a review because of standardizing the review period. However, while the FHACA and CZM Rules allow an applicant to presume that

an application is approved if the Department does not provide a written approval or denial within the 90-day review period, the FWPA Rules do not (see N.J.A.C. 7:7A-19.7(d)). The FWPA does not provide for this presumption in recognition of the unique and complex ecology of freshwater wetlands. In the rare cases that a 90-day review period is not sufficient, Department staff may take longer to review an application without the application being automatically approved.

292. COMMENT: The rules should clarify that an application cannot be deemed administratively complete without a full environmental report, including the alternatives analysis, as the existing rules do. The proposed rules do not clearly state whether an application without an alternatives analysis would be administratively complete or whether the category of administrative completeness has been reduced to a "check the box" application sheet. (277)

RESPONSE: The Department assumes the commenter is referring to the requirement at prior N.J.A.C. 7:7A-10.6(b) that an alternatives analysis be reflected on the application checklist for an individual freshwater wetlands or open water fill permit as a required component of an individual permit application. The adopted rules continue the requirement to submit an alternatives analysis at N.J.A.C. 7:7A-16.9(b)4v with the alternatives analysis being part of the environmental report required to be submitted as part of all applications for an individual permit. As a required component of an individual permit application, the environmental report, including the alternatives analysis, will be listed on the individual permit checklist. In accordance with the definition of the term at N.J.A.C. 7:7A-1.3, "administratively complete" means that every item required on the application checklist for a letter of interpretation or permit being sought is included in the application. By including the environmental report on the checklist for an individual permit application, the Department will continue to require an alternatives analysis for

an application to be considered administratively complete. Once an application is deemed administratively complete, the Department will review the application for technical completeness.

293. COMMENT: The rulemaking extending an applicant's time to provide necessary information for technical review from 30 days to 90 days allows applicants to submit poor, incomplete applications while providing an unreasonable grace period to correct their mistakes. (179 and 277)

RESPONSE: The adopted rules do not provide a blanket 90-day period for additional information to be submitted when an application is technically incomplete. N.J.A.C. 7:7A-19.2(b) provides that, when an application is administratively complete but technically incomplete, the Department will "issue notification to the applicant in writing that the application is technically incomplete. This notification shall specify the additional information required and the deadline by which the information must be submitted." N.J.A.C. 7:7A-19.2(e) establishes 90 days as the deadline for providing additional information if an alternate deadline is not specified in the Department's request. The time to submit additional information on a technically incomplete application is ultimately up to the Department project manager's discretion depending on the type and amount of information required and other extenuating circumstances. For example, if additional information on the soils on the site is necessary, but the ground is frozen, this may be reflected in the timeframe established by the Department to submit the additional information. If the required additional information is simple to produce, the Department may establish a timeframe shorter than 90 days.

294. COMMENT: The proposed rules weaken environmental protection by constricting the Department's time to review applications and increasing applicants' ability to submit incomplete applications for ill-conceived projects and then claim "hardship" as they invest additional time and resources on potentially damaging projects. (179 and 277)

RESPONSE: Nowhere in the adopted rules does the Department consider an applicant's own failure to provide a complete application a hardship. Under N.J.A.C. 7:7A-19.2(e), failure to timely submit additional information requested by the Department is cause for the Department to cancel an application unless an applicant demonstrates good cause for the delay. Good cause may include a delay in obtaining requested information on soils because the ground is frozen, making samples difficult to obtain, or personal extenuating circumstances on the part of the applicant. Good cause does not include an applicant's inadequate planning or research into a site. Furthermore, the 90-day review timeframe does not begin before an application is complete for review. An application declared technically incomplete is not "on the clock" until all necessary information is submitted to the Department. When all required information is provided, the Department will then declare the application complete for review as of the date the additional information was received (see N.J.A.C. 7:7A-19.2(b) and (c)). In cases where the Department does not act within the 20-working-day timeframe to determine completeness, an application may be deemed "complete for review" but, as explained in the Response to Comment 288, even if an application is complete for review, in no case will an applicant be able to take any action without final Department approval. However, the Department strives to make completeness determinations within the 20-working-day timeframe (as is the case in the CZM and FHACA Rules) to ensure incomplete applications are not declared "complete for review."

Department Review and Decision for Authorization for Maintenance of a Stormwater Management Facility under General Permit 1 and Repair of a Malfunctioning Individual Subsurface Sewage Disposal System under General Permit 24 (N.J.A.C. 7:7A-19.3)

295. COMMENT: N.J.A.C. 7:7A-19.3(a)1 and (b) seem to conflict and should be clarified. Under N.J.A.C. 7:7A-19.3(a)1, the Department determines the application is administratively and technically complete and declares the application complete for review. Why is the decision-making process described under N.J.A.C. 7:7A-19.3(b) prefaced with "If the application is administratively complete …," if under N.J.A.C. 7:7A-19.3(a)1, a higher-level declaration has already been made? In addition, later in the paragraph, the statement "If the Department does not so notify the applicant …" is not logical since a declaration (that is, notification) of completeness has already been provided under N.J.A.C. 7:7A-19.3(a)1. (255)

RESPONSE: The completeness review under N.J.A.C. 7:7A-19.3(a) may result in one of two determinations; either the application is both administratively and technically complete (the finding under paragraph (a)1 referenced by the commenter) or the application is not administratively and technically complete. As indicated in N.J.A.C. 7:7A-19.3(a)2, if the Department notifies the applicant of deficiencies prior to the expiration of the 20-day completeness review period, the subsequent 30-day review period provided to determine if the proposed activity has been authorized does not begin to run. The introductory clause of N.J.A.C. 7:7A-19.3(b) cited by the commenter reading "if the application is administratively complete" only serves to make clear that the 30-day timeframe to decide to approve or deny an application applies only to an application that is complete, whether by determination by the Department or by default via the Department's lack of notification to the contrary.

In accordance with N.J.A.C. 7:7A-19.3(b), in contrast to other applications under the FWPA Rules, which are not deemed approved if the Department is unable to reach a permit determination within the time specified in the rules (see N.J.A.C. 7:7A-19.7(d)), an application for authorization under general permit 1 or general permit 24 is deemed approved if the Department does not act within the specified time to either deny the application or advise the applicant that the activities may be authorized, but require a full application review in accordance with N.J.A.C. 7:7A-19.2. The later statement "If the Department does not so notify the applicant" in N.J.A.C. 7:7A-19.3(b) refers to the notification references in the previous sentence of that subsection; that is, the notification that the activities are not authorized under general permit 1 or general permit 24, or that the activities may be authorized but require a full application review under N.J.A.C. 7:7A-19.2, not the notification of the completeness or incompleteness of the application at N.J.A.C. 7:7A-19.3(a).

Cancellation of an Application (N.J.A.C. 7:7A-19.8)

296. COMMENT: The proposed rules fail to clarify the standards for when the Department will accept a "good cause" explanation to the criteria for cancelling an application. The Department should clarify that the failure to obtain authorization to do the work subject to the permit is not good cause, nor is the failure to survey and collect data. (277)

RESPONSE: The Department has not listed what may constitute "good cause" to avoid implying that good cause only includes one of a few examples and to avoid implying that circumstances that constitute good cause for a delay in providing information in one instance will always be considered good cause for delay in all instances. This provision is intended to provide common sense flexibility for unforeseen circumstances beyond the applicant's control.

N.J.A.C. 7:7A-20, Permit and Waiver Conditions; Modification, Transfer, Suspension, and Termination of Authorizations and Permits

Conditions that Apply to all Permits (N.J.A.C. 7:7A-20.2)

297. COMMENT: The list of conditions for permits is incomplete. All conditions specified in the FWPA should be listed, including the following: (1) Will not cause or contribute to a violation of any applicable State water quality standard; (2) Will not cause or contribute to a violation of any applicable toxic effluent standard or prohibition imposed pursuant to the "Water Pollution Control Act," P.L. 1977, c. 74 (N.J.S.A. 58:10A-1 et seq.); (3) Will not violate any requirement imposed by the United States government to protect any marine sanctuary designated pursuant to the "Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. §§ 1401 et seq.); and (4) Will not cause or contribute to a significant degradation of ground or surface waters. (415)

RESPONSE: The conditions that apply to all permits are conditions that apply to the activities and permittee after the permit is issued. The requirements listed by the commenter are included in the requirements that must be satisfied in order for an application to qualify for an individual permit at N.J.A.C. 7:7A-10.2. Furthermore, under N.J.A.C. 7:7A-20.3(b)2, 3, and 4, each permit issued by the Department shall include provisions ensuring that the regulated activity will be conducted in compliance with the findings and/or environmental guidelines issued under section 404(b)(1) of the Federal Act at 40 CFR Part 230, the Freshwater Wetlands Protection Act, and this chapter, including conditions to ensure that the regulated activity shall be conducted in a manner that minimizes adverse impacts upon the physical, chemical, and biological integrity of the waters of the United States and/or waters of the State, such as requirements for restoration or mitigation; any requirements necessary to comply with water quality standards established under

applicable Federal or State law; and requirements necessary to comply with any applicable toxic effluent standard or prohibition under section 307(a) of the Federal Act or applicable State or local law. Under N.J.A.C. 7:7A-2.2(b), the discharge of dredged or fill material into State open waters is regulated under the FWPA Rules (or, if in a non-delegable State open water subject to the Waterfront Development Law, regulated under the CZM Rules). If the discharge of dredged or fill material is permitted under the FWPA Rules, the Department has already made the determination that the activity complies with the laws listed by the commenter prior to issuing the permit. Further, if an applicable water quality standard or toxic effluent standard is promulgated after a permit is issued, N.J.A.C. 7:7A-20.3(b)3 and 4 require the Department to modify the applicable permit to ensure compliance with such standards.

Extension of an Authorization under a General Permit, a Transition Area Waiver, and an Individual Permit (N.J.A.C. 7:7A-20.4)

298. COMMENT: Permits should be required to be renewed more frequently to allow for inspection of any damage caused by a project. (354)

RESPONSE: In accordance with N.J.A.C. 7:7A-20.2(c)27, the Department's Bureau of Coastal and Land Use Enforcement must be notified at least three days prior to a permittee commencing regulated activities under the FWPA Rules. This notification ensures that the Department is aware that activities are occurring and allows staff to inspect the site and activities being conducted to evaluate compliance with the permit or authorization. In addition to the Department receiving notice of the commencement of activities, the rules at N.J.A.C. 7:7A-20.2(c)5 require a permittee to prevent, minimize, or correct any adverse impact on the environment resulting from activities conducted pursuant to the permit, or from noncompliance with the permit, while

N.J.A.C. 7:7A-20.5(c)6 requires a permittee to inform the Department of any unanticipated adverse effects on the environment not described in the application or in the conditions of the permit. N.J.A.C. 7:7A-20.2(c)7 requires a permittee to immediately notify the Department of any noncompliance that may endanger public health, safety, and welfare, or the environment. Additional protective conditions may be added to a permit in accordance with N.J.A.C. 7:7A-20.3. Failure to comply with any of the above-listed permit conditions will subject the applicant to enforcement action under N.J.A.C. 7:7A-22. These requirements provide the Department with sufficient opportunity to inspect a site and remain aware of what is occurring under the permit or authorization without the need for more frequent permit renewals.

299. COMMENT: The Department is proposing to remove the requirement that permittees requesting extensions of general permit authorizations and transition area waivers demonstrate that the rules governing the activities have not been amended without any data or studies to support the change. This rulemaking defies logic, because if the rules governing the activities have been amended, they would be amended upon a finding that the rules were not sufficiently protective of resources. (277)

300. COMMENT: When requesting a five-year permit extension, the applicant should continue to have to bear the burden of demonstrating that the rules governing the regulated activity have not changed. (84, 179, 222, and 402)

RESPONSE TO COMMENTS 299 AND 300: Rule amendments may be adopted for a wide variety of reasons, and are not always in response to a finding that the prior rules were not sufficiently protective of resources. For example, the amendments, repeals, and new rules adopted herein are primarily focused on aligning the administrative requirements in the FWPA

Rules with those in the CZM and FHACA Rules and creating consistent structure and organization across the three chapters. None of the changes adopted were in response to a finding that the prior rules were not sufficiently protective. The adopted amendments at N.J.A.C. 7:7A-20.4 align the extension request process in the FWPA Rules with that of the CZM and FHACA Rules to create consistency across the land use rules and to better accommodate situations in which areas regulated by more than one rule chapter overlap. While the rules continue to require the applicant to make the demonstration referenced by the commenter in an application for extension of an individual permit, because of the types of activities governed by general permit authorization and transition area waivers and existing strict standards applicable to these approvals, which ensure that authorized activities have only minimal impacts, such a showing is not necessary in this context. Particularly, in accordance with N.J.A.C. 7:7A-5.2, general permits will only be promulgated if the Department determines that the regulated activities will cause only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment, and will cause only minor impacts on freshwater wetlands and State open waters. Because of the limited impact allowed for an activity to qualify for these types of authorization, the Department has determined that a previously authorized activity should be allowed to continue under an extension for one additional five-year period provided it is demonstrated that the regulated activity has not changed from that originally authorized by the Department and there has been no significant change in the overall condition of the site. In contrast, because the potential impacts of individual permit activities are greater and activities/projects more complex, the rules, at N.J.A.C. 7:7A-20.4(b)4, continue to require applicants to demonstrate that the rules in this chapter governing the regulated activities authorized under the permit for which an extension is sought have not been amended such that

the activities do not meet the rules as amended. This is required because the potential environmental impacts of not holding individual permit activities to a new standard are potentially severe.

301. COMMENT: The existing rules provide for five-year extensions on some permits, provided the permittee proves there was no significant change in: the project and activities; the rules governing the site; and the site conditions, including wetlands boundary and resource classification. This rulemaking simply states that the Department has determined, via its experience, that a five-year extension is appropriate for most permits based on its observation that site conditions generally did not change significantly over time where activities were approved under freshwater wetlands individual permits that were subsequently extended. The Department's assertion that no harm will result from providing extensions for most permits does not appear to be based on any data, analyses, or studies. It is also unclear from the notice of proposal whether public notice must be provided for an extension. It appears that public notice will not be required for an extension; if this is the intent, the change should not be adopted to allow meaningful public comment on extension applications. (277)

RESPONSE: The demonstrations that must be made by the person requesting an extension, and confirmed by the Department, ensure that approving a five-year extension will not have an adverse environmental impact. The Department made a finding, by approving the original application, that the regulated activities complied with all applicable provisions of the FWPA Rules and the FWPA. If the site conditions and regulated activities have not changed from the time the Department approved the application, extending the term of the permit is not likely to have effects that are different from those originally evaluated by the Department. Public notice is

not required for an extension. Public notice was provided as part of the original permit application. For the Department to approve an extension request, the activity and site need to have remained the same as those identified in the individual permit.

302. COMMENT: The proposed duration of an authorization under a general permit is concerning. The term of a general permit is defined as five years, with the possibility for one five-year extension, without a required site condition review. The proposed change to remove the requirement for site condition review would allow for a 10-year general permit in freshwater wetlands, which would compromise the ability of communities to develop comprehensive land use policies that include consideration of cumulative environmental impacts of development while flexibly addressing community-related goals such as environmental justice, safety, meeting Federal stormwater (MS4) requirements, economic development, and improved air quality. (125)

RESPONSE: It is unclear what provision is interpreted as removing the need for review of site conditions before a permit or authorization may be extended. The extension provisions at N.J.A.C. 7:7A-20.4(b) reorganize the demonstrations previously codified at N.J.A.C. 7:7A-14.6(b) that must be made by the permittee in order to receive an extension. N.J.A.C. 7:7A-20.4(b)2 requires the person requesting the extension to demonstrate “that there has been no significant change in the overall condition of the site.” This requirement replaces the requirement at prior N.J.A.C. 7:7A-14.6(b)2iii that the permittee demonstrate “that there has been no significant change in … the conditions on the site, including the wetlands boundary and resource classification.” As stated in the notice of proposal Summary at 49 N.J.R. 866, the proposed extension requirements now codified at N.J.A.C. 7:7A-20.4(b)2 “reorganize and clarify the existing requirements at N.J.A.C. 7:7A-14.6(b)2, 2i, 2ii, and 2iii.” While the examples of site

conditions that must be addressed by the applicant were not continued in the rule text because the wetlands boundary and resource classification are only part of what must be addressed, the demonstration required under N.J.A.C. 7:7A-20.4(b)2 continues to include site conditions such as the wetlands boundary and resource classification. To reinforce the continuation of this requirement, the Department is changing N.J.A.C. 7:7A-20.4(b)2 on adoption to clarify that the "overall condition of the site" referenced there continues to include, among other things, the wetlands boundary and resource value classification, consistent with prior N.J.A.C. 7:7A-14.6(b)2iii.

303. COMMENT: The proposed amendments at N.J.A.C. 7:7A-20.4 appear to be a positive change in that they allow some flexibility for an extension when it is determined that the "overall condition of the site" has not changed, in contrast to the existing rules that provide that there be no changes to the conditions on the site, including wetlands and resource value. However, the Department needs to clarify how it will determine that the "overall condition" has not changed. (140)

RESPONSE: Consistent with prior N.J.A.C. 7:7A-14.6(b)2iii, which included as examples of "conditions of the site" that must be addressed by an applicant for an extension of a permit or authorization the wetlands boundary and resource classification, the "overall condition of the site" in N.J.A.C. 7:7A-20.4(b)2iii is intended to include among the site conditions that must be addressed in an applicant's demonstration of no significant change in wetlands boundaries and resource value classification. Wetlands boundary and resource classification information is critical in the Department's review of any application, but other changes in conditions on the site can also be important in determining if the analysis that originally concluded the regulated

activity complied with the rules is still applicable and the regulated activity continues to qualify for the previously granted permit or authorization. Other site conditions that may need to be addressed include changes in vegetation or changes in a State open water's designation under the Surface Water Quality Standards. Ultimately, the conditions that need to be evaluated depend on the characteristics of a particular site. Accordingly, an all-inclusive list of site condition factors that must be analyzed in each case is not possible.

The change in language reflected in N.J.A.C. 7:7A-20.4(b)2iii is intended only to align the requirements of the FWPA Rules with the CZM and FHACA Rules; it neither expands nor reduces the demonstration that must be made by an applicant for an extension. As discussed in the Response to Comment 302, the Department's analysis of the demonstration provided by an applicant for an extension will be the same under the adopted rules as it was under the prior rules. Both under prior N.J.A.C. 7:7A-14.6(b)2 and adopted N.J.A.C. 7:7A-20.4(b)2, the applicant must demonstrate to the Department's satisfaction that there has been no significant change in conditions on the site or the overall condition of the site; the prior rules did not limit the potential for an extension being approved to only where there has been no change in any site condition.

As indicated in the Response to Comment 302, the Department is changing N.J.A.C. 7:7A-20.4(b)2 on adoption to make clear that the demonstration regarding changes in the condition of the site that must be made for an extension of a permit or authorization to be granted continues to include the wetlands boundary and classification of any wetlands impacted by the regulated activity.

304. COMMENT: The current rules require an applicant to apply for an extension 60 or 30 days prior to the expiration of an individual permit or general permit authorization, while the proposed rules allow activities under a permit to continue past the original expiration date pending a decision on an extension. The proposed change allows permittees to extend the term of their permits by default, while the Clean Water Act assumption provisions limit permit terms to five years. For activities to continue pending an extension decision, the applicant should be required to demonstrate hardship circumstances outside of the applicant's control that made it impossible for the applicant to know an extension would be necessary and that rendered the applicant unable to timely apply for an extension rather than adopt a global change to address what should only be very rare circumstances. (277)

RESPONSE: The proposed amendments concerning permit durations and extension requests were intended to align the permitting process in the FWPA with the processes in the FHACA Rules and CZM Rules where appropriate. However, upon further consideration, the Department has determined that review and approval of any extension of regulated activities past the original permit term under the FWPA Rules should occur prior to the expiration of the original approval with regulated activities to cease upon expiration of the original permit or authorization if an extension has not yet been granted. Accordingly, the Department is not adopting the proposed amendment that would have allowed regulated activities to continue during Department review past the original expiration date and the rules will continue to require requests for extension to be filed far enough in advance of the expiration date to allow Department review to be complete before expiration of the original approval, consistent with the rules prior to this adoption.

Transfer of an Emergency Authorization, Authorization under a General Permit, or an Individual Permit (N.J.A.C. 7:7A-20.5)

305. COMMENT: The automatic permit transfer amendments at N.J.A.C. 7:7A-20.5(a), which are consistent with the CZM and FHACA Rules, are supported. (140 and 255)

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

Modification of an Authorization under a General Permit, a Transition Area Waiver, or an Individual Permit (N.J.A.C. 7:7A-20.6)

306. COMMENT: The proposed amendments to N.J.A.C. 7:7A-20.6(c) and (d) are supported as they allow for project design changes to be considered as minor technical modifications. (140)

RESPONSE: The Department acknowledges this comment in support of the rules. With reference to N.J.A.C. 7:7A-20.6(c), the Department notes that administrative modifications allowed under that subsection are only those that do not alter the design or layout of the project or affect the wetland limits. Specific minor technical modifications that may result in a change in the design or layout of a project are allowed under N.J.A.C. 7:7A-20.6(d). Similar to administrative modifications under N.J.A.C. 7:7A-20.6(c), qualifying minor technical modifications are limited to those that do not create additional wetland impacts.

307. COMMENT: The changes to the types of permit modifications are confusing and may substantially weaken wetlands protections. The requirements for administrative modifications do not contain critical language requiring the applicant to document or certify that such changes do not materially affect the project's design or impacts. For example, the rule allows applicants to request an administrative modification based on new data that would make the permit more

accurately reflect the site, extent of regulated areas, and/or permitted activities, but fails to state that if such data increases impacts over those of the original permit, it cannot be considered an administrative modification. (277)

RESPONSE: The types of permit modifications provided for in the rules are intended to establish procedures for different types of modifications that reflect the relative significance of the modification, which affects the amount of information that must be submitted to the Department in support of the request for approval of the modification and whether public notice of the modification is necessary. Concerning administrative modifications, N.J.A.C. 7:7A-20.6(c) specifies that an administrative modification is a change that "does not alter the design or layout of the project or affect the wetland limits." The example provided by the commenter of a permit where new data results in an increase in the amount of disturbance over the original permit would, therefore, not be considered an administrative modification.

308. COMMENT: The proposed rule removes the existing requirement for minor technical modifications that changes to materials or construction techniques must be required by another permitting agency to qualify in this category. (277)

RESPONSE: Whether changes to construction techniques or materials (that, as required by N.J.A.C. 7:7A-20.6(d), do not result in new or additional impacts to the wetland or transition area) are required by another permitting agency or not has no effect on the relative significance of the modification or the potential environmental impact of the change in the proposed regulated activity. The adopted rules, therefore, do not require consideration of whether changes to materials or construction techniques are required by another permitting agency when reviewing a request for a minor technical modification.

309. COMMENT: The proposed minor technical modification category includes changes in the size, shape, or location of the regulated activities or project provided the total area of disturbance does not increase. This amendment does not take into account the type of wetland being disturbed, which can result in conflicts with other sections of the rules. For example, general permit 2 does not count impacts to emergent wetlands as permanent disturbance, but would consider impacts to forested wetlands permanent disturbance. To avoid such conflicts, project changes in this category should be vetted by the public under notice and comment provisions. Unfortunately, administrative and minor technical modifications are excluded from public notice requirements. (277)

RESPONSE: The situation identified by the commenter does not cause any conflicts in implementing the rules. The “total area of disturbance” includes both permanent and temporary disturbance. While general permit 2 establishes a 0.5-acre limit for permanent disturbance (which does not include temporary impacts to emergent wetlands that do not alter the character of the existing wetland), it also requires minimization of temporary disturbance. N.J.A.C. 7:7A-20.6(d) defines a minor technical modification as “a change in the design or layout of a project, including any associated change to an approved site plan or other document, that the applicant demonstrates does not result in new or additional impacts to the wetland or transition area.” While increases in temporary disturbance do not affect the “total disturbance” calculated for assessing compliance with the requirements of general permit 2, the applicant must demonstrate that a minor technical modification does not result in new or additional impacts, which are not limited only to permanent disturbance. Under N.J.A.C. 7:7A-20.6(c), an administrative modification includes changes that do not alter the design or layout of a project at all.

Because, by definition, administrative and minor technical modifications do not increase the environmental impact of a proposed activity, the Department will not impose the time and expense of additional public notice on an applicant.

310. COMMENT: While there is a separate provision establishing that the Department will determine if a proposed modification in any of the three categories will have significant adverse environmental effects and require a new permit application, there is no requirement for the applicant to provide the Department with such analysis with respect to administrative modifications and no public notice and comment period for the applicant's analysis for a minor technical modification. There is no language limiting the use in each category of modification to direct applicants to only apply for an administrative modification if the changes are environmentally immaterial. The proposed rule, therefore, seems to relax the existing standard requiring public notice for projects that will result in any additional wetlands impacts over those of the original permit to a standard in which notice will only be required for projects that will "significantly increase the environmental impact of the regulated activities." (277)

RESPONSE: The adopted requirements for each type of permit modification define what types of changes can be made under each type of modification. The requirements for all types of modifications at N.J.A.C. 7:7A-20.7(b), (c), and (d) require information commensurate with the relative significance of the modification. Each type of modification requires a submittal of a description of the proposed change which, in a complete application, should adequately demonstrate that the requirements of the modification type are met. If an applicant applies for the inappropriate type of modification, the Department will reject the application and advise the applicant of the correct modification type.

The adopted rules do not relax standards for public notice. The prior rules, at N.J.A.C. 7:7A-10.7, did not require public notice for a minor modification. In the adopted rules, the types of modifications categorized as "minor" in the prior rules are split into administrative modifications, minor technical modifications, and permit transfers, which continue to not require public notice. The prior rules required public notice of applications for major modifications. The adopted rules, at N.J.A.C. 7:7A-20.7(d)2, require public notice for major technical modifications, which are similar to major modifications under the prior rules. Additionally, in accordance with N.J.A.C. 7:7A-20.6(f), if changes proposed in a modification application "significantly increase the environmental impact of the regulated activities," the Department will reject the application and require the applicant to submit a new permit application, which is subject to all applicable public notice requirements at N.J.A.C. 7:7A-17.

N.J.A.C. 7:7A-21, Requests for Adjudicatory Hearings

Procedure to Request an Adjudicatory Hearing; Decision on the Request (N.J.A.C. 7:7A-21.1)

311. COMMENT: The time period to request an adjudicatory hearing is not sufficient for the public to adequately respond. (346)

RESPONSE: The 30-day time period in which a person may submit an adjudicatory hearing request is the same as the time period to request an adjudicatory hearing on enumerated Department decisions under the prior rules at N.J.A.C. 7:7A-1.7(d), and in equivalent provisions within the CZM Rules and FHACA Rules. In conjunction with the public notice and opportunity for review and comment provided during the permit application review process, the Department believes that this timeframe allows adequate opportunity to request an adjudicatory hearing on a permit decision.

312. COMMENT: The proposed amendments at N.J.A.C. 7:7A-21.1(a) that require third-party objectors to send evidence of a hearing request to the permittee are supported. The Department should implement further amendments consistent with this provision to require third parties who submit comments to the Department during the application review process to also copy the applicant. (140)

RESPONSE: Comments received on an application during the review process will be provided to the applicant by the Department upon the applicant's request. The Department encourages comment on permit applications to ensure decisions made are informed by all available input. The Department believes that communication between the Department and applicant in cases where the applicant wishes to obtain a copy of all filed comments is preferable to requiring that commenters on all applications submit copies of comments directly to the permit applicant.

313. COMMENT: At N.J.A.C. 7:7A-21.1(f), the Department should make its decision regarding third-party hearing requests within 30 days to comply with the Administrative Procedure Act and Uniform Administrative Procedure Rules. Similarly, the Department should have a 30-day timeframe to act upon an appeal request pursuant to N.J.A.C. 7:7A-21.1(f). (140)

RESPONSE: The Department makes every effort to make determinations as to whether requests for adjudicatory hearings are considered contested cases that satisfy all applicable requirements, both where the requester is the permittee and where a person other than the permittee (that is, a third party) has requested a hearing. However, as recognized by the Office of Administrative Law's Uniform Administrative Procedure Rules, the determination as to whether a matter

qualifies as a contested case can vary in difficulty, and it is sometimes necessary to consult with the Attorney General's office (see N.J.A.C. 1:1-4.1(b)). This is particularly true in the context of third-party hearing requests. The APA prohibits State agencies from promulgating rules granting administrative hearings to third parties on permit decisions unless specifically authorized to do so by Federal law or State statute allowing third-party appeals (see N.J.S.A. 52:14B-3.1b through 3.3), with a "third party" defined as any person who is not a permit applicant, a State agency, or "a person who has a particularized property interest sufficient to require a hearing on constitutional or statutory grounds" (N.J.S.A. 52:14B-3.2). With such variability, incorporating a 30-day limit is not appropriate.

Effect of Request for Hearing on Operation of Permit or Authorization (N.J.A.C. 7:7A-21.3)

314. COMMENT: The rules proposed concerning the effect of a request for an adjudicatory hearing should include a Department response deadline and a defined decision standard. (179)

315. COMMENT: Proposed N.J.A.C. 7:7A-21.3 should incorporate a deadline for the Department to determine whether it will issue a stay of a permit when an adjudicatory hearing has been requested by a person other than the applicant. Additionally, the rules should incorporate a definition of the good cause standard by which the Department will determine whether it will grant such a stay. (179 and 277)

RESPONSE TO COMMENTS 314 AND 315: For the same reasons that commitment to a specific timeframe within which to grant or deny an adjudicatory hearing is difficult (see the Response to Comment 313), commitment to a specific time frame within which to decide on a stay request is equally difficult. As indicated in the Response to Comment 313, in the context of

a request for an adjudicatory hearing by a person other than the permittee, many cases will involve seeking input for the Attorney General's office. Accordingly, while the Department will make every effort to make determinations both on whether a contested case exists and on whether a stay should or should not be in place while a challenge proceeds, it is not able to commit to a timeframe within which those determinations will be made in every case.

With regard to what constitutes "good cause" to impose a stay, the Department makes this determination on a case-by-case basis. Good cause includes consideration of whether the stay is necessary to avoid an imminent threat of irreparable harm to public health, safety, or the environment. Similar to an application for injunctive relief in Superior Court, the Department's decision would also consider the ultimate likelihood of success of the challenge.

Permit Standards

N.J.A.C. 7:7A-6 General Permits-By-Certification

316. COMMENT: The addition of two new general permits-by-certification is supported. (69)

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

317. COMMENT: The proposed rules allow for general permits-by-certification, where a developer can certify that the project meets applicable standards or rules without any oversight. This is a violation of the FWPA. (12,13, 15, 20, 22, 23, 27, 29, 32, 33, 50, 51, 55, 35, 37, 38, 39, 41, 46, 55, 62, 63, 65, 67, 73, 74, 76, 85, 92, 93, 97, 103, 122, 123, 124, 127, 131, 133, 136, 137, 138, 142, 143, 148, 165, 170, 171, 173, 174, 183, 189, 202, 204, 206, 215, 217, 218, 219, 220, 229, 232, 233, 237, 238, 239, 240, 241, 242, 243, 244, 256, 265, 266, 280, 282, 283, 294, 301, 306, 312, 314, 321, 324, 326, 327, 329, 334, 343, 349, 354, 362, 374, 377, 382, 383,

387, 392, 395, 399, 407, 408, 410, 414, 415, 427, 431, 435, 437, 442, 446, 448, 449, 454, 456, and 461)

318. COMMENT: General permits-by-certification allow developers to build without looking at impacts properly. (12, 13, 15, 22, 23, 27, 29, 32, 33, 50, 51, 35, 37, 38, 39, 41, 46, 55, 62, 63, 65, 67, 73, 76, 85, 92, 93, 97, 103, 122, 123, 124, 127, 133, 137, 138, 142, 148, 165, 170, 171, 173, 174, 183, 189, 202, 204, 206, 215, 217, 218, 219, 220, 229, 232, 233, 237, 238, 239, 241, 242, 243, 244, 256, 265, 266, 280, 282, 283, 287, 294, 301, 306, 312, 314, 321, 324, 326, 327, 329, 334, 343, 349, 362, 374, 377, 382, 383, 387, 392, 395, 399, 407, 408, 410, 414, 427, 431, 435, 437, 442, 446, 448, 449, 454, 456, and 461)

319. COMMENT: Compliance should not be self-certifiable. An applicant's self-certification that there will be no harmful impacts to wetlands does not ensure adequate protection. The Department needs to utilize sound environmental analysis. (84, 130, 131, 147, 149, 222, and 402)

320. COMMENT: Allowing self-reporting of compliance with no oversight is opposed. The Department should not make it easier for applicants to get around the rules. There is already little oversight over projects, which has led to massive stream and wetland violations. (353)

321. COMMENT: Even though the Administrative Procedure Act may allow for general permits-by-certification, the FWPA only provides for general permits, individual permits, letters of interpretation, and transition area waivers. The Department has no authority to create a new type of approval under the statute. (415)

322. COMMENT: The Department is proposing new general permits-by-certification, as well as the expansion of certain general permits, which violates the Clean Water Act. A general permit, permit-by-rule, or, in this case, a general permit-by-certification may only be issued for those

activities that are *de minimis*, individually and cumulatively. The Department has not demonstrated that these activities will have *de minimis* impacts. To demonstrate that an activity is *de minimis*, the analysis must consider "a range of factors relating to the impact of discharges on aquatic ecosystems and the humans who use them, and must then document the environmental effects of the activities authorized by the permit in a decision document." See *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engrs*, 833 *F.3d* 1274 (11th Cir. 2016), citing 40 CFR Part 230 (2014). The USEPA regulations at 40 CFR 230.11 (2014) require an evaluation of the impacts of the proposed general permits, etc. "on the physical, chemical, and biological components of the aquatic environment." The proposed rules do not provide any evaluation of the impacts to the physical, chemical, or biological components of the aquatic habitat. Please provide references to all of the expanded permits for which the Department has studied the impacts to the wetlands or transition areas and the details regarding the studies and their results. Also, please provide references to all scientific literature that the Department relied on to determine that these permits would have no impact. (319, 320, and 328)

RESPONSE TO COMMENTS 316 THROUGH 322: The two adopted general permits-by-certification authorize a strictly limited subset of activities authorized under general permits in the prior rules. The FWPA at N.J.S.A. 13:9B-23.c authorizes the Department to adopt general permits for certain activities that the Department determines 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, will conform with the FWPA, and will not violate any provisions of the Federal Act. One such activity identified at N.J.S.A. 13:9B-23.c(3) is "[a]ppurtenant improvements or additions to residential dwellings lawfully existing prior to the effective date of P.L.1987, c.156 (C.13:9B-1 et seq.),

provided that the improvements or additions require less than a cumulative surface area of 750 square feet of fill and will not result in new alterations to a freshwater wetland outside of the fill area." The adopted general permit-by-certification 8 meets these requirements. The Department is also authorized by the FWPA at N.J.S.A. 13:9B-23.c(5) to adopt general permits for "[a]ctivities, as determined by the department, which will have no significant adverse environmental impact on freshwater wetlands, provided that the issuance of a general permit for any such activities is consistent with the provisions of the Federal Act and has been approved by the United States Environmental Protection Agency." This provision authorizes general permit-by-certification 24 for repair or modification of a malfunctioning septic system.

The adopted general permits-by-certification provide an alternate application process for authorization of activities that could have already been authorized by the general permits in the prior rules. Particularly, activities authorized under general permit-by-certification 8 were previously authorized under general permit 8 (previously codified at N.J.A.C. 7:7A-5.8, now codified at N.J.A.C. 7:7A-7.8) and activities authorized under general permit-by-certification 24 were previously authorized under general permit 25 (previously codified at N.J.A.C. 7:7A-5.25, now general permit 24, codified at N.J.A.C. 7:7A-7.24). The Department has previously determined that the adopted general permits have *de minimis* impact individually and cumulatively (see 19 N.J.R. 2330(a) and 20 N.J.R. 1235(a), regarding general permit and 8 N.J.R. 338(a) and 24 N.J.R. 975(b), regarding general permit 24).

As indicated by the commenters, the FWPA Rules must be as stringent as the Federal rules for activities in wetlands; the adopted rules continue to be as stringent, and, in many cases, more stringent than the Federal wetlands permitting program by strictly limiting general permit activities in size and scope and by requiring a permit for most activities in transition areas.

General permit-by-certification 24 is identical to prior general permit 25 for the repair of a malfunctioning septic system. An elaborate scientific analysis is not needed to demonstrate that replacing a failing septic system has minimal environmental impact when compared to the alternative of leaving an existing malfunctioning septic system in or near wetlands. The replacement or repair of a septic system leads to greater protection of wetlands and aquatic resources by stopping a source of pollution. The environmental benefit accomplished by stopping the impacts to water quality that result from septic system malfunctions through the activities authorized under this general permit-by-certification far exceed any impacts to wetlands. This activity also typically takes place in transition areas, which are beyond the jurisdiction of the Clean Water Act. To the extent that applicants can avoid placing septic systems in wetlands, they will do so, because placing a septic system in uplands is more cost-effective and requires less maintenance. Prior general permit 25 and adopted general permit 24 have been approved by the USEPA.

General permit-by-certification 8 is a tightly limited subset of activities under prior and adopted general permit 8, which the Department was directed to adopt by the FWPA if a finding was made that such activities will have minimal adverse environmental impact, and which has already been approved by the USEPA. General permit-by-certification 8 further limits the activities authorized by general permit 8 by only approving an addition to a previously existing residential dwelling and requiring the addition to be attached to the existing dwelling. In addition, both general permits-by-certification set forth disturbance limits applicable to the entire site, whether the area is within wetlands, a transition area, or not within a regulated area, to prevent unintended impacts to regulated areas in excess of that allowed under the permits.

When developing the general permits-by-certification, the Department reviewed years of permit applications for authorizations under the existing general permits to determine which activities had the least potential for environmental impact and were most frequently applied for to determine the best choices to streamline the process for activities with very minor impacts that would have the greatest benefit to staff and applicants in time saved on applications. The two activities now authorized under general permits-by-certification 8 and 24 were determined to be activities that always qualified for the applicable general permits when limited to the standards incorporated in the general permits-by-certification because the impact of these activities on any of the functions and values of wetlands is very minor. In the majority of permits reviewed, the activities were proposed in transition areas. Further, applications for general permit 24 (prior general permit 25) were often made during the closing on the sale of a home and were urgent, both in the context of the need to complete the sale of the home and in the need to stop the malfunctioning septic system from harming the environment. The construction of an addition under general permit 8, when connected to a legally existing dwelling, took place in areas already disturbed (for example, maintained lawn area or a patio), and was determined by the Threatened and Endangered Species Unit in the Division of Land Use Regulation to not pose any threat or have a potential impact on threatened and endangered species or species habitat. This determination could not be made without further review for the construction of an addition to a legally existing home that is not attached to the existing dwelling, and so the scope of the general permit-by-certification was appropriately limited to only those activities that do not have the potential to impact threatened and endangered species.

It is unclear what is meant by “expanded permits.” The adopted general permits at recodified N.J.A.C. 7:7A-7 have not been amended to expand the size or scope of regulated

activities authorized under each permit. The Department's previous analyses, in the rule proposals and adoptions in which the general permits were first proposed and adopted in the FWPA Rules, address the individual and cumulative impacts of the use of these permits on the aquatic environment. If the commenter is referring to amendments concerning the use of general permits 6 and 6A, those concerns are addressed in the Response to Comments 211 and 212.

The Department's electronic permitting portal requires the submission of complete and accurate information concerning a proposed project, in accordance with N.J.A.C. 7:7A-16.6. The portal performs a number of validations to ensure that the proposed activities comply with all applicable requirements. For example, for general permit-by-certification 8, the system will check for any previously approved disturbance to ensure that the cumulative footprint of disturbance to construct an addition does not exceed 750 feet. If the proposed disturbance would exceed the required limit individually or in combination with previously issued permits, the applicant cannot proceed with the application. When an applicant successfully demonstrates compliance with the FWPA Rules and provides all required information, the permit generated contains the conditions that apply to all general permits-by-certification and general permits at N.J.A.C. 7:7A-5.7 and the conditions that apply to all permits at N.J.A.C. 7:7A-20.2. One such requirement is the requirement to notify the Bureau of Coastal and Land Use Compliance and Enforcement in writing at least three working days prior to the commencement of regulated activities. This notification informs the Department that regulated activities will soon commence and enables staff to inspect the site before the activities commence and/or while activities are occurring to ensure compliance.

Because applicants are required to certify to the terms and conditions of the permit, creating a complete record of the applicant's knowledge and acceptance of the requirements, any

violation of the permit may be subject to enforcement action. Submitting false information in a permit application is also cause for enforcement action. The combination of the online permitting portal's capabilities, the Department's ability to inspect a site prior to any disturbance, and the Department's enforcement authority all encourage compliance with all applicable requirements. Should a permittee provide false information or violate any condition of the issued permit, the enforcement provisions at N.J.A.C. 7:7A-22 ensure that the violation will be remedied.

Finally, the USEPA has reviewed and approved the adopted general permits-by-certification in accordance with the assumption agreement between the State and the USEPA.

323. COMMENT: Proposed N.J.A.C. 7:7A-5.3(e) specifies when the Department must deny an application for authorization under a general permit, but there are not standards offered for when the Department must or could deny an application for authorization under a general permit-by-certification. This confirms that an applicant may apply for a general permit-by-certification by merely certifying the accuracy of its opinion that the proposed project falls within the limits of the permit and will receive the permit upon submitting the application. This process limits the ability of the Department to stop inappropriate projects before they're constructed and only allows public review in the aftermath of any environmental destruction, which is an unacceptable result. (277)

324. COMMENT: Merely requiring an applicant to declare that their project meets the requirements of the FWPA Rules to receive an instant general permit-by-certification and failing to specify circumstances under which these permits must be denied prevents the Department from exercising any oversight and deprives the public of any opportunity to review applications until after any damage to wetlands has already occurred. Applicants should not be allowed to

self-certify compliance with a law that the Department is responsible for interpreting and enforcing. (179)

RESPONSE TO COMMENTS 323 AND 324: An application for a general permit-by-certification is effectively "denied" by the online permitting system when the information submitted by the applicant does not conform to the requirements of the permit or when required uploads are not submitted. Rather than issue a written denial, the applicant simply cannot proceed to the end of the online permitting process and does not receive an authorization. Proceeding with regulated activities without receiving an authorization from the Department is cause for enforcement action under N.J.A.C. 7:7A-22. Applicants for general permits-by-certification are required to publish public notice in accordance with N.J.A.C. 7:7A-17, which is published prior to submitting an application. In addition, in accordance with N.J.A.C. 7:7A-20.2(c)27, the permittee must notify the Bureau of Coastal and Land Use Compliance and Enforcement in writing at least three working days prior to the commencement of regulated activities.

As specified at N.J.A.C. 7:7A-5.2, both general permits and general permits-by-certification authorize activities that have minimal environmental impact both individually and cumulatively. In the case of general permit-by-certification 8, the permit authorizes only a tightly limited subset of activities authorized under existing general permit 8, which in the Department's experience are never denied based on potential environmental impacts. In the case of general permit-by-certification 24, the permit offers another avenue for the activities authorized under general permit 24 that have an environmental benefit, are approved by local health departments, and are entitled to "automatic approval" under general permit 24 if the Department does not notify the applicant of a permit decision within 30 days.

325. COMMENT: The FWPA was adopted because the USACE's nationwide permits allowed self-certification and were resulting in widespread abuse and filling of wetlands. However, the USACE has since abandoned most nationwide permits that do not require an application, notification, and approval. Therefore, the State program will become less stringent than the Federal program if the Department adopts general permits-by-certification. (415)

RESPONSE: The adopted general permits-by-certification require an application, public notice, and result in a written authorization from the Department. As explained in the Response to Comments 316 through 322, the adopted general permits-by-certification authorize only very minor activities with minimal individual and cumulative impacts. The adopted nationwide permits do not involve public notice and, in general, authorize a much broader size and scope of activities than the general permits-by-certification. The validations performed through the electronic permitting portal, the requirement to certify that the activities will comply with each of a number of conditions and requirements, the creation of a complete and enforceable record of the activity and certifications, and the Department's enforcement powers all encourage compliance with all applicable requirements. The USEPA has reviewed the general permits-by-certification and determined that New Jersey's freshwater wetlands permitting program remains at least as stringent as the Federal program.

326. COMMENT: The Department has not established analysis or criteria under which additional "instant" permits may be proposed. While the two proposed general permits-by-certification appear innocuous, they set a dangerous precedent for allowing applicants to self-certify compliance with a law that the Department is charged with interpreting and enforcing.

This type of permit eliminates the chance for the Department to verify the accuracy of an applicant's determination of compliance and the chance to intervene where particular details of a project site might require more intensive review and analysis. (277)

RESPONSE: N.J.A.C. 7:7A-5.2(b) describes the conditions necessary for the Department to promulgate a general permit or general permit-by-certification. This type of permit will only be adopted for activities strictly limited in size and scope to ensure that the activity will have no more than minimal environmental impact. As explained in the Response to Comments 316 through 322, the validations inherent in the online permitting system verify the submitted information and the proposed activity's compliance with applicable requirements. In addition, N.J.A.C. 7:7A-20.2(c)27 (a standard condition that applies to all permits, including general permits-by-certification) requires a permittee to submit written notification to the Bureau of Coastal and Land Use Compliance and Enforcement at least three working days prior to the commencement of regulated activities, which puts the Department on notice that activities will commence and allows for the inspection of activities to assess compliance with the requirements of the permit.

327. COMMENT: An applicant who obtains a general permit-by-certification is unlikely to be aware of the need to seek any other necessary approvals from the Department as required at proposed N.J.A.C. 7:7A-5.3(i). These general permits-by-certification undermine the recent revisions to the FHACA Rules that are meant to provide added protections for Category One waters. (415)

RESPONSE: The conditions that apply to all permits at N.J.A.C. 7:7A-20.2(c)1 through 27 apply to general permits-by-certification and are included in the written approval provided to the

permittee upon approval of an application for an authorization under a general permit-by-certification. N.J.A.C. 7:7A-20.2(c)3 reiterates the requirement that "the permittee shall obtain all applicable Federal, State, and local approvals prior to commencement of regulated activities authorized under a permit." Therefore, if the project requires an approval under the FHACA Rules and is within a 300-foot riparian zone (that is, within 300 feet of a Category One water and all upstream tributaries to the Category One water within the same HUC-14), all the regulatory protections for Category One waters under the FHACA Rules will be in effect and must be complied with by the permittee. If the recipient of an authorization under a general permit-by-certification ignores the requirement specifically referenced in the authorization received, the Department will take appropriate enforcement action against that person; just as it would against anyone conducting an activity regulated under any of the Department's rules without the appropriate approval.

328. COMMENT: The provision that accepts pipeline developers' word that they have complied with standards is opposed because the Department cannot rely on a developers' assurance of compliance. Do not facilitate new pipelines; there are enough pipelines but wetlands are being lost. (146)

329. COMMENT: Please explain how environmental impacts may be affected by the proposed amendments concerning general permits-by-certification, especially as related to pipeline development. (189)

RESPONSE TO COMMENTS 328 AND 329: The Department did not propose a general permit-by-certification for utility line activities. The only activities that may be authorized under a general permit-by-certification are an addition to a single-family home of 750 square feet

(cumulatively) or less and the repair, replacement, or modification of a malfunctioning individual subsurface sewage disposal system. Both of the adopted general permits-by-certification authorize strictly limited subsets of previously existing general permits and, therefore, will not cause any additional environmental impacts as compared to the prior rules. Under the adopted rules, regulated utility line activities can only be authorized under a general permit or an individual permit, both of which are reviewed directly by Department staff prior to the issuance or denial of a permit.

General Permit-By-Certification 8-Construction of an Addition to a Lawfully Existing Residential Dwelling (N.J.A.C. 7:7A-6.1)

330. COMMENT: General permit-by-certification 8 for the construction of an addition to an existing residential dwelling violates the FWPA. The statute specifies that such activities may be covered by general permits but that such permits require Departmental review and approval. (415)

RESPONSE: Adopted general permit-by-certification 8 authorizes a strictly limited subset of general permit 8 activities. N.J.S.A. 13:9B-23.c authorizes the Department to adopt general permits for "[a]ppurtenant improvements or additions to residential dwellings lawfully existing prior to the effective date of P.L.1987, c.156 (C.13:9B-1 et seq.), provided that the improvements or additions require less than a cumulative surface area of 750 square feet of fill and will not result in new alterations to a freshwater wetland outside of the fill area." The adopted general permit-by-certification offers an alternative means to apply for an authorization and meet the requirements for a limited subset of these activities and, therefore, does not violate the FWPA. The FWPA requires applicants to provide written notice to the Department prior to commencing

an activity under a general permit and prescribes 30 days for the Department to determine if an individual permit is required, rather than a general permit, but the FWPA is silent on how the Department should review general permit applications. The online permitting portal does not allow an applicant to proceed if the size or scope of the proposed activity precludes the use of the general permit-by-certification, effectively providing notice that the general permit-by-certification is not the appropriate type of approval for the activity. As explained in the Response to Comments 316 through 322, the online permitting system validates information submitted by applicants to ensure the activities proposed meet the requirements of the general permit-by-certification. In this fashion, the Department reviews the proposed minimal disturbance of wetlands specifically authorized under N.J.S.A. 13:9B-23.c(3).

331.COMMENT: The square footage limits at N.J.A.C. 7:7A-6.1(a)4 seem to be intended to address a small addition at a property that does not have an LOI and is helpful as a simplified process. However, please clarify why disturbance in non-regulated areas are also counted towards the square footage limits, as the Department does not have regulatory authority over such areas. (140)

RESPONSE: Because general permits-by-certification do not require an LOI, the Department has determined that it is appropriate to apply the disturbance limit to disturbance of all areas, including those outside of freshwater wetlands and transition areas. An applicant who applies for a general permit-by-certification may not have the expertise to determine the extent of a wetland or transition area and Department staff do not directly review submitted materials before an authorization is issued. To ensure that excessive impacts to regulated areas do not occur, the Department has determined it is appropriate to apply a flat, 750-square foot total limit of

disturbance. If a greater amount of total site disturbance is required, including disturbance outside of regulated areas not included in the calculation of freshwater wetlands or transition area disturbance, such that the total disturbance exceeds 750 square feet, but the disturbance in freshwater wetlands or transition areas does not exceed 750 square feet, cumulatively, then the applicant is free to apply for an authorization under general permit 8 and an LOI.

N.J.A.C. 7:7A-7, General Permits

General

332. COMMENT: The replacement of individual permits with general permits is concerning. (179)

RESPONSE: The Department did not propose any new general permits, and did not propose any general permits to replace activities previously authorized under individual permits.

333. COMMENT: The Department should clarify or define what would be considered “scrub shrub,” as used in general permits 2 and 21 and at N.J.A.C. 7:7A-15.12, Contents of a mitigation proposal, and what would be considered “emergent wetlands” as used in general permits 2 and 13. N.J.A.C. 7:7A-1.3 only defines “palustrine wetlands.” (140)

RESPONSE: “Emergent” wetlands refer to wetlands dominated by herbaceous vegetation, such as grasses, sedges, and rushes. “Palustrine emergent” is defined at N.J.A.C. 7:7A-1.3 as “a wetlands vegetation pattern in which persistent and non-persistent grasses, rushes, sedges, forbs and other herbaceous or grass-like plants are the dominant vegetation.” “Scrub shrub” refers to wetlands dominated by woody vegetation not primarily composed of mature trees, including true shrubs and young trees.

General Permit 2–Underground Utility Lines (N.J.A.C. 7:7A-7.2)

334. COMMENT: The proposed rule weakens the general permits in the FWPA Rules to be as weak as the general permits in the FHACA Rules, including general permit 2, which makes it easier to build pipelines through wetlands. (12,13, 15, 22, 23, 35, 51, 52, 63, 76, 85, 104, 144, 189, 202, 218, 232, 233, 237, 240, 243, 244, 266, 294, 306, 324, 327, 329, 334, 343, 361, 362, 377, 387, 392, 395, 399, 408, 414, 415, 427, 431, and 454)

335. COMMENT: Rules that allow lax general permits will enable the construction of potentially toxic pipelines through and under wetlands, which endangers water supplies on which many New Jerseyans rely. (93)

336. COMMENT: New general permits that allow pipelines are an unacceptable threat to aquifers and may threaten public health. (103)

RESPONSE TO COMMENTS 334 THROUGH 336: It is unclear what changes the commenters believe weaken the general permits. As explained in the notice of proposal Summary, the vast majority of changes to general permits serve to reorganize existing provisions and clarify requirements without changing the substance of those requirements. A minor change to the procedure for submitting a mitigation proposal for impacts authorized under a general permit is adopted that does not weaken the substantive requirements of the general permits; for general permits that require mitigation, the time to submit a mitigation proposal has changed from 120 days prior to commencing activities to 90 days prior to commencing activities to standardize review times of applications. Provisions for the timing of mitigation have also been removed, since this information is also included in the mitigation subchapter, now codified as N.J.A.C. 7:7A-11.

The organizational changes to the FWPA Rules were meant to standardize how information is presented between the FWPA Rules and FHACA Rules, with no effect on the substantive requirements of the general permits. Amendments to FWPA general permit 25, for minor channel or stream cleaning for local government agencies, while aligning the general permit with the similar general permit in the FHACA Rules, were necessary to be consistent with statutory amendments to the Stream Cleaning Act by P.L. 2015, c. 210.

The adopted rules do not include substantive changes to general permit 2. The amendments to general permit 2 only reorganize the requirements of the permit to facilitate understanding and make minor changes to the provisions related to mitigation, including requiring a mitigation proposal within 90 days of commencing activities rather than 120 days and removing reference to the timing of mitigation. The mitigation changes are not unique to general permit 2 but are adopted in all general permits in the chapter. The adopted amendments do not change any of the substantive requirements of general permit 2 that have been in place since its adoption. Therefore, the amendments do not change the relative ease or difficulty with which an applicant may construct a utility line in an area regulated under the FWPA Rules.

337. COMMENT: Proposed N.J.A.C. 7:7A-7.2(a)1 is internally inconsistent. The provision claims that “Anything that changes the character of the existing wetland, even if only to a different wetland type, is permanent disturbance” but then allows that the “installation of a utility line in scrub shrub or emergent wetlands shall not be considered permanent disturbance.” The installation of a utility line in scrub shrub and emergent wetlands changes the character of the wetlands to a disturbed, maintained system that is often full of invasive species. Therefore, this activity represents a permanent disturbance, and the applicable statement should either be deleted

or revised to say that it shall be considered a permanent disturbance. This appears to be an attempt to facilitate destructive gas pipeline projects that destroy New Jersey's wetlands. (415)

338.COMMENT: The Department is proposing to amend recodified N.J.A.C. 7:7A-7.2 to state that installation of utility lines in scrub-shrub or emergent wetlands shall not be considered permanent disturbance. Disturbance in these areas should require mitigation, like other disturbances. (125)

RESPONSE TO COMMENTS 337 AND 338: There is no change in the regulation of utility line construction in regulated areas from the prior rules; the provision discussed by the commenters, including the indication that installation of a utility line in scrub shrub or emergent wetlands is not considered to be permanent disturbance for the purpose of that section, was previously codified as part of general permit 2 at previous N.J.A.C. 7:7A-5.2(c)1.

The Department recognizes the potential environmental impact of constructing new utility lines through freshwater wetlands, transition areas, or State open waters and is, therefore, maintaining the stringent standards that were previously applicable to authorization under general permit 2 for underground utility lines. With reference to N.J.A.C. 7:7A-7.2(a)1, this provision continues to limit permanent above-ground disturbance associated with installation of an underground utility line. The 0.5-acre maximum permanent disturbance allowed, in conjunction with other restrictions applicable to this general permit, ensures that only minor impacts qualify for the general permit and that any impact allowed is the minimum necessary to complete the installation in compliance with any other applicable law, including OSHA safety standards. N.J.A.C. 7:7A-7.2(a)1 makes clear that activities that result in permanent changes to the character of the impacted wetland, such as maintaining clearing over the installed underground utility line, are considered permanent disturbance. The Department does not

consider the installation of a utility line to alter the character of a wetland when the area can be restored to preexisting conditions. However, when the area cannot be restored to preexisting conditions, the Department will consider the utility line installation permanent disturbance and require mitigation in accordance with N.J.A.C. 7:7A-11. For example, due to safety requirements, forested wetlands cannot be maintained within the utility right-of-way. In this case, because preexisting conditions cannot be restored, mitigation for permanent impacts to forested wetlands will be required. The adopted amendments reorganized the requirements of the general permit without affecting their substance.

339. COMMENT: At proposed N.J.A.C. 7:7A-7.2(a)4, how will the Department know that the temporary area is "the minimum size necessary for compliance with applicable law?" Is there a chart or other information that would enable both the Department and the public to determine what the minimum should be? (415)

RESPONSE: The "minimum size necessary for compliance with applicable law" depends on a number of variables that differ from site-to-site and project-to-project. The law or laws applicable to a project are a function of the type of utility, the location of the proposed project, and the entity responsible for the project. For example, electric utility lines are subject to the Board of Public Utility regulatory requirements at N.J.A.C. 14:5 (including N.J.A.C. 14:5-9, Electric utility line vegetation management), while water and wastewater lines must comply with N.J.A.C. 14:9. Additional Federal requirements and local ordinances, as well as additional Department regulations effectuating laws other than the FWPA may also apply. The type of utility, size, location, and site-specific considerations, such as topography and geology also influence what size of disturbance is necessary to install the utility.

340. COMMENT: Land Use Management should not defer to the Department's Municipal Finance and Construction Element to determine which activities should and should not occur in the State's wetlands under proposed N.J.A.C. 7:7A-7.2(a)6. Manholes and siphons for sewer lines do not belong in wetlands because they can interfere with hydrology. Therefore, the Municipal Finance and Construction Element should revise its regulations to ensure that manholes and siphons for sewer lines are prohibited in wetlands. (415)

RESPONSE: The Municipal Finance and Construction Element retains jurisdiction over locating manholes and siphons in consideration of site constraints. Between the Municipal Finance and Construction Element's regulations and professional judgement, and the Department's review and direction to minimize impacts to freshwater wetlands, the review process under general permit 2 ensures that impacts are minimized, such that hydrology is not significantly affected.

341. COMMENT: The proposed increase in allowances for permanent disturbance under general permit 2 to 0.5 acre and 20 feet wide is excessive, especially in areas with few remaining freshwater wetlands. (125)

RESPONSE: The disturbance limit of 0.5 acre and maximum permanently maintained clearing of 20 feet wide does not represent an increase from the prior rules. Prior N.J.A.C. 7:7A-5.2(c)1 and 2 contained identical limits. These limits represent the maximum permanent disturbance permittable through an authorization under general permit 2. The additional requirements in the general permit that result in minimized disturbance, the conditions that apply to all general permits, conditions that apply to all permits, and ability to establish additional permit conditions all further minimize the impacts associated with activities authorized under general permit 2.

Finally, N.J.A.C. 7:7A-7.2(e) requires mitigation for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters, and for permanent impacts of less than 0.1 acres unless the applicant demonstrates that the activities have been designed to avoid and minimize impacts to wetlands.

General Permit 3-Discharge of Return Water (N.J.A.C. 7:7A-7.3)

342. COMMENT: General permit 3 should prohibit the discharge of drilling fluid or other tainted pipeline or utility project fluid into wetlands without treatment and monitoring to ensure that even short-term discharges meet surface and groundwater standards. (431)

RESPONSE: General permit 3 authorizes the discharge of return water from an upland, contained, dredged material management area into State open waters, and placement of a pipe above ground for the discharge through freshwater wetlands and/or transition areas. The activities listed as authorized under general permit 3 do not include pipeline or utility projects, drilling to install underground utility lines, or discharge of drilling fluid.

General Permit 4-Hazardous Site Investigation and Cleanup (N.J.A.C. 7:7A-7.4)

343. COMMENT: The clarification that a licensed site remediation professional should guide decision making on investigation and cleanup sites provided in recodified N.J.A.C. 7:7A-7.4 is supported. (69)

344. COMMENT: The inclusion of licensed site remediation professionals in general permit 4 is supported. (262)

RESPONSE TO COMMENTS 343 AND 344: The Department acknowledges these comments in support of the rules.

345. COMMENT: While the Department generally shows appropriate recognition for the established Licensed Site Remediation Program in this rulemaking, there are some limiting provisions in the context of contaminated sites that may have the effect of discouraging and, thus, delaying or preventing remediation from occurring, such as at proposed N.J.A.C. 7:7A-7.4 for general permit 4. How would an applicant demonstrate the proposed plan causes minimum feasible disturbance? Also, how would the cost be determined in the analysis? Regarding the requirement to mitigate in accordance with N.J.A.C. 7:7A-11.12(b), would restoration of wetlands be considered as sufficient mitigation, and will that be determined on a case-by-case basis? (140)

RESPONSE: N.J.A.C. 7:7A-7.4(a)1i and ii describes how the applicant or a licensed site remediation professional must demonstrate that the disturbance is the minimum necessary for compliance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, and the Administrative Requirements for the Remediation of Contaminated Sites rules, N.J.A.C. 7:26C. Specifically, the demonstration must include an exploration of all feasible alternative remediation methods acceptable under N.J.A.C. 7:26E and 7:26C, and the identification of any remediation methods that would result in less area of freshwater wetlands, State open waters, and transition areas disturbance, with an explanation for why these remediation methods were not chosen. The applicant should explain how the proposed disturbance is the minimum necessary to accomplish the goals of the remediation and why proposed disturbance is not excessive to address the remediation of the property. Cost can be included in the discussion of why alternative methods were not chosen, but the applicant must justify why the proposed amount of disturbance is appropriate to accomplish the remediation. Staff reviewing applications under this general

permit consult with Site Remediation Program staff to evaluate the proposed methods and proposed amount of disturbance. The Department does not anticipate that the adopted general permit will discourage, delay, or prevent remediation activities. The prior rules contained the requirement that disturbance shall be the minimum that is necessary for compliance with the Department's Technical Requirements for Site Remediation, N.J.A.C. 7:26E. The adopted general permit only serves to recognize the role of licensed site remediation professionals in the remediation process and clarify how an applicant must demonstrate that disturbance is the minimum feasible to comply with applicable remediation requirements.

N.J.A.C. 7:7A-7.4(a)2 requires mitigation in accordance with all applicable requirements of N.J.A.C. 7:7A-11. If a disturbance meets the definition of a temporary disturbance, mitigation is required in accordance with N.J.A.C. 7:7A-11.8. Mitigation for permanent disturbances must be provided in accordance with the hierarchy at N.J.A.C. 7:7A-11.9 (for a smaller disturbance) or 11.10 (for a larger disturbance), and all applicable general and mitigation alternative-specific requirements in the subchapter.

<u>General Permit 6 – Non-Tributary Wetlands and General Permit 6A– Transition Areas Adjacent to Non-Tributary Wetlands (N.J.A.C. 7:7A-7.6 and 6A)</u>

346. COMMENT: The notice of proposal Summary states that general permit 6 cannot be used solely for the purpose of eliminating a natural resource to avoid future regulation, but this stipulation is difficult to prove and would not likely occur in reality. (376)

RESPONSE: As the commenter indicates, this situation is not likely to occur. In practice, this requirement means that the Department would not authorize the destruction of wetlands under a general permit 6 without any associated development or regulated activity that requires such

disturbance. The previous rules prohibited this type activity for all general permits at prior N.J.A.C. 7:7A-4.3(b)1. The adopted rules expand the prohibition to additionally apply to all general permits-by-certification at N.J.A.C. 7:7A-5.7(b)1.

347. COMMENT: Exceptions provided under general permits 6 and 6A are opposed because they fail to protect vernal habitats of less than one acre and their associated transition areas. General permits 6 and 6A fail to protect small wetlands, leading to a "death by a thousand cuts" over decades as wetlands shrink due to direct loss, development, and altered hydrology. (431)

RESPONSE: As explained in the Response to Comments 222, 223, and 224, the Department reviews applications for authorization under general permits 6 and 6A in relation to vernal pools on a case-by-case basis to determine if the presence of a vernal habitat means that the application should be reviewed under the more detailed individual permit process.

The FWPA directs the Department to issue a general permit for an activity in a freshwater wetland that is not a surface water tributary system discharging into an inland lake or pond, or a river or stream, and which would not result in the loss or substantial modification of more than one acre of freshwater wetland, provided that this activity will not take place in a freshwater wetland of exceptional resource value or a USEPA priority wetland (see N.J.S.A. 13:9B-23b). General permit 6 fulfills this mandate. In addition, general permit 6 does not authorize activities within a State open water that is a special aquatic site, or a State open water that is larger than one acre. General permit 6A does not authorize activities in a transition area adjacent to an exceptional resource value wetland or USEPA priority wetlands. The requirement for activities to occur in or adjacent to isolated wetlands ensures that activities do not affect other

freshwater wetland or State open water ecosystems, keeping the impacts localized to the small area of the activities authorized under the permit(s).

While the use of general permit 6 may in some cases eliminate a wetland smaller than one acre, mitigation is required for all permanent disturbance over 0.1 acre. Mitigation is required at minimum at a 1:1 ratio, and, in most cases, at a 2:1 or greater ratio, to prevent the long-term loss of wetlands described by the commenter. Mitigation is required for disturbance less than 0.1 acre, unless the applicant demonstrates that the activities have been designed to avoid and minimize impacts to wetlands, by configuring the activity so that most or all disturbance is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible.

General Permit 8-House Additions (N.J.A.C. 7:7A-7.8)

348. COMMENT: The Department cannot change the language of general permit 8 because it is contained in the FWPA. (415)

RESPONSE: The FWPA directs the Department to issue a general permit for "Appurtenant improvements or additions to residential dwellings lawfully existing prior to the effective date of P.L.1987, c.156 (C.13:9B-1 et seq.), provided that the improvements or additions require less than a cumulative surface area of 750 square feet of fill and will not result in new alterations to a freshwater wetland outside of the fill area." (see N.J.S.A. 13:9B-23.c(3)) The activity addressed by this portion of the FWPA is continued in adopted general permit 8, with several additional protective requirements incorporated to ensure, as required by the FWPA, that the activities covered by the general permit "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, will be in conformance with the purposes of P.L.1987, c.156 (C.13:9B-1 et seq.), and will not violate any provision of the Federal Act." (N.J.S.A. 13:9B-23) The adopted rules do not change the requirements of this general permit; rather, the Department has reorganized the general permit to be consistent with the structure of the other general permits and to enhance clarity. The changes serve to clarify that the limit of fill and/or disturbance allowed by this general permit is 750 square feet or less both for additions or appurtenant structures to an existing residential dwelling, and for an increase in the footprint of a previously lawfully existing dwelling that is being replaced within five years of the destruction of that dwelling. These changes are consistent with the FWPA.

General Permit 11-Outfalls and Intake Structures (N.J.A.C. 7:7A-7.11)

349. COMMENT: The proposed rules should not allow stormwater to be discharged directly into or immediately above a wetland. This causes scouring, which could lead to the silting in of the wetland, particularly in southern New Jersey where there are sandy soils, destroying vegetation and the wetland's ecological functions. (415)

RESPONSE: General permit 11 cannot be used to allow construction of an outfall that will result in a scouring condition in a wetland or transition area. Specifically, N.J.A.C. 7:7A-7.11(e) requires all activities under general permit 11 to comply with the specifications and requirements in the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90. These standards require stormwater to be discharged so as not to cause erosion. Compliance with these standards ensures that the discharge of stormwater from an outfall does not cause scour and, therefore, does not cause siltation of land that may be around or adjacent to wetlands. For an outfall to be authorized under an individual permit, it must meet the robust standards at N.J.A.C.

7:7A-10.2, including the requirement that there is no practicable alternative for the outfall, including its redesign, that would have a lesser impact on the aquatic ecosystem or avoid freshwater wetlands and State open waters. Additionally, all permits issued under the FWPA Rules are conditioned on obtaining any required approvals from the Soil Conservation District having jurisdiction over the site, which ensures that activities will not cause erosion, scour, or siltation.

General Permit 13-Lake Dredging (N.J.A.C. 7:7A-7.13)

350. COMMENT: Why is there a reference to a general permit-by-certification at proposed N.J.A.C. 7:7A-7.13(f)? This permit is not included in the list of general permits-by-certification at N.J.A.C. 7:7A-5, nor should it be as general permits-by-certification are illegal under the FWPA. (415)

RESPONSE: N.J.A.C. 7:7A-7.13(f) refers to N.J.A.C. 7:7A-5.7, the heading of which is "Conditions applicable to an authorization pursuant to a general permit-by-certification or *a general permit"* (emphasis added), in order to point the reader to the standard conditions that apply to all general permits and general permits-by-certification. The reference is particularly significant for this general permit because, in addition to other conditions that must be met by all general permits and general permits-by-certification, N.J.A.C. 7:7A-5.7(b)10 requires a permittee to use an acceptable disposal site, outside of areas regulated under the FWPA Rules, to place dredged or excavated materials. The reference to general-permits-by-certification is only made as part of the full heading of the applicable section to allow readers to easily reference back to the standard conditions listed in N.J.A.C. 7:7A-5.7. See the Response to Comments 316

through 322 for an explanation of the Department's authority to issue general permits-by-certification.

General Permit 16-Creation, Restoration, and Enhancement of Habitat and Water Quality Functions and Values (N.J.A.C. 7:7A-7.16)

351. COMMENT: General permit 16 is supported because the activities it authorizes improve environmental quality. (431)

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

352. COMMENT: Authorizing activities under general permit 16 that are approved by a charitable conservancy is opposed. Some charities seek to degrade open space through logging to benefit one species while many more species are harmed. These activities are approved in secret, with meetings only publicized a few days in advance to circumvent public participation. Some of New Jersey's nonprofit groups have become for-profit groups subsidized by taxpayers. In order to support their high lobbying and administrative staffs, they have become corrupt. The Department should not be permitted to make deals with certain friendly nonprofits to log public land for profit. The Department must be halted from approving any more environmentally destructive plans without complete public involvement. (346)

RESPONSE: General permit 16 authorizes activities necessary to implement a plan for the creation, restoration, or enhancement of habitat and water quality functions and values of wetlands. Activities under this general permit must be part of a plan approved by certain government agencies or a charitable conservancy or required by a government agency under a mitigation plan. However, activities associated with these plans are not automatically approved

with no opportunity for public involvement. Applications for general permits must include documentation that public notice was provided in accordance with N.J.A.C. 7:7A-17, and the application is reviewed in accordance with N.J.A.C. 7:7A-19, including publication of notice in the DEP Bulletin and acceptance of public comments on the application. In addition, general permit 16 contains conditions at N.J.A.C. 7:7A-7.16(b)2 through 6 and (c), such as the requirement for the project to improve the values and functions of the ecosystem and the requirement to minimize disturbance of freshwater wetlands, transition areas, and/or State open waters, that ensure activities authorized under this general permit do not degrade or destroy the State's wetland ecosystems.

353. COMMENT: Recodified N.J.A.C. 7:7A-7.16(a) provides an extensive list of potential wetland improvement activities. It is suggested that the Department add "the installation and maintenance of temporary and permanent soil erosion and sediment control features" to this list. (255)

RESPONSE: N.J.A.C. 7:7A-7.16(a) provides examples of activities that will clearly contribute to the creation, restoration, and enhancement of habitat and water quality functions and values, but is not an exhaustive list of all activities that may be authorized. If the installation of soil erosion and sediment control features is necessary to implement a creation, restoration, or enhancement plan and is approved or required by one of the entities listed at N.J.A.C. 7:7A-7.16(b), it may be authorized under general permit 16.

354. COMMENT: Proposed N.J.A.C. 7:7A-7.16(b)1ii(1) does not make sense as written. All of the activities described under general permit 16 are regulated activities and may also need an

approval under the FHACA Rules if they involve structures in a channel or flood hazard area. Unless the activities are the subject of the permit that is submitted, they would be occurring in a regulated area without a permit. (415)

RESPONSE: N.J.A.C. 7:7A-7.16(b)1ii(1) is intended to convey that the Department will not require a separate permit under the FWPA Rules for a mitigation plan required under the FWPA Rules. This provision does not relieve an applicant from complying with the requirement applicable to all permits at N.J.A.C. 7:7A-20.2(c)3 that the permittee obtain all applicable Federal, State, and local approvals. This requirement makes clear that nothing in the FWPA Rules excuses activities taking place in areas regulated under other statutory or regulatory schemes, including the FHACA Rules, from obtaining any additional approvals necessary under those other programs or authorities.

355. COMMENT: It is suggested that N.J.A.C. 7:7A-7.16(b)1ii be amended to include a clarification to specify that the Department does not require the submittal of a separate application for an authorization or permit "to implement or monitor the mitigation itself." (255)

RESPONSE: Adopted N.J.A.C. 7:7A-7.16(b)1ii(1) states, "Pursuant to N.J.A.C. 7:7A-11, a mitigation plan submitted to the Department to satisfy the requirements and/or conditions of a permit does not require the submittal of a separate application for an authorization or permit." Accordingly, the rules already make clear that mitigation required under the FWPA Rules and approved by the Department under N.J.A.C. 7:7A-11 does not require a separate authorization or permit to be implemented or monitored. However, mitigation required by the USACE or under a different Department authority, such as the FHACA Rules, may require additional approval

under N.J.A.C. 7:7A-7.16 for activities in freshwater wetlands, transition areas, and State open waters.

356. COMMENT: The proposed rule weakens protections for wetlands by allowing the conversion of wetlands to open waters, which clearly destroys the wetland. There are plenty of ponds and open water already. Wetlands, however, are scarce and should not be converted. (12,13, 22, 23, 35, 63, 76, 85, 173, 174, 189, 202, 218, 232 233, 237, 243, 244, 266, 294, 306, 324, 327, 329, 334, 343, 362, 363, 377, 392, 395, 399, 408, 414, 427, 431, and 454)

357. COMMENT: The rules should not allow wetlands to be converted into open waters, which destroys the wetland. When would such a conversion be appropriate or environmentally beneficial? Open waters and ponds are plentiful while wetlands are scarce. The same effect occurs when a wetland is turned into a stormwater detention basin, which should also not be permitted. The goal of the FWPA is to protect wetlands, so allowing them to be converted is a violation of the act. (51, 52, 240, and 415)

358. COMMENT: The rulemaking favors the creation of open water, which is already the fastest-growing wetland type, while other wetlands types are experiencing unacceptable losses. (353)

RESPONSE TO COMMENTS 356 THROUGH 358: The commenters seem to be referring to the requirements for authorization under general permit 16, which allows the Department to approve the conversion of wetlands to State open waters or transition area, conversion of State open waters to wetlands or transition area, or the conversion of transition area to freshwater wetlands or State open waters. The adopted provision remains unchanged from the previous rules. Conversion from one regulated feature to a different regulated feature is acceptable only

when the Department determines that doing so is environmentally beneficial (see N.J.A.C. 7:7A-7.16(b)3 and 6). If a proposal to convert a wetland into a State open water would not be environmentally beneficial, not only would the Department not approve the activity, the proposed activity would no longer be eligible for a general permit 16. In accordance with N.J.A.C. 7:7A-7.16(b), any activities authorized under general permit 16 must comply with the conditions at N.J.A.C. 7:7A-5.7 and 20.3, be approved by a specific government agency or charitable conservancy, or required by a government agency under a mitigation plan. Additionally, the proposed project must be consistent with the goals of the FWPA, improve the values and functions of the ecosystem, have a reasonable likelihood of success, disturb the minimum amount of freshwater wetlands, transition areas, and/or State open waters necessary, and not reduce the total combined acreage of regulated area(s) on the site. In addition, as specified by N.J.A.C. 7:7A-7.16(c), the Department will not authorize activities under general permit 16, unless the sole purpose of the activity is habitat creation, restoration, or enhancement. This provision specifically prohibits the construction of a stormwater management basin from being approved under general permit 16.

359. COMMENT: N.J.A.C. 7:7A-7.16(b)6 should require wetlands, transition areas, or State open waters that resulted from a conversion of one type of regulated area to another (for example, the conversion of a transition area to a wetland) to be protected under a conservation restriction. Without the protection of a conservation restriction, there will not be reasonable protections for areas converted to wetlands as the wetlands could be converted to open water or transition areas in the future. Also, as the transition area is modified, it may be significantly thinner in spots. Thus, permanently protecting the modified transition area “is necessary to more

carefully control the activities that are permitted to occur since the remaining transition area is the minimum necessary to protect the adjacent wetland from the permitted development activities (39 N.J.R. 3587(a)).” (319 and 328)

360. COMMENT: The proposed change to not require an applicant for an authorization under general permit 16 to record a conservation restriction on the property subject to the permit is opposed. The Department justifies this change by comparing it to a similar amendment made to a coastal general permit in 2013. However, the two permits are inherently different and the change is not appropriate for general permit 16 in the FWPA Rules. (277)

RESPONSE TO COMMENTS 359 AND 360: Areas converted to wetlands under general permit 16 are protected under all of the requirements of N.J.A.C. 7:7A and the FWPA. In many instances, the types of activities for which this general permit is authorized are voluntary projects for the sole purpose of increasing the ecological benefits of a site. Furthermore, these activities in many cases take place on land owned by a government agency or charitable conservancy, whose mission involves protecting wetlands and other environmental resources. Additional restriction of a property by requiring the recording of a conservation restriction only discourages environmentally beneficial activities under this general permit without a clear environmental benefit. In cases where activities under this permit satisfy a mitigation obligation from a Federal agency or other Department rule (such as riparian zone mitigation), the requirements for the mitigation itself ensure that future activities do not negatively impact any created, restored, or enhanced wetlands, transition area, or State open water. The use of this permit would not result in a thinning of a transition area such that the adjacent wetlands would be at risk. If a transition area is impacted by activities under this permit, it is because the Department has determined it is environmentally beneficial. In most cases, this would be the result of a conversion of transition

areas to freshwater wetlands, which would create a new transition area around the created wetlands of 50 or 150 feet from the new wetlands boundary.

Coastal general permit 24 is not so different from FWPA Rules general permit 16 as to preclude comparison. The removal of the conservation restriction requirement from coastal general permit 24 was discussed in the notice of proposal Summary to illustrate that past Department rulemaking made similar amendments based on similar considerations. Both general permits authorize similar environmentally beneficial activities, albeit often in different areas of the State, and both permits have been amended to remove the conservation restriction requirement in order to encourage voluntary activities to create, restore, or enhance ecosystem functions and values.

361. COMMENT: It is unclear whether habitat restoration, creation, or enhancement projects using Wetland Mitigation Council funding are required to record a conservation restriction. Because these projects use funds collected for compensatory mitigation, a conservation restriction should be required. Similarly, projects funded by State or Federal grants should be protected long-term through a conservation restriction. (277)

RESPONSE: N.J.A.C. 7:7A-11.22(b), which has been continued from prior N.J.A.C. 7:7A-15.20(b) with minor changes, continues to establish that "[i]f the Council transfers funds or land, the Council shall first execute and record a conservation restriction that meets all applicable requirements at N.J.A.C. 7:7A-12, and that ensures that the funds or land will be used only for mitigation and freshwater wetlands conservation." While this requirement is not restated within general permit 16, any project authorized under general permit 16 that uses land or funds transferred from the Wetlands Mitigation Council will be subject to the conservation restriction

requirement. Requirements specific to State or Federal grant-funded projects are more appropriately established within grant agreements and not in the body of freshwater wetlands general permit 16.

General Permit 17-Trails and Boardwalks (N.J.A.C. 7:7A-7.17)

362. COMMENT: The Department states in the notice of proposal Summary that the Department intends to align the rules governing the permitting process of all three land use permitting programs (freshwater wetlands, coastal, and flood hazard) and claims that, when the notice of proposal is adopted, the rules governing the process for obtaining a permit will be standardized across all three chapters of land use rules as much as possible and will be organized in a uniform order and format. Taking this intended goal of alignment into account, amendments to general permits in the FWPA Rules and FHACA Rules are required. Specifically, FWPA general permit 17 for trails and boardwalks and FHACA general permit 12 for footbridges and general permit 13 for trails and boardwalks, while authorizing similar activities, contain contradictory restrictions on said activities. FWPA general permit 17 does not allow the use of any motorized vehicles, while FHACA general permits 12 and 13 permit the use of certain motorized vehicles. FWPA general permit 17 restricts the width of a trail to six feet but allows an unspecified wider width upon a demonstration of need by the applicant related to the Barrier Free Subcode of the Uniform Construction Code. FHACA general permits 12 and 13 also limit the width of a trail or bridge to six feet while allowing a wider width based on the requirements of the Barrier Free Subcode, but both include a maximum width of 10 feet. These contradictory requirements could result in an applicant needing to apply for an individual permit under the FWPA while being eligible for a general permit under the FHACA Rules, or vice versa. This result is contrary to the

stated intent of the notice of proposal, seems unjustified, and would result in a waste of Department and applicant resources. In addition, many owners and operators of trails, boardwalks, and bridges are required to maintain and police them, as well as provide alternative means of transport in emergency situations and for disabled persons. In order to meet these obligations, trail/boardwalk and bridge owners must be able to utilize motorized vehicles for limited purposes and should be permitted to under the FWPA general permit. Furthermore, electric-based motorized vehicles and transports should be encouraged wherever possible to foster sustainability and reduce noise and greenhouse gas pollution.

In light of this issue, revisions should be made to allow trails or boardwalks to accommodate "electric motorized single user methods of transportation, and lightweight motorized vehicles, including golf carts and maintenance carts utilized for security, maintenance, and transport of individuals requiring mobility assistance" to be constructed under FWPA general permit 17, with the restriction that "except when utilized for security, maintenance, or for transportation of individuals requiring mobility assistance, general permit 17 does not authorize the use of golf carts or all-terrain vehicles." FHACA general permit 12 and 13 should be similarly amended to explicitly state that the footbridge or trail/boardwalk can be used to carry electric motorized single user methods of transportation, maintenance carts, or all-terrain vehicles utilized for security, maintenance and transport of individuals requiring mobility assistance. The 10-foot limit on width where an applicant demonstrates that a bridge or trail/boardwalk must be wider than six feet to comply with State and Federal barrier free access requirements should be deleted for consistency with FWPA general permit 17. These amendments will provide applicants with certainty and predictability and are in line with the Department's stated goal to align the three land use permitting rules. (355)

RESPONSE: The adopted rules serve to align the administrative processes for obtaining a permit under the FWPA Rules with those processes in the CZM and FHACA Rules. However, the Department agrees that the general permits for trails and boardwalks across the three rules are not entirely aligned in their requirements. On July 17, 2017, the Department published a rule proposal that includes amendments and new rules to align how trails, boardwalks, and paths are regulated under the three land use rule chapters. See 49 N.J.R. 2122(a). These amendments clearly distinguish between very low-impact trails and boardwalks, and multi-use paths by including new general permits in the CZM Rules and FHACA Rules, and amending existing permits in the FHACA Rules and FWPA Rules. FWPA general permit 17A was proposed to be amended to allow the construction of multiple-use paths for use by "light vehicles," such as golf carts, to align the requirements with those of existing FHACA general permit 13. Width requirements were also proposed to be aligned between the land use rules by specifying a maximum width of six feet for trails and boardwalks, and a maximum width of 10 feet for multiple use paths without requiring an applicant to demonstrate the need to comply with the Barrier Free Subcode of the Uniform Construction Code. However, the comments received on the July 17, 2017 notice of proposal indicate that the Department may need to conduct additional stakeholder sessions to further refine the proposed permits to ensure that regulation of trails, boardwalks, and multiple-use paths is consistent across the three rule chapters as appropriate, is protective of environmentally sensitive areas, but also does not hinder efforts to connect trail networks and provide the public access to nature. In sum, the Department recognizes the issues raised by the commenter and is actively working to solve them.

363. COMMENT: General permit 17 is supported because trails and boardwalks, when implemented in a way that protects wetlands from potential impacts of recreation, enhance recreation while also supporting education and appreciation of wetlands. (431)

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

General Permit 20-Bank Stabilization (N.J.A.C. 7:7A-7.20)

364.COMMENT: It is not appropriate for Land Use Management to defer to the Department's Bureau of Environmental Analysis, Restoration, and Standards at proposed N.J.A.C. 7:7A-7.20(a)2ii(1). The Department's goal should be to achieve the project that is best for the environment. The Bureau of Environmental Analysis, Restoration, and Standards may provide funding, but may not have the expertise to ensure that a project will be environmentally beneficial or successful and should, therefore, revise its program to ensure that the projects it intends to fund meet all requirements of the FWPA Rules. Providing money for a project without establishing good restoration standards almost guarantees its failure. (415)

RESPONSE: The Department is not proposing to change any of the standards under general permit 20. Rather, the Department, at N.J.A.C. 7:7A-7.20(a)2iii(1), is updating what was previously codified at N.J.A.C. 7:7A-5.20(c)3i to accurately reflect the current name of the bureau within the Department that is involved in funding bank stabilization. As stated in the notice of proposal Summary (see 49 N.J.R. 2122(a)), the Division of Watershed Management no longer exists within the Department. To reflect the Department's current organization, the Department is replacing the outdated reference with a reference to the Bureau of Environmental Analysis, Restoration, and Standards, which is the current bureau within the Department that may fund bank stabilization activities. The Bureau of Environmental Analysis, Restoration, and

Standards administers a competitive grant program to fund projects that address impaired waters on the State's 303d list. Under this general permit, if the Bureau of Environmental Analysis, Restoration, and Standards is providing funding to the project, the applicant would be allowed a larger linear footprint to undertake the bank stabilization activity in order to facilitate projects designed to improve water quality in New Jersey.

General Permit 22-Expansion of Cranberry Growing Operations in the Pinelands (N.J.A.C. 7:7A-7.22)

365. COMMENT: General permit 22 is illegal and should be repealed because it does not provide appropriate limitations on impacts and the mitigation requirement is not consistent with State and Federal regulations. The Natural Lands Trust declined to accept Pinelands Development Credits (PDCs) because the permit was inappropriate. (415)

RESPONSE: General permit 22 is not illegal and is consistent with State and Federal regulations. This general permit was first established on October 4, 1999 (see 31 N.J.R. 2964(a)). Since then, the general permit was amended on April 3, 2000, and again on September 4, 2001. The changes adopted under the current rulemaking are minor and reflect revisions to ensure consistency in structure of the general permit with other permits and to update citations. It is not clear if the commenter is referring to a specific permit action that involved the Natural Lands Trust; however, PDCs are approved by the New Jersey Pinelands Commission. Any permittee authorized under general permit 22 does not have an obligation to work with or meet any requirements of the Natural Lands Trust.

General Permit 25-Minor Channel or Stream Cleaning for Local Government Agencies

(N.J.A.C. 7:7A-7.25)

366. COMMENT: The proposed rules weaken protections by allowing for stream cleaning activities in transition areas even if the activities end up destroying wetlands. (13, 15, 22, 23, 35, 51, 52, 85, 63, 76, 173, 174, 189, 202, 218, 232, 233, 237, 240, 243, 244, 266, 294, 306, 324, 327, 329, 334, 343, 362, 377, 392, 395, 399, 408, 414, 415, 427, 431, and 454)

367. COMMENT: The proposed rules eliminate the current 500-foot limit to stream clearing and desnagging within a municipality under general permit 25. However, clearing and desnagging can have substantial impacts on habitat, benthic resources, and water quality, especially when taking settlement and silt into account. Removing this limit reduces the Department's authority to prevent impacts, such as sediment and contaminant resuspension and habitat damage. (376)

RESPONSE TO COMMENTS 366 AND 367: The adopted changes to general permit 25 are consistent with the legislative changes to the Stream Cleaning Act by P.L. 2015, c. 210, which amended N.J.S.A. 58:16A-67 effective January 11, 2016, and with flood hazard area general permit 1 at N.J.A.C. 7:13-9.1 (see 47 N.J.R. 1041 (a); 48 N.J.R. 1067(a)). This general permit authorizes a county, municipality, or a designated agency thereof, to conduct activities in freshwater wetlands and transition areas within their jurisdiction necessary to desnag a channel or stream and/or remove accumulated sediment, debris, and garbage that are obstructing flow in the channel or stream. As provided in the act at N.J.S.A. 58:16A-67.b(4), where such activities are undertaken by a municipality or county (or a designated agency of either) wholly within the jurisdiction of one municipality, they are authorized under this general permit. However, consistent with the act at N.J.S.A. 58:16A-67.b(4)(b), where the activity is to be undertaken by a county or its designated agency and the project is located within more than one municipality, the

adopted rules continue to provide that the activity may only qualify for authorization under this general permit if the channel reach is less than 500 feet in length (see N.J.A.C. 7:7A-7.25(a)6ii).

Impacts to transition areas are necessary to allow for access to the stream in order for the regulated activity to be undertaken. However, the FWPA Rules include a variety of restrictions and requirements designed to ensure that activities authorized by this general permit result in only *de minimis* impacts to wetlands and the environment in general. For example, N.J.A.C. 7:7A-7.25(a)4 requires stream cleaning activities to be conducted from only one bank where possible, which minimizes impacts to vegetation in wetlands and transition areas adjacent to the stream, therefore, minimizing the risk of bank erosion. N.J.A.C. 7:7A-7.25(a)5 requires permittees to avoid the use of heavy machinery in the stream channel, which further minimizes sediment resuspension. Additionally, like all other general permits that authorize activities that may introduce sediment into a stream, activities under general permit 25 must comply with the timing restrictions in Table 5.7 in accordance with N.J.A.C. 7:7A-5.7(c) to protect fishery resources and/or spawning fish populations. The protective requirements in general permit 25 and the conditions that apply to all general permits ensure that stream cleaning activities have only minimal impacts on freshwater wetlands, transition areas, State open waters, and the aquatic environment.

368. COMMENT: Proposed N.J.A.C. 7:7A-7.25(d) states, “[t]his general permit does not authorize activities that alter the natural banks of the stream. Such modification may in some cases be authorized under general permit 20.” When would altering the natural banks of a stream be allowed under a permit for stream bank stabilization? Natural and artificial materials might be

used for structural integrity but should not alter the natural banks of the stream. This provision should be deleted. (415)

RESPONSE: Some bank stabilization activities that could be authorized under general permit 20 may alter the natural banks of a stream in the sense that the bank may be armored with riprap. Further, as indicated at N.J.A.C. 7:7A-7.20(e)4iii (previously codified at N.J.A.C. 7:7A-5.20(e)3), activities could be authorized under general permit 20 that include replacement of material to restore an eroded shoreline or streambank as part of a bank stabilization if the applicant demonstrates to the Department's satisfaction that modification of the existing bank by replacing the previously eroded material would be environmentally beneficial. The Department believes that cross-reference to the potential for such activities to qualify for general permit 20 at N.J.A.C. 7:7A-7.25(d) is appropriate. While, as indicated above, some bank stabilization projects may include placement of hard materials along the natural stream bank, as in previous N.J.A.C. 7:7A-5.20(a), adopted N.J.A.C. 7:7A-7.20(a) makes clear that general permit 20 does not authorize channelization, which is a much more intensive modification to the natural banks of a stream.

369. COMMENT: In general permit 25, the Department is proposing to replace the provision that the general permit does not authorize removal of material below the natural bottom of the water with the requirement that material removal does not alter the natural bed and banks of the water. Consequently, the requirement that activities only disturb a channel or bed of the water (not banks) except for access is deleted. This change facilitates modifications to the floodplain and may spur unforeseen flood risk. (208)

RESPONSE: The intent of the statutory provisions at N.J.S.A. 58:16A-67 regarding stream cleaning activities is to be protective of streams corridors and at the same time allow for cleaning of debris to relieve or prevent flooding. The requirements incorporated into general permit 25 at N.J.A.C. 7:7A-7.25 are intended to allow achievement of this goal in a manner that ensures that regulated activities authorized by the general permit do not have more than a minimal impact on resources protected by the FWPA Rules. The requirement referenced by the commenter that activities not alter the natural bed and banks of the water is more protective than the previous requirement that material not be removed below the natural bottom of the water. Prohibiting the alteration of the natural bed of a water encompasses the prior requirement that activities not include removal of material below the natural bottom of the water and ensures the natural contours of the channel or stream are preserved, which will reduce the risk of erosion of the bank and sedimentation of the water body and better preserve stream ecology. The requirement that the banks of the water are not altered is more restrictive than the requirement that activities only disturb the bed of a water except as needed for access. Requiring that the natural bed and bank of a water are not altered ensures the restoration of natural conditions following the completion of stream cleaning activities.

The main intent of amendments to general permit 25 was to align the requirements of this freshwater wetlands general permit with flood hazard general permit 1 at N.J.A.C. 7:13-9.1 in order to streamline the permitting of county or municipal stream cleaning activities. The changes made continue to maintain or strengthen the appropriate protections present in the prior rules.

N.J.A.C. 7:7A-8, Transition Area Waivers

General Comments

370. COMMENT: The proposed rules weaken protections by allowing permittees to "play games" with buffers and transition areas. A waiver can be issued to get past disturbance limits. (13, 15, 22, 23, 35, 63, 74, 76, 85, 173, 174, 189, 202, 218, 232, 233, 237, 243, 244, 266, 294, 306, 324, 327, 329, 334, 343, 362, 377, 392, 395, 399, 408, 414, 427, 431, and 454.

371. COMMENT: The proposed rules allow transition area waivers, which effectively circumvents the disturbance limits, negating the function of wetland buffers. (51, 52, 240, and 415)

RESPONSE TO COMMENTS 370 AND 371: The Department issues transition area waivers to authorize regulated activities within the transition areas adjacent to freshwater wetlands. The ability of the Department to issue a transition area waiver comes from the FWPA at N.J.S.A. 13:9B-18, which states "[t]he department shall grant a transition area waiver reducing the size of a transition area to not less than the minimum distance … provided that (1) the proposed activity would have no substantial impact on the adjacent freshwater wetland or (2) the waiver is necessary to avoid a substantial hardship to the applicant caused by circumstances peculiar to the property." The adopted amendments remain consistent with the intent of the FWPA. The ability of an applicant to apply for a transition area waiver is not a new provision and is consistent with the FWPA. As explained further in the Response to Comments 372 through 376, the adopted amendments provide appropriate flexibility while maintaining stringent transition area protections.

372. COMMENT: Today's transition areas are tomorrow's floodplains. The proposed regulatory flexibility for development in transition areas (including changes to permit duration and the

duration of an emergency permit) increase the possibility of increasing disturbances to transition areas, potentially exposing more areas and structures to current and future flood hazards. (208)

373. COMMENT: The diminution of transition area protections is concerning. Transition areas are a critical component of freshwater wetlands ecosystems as they provide temporary refuge for freshwater wetlands fauna during high water episodes, as well as critical habitat for animals dependent upon, but not resident in, freshwater wetlands. They also accommodate variations in freshwater wetland boundaries over time. In northern and central New Jersey, including Hunterdon and Mercer counties, upland transition areas protect an often expansive and complex mosaic of fragile wetlands along streams that drain the many long ridges. Transition areas are important zones that not only protect down-gradient streams and wetlands but also protect associated and sometimes uncommon or rare natural communities within upland transition areas. The animal and plant communities rely upon the nearby water and residual moisture. (179)

374. COMMENT: Decreasing protections for transition areas and buffers will endanger wildlife and encourage development encroachment. (84, 222, and 402)

375. COMMENT: Please explain special activity and transition area waivers and why they are being expanded. (179)

376. COMMENT: Explain how the changes to transition area waivers protect wetlands and wildlife habitat. (189)

RESPONSE TO COMMENTS 372 THROUGH 376: Transition areas waivers are a type of authorization that allows for a modification of a transition area. The Department issues transition area waivers to authorize regulated activities within the transition areas adjacent to freshwater wetlands. There are five types of transition area waivers, each with their own set of requirements. These include: averaging plan, special activity, hardship, general permit, and

access transition area waivers. Special activity transition area waivers authorize regulated activities in transition areas associated with stormwater management, linear development, redevelopment, or activities that, if proposed in a freshwater wetland, would meet the standards for an individual permit. These waivers are only issued when the activities will not result in a substantial impact on the adjacent freshwater wetlands, and the proposed project will minimize impacts to the freshwater wetland and transition area. For stormwater management and linear development special activity waivers, the Department requires applicants to demonstrate that there is no feasible alternative onsite location that is outside of the transition area or freshwater wetlands. A redevelopment special activity waiver is only issued when the area of proposed activity is significantly disturbed, so that it is not fully functioning as a transition area at the time of application. The substantive requirements for the various types of special activity waiver are not changing in this rulemaking, nor are the duration provisions for any transition area waiver. While the Department had proposed to increase the duration of certain individual permits to 10 years at N.J.A.C. 7:7A-9.2(b), transition area waivers have a five-year duration with the possibility of one five-year extension in accordance with N.J.A.C. 7:7A-8.5, and would not have been affected by the proposed change in permit duration. As indicated in the Response to Comments 227 through 234, the Department has not adopted the change to the permit duration.

The Department is adopting the amendment at N.J.A.C. 7:7A-5.4(a)1 that allows certain types of transition area waivers to be combined with a general permit to authorize total disturbance greater than the general permit disturbance limit. While combination of a general permit and a transition area waiver was not allowed under the prior rules, the requirement that waivers are only issued when the proposed regulated activities will not result in a substantial impact on the adjacent freshwater wetlands, in conjunction with the requirement that the

proposed project minimize impacts to the freshwater wetland and transition area, ensures that any impact resulting from the combination of general permits and transition area waivers is minimal.

General Provisions for Transition Area Waivers (N.J.A.C. 7:7A-8.1)

377. COMMENT: The Department's failure to include impacts to transition areas from access through the transition area to the area of the activity when calculating the size of disturbance in determining general permit compliance at N.J.A.C. 7:7A-8.1(a)5 is inappropriate. Given the integral nature of transition areas to the health of a wetland, neglecting to quantify the impacts to these areas may, in fact, turn a *de minimis* impact into one that will significantly degrade the wetland. What studies has the Department reviewed or undertaken to determine that excluding the transition area will not have an individual or cumulative impact on the viability or health of an impacted wetland? Has the Department undertaken any examination of the long-term health of wetlands with impacted transition areas? (319 and 328)

378. COMMENT: The amendment providing that disturbance authorized under an access transition area waiver will not be counted in calculating the amount of disturbance under a permit or mitigation proposal, should be withdrawn. (277)

RESPONSE TO COMMENTS 377 AND 378: Access transition area waivers were issued under the prior rules and are directly required by the FWPA at N.J.S.A. 13:9B-12, which provides that "if a freshwater wetland permit is approved and issued pursuant to the provisions of this act the department shall waive or modify the requirement for a transition area to the extent required to provide access to the site of the approved regulated activity." As explained in the notice of proposal Summary, the strictly limited types of activities authorized by an access transition area

waiver result in only minor and often times temporary impacts to transition areas and, thus, are not counted in the overall amount of disturbance of the regulated activity. The very limited scope of activities authorized under an access transition area waiver are described at N.J.A.C. 7:7A-8.1(a)5i and ii. Activities are only authorized under this type of waiver when the activities are in that portion of the transition area bordering on that portion of the freshwater wetland in which the authorized activity is to take place and are necessary to accomplish the activity permitted in the adjacent freshwater wetlands. Transition area disturbance beyond the scope of these requirements must be authorized under a separate transition area waiver. Finally, in accordance with N.J.A.C. 7:7A-8.1(b), the Department may add additional conditions to any transition area waiver, including a waiver for access, as necessary, to ensure that an activity does not result in a substantial impact on the adjacent wetlands, and does not impair the purposes and functions of transition areas.

379. COMMENT: The amendment to N.J.A.C. 7:7A-8.1(a)5ii to specify that access transition area waivers allow regulated activities for future use of a regulated activity authorized under a general permit is supported. (255)

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

380. COMMENT: Proposed N.J.A.C. 7:7A-8.1(b)4 and (e), which provide that if the Department determines on a case-by-case basis that a conservation restriction is necessary as a condition of a transition area waiver, only the remaining transition area and not the adjacent wetland will be subject to the conservation restriction, are supported. (140)

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

381. COMMENT: The amendments to proposed N.J.A.C. 7:7A-8.1(e) and 8.2(f) are illogical and should be deleted. The FWPA allows transition area waivers assuming that the entire transition area maintains its values and functions after modification. The Department cannot separate the altered portion of the transition area from the whole, since the altered piece will not function independently. The entire transition area must be protected after a waiver is granted. Also, there is no transition area without an adjacent wetland, so it does not make sense to require the protection of an isolated piece of the area. This is akin to obtaining homeowner's insurance for an addition to a house but not for the original house. (415)

382. COMMENT: The Department should not delete the provision at N.J.A.C. 7:7A-8.1(e) requiring an applicant to deed restrict not only a modified transition area but also the adjacent wetland. In the 2008 rule proposal, the Department determined that, since transition areas protect the integrity of wetlands, upon a modification of that transition area, it is important for the health of the wetland to permanently protect not only the transition area but the adjacent wetland. As the FWPA provides at N.J.S.A. 13:9B-16(a)(1), transition areas act as "an ecological transition zone ... which is an integral portion of the wetland ecosystem." (319 and 328)

383. COMMENT: The proposed amendments to transition area waiver provisions will make the placement of a conservation restriction on modified transition areas either optional or only required on the expanded portion of a buffer. This would leave the remaining transition area subject to future modifications, which would further reduce their ability to buffer wetlands from secondary impacts of development. The proposed changes are inconsistent with the FWPA's mandate to protect transition areas for their important role in wetlands ecosystems. Without transition areas, wetlands can be gradually destroyed or degraded by adjacent activities, which is

a common occurrence under the Federal 404 program (which does not regulated transition areas). The proposed change to allow an applicant to place a conservation restriction only on the expanded modified buffer has not been, and cannot be, supported by scientific rationale to demonstrate that the change would continue to protect these vital regulated areas. (277)

384. COMMENT: The Department has experienced many cases where transition areas have been subject to encroachment by homeowners even when marked with monuments and deed restricted. The transition area subject to deed restriction under the rulemaking may only be narrow slivers of land as little as one foot wide to no more than 25 feet wide, which makes the long-term protection of these small but sensitive areas unlikely without protecting the entire modified transition area and wetlands. (277)

RESPONSE TO COMMENTS 381 THROUGH 384: A conservation restriction is required in all cases for the expanded portion of a transition area under a transition area averaging plan waiver because the compensation area is located outside of the Department's usual jurisdiction under the FWPA Rules. Protection of all other remaining transition areas and the adjacent wetlands may be accomplished through the protective requirements of the FWPA Rules, or, if necessary, through requiring a conservation restriction to be recorded on the remaining portion of a transition area in accordance with N.J.A.C. 7:7A-8.1(e). The conservation restriction provisions in the prior rules were always an optional condition that could be placed by the Department as necessary, and not a default requirement for all transition area waivers. In accordance with the FWPA and N.J.A.C. 7:7A-8.1(b), the Department will not issue a transition area waiver that would result in a substantial impact on the adjacent wetlands, or that would impair the purposes and functions of transition areas listed at N.J.A.C. 7:7A-3.3.

385. COMMENT: Proposed N.J.A.C. 7:7A-8.1(b)3, which clarifies that only the modified transition area must be marked, is supported. However, clarification is needed at N.J.A.C. 7:7A-8.1(b)3i as to whether planting of vegetation and/or signage with markers are acceptable to mark a transition area boundary, especially in the residential context, as has been accepted in the past if there is little danger of encroachment into regulated areas. The notice of proposal Summary confirms that the FWPA does not regulate people entering and walking in a wetland or transition area, yet the references in the rule to fencing appear to be intended to do just that. Signage and alternative markers adequately alert the public to the existence of regulated areas and are more cost-effective than fencing, which imposes an unnecessary cost burden on development and on the end-user, the purchaser of a developed parcel. (140)

RESPONSE: As established in N.J.A.C. 7:7A-8.1(b)3, the Department will determine the appropriate transition area markers in consideration of a number of factors, including the type of project proposed, wildlife that may be present, and the likelihood for people to disturb the transition area and/or wetland. Markers must be permanent and must clearly delineate the boundary of the transition area to prevent unauthorized and inappropriate disturbance to the modified transition area and adjacent wetlands. While it is anticipated that in many cases the required permanent marking will be accomplished using concrete monuments or other similar features, as indicated in the rule text, there may be situations where the Department determines that the appropriate delineation of the transition area should be accomplished by fencing to prevent disturbance of the transition area and/or wetland. The appropriateness of any particular type of marker will be determined by the Department on a case-by-case basis during the review of an application for a transition area waiver. Please also note that “modified transition area” referred to in the general provisions for transition area waivers at N.J.A.C. 7:7A-8.1(b)3 may

refer to the entirety of a transition area within which disturbance occurs in addition to any compensation area associated with a transition area averaging plan waiver, if applicable. The term “modified transition area” is intended to capture the transition area that will be changed in some way (disturbed, reduced, or added) as a result of the regulated activities, and is not synonymous with the “averaging compensation area” associated with averaging plan waivers under N.J.A.C. 7:7A-8.2.

386. COMMENT: Proposed N.J.A.C. 7:7A-8.1(b)3 no longer limits the options for marking a modified transition area waiver to permanent fencing. However, this provision leaves all decision-making on type, number, and spacing of markers to the Department, which prevents the applicant from knowing the cost of compliance. The Department should allow applicants to propose protective markers in submitted permit plans. (255)

RESPONSE: Applicants are welcome to propose markers in their application and are encouraged to demonstrate why the proposed markers are appropriate in consideration of the type of project proposed, wildlife that may be present, and the likelihood for people to disturb the transition area and/or wetland. As applicants begin to plan and budget for proposed activities, they are welcome to contact the Department to request a pre-application conference in accordance with N.J.A.C. 7:7A-15. However, the final decision of whether to require that a transition area be marked, and the type of marker required in order to ensure that transition areas and/or wetlands are adequately protected from inappropriate disturbance, continue to be made by the Department during a review of an application for a transition area waiver.

387. COMMENT: Can it be assumed that the requirement to mark a modified transition area will not apply to an access transition area waiver, since the proposed rules allow an access transition area waiver to authorize disturbance necessary for future use of the regulated activity authorized on the site? (255)

RESPONSE: The condition that a modified transition area be permanently marked applies to all transition area waivers as necessary to ensure that an activity does not result in a substantial impact on the adjacent wetlands, and does not impair the purposes and functions of transition areas. The Department will determine the appropriateness of this condition independently for each application.

Transition Area Averaging Plan Waiver (N.J.A.C. 7:7A-8.2)

388. COMMENT: In N.J.A.C. 7:7A-8.2(c)1, the Department should clarify that the required setback for a structure, impervious surface, or stormwater management facility, includes only the footprint of the feature and excludes any associated land grading or other disturbance required for construction. (69)

RESPONSE: The listed features may include a graded area that is part of the structural support of the development or construction; for example, some road construction can include grading that is a necessary support component of the road construction. The Department agrees that there are some cases where grading is not part of the structure or feature and is necessary to connect topography on the site. In those cases, the grading would not be included in the required setback. However, in cases like the road example above where the grading is an integral component of the construction, the grading would be included in the required setback. In sum, when grading is an integral part of the structure, impervious surface, or stormwater management facility, such as an

embankment needed to stabilize a road, the grading must be set back more than 20 feet from freshwater wetlands for the Department to be able to make the finding that the activity will not result in a substantial impact on the adjacent freshwater wetlands and issue a transition area averaging plan waiver. Grading not integral to the functioning of the structure, such as minor grading to topographically connect the site in the vicinity of the structure, impervious surface, or stormwater management facility, occurring within 20 feet of freshwater wetlands does not automatically result in the determination that there will be a substantial impact on freshwater wetlands under N.J.A.C. 7:7A-8.2(c), and, therefore, may be approvable under a transition averaging plan waiver.

389. COMMENT: The proposed amendments to N.J.A.C. 7:7A-8.2(f), where the conservation restriction for a transition area waiver averaging plan waiver must only restrict future activities in the averaging compensation area instead of restricting activities in all remaining wetlands and transition areas, are supported. (69, 140, and 262)

RESPONSE: The Department acknowledges this comment in support of the rules. However, please be advised that the Department may require the recordation of a conservation restriction for both the reduced and expanded transition area under a transition averaging plan, or for other transition area waivers, on a case-by-case basis in accordance with N.J.A.C. 7:7A-8.1(e), as explained in the Response to Comments 381 through 384. The adopted rules require a conservation restriction *in all cases* for the compensation area of a transition area averaging plan under N.J.A.C. 7:7A-8.2(f), but do not preclude the Department from requiring a conservation restriction be recorded to protect remaining transition area when issuing other types of transition area waivers or in addition to the compensation area.

390. COMMENT: Please clarify if a property owner may rely on an averaged transition area that has been recorded in a conservation restriction, even if the contract purchaser abandons the project, past the five-year limit of the transition area waiver approval. Similarly, if a project is not complete but a conservation restriction has been filed, please clarify whether the property owner or successor in interest can continue to rely on the recorded, averaged transition area. (140)

RESPONSE: If no regulated activities have occurred and the transition area waiver has expired, the regulated transition area is that which would exist under the rules in relation to the wetlands on, or adjacent to, the site in the absence of a transition area waiver, which is specified at N.J.A.C. 7:7A-3.3. If regulated activities have commenced (and, therefore, a portion of the transition area has been or is being disturbed or destroyed, necessitating the designation of a compensation area) and the transition area averaging waiver has not expired, the "averaged" transition area remains in effect. If the property owner or successor in interest seeks to continue activities beyond the expiration date of the transition area waiver, an extension in accordance with N.J.A.C. 7:7A-20.4 must be obtained.

391. COMMENT: Does proposed N.J.A.C. 7:7A-8.2(b)1i apply to a distance that exceeds 10 feet? It is unclear whether the intent was to prohibit a transition area waiver if there is a very small area of a proposed project where the slope is over 25 percent (one 10-foot interval for example). Also, please clarify what an applicant would be required to demonstrate. (140)

RESPONSE: The explanation of how to determine slope is the same as in the prior rules and has simply been recodified from prior N.J.A.C. 7:7A-6.4(g). N.J.A.C. 7:7A-8.2(b)1i applies to any

distance of transition area; the provision directs the applicant to calculate the slope by measuring in 10-foot intervals. The slope of a distance greater than 10 feet would be determined by calculating the slope for multiple 10-foot intervals. If any portion of the transition area contains a slope greater than 25 percent, N.J.A.C. 7:7A-8.2(b)1 would not be satisfied and a transition area waiver would not be issued unless the applicant was able to demonstrate through scientific documentation that the proposed activity would have no substantial impact on the adjacent wetlands in accordance with N.J.A.C. 7:7A-8.1(d). N.J.A.C. 7:7A-8.1(d) provides that the Department will issue a transition area waiver in this case and in other cases where the applicant has rebutted the presumption that the activity will have a substantial impact on adjacent wetlands under N.J.A.C. 7:7A-8.2 by demonstrating that the activity would qualify for an individual permit under the FWPA Rules. Therefore, the applicant must demonstrate compliance with all applicable requirements in N.J.A.C. 7:7A-10, Requirements for all individual freshwater wetlands and open water fill permits. N.J.A.C. 7:7A-8.2(b)1 does not allow the slope to be averaged across the length of the transition area.

Special Activity Transition Area Waiver (N.J.A.C. 7:7A-8.3)

392. COMMENT: The example of a lawn should not be deleted from N.J.A.C. 7:7A-8.3(f)1 because it should not be any easier to obtain a transition area waiver to place a structure or make some other permanent change to a lawn than to any other natural transition area. Because a lawn is vegetated, it provides some function as a transition area – certainly more than a paved area. Although a lawn may not provide habitat, it assists with stormwater abatement and water quality protection, absent any chemical lawn treatments. (415)

RESPONSE: The example of a lawn was deleted to avoid confusion because there are some cases where a lawn or lawn-like area may be considered significantly disturbed. For example, an intensively maintained grass field used for sports games and surrounded by a track may be considered a lawn by some readers but is not likely to be functioning as a transition area at the time of application. A lawn adjacent to a single-family home, however, is likely to maintain some transition area functions.

N.J.A.C. 7:7A-10, Requirements for all Individual Freshwater Wetlands and Open Water Fill Permits

393. COMMENT: The proposed rules state: "An applicant shall not segment a project or its impacts by applying for general permit authorization for one portion of the project and applying for an individual permit for another portion of the project. Similarly, an applicant shall not segment a project or its impacts by separately applying for individual permits for different portions of the same project on the same site." This is one of two sections of the rules that utilize the phrase, "on the same site." This phrase seems to allow for the improper segmentation of projects like pipelines. The text appears to differentiate between project and site. There is no need to stipulate “on the same site” if this standard is meant to apply to the entire project. (415)

394. COMMENT: The proposed rules allow applicants to avoid considering cumulative impacts by allowing projects to be segmented with multiple general permits and individual permits for each wetland impact instead of the entire project. (104, 144, and 361)

395. COMMENT: The addition of the phrase “on the same site” at proposed N.J.A.C. 7:7A-10.1(c) does not add to the clarity of the section and could be interpreted to mean that multiple individual permits for a project can be obtained for projects spanning multiple sites. The

proposed addition should not be adopted to avoid misinterpretations that could lead to environmental destruction. (277)

RESPONSE TO COMMENTS 393 THROUGH 395: The FWPA Rules do not permit multiple general permit authorizations and/or multiple individual permits to be used to segment a project. Under N.J.A.C. 7:7A-10.1(c), an application needs to address wetland and State open water impacts from the entire proposed project or combination of regulated activities, as the entire right-of-way or proposed area of disturbance is considered a single site. Segmentation of a project by applying for multiple general permits and/or individual permits separately is explicitly prohibited by adopted N.J.A.C. 7:7A-5.4(a)1 and 10.1(c). The proposed addition of "on the same site" at N.J.A.C. 7:7A-10.1(c) was intended to clarify the requirement with no change in meaning, as described in the notice of proposal Summary at 49 N.J.R. 877. However, based on the comments above, the Department agrees that addition of this phrase could be misinterpreted in the future to arguably allow one project to be broken into multiple sites with permits obtainable for each individual site, contrary to the Department's intent. Therefore, the proposed addition of "on the same site" is not being adopted.

Mitigation

General Support

396. COMMENT: The proposed success criteria that require that the permittee demonstrate that the wetland community comprised of the planted vegetation or targeted hydrophytes as detailed in the approved mitigation plan has achieved, or is on track to achieve, the desired wetland community, is supported. (335)

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

General Opposition

397. COMMENT: Mitigation is a fraud and does not work. (346)

398. COMMENT: Mitigation has been an overwhelming failure with abysmal success rates, resulting in the loss of myriad wetlands and wetland-dependent habitats over the last few decades. The rules should be made more stringent in acknowledgement of the fact that the failed science of mitigation has resulted in water quality degradation. (160)

399. COMMENT: The expansion of mitigation under the proposed rules is strongly opposed. Mitigation is questionable at best as wetlands take centuries to form and, thus, cannot be replaced by new plantings and excavations that do not provide the same values and functions as natural sites. For this reason, mitigation should never be out-of-kind. For example, the rules allow for the destruction of a healthy cedar swamp in exchange for the planting of salt grass. This is not an equal match of functions and values. In contaminated areas, *Spartina* requires an oxygen type of environment whereas Phragmites does not. The rules also allow for wetlands to be replaced with uplands, which again, are not equal in terms of functions and values. (240 and 415)

400. COMMENT: Mitigation is continually expanded, but avoidance should be the first priority. The FWPA Rules should contain requirements for avoidance and for analyzing alternatives for minimization as a routine element of the permit process rather than falling back on mitigation. (179)

401. COMMENT: The flora, fauna, and fresh water in existing wetlands are irreplaceable. In projects where wetlands are filled in one area and replaced with manmade wetlands elsewhere, the manmade wetlands were not the same as the natural wetlands. (299)

RESPONSE TO COMMENTS 397 THROUGH 401: Mitigation is a nationally recognized means to fully compensate for any ecological loss associated with a permit. The Department agrees that, where possible, avoidance of impacts to wetlands is preferable. Accordingly, both general and individual permits are structured to avoid and minimize disturbance, prior to providing mitigation. Once an applicant has received a permit, mitigation, if required, is a condition of that permit. In accordance with N.J.A.C. 7:7A-11.2(a), generally mitigation must be in-kind and shall fully compensate for any ecological loss. While in-kind mitigation is generally required, the rules do allow the Department to consider a proposal for out-of-kind mitigation. However, as specified in N.J.A.C. 7:7A-11.2(a), the Department will only approve out-of-kind mitigation if it is satisfied that the mitigator has demonstrated through current scientific literature that the mitigation meets the goals and objectives of this subchapter and would result in equal ecological functions and values; in no case would the Department approve mitigation that did not meet that standard. The rules specify the types of information a mitigator must supply to support such a demonstration. While the Department agrees that there are instances where out-of-kind mitigation would not fully compensate for all ecological loss from a permitted activity, there are many instances where out-of-kind mitigation can provide equal, or even greater ecological functions and values than those impacted by the permitted activity. For example, if a permittee impacts a *Phragmites*-dominated wetland and proposes to compensate for that disturbance with a forested wetland mitigation project, the Department would allow for this out-of-kind mitigation as the functions and values of a forested wetland are greater than the functions and values of a *Phragmites*-dominated wetland system.

The Department considers its mitigation program to be a successful one. Through implementation of the rules, which require a robust monitoring regime for all mitigation projects,

the Department ensures that every mitigation site meets the Department mitigation success criteria. Only after a final monitoring report is reviewed and determined to have met established success criteria does the Department issue a final letter to acknowledge that mitigation is complete. These standards ensure that the Department's mitigation program remains successful. One example of the Department's success is its mitigation banking program. The State has 20 approved mitigation banks. While these approved mitigation banks are all in different stages of mitigation monitoring, all are on track to meet their respective performance standards.

402. COMMENT: Each acre of wetlands absorbs up to a million gallons of water and filters out pollutants that endanger New Jersey's water supply. However, wetlands will be endangered if the proposed rules are adopted because the proposed rules reduce the responsibility of developers for wetlands restoration after construction. Instead of inspections to confirm restoration works, the Department will rely on the developer's word. (171)

RESPONSE: The Department is not reducing the responsibility of developers for wetlands restoration. All the requirements under the previous rules have been maintained under this rulemaking. In addition, the Department has never relied upon a developer's word to confirm that the required mitigation has been successfully completed. Instead, all approved mitigation plans require the submission of a construction completion report, which includes as-built plans, as well as a yearly submission of monitoring reports in accordance with N.J.A.C. 7:7A-11.12(e), (f), and (h). In addition to the submission of these reports, the Department conducts regular inspections of mitigation sites to ensure compliance with both the permit conditions and the approved mitigation plan. In accordance with N.J.A.C. 7:7A-11.12(i), the Department will make

a declaration that the mitigation is successful based on the mitigator's demonstrations of success in accordance with N.J.A.C. 7:7A-11.12(h).

N.J.A.C. 7:7A-11.1Mitigation Definitions

403. COMMENT: Please define and reference a list of invasive species in New Jersey as this term is referenced in the mitigation provisions proposed. (335)

404. COMMENT: There is no definition of "invasive plant species" in the FWPA Rules, although the term is used several times. The Department should provide a definition consistent with the definitions in the FHACA and CZM Rules. (255)

RESPONSE TO COMMENTS 403 AND 404: While, the Department strived to administratively align the FWW, CZM, and FHA rules, it appears that this definition was inadvertently missed. However, invasive species are those species that are not native to New Jersey. These species could negatively affect wetland species and alter the ecology of New Jersey's wetland ecosystem. New Jersey has an Invasive Species Council that provides information on invasive species of New Jersey. Fact sheets for many of New Jersey's common invasive species can be found at:

http://www.nj.gov/dep/njisc/docs/Final%20NJ%20Strategic%20Management%20Plan%20for%20Invasive%20Species%2011.09.pdf.

405. COMMENT: Please define "growing season" as referenced in the proposed mitigation provisions. (335)

406. COMMENT: What is the first full growing season? If planting is performed in April, the first growing season extends from May through October. Therefore, plants that were placed in

the ground in April 2017 can be monitored for the first full growing season in October 2017, but that will not be a complete year of monitoring. Is the intent to wait one full year before monitoring begins? (415)

RESPONSE TO COMMENTS 405 AND 406: "Growing season," as it relates to monitoring mitigation sites, generally means a period of time from early spring to fall when plants are actively growing. Where construction of a mitigation site is completed early in the growing season, including planting, the first year of monitoring would end at the conclusion of the growing season that same year. Therefore, in some cases, monitoring of the mitigation site could begin in the same calendar year as the completion of construction. However, if construction of the mitigation site is completed at a later point in the growing season, for example in the fall, the first year of monitoring would not take place until the following growing season. The intent of mitigation monitoring is to ensure that a full growing season is included in the first year of monitoring, it does not mean that an applicant must wait one full year before monitoring begins or that a full calendar year of monitoring is necessarily required.

N.J.A.C. 7:7A-11.2, General Provisions

407. COMMENT: N.J.A.C. 7:7A-11.2(b) provides that a mitigation proposal may be submitted as part of a permit application for concurrent review, but that presupposes that the applicant will be granted approval to impact the wetland area for which they have applied for a permit. This provision should be deleted. Mitigation is not supposed to be a consideration for permit approval, so it is inappropriate to provide a mitigation proposal at the time of application since the amount of mitigation that will be required and the specific impacts that must be mitigated will not be known. (415)

RESPONSE: The applicant submitting a mitigation plan at the time of permit application submits the proposed mitigation plan with the understanding that it is based upon their anticipation of what will be required, which may or may not match with the Department's analysis. Should the Department determine that mitigation in excess of that included in the proposed mitigation plan is required, the applicant would be required to amend the submitted plan to fully compensate for the wetland functions and values impacted.

The allowance for mitigation to be submitted as part of a permit application, does not presuppose that the applicant will be granted approval to impact the wetland area for which they have applied for a permit. Rather, it allows for efficient and effective review by the Department, as the Department can issue mitigation specific conditions if and when the permit is issued. In addition, it allows for more meaningful public notice to the people of New Jersey because the public will be notified of the impacts and the mitigation to compensate for those impacts at the same time. Public notice of a permit application and a proposed mitigation project at the same time means that interested stakeholders can comment on all aspects of the project at the same time. Submission of a mitigation proposal after the issuance of a permit requires additional public notice specifically for the mitigation proposal and a possible disconnect between the regulated activity requiring the permit and the mitigation for any interested stakeholders.

408. COMMENT: N.J.A.C. 7:7A-11.2(c) should be deleted because there are no productivity models that provide mitigation ratios. Furthermore, the rules do not provide any criteria for the Department to use to determine if such a model actually demonstrates that a smaller mitigation area will result in replacement wetland resources of equal ecological value. This section is too

vague and, therefore, invites deal-making and unequal treatment under the rules and makes it impossible for the public to know if wetlands are actually being protected. (415)

409. COMMENT: The proposed rules at N.J.A.C. 7:7A-11.2(c) allow mitigation to be approved at a 1:1 ratio. The existing 2:1 ratio was established because creating wetlands is not easy, and fails half of the time. In addition, man-made wetlands are never able to achieve the functions of the natural ecosystem that was disturbed or destroyed, making it important for the mitigation to encompass more area than was disturbed. If an applicant is approved for a 1:1 ratio, there is no margin of error and no opportunity to fully compensate for lost ecological function. Furthermore, if the mitigation fails or partially fails, then the State and its resources have been diminished. Additionally, the proposed rules require the applicant to only produce a model to justify a reduced mitigation ratio. Models are subject to failure, creating another uncertainty, which leads to mitigation that, at best, only results in equal ecological function and, more likely, results in reduced ecological function. The 2:1 mitigation ratio should not be reduced. (388)

410. COMMENT: The Department is permitting an applicant to reduce their required mitigation at proposed N.J.A.C. 7:7A-11.2(c) if they demonstrate through models or studies that a smaller amount of mitigation provides equal ecological benefit. However, there does not appear to be a provision that requires the applicant to demonstrate that the models were correct by monitoring the actual mitigation site. There should be a requirement for a demonstration that the smaller mitigation site did, in fact, provide the same ecological benefits over the long-term as the full acreage would have provided. If equal ecological benefit is not provided, the applicant should be required to provide additional mitigation to provide the anticipated ecological benefit. (319)

RESPONSE TO COMMENTS 408 THROUGH 410: All mitigation approved by the Department is required to fully compensate for the entirety of an ecological loss. As indicated in the notice

of proposal Summary and specified in the rule text at N.J.A.C. 7:7A-11.2(c), to support a demonstration of equal ecological value, a mitigator must satisfy N.J.A.C. 7:7A-11.2(a) by providing current scientific literature, surveying the conditions on the site of the disturbance and mitigation area, documenting the existing conditions on the site and the proposed conditions on the mitigation area, and detailing how the mitigation proposal will replace the ecological values of the wetland resources lost or disturbed should the mitigator propose a mitigation area that is smaller than the full acreage required under this subchapter. The Department requires the use of productivity models or similar studies to demonstrate that a smaller area will provide equivalent ecological functions and values to that of the area of disturbance. These models are not meant to provide a ratio, only to provide justification of the ecological values of the site. Once the mitigation site has been constructed, the responsible party must demonstrate to the Department through its required monitoring regime (generally five years), that the mitigation site is meeting the goals and requirements of the approved permit and mitigation plan. It is through the implementation of this monitoring that the Department is able to ensure that the smaller mitigation sites are successful. If a mitigation project does not meet the success criteria established in N.J.A.C. 7:7A-11.12(h), the Department will require corrective action and can determine the appropriate corrective actions that the mitigator shall implement, including regrading or replanting the mitigation site, relocation of the mitigation to another more suitable site, and/or extending the monitoring period as necessary to ensure the success of the mitigation.

411. COMMENT: There appears to be a language discrepancy in the notice of proposal regarding mitigation. At one point, the rules clearly state that mitigation shall never be at less

than a 1:1 ratio, but in the next section, the rules say that mitigation may be at less than 1:1. (415)

RESPONSE: A mitigator is responsible to provide an area of mitigation in accordance with this subchapter, unless the mitigator demonstrates that a smaller area of mitigation will result in a replacement of wetland functions of equal ecological values to those lost or disturbed. However, in no case shall the Department approve a mitigation ratio of less than 1:1 as stated at N.J.A.C. 7:7A-11.2(c). For example, if a permittee proposes wetland creation, the mitigation ratio pursuant to this subchapter is 2:1. However the permittee does have the option, at N.J.A.C. 7:7A-11.12(b)1, through the use of a productivity model, to demonstrate that a lesser ratio would still provide equal functions and values. In this example, a permittee could attempt to document that a ratio of 1.5:1 is appropriate. However, a request to reduce the ratio to 0.5:1 is inappropriate as it fails to meet the requirements at N.J.A.C. 7:7A-11.2(c). While under N.J.A.C. 7:7A-11.2(d), mitigation will not be required when the Department determines impacts are *de minimis*, where the Department determines that mitigation is required, a ratio of at least 1:1 is always required in accordance with N.J.A.C. 7:7A-11.2(c).

412. COMMENT: N.J.A.C. 7:7A-11.2(d) should be deleted because it violates the FWPA, which does not allow mitigation for an individual permit to be waived because the impact is *de minimis*. Further, there is no definition for *de minimis*, which will lead to deal-making and unequal treatment under the rules. (415)

413. COMMENT: The proposed changes at N.J.A.C. 7:7A-11.2(d) are inconsistent with the mitigation objectives of the FWPA. Mitigation must be required at least at a 1:1 ratio. (84, 179, 222, and 402)

414. COMMENT: The provision allowing mitigation requirements to be waived under an individual permit, if the Department determines the impacts to freshwater resources are *de minimis,* is opposed. Each impact to a freshwater wetland reduces its natural ability to provide ecological functions in the area and downstream. This amendment could lead to progressive developments under individual permits which all assume *de minimis* impacts, with no comprehensive and cumulative impact analysis of the combined impact of those losses on the area or watershed. Seemingly *de minimis* impacts can add up to a much greater impact. The proposed amendment will allow the continued deterioration of the State's resources. (388)

415. COMMENT: The proposed provision specifying that mitigation is not required for a *de minimis* impact where the applicant demonstrates avoidance and minimization of impacts is opposed because it lacks specificity. In the immediately preceding section, the rules provide that mitigation shall never be approved at a ratio less than 1:1, which would preclude the above-described provision. In the case of a shortfall like in the example provided in the notice of proposal Summary, the applicant should be directed to purchase a portion of a credit from a bank or make an in-lieu fee contribution. Because this section applies to individual permits, impacts cannot be considered minimal. This provision is inconsistent with the FWPA and the objectives of the mitigation rules. (277)

RESPONSE TO COMMENTS 412 THROUGH 415: The FWPA provides standards that must be met before regulated activities can be allowed that have adverse impacts to freshwater wetlands and provides the Department with a suite of tools to achieve the required protection. N.J.S.A. 13:9B-13.b provides that "the department shall require as a condition of a freshwater wetlands permit that all appropriate measures have been carried out to mitigate adverse environmental impacts, restore vegetation, habitats and land and water features, prevent

sedimentation and erosion, minimize the area of freshwater wetland disturbance and insure compliance with the Federal Act and implementing regulations." The Act does not specify the amount of impact that requires compensatory mitigation nor does it mandate that all individual permits require mitigation. Instead, in that same section, the Act provides that the Department "may" require creation, enhancement or restoration of an area of freshwater wetlands of equal ecological value for what will be lost. Through the alternatives analyses required under an individual permit, the Department requires that an applicant demonstrate that impacts to the freshwater wetlands associated with a proposed project have been minimized. In instances where an applicant has demonstrated that the impacts are unavoidable and minimized, and the Department is able to determine that appropriate measures have been taken by the applicant to alleviate impacts, including impacts to vegetation, habitat, and land and water features, and that the proposed activity complies with the requirements of these rules and with the FWPA and the Federal Act, then compensatory mitigation need not be required in instances where the impacts are very small. The Department provided an example in the notice of proposal Summary (see 49 N.J.R. 879) of a situation in which mitigation for impacts would not be required. In that example, the impacts associated with the replacement of an existing bridge resulted in 0.50 acres of impacts to freshwater wetlands associated with the installation of new pilings. However, through the removal of the old bridge and pilings, 0.498 acres of wetlands were restored, leaving 0.002 acres of unmitigated wetland impacts. In this situation, the Department could determine that the remaining 0.002 acres of disturbance is *de minimus* and, therefore, not require mitigation for that impact.

416. COMMENT: New N.J.A.C. 7:7A-11.2(d) establishes that mitigation for an individual permit is not required where the Department determines that environmental impacts to the freshwater resources are *de minimis* and where the applicant demonstrates avoidance and minimization of impacts. While this is supported, the Department did not provide a definition or criteria for determining what impacts are *de minimis*, and only provided an example of a *de minimis* impact in the notice of proposal Summary. The Department is requested to provide a definition and criteria or examples for determining *de minimis* impacts in the rule. (255)

RESPONSE: The Department acknowledges the commenter's support of this provision. The Department does not believe that a definition of *de minimis* is necessary as the term is meant to be understood in its commonly understood meaning; a *de minimis* impact is one that is lacking significance or importance and is so minor as to merit disregard.

417. COMMENT: The proposed rules allow a permittee with multiple sites to aggregate their mitigation obligations into one mitigation site. There is no requirement that the mitigation site be within the same HUC-14 or even the same watershed management area as the majority of the sites of disturbance. As it is ecologically beneficial for the mitigation to occur closer to the site of disturbance, this provision will not result in the enhancement of water quality, the reduction in flooding, or the maintenance of habitat for flora and fauna. (319)

418. COMMENT: The provision to allow multiple site disturbances to be rolled into one mitigation raises concerns that the mitigation in this scenario could occur outside of the impacted watershed. If a large corporation has impacts throughout the State, but only one mitigation site is selected to mitigate all of the impacted sites, then the natural resources and communities in many of the impacted areas will be diminished with no ecological compensation. (388)

RESPONSE TO COMMENTS 417 AND 418: The potential for a single permittee to aggregate mitigation for multiple disturbances to a single mitigation project referenced by the commenters, previously codified at N.J.A.C. 7:7A-15.2(k), was added to the Freshwater Wetlands rules in October 2008 (See 39 N.J.R. 3587(a)) and is continued in the adopted rules at N.J.A.C. 7:7A-11.2(l) with minor wording changes that do not alter what may be authorized or the limitations applicable to this allowance. This subsection prevents the need for multiple small mitigation sites in several watersheds. The alternative of requiring that multiple small projects be performed at numerous sites is not desirable since mitigation is often more successful ecologically and more cost effective when aggregated. As indicated in the rules at N.J.A.C. 7:7A-11.2(a), all mitigation required under the FWPA Rules must fully compensate for any ecological loss. As aggregation of mitigation requirements to one project can only occur with Department approval and must comply with the hierarchies at N.J.A.C. 7:7A-11.9 or 10, as part of its review of a request to aggregate mitigation requirements the Department will ensure that the proposed mitigation site provides equal functions and values to the impact areas and fully meets that requirements set forth under this subchapter.

419. COMMENT: Proposed N.J.A.C. 7:7A-11.12(c) replaces the 2:1 mitigation ratio for any restoration or creation activities at existing N.J.A.C. 7:7A-15.8 with a 1:1 ratio. A report published by the Department in 2002, stated that approximately 0.45 acres of wetlands were established for each acre of mitigation proposed. A 1:1 mitigation requirement would then result in a 65 percent reduction in wetlands, which does not achieve the Federal goal of no net loss. Preserving the 2:1 mitigation ratio increases the probability that the State could achieve this goal. (376)

420. COMMENT: Under N.J.A.C. 7:7A-11.12(b) the Department is proposing a reduction in the 2:1 mitigation requirement to a 1:1 mitigation requirement. This amendment is not consistent with the intent of the FWPA, which set no net loss/net gain goals. (125)

RESPONSE TO COMMENTS 419 AND 420: The Department has not changed the standard 2:1 ratio of creation to loss for wetlands creation or restoration. Instead, at N.J.A.C. 7:7A-11.12(b) the Department is continuing the 2:1 ratio, but providing that, in limited cases, a ratio less than 2:1 may be approved. Particularly, N.J.A.C. 7:7A-11.12(b) states that "if creation or restoration is the mitigation alternative, wetlands shall be created or restored at a creation or restoration to lost or disturbed ratio of 2:1, unless the applicant demonstrates ... that creation of restoration at a ratio of less than 2:1 will provide equal ecological functions and values." The rules specify the types of information required to be provided to support a request to provide less than a 2:1 ratio and make clear that in no case will the Department approve any reduction unless the information provided demonstrates to the Department's satisfaction that the proposed mitigation will result in a project that provides equal ecological functions and values. The amendment recognizes that there are a range of wetlands types, and that, in particular cases, it may be possible to achieve the required ecological functions and values without strictly requiring the 2:1 ratio be provided. In some cases, the amendment may even allow the Department the ability to approve a project at the lower ratio that provides better than the required offset. For example, if impacts to an invasive-species dominated emergent wetland are mitigated at a 1:1 ratio through restoration of forested wetlands that would reconnect fragmented wildlife habitat, the functions and values provided, even at a 1:1 ratio, may exceed those lost as a result of the original disturbance.

The limited potential for approval of a reduction in the required ratio of creation or restoration to lost or disturbed below 2:1, with the proviso that in no case will the reduction

result in a ratio of less than 1:1, provided the resulting project results in at least equal functions and values as those impacted by the activity that created the need for mitigation, is consistent with both the FWPA and the Federal Act.

Timing of Mitigation (N.J.A.C. 7:7A-11.3)

421. COMMENT: Proposed N.J.A.C. 7:7A-11.3(a)1 inappropriately deletes the statement "except that no regulated activities shall occur before the Department has approved a mitigation proposal." This language should remain since wetland enhancement requires work in regulated areas. In addition, many mitigation proposals are not well conceived and should not be initiated prior to Department approval. (277)

RESPONSE: Mitigation may not commence until the mitigation proposal has been approved by the Department. The requirement cited by the commenter making clear that no regulated activities may occur prior to Department approval of a mitigation proposal, which was previously codified at N.J.A.C. 7:7A-15.3(a)1, has been relocated to N.J.A.C. 7:7A-11.2(g) which states, "[m]itigation shall not commence until the Department has approved a mitigation proposal through one of the approvals listed at (e) above." Therefore, continuation of the statement "except that no regulated activities shall occur before the Department has approved a mitigation proposal" in adopted N.J.A.C. 7:7A-11.3(a)1 would be duplicative.

Property Suitable for Mitigation (N.J.A.C. 7:7A-11.4)

422. COMMENT: Please clarify N.J.A.C. 7:7A-11.4(c)1 as follows (additions in bold, deletions in brackets): "The installation of **a new public facility**, or improvement to[,] an existing public

facility**, which is** intended for human use, such as a ball field, nature trail, or boardwalk; or …"

(255)

RESPONSE: The Department is clarifying this provision on adoption in response to this comment.

423. COMMENT: N.J.A.C. 7:7A-11.4(f) is too broad. The Historic Preservation Office should be consulted to ensure that a mitigation activity does not impact a historic resource. For example, if a mitigation site contains a historic cemetery, the project can still presumably proceed if the applicant agrees to ensure protection of the cemetery. (415)

RESPONSE: This requirement, which was recodified from N.J.A.C. 7:7A-15.4(d) is intended to prevent mitigation activities from having an adverse impact to cultural or historic resources. The "area" referred to in N.J.A.C. 7:7A-11.4(f) is not intended to mean the entire property on which mitigation can occur. In the commenter's example of a property that contains a historic cemetery, the Department may approve mitigation in another area of the property if, after consultation between the Division of Land Use Regulation and the State Historic Preservation Office, the Department determines that the mitigation proposed will not have an adverse impact on the cemetery or any other cultural or historic resource on the site.

424. COMMENT: N.J.A.C. 7:7A-11.4(i) is too broad and should be deleted. Every tidal system may have the potential for "the reintroduction of contamination to ecological communities." The provision precludes mitigation in any tidal system and in most freshwater systems throughout the State. (415)

RESPONSE: N.J.A.C. 7:7A-11.4(i) is similar to previous N.J.A.C. 7:7A-15.4(h) but has been modified to further align the processes and terminology of the FWPA rules with the process and terminology of the CZM rules. The goal of this section is to ensure that for every proposed mitigation project, the permittee demonstrates to the satisfaction of the Department that any ecological risk on the site has been addressed. In order for an applicant to fully address the ecological risk, consideration must be given to the surrounding area and the amount of contamination surrounding the site. This provision is purposefully broad, as there are many scenarios of ecological risk and this provision must be able to cover them all. The Department believes that the protections provided by this subsection of the rules to ensure that mitigation does not have unintended effects, including reintroduction of contamination to ecological communities, or exposure of humans to contamination, are both necessary and appropriate.

Further, N.J.A.C. 7:7A-11.4(i) does not preclude mitigation in any tidal system and in most freshwater systems. Instead, the subsection ensures that identified risks are appropriately analyzed to avoid inappropriate risks to human health and the environment. If it is determined that there is no ecological risk, as indicated at N.J.A.C. 7:7A-11.4(i)1, the proposed mitigation, regardless of whether it is in a tidal system or a freshwater system, is reviewed to determine whether it otherwise complies with the requirements of the rules; if it does, the mitigation may be approved. Even if it is determined that the proposed mitigation activities would pose an ecological risk, while the Department would not allow such a risk to occur, the rules provide the mitigator with the ability to proceed with the mitigation if they were to first remediate the site in accordance with the Department's Technical Requirements for Site Remediation. The Department believes that elimination of this subsection and the protections it provides would be

contrary to the goals of the FWPA and the Department's mission to protect public health and the environment.

425. COMMENT: New N.J.A.C. 7:7A-11.4(j) establishes that properties where a substantial amount of soil must be removed in order to achieve suitable wetland hydrology are not acceptable mitigation sites. The Department is requested to clarify the meaning of "substantial," including examples of context and intensity. (255)

RESPONSE: N.J.A.C. 7:7A-11.4(j) specifies that proposed mitigation sites where a substantial amount of soil must be removed to achieve suitable wetland hydrology are not acceptable mitigation sites. These sites are not suitable for mitigation purposes as it is questionable if the hydrology would support a wetland in perpetuity. If an applicant must remove feet of soil in order to establish hydrology appropriate for a wetland, the proposed site does not have a high probability of success and, therefore, is not an approvable mitigation site.

While the determination of what constitutes "substantial" soil removal is somewhat site- and situation-specific, mitigation sites should be selected in areas where a wetland could or would normally exist in the landscape. For example, a wetland will not generally exist at high elevations. Accordingly, a proposal to remove substantial amounts of soil to artificially lower the surface elevation in a high elevation area is not likely to result in the establishment of a wetland. As such a proposal to remove substantial amounts of soil would be anticipated to result in an unsuccessful mitigation project, the project would not be approved under N.J.A.C. 7:7A-11.4(j).

426. COMMENT: The existing FWPA Rules require the mitigation site to be owned in fee simple, and, if there are easements on the property, those easements must be extinguished. The

proposed amendments remove the requirement for the easements to be extinguished. If an easement could potentially impact the functioning of the wetland or the mitigation site, the easement should be extinguished before the Department accepts the site as suitable for mitigation. (319)

RESPONSE: The rules maintain at N.J.A.C. 7:7A-11.4(a) that the Department may only approve mitigation on property that is owned in fee simple or under legal control of the person responsible for performing the mitigation. The adopted subsection simplifies the language while continuing to ensure that the mitigator has legal rights sufficient to carry out the mitigation. Further, all mitigation sites must have a conservation restriction placed on them. The person responsible for performing the mitigation would need the legal right to place a conservation restriction on the mitigation site. If the person responsible for performing the mitigation has legal rights to the property sufficient to both record the required conservation restriction and to otherwise comply with all requirements of the rules without the need to extinguish an easement that does not affect the proposed mitigation, then in that instance, there is no reason to prohibit the mitigation. However, if an easement present on the property might allow activities that would be contrary to, or interfere with, a successful mitigation project and/or compliance with all requirements of the rules, the mitigation project would not be approved. In that instance, the Department would view the person responsible for mitigation as lacking sufficient legal control of the property to enable compliance with all requirements of this chapter and the proposal would be rejected. Accordingly, it is unnecessary to require extinguishment of all easements in every case.

Conceptual Review of a Mitigation Area (N.J.A.C. 7:7A-11.5)

427. COMMENT: Proposed N.J.A.C. 7:7A-11.5(d) removes the content concerning scheduling and conducting a site inspection. Will the Department no longer conduct a site inspection as part of a conceptual review of a mitigation area? (255)

RESPONSE: Under neither the previous rules nor the adopted rules, is a site inspection required for all conceptual reviews. Site inspections were not required in all cases under the prior rules, but could be scheduled at the Department's discretion. Elimination of the language regarding the potential for the Department to conduct a site inspection does not indicate that site inspections may not be part of a conceptual review in appropriate situations.

Department Review and Approval of a Mitigation Proposal (N.J.A.C. 7:7A-11.7)

428. COMMENT: Proposed N.J.A.C. 7:7A-11.7(a) establishes that, for a mitigation proposal submitted to comply with a condition of a permit, the Department's completeness review will occur within 30 calendar days of receipt. Is the referenced review for administrative completeness, technical completeness, or both (leading to the Department declaring the proposal "complete for further review" per N.J.A.C. 7:7A-11.7(a)2)? (255)

RESPONSE: N.J.A.C. 7:7A-11.7 specifies that the Department will review a mitigation proposal submitted to comply with a condition of a permit within 30 calendar days. The Department will either request additional information or declare the proposal complete "for further review." This process is distinct from the administrative and technical completeness review of a permit application under N.J.A.C. 7:7A-19. For the purposes of the review of a mitigation proposal, a proposal is complete for further review when it contains all of the information and materials required by N.J.A.C. 7:7A-11.6 for the chosen mitigation alternative. However, during the subsequent review of the proposal, the Department may determine that the mitigation alternative

chosen is not appropriate, require changes to the proposed mitigation plan, or request more information. While the initial completeness review for a mitigation proposal at N.J.A.C. 7:7A-11.7(a) is similar to the administrative completeness review for a permit application, it is a distinct process not to be confused with the permit application review process.

Mitigation Hierarchy for a Smaller Disturbance and Mitigation Hierarchy for a Larger Disturbance (N.J.A.C. 7:7A-11.9 and 11.10)

429. COMMENT: At N.J.A.C. 7:7A-11.9(c)1, what size is sufficient? Small parcels may remain in a disturbed area that provide habitat or other valuable features that should be protected, regardless of the size of the parcel. (415)

RESPONSE: The provisions under this section do not address or require a minimum or maximum size for a mitigation site. The Department concurs with the commenter that small parcels can provide habitat or other valuable features that should be protected. At N.J.A.C. 7:7A-11.9(c)1, the Department will consider the size of a proposed mitigation area in determining the feasibility of onsite or offsite creation, restoration, or enhancement to compensate for a smaller disturbance. Larger mitigation areas, and those areas associated with a larger wetland complex, are more likely to be feasible sites to provide equal or better ecological functions and values to those lost; however, N.J.A.C. 7:7A-11.9(c)1 does not establish a required parcel size or preclude the use of a relatively small parcel for mitigation, provided the mitigation required can be achieved on the parcel in accordance with all applicable requirements of N.J.A.C. 7:7A-11.

430. COMMENT: Proposed N.J.A.C. 7:7A-11.9(c) retains the presumption that onsite mitigation is not feasible for a smaller disturbance and requires the purchase of “in-kind” credits from a

mitigation bank, or onsite or offsite restoration, creation, or enhancement. However, proposed N.J.A.C. 7:7A-11.2(a) specifies that the Department will consider proposals for out-of-kind mitigation if the mitigation would result in equal ecological functions and values. The Department is requested to preface proposed N.J.A.C. 7:7A-11.9(c) with the phrase, "Except as provided at N.J.A.C. 7:7A-11.2(a) …" to reflect this provision. (255)

RESPONSE: N.J.A.C. 7:7A-11.2(a) specifies that mitigation shall be in-kind and while there is an exception allowed on a case-by-case basis for out-of-kind mitigation provided the applicant can demonstrate the mitigation project can provide equal ecological functions and values, the Department prefers in-kind mitigation. This is evident in the hierarchy at N.J.A.C. 7:7A-11.9(c), which requires the purchase of in-kind mitigation credits from a mitigation bank; if that is not feasible, then mitigation must be completed through on-site restoration, creation, or enhancement, or offsite restoration, creation, or enhancement within the same watershed management area as the disturbance. Mitigation must provide equal ecological values to those wetlands that were impacted by the regulated activity, however, there are those instances where this is not practical or feasible and providing a mitigation site that provides greater ecological value than those wetlands that were lost would be the preferred option. There is an exception for this circumstance built into the rules on a case-by-basis. Since this exception exists at N.J.A.C. 7:7A-11.2(a), there is no reason to restate it again at N.J.A.C. 7:7A-11.9(c) and risk implying that the Department will routinely accept out-of-kind mitigation by including this alternative in the hierarchy.

431. COMMENT: At N.J.A.C. 7:7A-11.9(f), why must applicants supply a list of six sites? What happens if six sites are not available on the market? For a small impact, this provision is onerous. (415)

RESPONSE: In the Department's experience, some permittees are interested in pursuing only a particular mitigation alternative and so attempt to demonstrate that other mitigation alternatives are not practical or feasible. 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. The adopted rule requires that six sites be presented, in order to ensure that the permittee has thoroughly investigated possible sites. Although in some cases more sites would be desirable to ensure that possible sites were not missed, the Department believes that six sites are adequate. 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.

If sites are not available to purchase, the mitigator will include that information in their demonstration of the infeasibility of offsite mitigation in accordance with N.J.A.C. 7:7A-11.9(f)3. While offsite creation, restoration, or enhancement is higher in the hierarchy of preferred mitigation alternatives, there are other alternatives that may be acceptable if offsite mitigation is not feasible. Under N.J.A.C. 7:7A-11.9(d), if credit purchase and onsite or offsite creation, restoration, or enhancement are not feasible, mitigation must be provided by a monetary contribution to the In-Lieu Fee Program and/or upland preservation. If these options are infeasible, mitigation must be in the form of a land donation.

The adopted mitigation hierarchy seeks to ensure timely and successful compensation for impacts to freshwater wetlands; to ensure the most ecologically valuable mitigation is provided, the consideration of sites in accordance with N.J.A.C. 7:7A-11.9 is appropriate.

432. COMMENT: Why must an applicant with a small disturbance use a mitigation bank, while an applicant with a larger disturbance may choose to perform mitigation themselves under N.J.A.C. 7:7A-11.10(c) regardless of their capabilities? The Department of Transportation is an example of an entity performing mitigation for larger impacts and what is their track record with performing that mitigation properly and in a reasonable amount of time? Tennessee Gas took more than five years to begin to address the mitigation requirement for their impacts, but the Department took no action against them. Projects with a large impact should be required to use a mitigation bank if possible so that this problem is not repeated. (415)

RESPONSE: An applicant with a larger disturbance is required to perform mitigation through restoration, creation, or enhancement onsite, as this is the most environmentally beneficial location to mitigate for the wetland loss. Only when onsite mitigation is determined infeasible, is a permittee authorized to look offsite in the same watershed management area as the disturbance or to purchase credits from a mitigation bank with a service area that includes the area of disturbance. Any entity, regardless of their capabilities, is required to meet the standards and substance of the mitigation requirements at N.J.A.C. 7:7A-11.

433. COMMENT: At proposed N.J.A.C. 7:7A-11.9(c), the Department indicates that onsite mitigation is not feasible for smaller sites. Permitting mitigation for smaller impacts through the purchase of credits in the in-lieu fee program will not compensate the area for the impacts to the wetland. The Department does not provide a concrete geographic range for “service area.” This “service area” may be larger than a watershed management area, an area that is already too big to provide ecological benefits to the impacted areas. The Department’s proposed mitigation

program will sacrifice some areas for the benefit of others. Also, the Department has not provided any science-based analysis to support this proposed amendment. (319)

434. COMMENT: The mitigation hierarchy for a larger disturbance at proposed N.J.A.C. 7:7A-11.10(c) should favor onsite mitigation or, if that is not possible, mitigation as close to the site as possible within the same HUC-14. If that is not possible, mitigation should be within the same HUC-11. The default area for mitigation, whether large or small, should not be within a service area or watershed management area that may be a significant distance from the impact. (319)

435. COMMENT: The proposed provision to allow mitigation to occur outside of the immediate area of impacts will result in less protection for the impacted area. The result of this provision will be a greater potential for flooding and more water pollution in the area of the permit while environmental benefits go to the surrounding mitigation bank where the mitigation occurred. (14, 18, 53, 54, 77, 85, 90, 91, 107, 143, 163, 177, 178, 200, 205, 248, 251, 253, 258, 264, 267, 269, 291, 292, 307, 322, 331, 339, 364, 372, 421, 426, 432, and 450)

436. COMMENT: Allowing mitigation to take place in areas adjacent to the impacted area rather than directly around the impacted area does not make sense and will not address the localized impacts of flooding or water pollution. (240 and 415)

437. COMMENT: Allowing a monetary contribution in lieu of mitigation and allowing mitigation to occur far from the location of disturbance fails to protect water resources because they do not account for the fact that New Jersey’s surface waters are impaired. (431)

438. COMMENT: Allowing the purchase of credits from a mitigation bank in another area of the State from the disturbance does not protect local drinking water. (84, 179, and 222)

439. COMMENT: Removing the proximity requirement for mitigation will result in the shifting of impact out of the mitigation area, rather than the avoidance of significant impact through

mitigation. Even if the mitigated wetlands are in the same Watershed Management Area as the permit area, the result is not automatically guaranteed to be beneficial. Therefore, the rules should contain a requirement that proposed mitigation plans show a demonstrable benefit to the permit area. (253 and 364)

440. COMMENT: Allowing mitigation to occur outside of the immediate area of impacts will result in fewer protections for the impacted area. This is an environmental justice issue; managing for no let loss of ecological services must take into account the distinct services provided by freshwater wetlands in urban areas. These ecological services, specifically flood control/stormwater absorption, carbon storage, water and air pollution removal, and local climate regulation, are qualitatively different in urban landscapes characterized by significant impervious cover issues. (125)

441. COMMENT: The proposed rules would allow a permit to fill in wetlands in one town in exchange for buying credits in another town. The two areas have different wildlife areas, and different streams run through the areas. Removing the requirement that mitigation occurs as close to the impact as possible will result in further damage to New Jersey's wetlands. (14, 18, 53, 54, 77, 85, 90, 91, 107, 143, 163, 177, 178, 200, 205, 248, 251, 253, 258, 264, 267, 269, 291, 292, 307, 322, 331, 339, 364, 372, 421, 426, 432, and 450)

442. COMMENT: The proposed rules allow mitigation to occur outside of the watershed of the disturbance as a means of allowing destruction in more wetlands. Mitigation never fully equals what was lost. (104, 144, and 361)

443. COMMENT: The proposed mitigation amendments are concerning. Currently, mitigation must occur within the same HUC-11. These areas average about 60 square miles. Under the proposed rules, mitigation is only required to be performed within the same watershed

management area. While there are 151 HUC-11 regions in the State, there are only 20 watershed management areas. Projects undertaken under the in-lieu fee program only need to be within the same water region (of which there are only five in the State) as the disturbance. While wetlands provide essential services to the watershed and estuary systems at a higher level, they also serve the immediate adjacent areas by providing habitat, regulating surface water flow, managing stormwater, and improving water quality. The loss of these types of benefits within a highly developed area is a significant one that must be mitigated within the same HUC-11, not just within the same estuary. (376)

444. COMMENT: The Department is proposing to delete the requirement for mitigation to occur within the same HUC-11 or adjacent HUC-11 at N.J.A.C. 7:7A-11.9(c)2. However, the Department does not provide any studies that justify the statement that "the effects and benefits to the estuary as a whole are the same wherever the mitigation is performed." Given the benefits that wetlands provide in filtering pollution and in absorbing stormwater, mitigation should be required as close to the impacts as possible to prevent damage to the aquatic system and increased flooding. If wetlands are impacted in an area of heavy nonpoint source pollution, restoration downstream of those impacts may not be a remedy, as there is no mechanism to filter the pollution. Additionally, wetlands provide habitat for wildlife, including threatened and endangered species. Removing the requirement to mitigate as close to the site of the permit as possible, or at least within the same HUC-14, could lead to further fragmentation of habitat and may not result in the restoration of habitat similar to the habitat that was impacted. In the watershed management areas where drinking water comes primarily from private or community wells, mitigation in the wetlands of a different HUC-11 will most likely not offset the potential damage to the groundwater/drinking water. Therefore, the rules should prefer mitigation occur

within the same site as the disturbance. If mitigation is not possible on the impacted site, it should occur within the same HUC-14, which would be consistent with Federal requirements. (319)

445. COMMENT: Under recodified N.J.A.C. 7:7A-11.9(c)2, the Department is proposing to delete the requirement that offsite restoration, creation, or enhancement occur within the same HUC-11 or an adjacent HUC-11 as the disturbance. This amendment is opposed because it releases developers from restoring areas near where the destruction of wetlands occurred and allows developers to prioritize restoration within the larger estuary instead of the impacted HUC-11. (125)

446. COMMENT: Mitigation must take place within the same HUC 14 as the wetland loss or damage. If mitigation is farther from the impact, it will not adequately address surface water and groundwater effects and waters will continue to fail to support designated used. (431)

RESPONSE TO COMMENTS 433 THROUGH 446: The Department is adopting many amendments to mitigation standards in an effort to provide clarity and to simplify requirements. The current rulemaking does not significantly change the mitigation hierarchy for a mitigation site, nor does it change the location of where mitigation may occur. Under the FWPA Rules, it has always been recognized that, in order to achieve the required equal functions and values, it may be necessary in certain cases to allow mitigation for impacts to include mitigation offsite within the same watershed management area; the previous rules do not restrict mitigation to the same HUC-11 as the disturbance. While the prior rules required a mitigator to first look to perform mitigation on sites within the same HUC-11 or adjacent HUC-11 in the same watershed management area as the disturbance when pursuing offsite mitigation, if that was not feasible, mitigation could occur elsewhere in the same watershed management area. In practice, the

Department found that the majority of mitigators could not find suitable sites within the same HUC-11 and, therefore, would perform offsite mitigation within the same watershed management area. By allowing the offsite mitigation site to be located within the same watershed management area rather than requiring applicants to first consider the same HUC-11 or an adjacent HUC-11, the Department is providing greater flexibility in locating a potential mitigation site that will provide for in-kind mitigation. HUC-11s and watershed management areas all drain into the same estuary. Therefore, the effects and benefits to the estuary system as a whole are the same wherever the mitigation is performed, as long as it is in the same watershed management area as the disturbance. As with any mitigation that is not performed at the site where the impact occurs, the site does experience a loss; however, the overall ecosystem benefits from the mitigation.

The requirement that the purchase of bank credits must be from a bank that includes the disturbance site in its service area similarly simplifies the mitigation process without sacrificing environmental benefits. Under N.J.A.C. 7:7A-11.26(b)8, the service area of a mitigation bank must be designed to give priority to mitigation for impacts in the same watershed management area as the proposed bank. The prior rules requirements for the mitigator to first consider the purchase of credits from a bank in the same or adjacent HUC-11 as the site of the impacts led to the same issues as the similar requirement for offsite mitigation; most mitigators could not find banks within the same HUC-11 and would end up purchasing credits from a bank in the same watershed management area as the impacts. When approving a mitigation bank, the Department ensures that the service area is designed to provide mitigation that compensates for the loss of wetlands functions and values within a hydrologically connected service area.

The proposed rules still ensure that permitted impacts are properly mitigated. In accordance with N.J.A.C. 7:7A-11.2(a), any mitigation must fully compensate for any ecological loss occurring as a result of the regulated activity. Mitigation must result in equal ecological functions and values as those lost, including surface and groundwater quality benefits, habitat functions, and stormwater management functions. Further, the adopted rules ensure that permitted impacts are limited, even when mitigation is required. As explained in the Response to Comments 77 through 85, stringent standards ensure that permitted activities do not significantly impact water quality near the site of the impact, while, as explained in the Response to Comments 35 through 37, additional requirements ensure protection of threatened and endangered species and their habitats. Activities must be acceptable under these and other stringent requirements to be permitted; mitigation is not a substitute for compliance with all applicable requirements of N.J.A.C. 7:7A.

With reference to environmental justice concerns, the FWPA Rules minimize disturbance through the robust requirements for activities in and near freshwater wetlands described in previous comments and responses. When applying the mitigation hierarchies in N.J.A.C. 7:7A-11.9 and 11.10, mitigation located as close to the impacts as possible is preferred.

447. COMMENT: Land donations should be a more preferred option in the mitigation hierarchy over monetary contributions. Money contributions are not well tracked and are misused. (346)
RESPONSE: As explained in the notice of proposal Summary, the Department has determined that land donation is the least favorable mitigation alternative, as it does not result in the creation, restoration, or enhancement of wetlands on the ground. The Department's In-Lieu Fee Program, which is administered by the New Jersey Wetlands Mitigation Council (Council), manages all

monetary contributions received in accordance with the In-Lieu Fee Instrument (http://www.nj.gov/dep/landuse/download/mit_040.pdf). This instrument is an agreement that was signed by the Department, the USEPA, and the Council. The ILF Instrument sets forth guidelines and responsibilities for the establishment, use, operation, protection, monitoring, and maintenance of the ILF Program to ensure the work associated with the ILF Program produces the necessary compensatory mitigation credits to compensate for unavoidable impacts to waters of the United States, including wetlands, that result from activities authorized under the FWPA, N.J.S.A.13:9B-1 et seq., FWPA rules, N.J.A.C. 7:7A, and CZM Rules, N.J.A.C. 7:7. The ILF Program will accomplish these objectives by creating, restoring, enhancing, and preserving in perpetuity both freshwater and coastal wetlands habitats throughout New Jersey within the ILF Program service area.

The Council has implemented and carried out to completion many projects throughout the State of New Jersey since its inception in July 1988, and will continue to achieve no net loss of wetlands under this ILF Program. Historically, the Council has provided full compensation for all wetland impacts received through monetary contributions. For example, at the time of implementation of the ILF instrument, the Council had accepted $7,653,760.17, which represents payments to compensate for 48.6755 acres of wetland impacts. The Council then provided funding to non-profits and governmental entities whose projects resulted in 643.40 acres of land preserved and 355.84 acres of restored and enhanced wetlands for a total acreage of over 1,000 acres of mitigation completed. All Council-funded projects are required to meet the mitigation requirements in the FWPA Rules and CZM Rules, as applicable. Therefore, as evidenced by the tracking of monetary contributions through the years and the Council's demonstrated success in

facilitating mitigation, the indication that monetary contributions are poorly tracked and misused is not accurate.

Requirements for Upland Preservation (N.J.A.C. 7:7A-11.13)

448. COMMENT: The Department is proposing to require transfer of ownership and the maintenance fund to the government agency or charitable conservancy prior to Department sign off on the success of uplands preservation. The Department states that these actions are needed to ensure the project will be successful in the long-term and, therefore, must occur prior to the Department declaring the mitigation has been successfully completed. However, acceptance of mitigation lands by land stewards has become problematic. Many do not desire lands unless they are in a specific geographic region. Many will not accept lands with the Department conservation restriction fearing onerous and perpetual management and maintenance responsibilities. Many agencies have declined fully approved and successful mitigation lands, such as Green Acres, the Division of Fish and Wildlife, the New Jersey Conservation Foundation, and the Ocean County Natural Land Trust Fund Program. Also, the Federal National Wildlife Refuge will not accept any lands encumbered by the Department conservation restriction. The requirement of land transfer prior to "sign-off" puts the fate of mitigators in the hands of limited land stewards who are not party to or obligated by these regulations to accept lands simply because these regulations target them as stewards. (335)

RESPONSE: A conservation restriction must be placed on all wetland mitigation projects and wetland mitigation banks; without such protection, the Department cannot ensure that mitigated wetlands will be protected in perpetuity. The Department believes the placement of a conservation restriction on the land is critical to the long-term success of the project and,

therefore, will not waive or lift a conservation restriction for a mitigation bank transferred to the Federal government or other government agency. With no restrictions on the land, an agency could more readily sell the property and/or modify the land for other purposes that may not protect the wetlands.

As explained in the notice of proposal Summary, it is necessary to require the transfer of land prior to the Department declaring mitigation successful in order to ensure the long-term success (success in this case being the long-term preservation of an upland area which supports the functions and values of adjacent wetlands) of the mitigation. This requirement ensures the lost functions and values for which mitigation is required are properly compensated for by the responsible party(ies) (see N.J.A.C. 7:7A-11.26(c)18). The Department anticipates that mitigation bankers will seek suitable charitable conservancies to transfer the mitigation project as part of their planning to satisfy this condition of the mitigation banking process will before completion of the mitigation banking requirements.

449. COMMENT: The Department should add wetlands preservation as a mitigation alternative and establish a mitigation ratio for wetlands preservation. (335)

450. COMMENT: Why is preservation a mitigation option for mitigation banks but not for other applicants? Why are the owners of small properties with smaller disturbances precluded from deed restricting the remainder of the wetlands on their properties upon completion of regulated activities? The protection and preservation of wetlands is appropriate, and the Department should allow wetland preservation in those cases where no other mitigation options are feasible. If the wetland area contains threatened or endangered species, preservation is the only option and should remain available. (415)

RESPONSE TO COMMENTS 449 AND 450: The Freshwater Wetlands Protection Act does not recognize wetland preservation as a mitigation alternative. However, upland preservation may serve as mitigation if such preservation would assist or function as a component of a freshwater wetland ecosystem. Mitigation banks (as well as other mitigators) may provide mitigation through a land donation, which has the effect of preserving wetlands but also ensuring that the land is stewarded by an appropriate entity; wetlands preservation that is not accomplished via land donation to an appropriate government agency or charitable conservancy is not an acceptable mitigation alternative.

Requirements for Credit Purchase from an Approved Mitigation Bank (N.J.A.C. 7:7A-11.14)

451. COMMENT: The definition of "credit purchase" states that "[o]nce a credit is applied to satisfy a mitigation obligation under this subchapter, it is exhausted and may not be sold or used again." Therefore, mitigation bankers should not be allowed to resell credits from a wetlands area as riparian zone credits. Once sold, the credit is supposed to be exhausted and should not be reincarnated as a different type of credit. Also, as N.J.A.C. 7:7A-11.2(m) says that mitigation cannot be used to satisfy a different provision unless it actually satisfies that provision, mitigation bankers that did not take any action to create riparian zone credits should not be given additional credits since no action was taken to also meet the requirements of this subchapter. (415)

RESPONSE: Mitigation bankers are not reselling credits in the scenario described by the commenter. Riparian zone credits are established on a bank site in accordance with the FHACA Rules, N.J.A.C. 7:13, with any credits established meeting the requirements of that

chapter. When either wetland or riparian zone credits are sold, they are exhausted and are not resold again. However, sale of a wetland credit does not exhaust or otherwise impact a riparian zone credit established in accordance with the FHACA Rules. Similarly, sale of a riparian zone credit does not impact a wetland credit established under these rules by a mitigation banker. Mitigation bankers have undertaken actions to establish riparian zone credits in accordance with the appropriate regulations and it is, therefore, appropriate to establish riparian zone credits at the banks.

Requirements for a Land Donation (N.J.A.C. 7:7A-11.15)

452. COMMENT: No single family will have five acres available for a land donation, so N.J.A.C. 7:7A-11.15(d)1 unfairly discriminates against smaller property owners who are likely to have smaller wetland impacts. (415)

RESPONSE: It is not the Department's intent to discriminate against single family homes. A land donation is very low in the mitigation hierarchy and it is very unlikely that a single-family homeowner would reach this option in the hierarchy or wish to satisfy a mitigation obligation with this option. Most single-family homeowners are able to either conduct their own mitigation on site or will purchase credits from a bank or make an In-Lieu Fee contribution to the Mitigation Council, which are all more conducive to the very small impacts usually associated with activities at single-family home properties.

453. COMMENT: The Department should establish its own entity to accept donated land parcels since these parcels, although valuable, will likely be too small and too scattered for non-profit entities to accept. (415)

RESPONSE: The Department has the ability to accept donated land parcels through the Green Acres Program. However, when determining if a parcel should be accepted, the Department reviews ecological characteristics of the proposed parcel for donation, as well as their proximity to existing State holdings.

Requirements for a Monetary Contribution to the Department's In-Lieu Fee Program (N.J.A.C. 7:7A-11.16)

454. COMMENT: Under the proposed rules, for single family property owners, the amount of monetary contribution is the acreage of wetlands/State open water impacts multiplied by $42,300, adjusted periodically using the Consumer Price Index for Urban Consumers (CPI) published by the U.S. Department of Labor. This is the same procedure in the existing rules, with the dollar amount adjusted using the CPI for 2016. For property owners that are not single-family property owners, the monetary contribution is the acreage of wetlands/State open water impacts multiplied by a greater dollar amount, also adjusted periodically. "Periodically" is not a reliable adjustment period and leaves the adjustment subject to a when and if basis. Because the single-family homeowner monetary contributions are proposed to be adjusted periodically, rather than annually, these adjustments may not occur, especially without a specific person or department responsible for this task. The adjustment should be automatic and annual regardless of value change. (335)

RESPONSE: As set forth at N.J.A.C. 7A-11.16(f), the Department will update the codified monetary contribution amount when the Consumer Price Index adjustment either solely or cumulatively since the last adjustment results in a change of $500.00 or more above the currently codified amount. While this will not necessarily result in adjustment on an annual basis in years

where the Consumer Price Index change is small, the Department believes this threshold provides a reasonable, efficient basis for making the change.

455. COMMENT: In the notice of proposal Summary, the Department describes how the Wetlands Mitigation Council has leveraged monetary contributions to achieve mitigation projects with wetlands benefits and functions produced that exceed the necessary amounts for the disturbance that the monetary contributions offset. The demonstration of the Council producing mitigation far in excess of those necessary is debatable. At least one major mitigation project on the ILF tabulation (9.5 credits of 141 reported to have been created) has not been built since funded six years ago. Additionally, this project is currently designed to deliver less mitigation than approved six years ago. By comparison, private sector mitigation banking has occurred in the State since the 1990s. However, not one bank has been awarded more or excess mitigation credits compared to its implementing authorities, such as Resolutions or Mitigation Banking Instruments. (335)

RESPONSE: Because the Council has been able to leverage monetary contributions, the Council has been able to establish, through wetland restoration, creation, or enhancement, more acreage (credits) than the permitted impacts for which monetary contributions were provided. The number of credits that the Council has established was determined using the ratios established by these rules. In regard to the specific project that the commenter references, the project is currently designed to fully satisfy the requirements set forth by the Council at the time of its approval. This project represents less than one percent of the overall credits established by the Council, far less than the 10 percent that would be afforded to a private banker for completing the administrative aspects of a mitigation bank. Specifically, under these rules, a private banker

would receive 10 percent of the total number of credits for compliance with all pre-release credit sale conditions. New Jersey's ILF program has not been awarded more or excess mitigation credits than they have completed or are about to complete.

456. COMMENT: Under the proposed rules, the Council will consider cost estimates submitted by the applicant and the Department, information obtained from experts in the field of mitigation, and any other information available to the Council in determining the costs of mitigation to determine the amount of a monetary contribution. This requirement will provide advanced notice to Council members, so they may make a thorough review. Will Council members be allotted 30 to 60 days advanced notice? Will Council members be provided design plans and data for review as far in advance as the Department is provided same data? (335)

RESPONSE: The Wetland Mitigation Council will be provided the same information that the Department receives in the applicant's mitigation proposal. The Council will receive the information as soon as it has been reviewed by the Department and is ready for Council review. This will be no later than two weeks prior to the scheduled Council meeting.

Financial Assurance for Mitigation Projects; General Provisions (N.J.A.C. 7:7A-11.17)

457. COMMENT: Although financial assurance is an acceptable concept, all types of financial assurance listed at N.J.A.C. 7:7A-11.17(d) have an associated cost that will likely be passed on to the applicant or, in the case of a mitigation bank, added to the price of credits. What are the specific charges to an applicant for each type of assurance? The costs of these assurances should have been included in the Economic Impact statement since they will affect the cost of mitigation, which affects the cost of development. (415)

RESPONSE: The Economic Impact statement discusses the economic impacts both positive and negative for proposed new amendments. The requirement for financial assurance is not a new requirement, therefore, was not included in the economic analysis. The costs for an applicant to provide financial assurance remains unchanged.

New Jersey In-Lieu Fee Mitigation Program (N.J.A.C. 7:7A-11.23)

458. COMMENT: Regardless of the USEPA's approval, the Department's in-lieu fee program does not meet Federal requirements as the USACE will not allow it to be used for impacts associated with Federal permits. (415)

459. COMMENT: The money coming into the Department through the In-Lieu Fee (ILF) Program is opposed. (327)

460. COMMENT: The concept of in-lieu fee payments is opposed. An in-lieu fee payment can quickly become a payoff to allow projects to proceed regardless of the law. (346)

RESPONSE TO COMMENTS 458 THROUGH 460: In accordance with the Freshwater Wetlands Protection Act, the Wetland Mitigation Council is the only entity in New Jersey that may collect and disburse funds under the FWPA Rules. The adopted changes incorporate provisions from the ILF Program Instrument approved by the USEPA in June 2015. This ILF Instrument represents an agreement entered into by the Department, the USEPA, and the Wetlands Mitigation Council concerning the operation, responsibilities, and goals of the ILF Program. The ILF Program enables those responsible for mitigation under the FWPA Rules to fulfill their mitigation obligation through a monetary contribution to the ILF Program. Those monetary contributions are then distributed by the Wetlands Mitigation Council (as the ILF Program Administrator) to fund mitigation in designated service areas across the State.

USEPA approval of the ILF Program Instrument documents the Federal agency's agreement that the ILF Program is consistent with Federal regulations. The USACE could sign on to the ILF Program Instrument and allow the Department's ILF Program to be used for impacts associated with Federal permits, but this has not yet occurred. The USACE's decision on whether to sign onto the ILF Program Instrument is not indicative of whether the ILF Program meets Federal requirements; as explained previously, the Department has assumed freshwater wetlands permitting authority from the Federal government and, per the USEPA's approval of the Department's ILF Program, has established in-lieu fee mitigation requirements at least as stringent as Federal requirements.

In addition, as stated in the Response to Comment 449, funds deposited with the ILF Program are tracked and have proven to be successful in creating, restoring, enhancing, and preserving (through land donations) wetlands. Those projects that receive approval by the Council to receive funding meet all the standards and requirements of the FWPA Rules.

Finally, ILF funds are not received by the Department, but are paid to the ILF Program, which is administered by the Wetland Mitigation Council. While the Department is a signatory to the In-Lieu Fee Instrument, the Council is an independent body which is comprised of seven members appointed by the Governor with the advice and consent of the Senate.

New Jersey In-Lieu Fee Mitigation Program Grant Funding Procedures (N.J.A.C. 7:7A-11.24)

461. COMMENT: The Wetland Mitigation Council should not be able to distribute funds at any time. Alleged "charities" should not be supported by tax dollars but should be supported by donations. The Council will act against the citizens of New Jersey in order to gain access to

taxpayer dollars. In addition, the Council works with the Department to keep information and knowledge of what is going on from the public. (346)

RESPONSE: The FWPA at N.J.S.A. 13:9B-14 establishes the Wetland Mitigation Council (Council). The Council, as required by the FWPA, is comprised of seven members: the Commissioner of the Department, who serves ex officio; and six members of the general public appointed by the Governor with the advice and consent of the Senate, two of whom are recommended by recognized building and development organizations; two of whom are recommended by recognized environmental and conservation organizations; and two of whom are recommended from institutions of higher learning in the State.

The Council is not supported by taxpayer money; rather, the money that the Council receives represents compensation for unmitigated wetland loss. Section 15 of the FWPA, N.J.S.A. 13:9B-15, states that the Council is responsible for disbursements of funds from the Wetlands Mitigation Bank to finance mitigation projects. Specifically, the Wetland Mitigation Council, in consultation with the USEPA, may transfer any funds or lands restricted by deed, easement, or other appropriate means for mitigation and freshwater wetlands conservation purposes, to a State or Federal conservation agency that consents to the transfer, to expand or provide for: freshwater wetlands preserves; transition areas around existing freshwater wetlands to preserve freshwater wetland quality; future mitigation sites for freshwater wetlands enhancement, restoration, or other mitigation efforts, or research to enhance the practice of mitigation. The Council's duties are further enunciated in N.J.A.C. 7:7A-11.22, which sets forth that the Council's duties and functions include the review of: proposed monetary contributions, proposed land donations, advising the Department on mitigation issues; buying land in order to conduct mitigation, or to preserve wetlands, transition areas, uplands, and/or State open waters; contracting with a charitable

conservancy or appropriate agency to carry out its responsibilities; conducting research to monitor the success of mitigation as part of a Council-funded and approved creation, restoration, or enhancement project; enhancing or restoring wetlands on public lands; and disbursing funds from the Wetland Mitigation Fund to finance the activities listed above. To carry out these functions, the Council may contract with a government agency, nonprofit organization, or other appropriate agency to carry out its responsibilities.

All monetary contributions received by the Council are held at a financial institution that is a member of the Federal Deposit Insurance Corporation. All interest accruing from the account will be used to fund projects to provide compensatory mitigation for impacts to wetlands authorized by Department permits. Monetary contributions paid may only be used for the restoration, creation, enhancement, or preservation of wetlands and associated buffers. Specifically, funds may be used for the selection, design, land acquisition (that is, appraisals, surveys, title insurance, etc.), implementation, and management of compensatory mitigation projects. This may include fees associated with securing a permit for conducting mitigation activities, activities related to restoration, enhancement, creation, and/or preservation of wetlands and associated buffers, maintenance and monitoring of mitigation sites, or any other fee related to the mitigation process contemplated by the Council.

The Council currently operates under an approved In-Lieu Fee Instrument, which requires that any future projects approved by the Council must meet the requirements and procedures of the In-Lieu Fee Instrument. Under the In-Lieu Fee Program, the Council must put out a request for proposals in order to receive potential applications to fund. Once the request for proposal has closed, the Council will meet and review the proposed project during their regularly scheduled public meetings. The Council typically meets six times per year, and all meetings are announced

through notification to newspapers, a listserv, and the Department's webpage. In addition, all meetings are open to the public and public comment is taken into consideration on all decisions by the Council.

462. COMMENT: As established by proposed N.J.A.C. 7:7A-11.23(e), the Council will disburse mitigation fund dollars for ILF projects within primary and secondary service areas of the State. The primary service area will be the service area where the impact occurs and for which the monetary contribution is collected, and is the preferred location for mitigation to occur. The secondary service area will be the adjacent water region where the impact may be mitigated for if, after three years, there are no credits available within the primary service area. When a monetary contribution has been collected and cannot be assigned to an approved project within the primary service area after three years, the Program Administrator shall utilize a secondary service area in order to provide compensation. Why is the State Bank afforded different and larger service areas than private sector mitigation banks? Federal Mitigation Rules require mitigation banks and ILF programs to be treated equitably. (335)

RESPONSE: The commenter is correct; the Federal government does require mitigation banks and ILF programs to be treated equitably. In addition, under the 2008 Compensatory Mitigation Rules, the hierarchy prefers the use of ILF and banking over permittee-responsible mitigation. These rules, however, do not preclude the use of permittee responsible mitigation. As an assumed program, New Jersey must remain as stringent as the Federal government when administering its wetland program. In New Jersey, the Department has established a hierarchy that, for larger sites, has banking higher in the hierarchy than the ILF. If an applicant has been approved to make a monetary contribution, then the applicant has demonstrated to the

Department that there are no feasible mitigation alternatives within the Watershed Management Area where the impact occurs, including credit purchase from a bank with a service area that includes the site of the impacts. The ILF Program's service area is larger than a typical mitigation bank service area in recognition of the fact that the mitigator has already demonstrated that onsite mitigation, offsite mitigation, and bank credit purchase are not feasible options. While the ILF Program's service area is typically larger than a mitigation bank's service area, the rules do allow for a mitigation banker to make an ecological argument that a larger service area will provide equal functions and values to the impacts that the bank is servicing (see N.J.A.C. 7:7A-11.26(c)8).

Mitigation Banks (N.J.A.C. 7:7A-11.25 and 11.26)

463. COMMENT: Mitigation banks should never be used. It is far too easy to criminalize their operations (346).

464. COMMENT: Wetland mitigation banks should not be allowed. Most wetland banks in New Jersey have failed. (240 and 415)

RESPONSE TO COMMENTS 463 AND 464: The practice of compensatory mitigation and mitigation banks is a nationally recognized strategy for offsetting lost ecological functions and is supported by Federal guidelines released by the USEPA and USACE. Additionally, New Jersey's 19 approved wetlands mitigation banks serving 19 of the 20 watershed management areas throughout the State are an example of success in implementing this strategy.

465. COMMENT: The credit release schedule is too stringent and is curtailing mitigation banking in the State. The State protects credit releases as if the credits were immediately sold

and used as mitigation; review of banking in New Jersey indicates this is hardly ever the case. A banker implements a mitigation project and delivers all mitigation value immediately. Over a projected five-year period, credits are released based on performance. However, this process actually takes almost seven years considering the build year and the last year inspection. A banking company has eight operating banks in the State containing 129 credits, enough mitigation to compensate for 129 acres of impact. However, fewer than 25 percent of these credits have been used as mitigation over an 11-year period. This demonstrates that the private mitigation banking sector is providing advanced mitigation to the State well in advance and in excess of need. Holding 25 percent of the credits until year five, really closer to year seven, is unnecessary, stifling advanced mitigation and punitive. The State retains tremendous control over the bank via bonds and permit approval to use any credits, without having to hold 25 percent for seven years. A 10 percent release upon construction completion (aka hydrologic regime establishment) is too low. As there are already a number of protective measures in place, including maintenance bonds, performance bonds, and the fact that any mitigation bank can be shut down at any point, this additional protective measure goes one step too far. Please add a section whereby mitigation banks can be reassessed in year five to include more credits than in the implementing mitigation banking instrument, if performance metrics exceed those stipulated in the mitigation banking instrument. (335)

RESPONSE: Unlike permittee-constructed mitigation for a single project, a mitigation bank is a mitigation alternative where mitigation is provided for multiple types of wetland impacts associated with multiple projects for multiple permittees at a single site. Generally, other mitigation projects compensate for impacts associated with a single disturbance and are typically smaller and, therefore, easier to remedy should the mitigation begin to fail. Because mitigation

banks are larger in size and represent multiple impacts from multiple permittees, if a mitigation bank were to fail, there is a greater loss to the environment than a smaller permittee responsible mitigation project. Failure of the bank means that compliance with the FWPA Rules and compensation for the losses associated with many permitted activities may not occur within a timely manner. Therefore, it is necessary for the Department to hold credits in reserve to ensure that the mitigation bank is successfully meeting certain milestones and compensating for the impacts for which mitigation is required.

466. COMMENT: The proposed rules require that a banker transfers a mitigation bank site in fee simple to a government agency or Department-approved charitable conservancy. What are the approval criteria for a charitable conservancy? Does the Department have a list of approved charitable conservancies? (335)

RESPONSE: As indicated in the definitions at N.J.A.C. 7:7A-1.3, a charitable conservancy is a corporation or trust that meets the definition of a charitable conservancy at N.J.S.A. 13:8B-2. In accordance with the statutory definition, a charitable conservancy is a corporation or trust whose purposes include the acquisition and preservation of land or water areas or of a particular land or water area, or either thereof, in a natural, scenic, or open condition, no part of the net earnings of which insures to the benefit of any private shareholder or individual, and which has received tax exemption under section 501(c) of the 1954 Internal Revenue Code. The Department does not maintain a list of all the potential charitable conservancies that would qualify to receive a transfer of a mitigation bank. If a charitable conservancy meets the statutory definition, then it is eligible to receive a transfer of a mitigation bank.

467. COMMENT: Preservation credits should not be released prematurely because doing so provides a disincentive for a banker to complete the more difficult aspects of the mitigation bank project. Preservation credits should be apportioned with the release of other credits to ensure that the entire bank is completed. (415)

RESPONSE: N.J.A.C. 7:7A-11.25(f) states that preservation credits may be released in their entirety when the conditions set forth at recodified N.J.A.C. 7:7A-11.25(e)1 are met. All credits will be released upon completion of the following: signing of the banking instrument approving the bank; and compliance with all pre-release credit sale conditions in the banking instrument approving the bank, including securing all construction permits, posting adequate and effective financial assurance, and filing the conservation restriction. This is appropriate, since once all the pre-release credit sale conditions are completed, the preservation component of the mitigation bank has already achieved success and does not have to be monitored further. Therefore, there is no reason to withhold credit release based on success criteria. A banker is obligated under N.J.A.C. 7:7A-11.25(c) to carry out all requirements of the banking instrument approving the bank, regardless of whether or when credits are sold. Construction of the wetland creation, enhancement, or restoration components of an approved mitigation bank must be initiated no later than one year after the date of the first credit transaction. For these aspects of the mitigation bank, credits are not released until performance standards have been met and are only released in accordance with the credit release schedule at N.J.A.C. 7:7A-11.25(e)1.

468. COMMENT: Why are credits for preservation not included at N.J.A.C. 7:7A-11.26(b)3? (415)

RESPONSE: The list of potential mitigation alternatives at N.J.A.C. 7:7A-11.26(b)3 is not intended to be all-inclusive. Instead, similar to the prior rules at N.J.A.C. 7:7A-15.25(a)3, the three most common mitigation alternatives are listed as examples of the alternatives that may be considered; preservation mitigation is one of the mitigation alternatives allowed by the rules and accordingly would be one of the options allowed under this paragraph.

469. COMMENT: The rules should be amended to indicate that the Department must respond within 60 days of the submittal of a monitoring report for a mitigation project. (335)

RESPONSE: It is not appropriate to conduct a site inspection without the monitoring report as the purpose of the site inspection is to confirm the findings of the monitoring report. Most monitoring reports are submitted in December and January. In most cases, Department review of a monitoring report includes a visit to the mitigation site. Due to the timing of the submission, it is not always feasible or practical to conduct the site inspection during the winter months, resulting in a delay in completing the review that may extend beyond the 60-day period suggested by the commenter.

N.J.A.C. 7:7A-12, Conservation Restrictions

Conservation Restriction Form and Recording Requirements (N.J.A.C. 7:7A-12.1)

470. COMMENT: N.J.A.C. 7:7A-12.1(f) is not accurate. The Wetlands Mitigation Council is not involved in approving wetland mitigation banks. (415)

RESPONSE: While the Wetlands Mitigation Council is not involved in the review of mitigation bank plans or draft instruments, the Council is the authority responsible for approving land

donations. Therefore, land donation mitigation banks must be approved by the Council, including the conservation restriction recorded to ensure the protection of the donated land in perpetuity. Adopted N.J.A.C. 7:7A-12.1(f) correctly identifies the potential scope of the Council's involvement in activities requiring a conservation restriction.

Property Owners' Reservation of Rights (N.J.A.C. 7:7A-12.2)

471. COMMENT: New N.J.A.C. 7:7A-12.2, which allows the property owner or grantor to reserve the right to abandon a project at any time prior to the start of site disturbance and receive an executed release of the conservation restriction to be recorded by the permittee or grantor is supported. (255)

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

472. COMMENT: The amendments regarding the timing procedures for recording conservation restrictions at N.J.A.C. 7:7A-12.2 are supported because applicants will be able to make *de minimis* changes. However, clarification is needed as to whether the proposed changes will be retroactive to apply to all previously recorded conservation restrictions to allow for *de minimis* changes to be made to them. (140 and 262)

RESPONSE: The adopted provision will apply to all new conservation restrictions recorded under this chapter. Prior N.J.A.C. 7:7A-2.12(i) also allowed for *de minimis* modification of a recorded conservation restriction with slightly different process requirements, but under prior N.J.A.C. 7:7A-2.12(j), the recorded conservation restriction itself was required to include language allowing for a modification for this provision to apply. The ability to make *de* minimis

changes will, therefore, not retroactively apply to previously-recorded conservation restrictions that do not contain language specifically reserving the ability to make *de minimis* changes.

473. COMMENT: The Department should include a clause in the required conservation restriction form that recognizes amended N.J.A.C. 7:7A-12.2(b), which allows for release of the conservation restriction if construction has not commenced. (140 and 262)

RESPONSE: The Department has added this language to the approved conservation restriction form available on its website or by contacting the Department at the address set forth in adopted N.J.A.C. 7:7A-1.4.

474. COMMENT: With regard to N.J.A.C. 7:7A-12.2(b), how should applicants demonstrate a project has been abandoned? Is a letter to that effect sufficient? (140)

RESPONSE: An applicant needs to submit a letter informing the Department that a project has been abandoned. The applicant must also state in such as letter that they relinquish and abandon all permits issued in connection with the project. Upon the Department's confirmation that no regulated activities (including pre-construction earth movement and vegetation removal) have occurred, the Department will provide an executed release of the conservation restriction to the permittee or grantor.

475. COMMENT: While proposed amendments to the "right to abandon" provision in N.J.A.C. 7:7A-12.2(b), are a positive step, further amendments are needed to establish that if a conservation restriction is recorded, the approval should remain valid in perpetuity unless the activity would not be allowed due to new regulations. Where the Department receives the benefit

of the conservation restriction and the affected property owner's land is made subject to the limitations imposed by the conservation restriction in perpetuity, the owner should likewise have perpetual rights under the approval. (140)

476. COMMENT: The proposed rules do not address the inconsistent position that a deed restriction is valid in perpetuity while a transition area waiver is only valid for five years with the potential for one five-year extension. If no activities have commenced within five years, there should be a provision in the conservation restriction that it be removed. Alternatively, the transition area waiver should be valid as long as the conservation restriction is in effect. (140 and 262)

RESPONSE TO COMMENTS 475 AND 476: Most permits, including transition area waivers, are valid for five years, with the possibility for one five-year extension. Site conditions, regulations, and laws may change over time, such that the activity formerly approved may not be "approvable" in perpetuity. The Department establishes set permit durations and extension requirements that allow for delays in project commencement while remaining protective of freshwater wetlands, transition areas, and State open waters. Allowing regulated activities to occur well beyond the date of issuance of the permit without Department confirmation of site conditions is not appropriate. Because the landowner has the ability to abandon the project before any site disturbance occurs, and may make *de minimis* changes to a recorded conservation restriction, the Department does not believe that allowing permits to remain valid in perpetuity is necessary to respect the property owner's rights. The recorded conservation restriction, combined with the permit and LOI recording requirements, ensure that current and future property owners are aware of the regulatory history of the property. Furthermore, applicants and

property owners can ask the Department to release the conservation restriction in the event that a permit is issued and expires before any regulated activities have occurred.

N.J.A.C. 7:7A Appendix 1

477. COMMENT: The proposed updates to N.J.A.C. 7:7A Appendix 1 are supported because they serve to more accurately identify those areas that meet the definition of vernal habitat. (277)

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

478. COMMENT: The notice of proposal Summary states that "[f]acultative species are those that use vernal habitats, but not exclusively, and, therefore, the Department requires the presence of two or more of these species for vernal habitat documentation," but then states, in reference to the two addition turtle species added to N.J.A.C. 7:7A Appendix 1, that "[t]he Department will not determine a vernal habitat is present by only observing the presence of turtle species, so the addition of the Eastern Box Turtle and Eastern Musk Turtle will have very minor effects." Facultative species include several turtle species, with two more proposed to be added. Does the Department intend to modify the vernal habitat facultative species criteria such that the presence of two facultative turtle species is not enough to classify a wetland as a vernal habitat? (409)

RESPONSE: The apparent contradiction identified by the commenter was not intended. The second sentence in the notice of proposal Summary should have read (addition to Summary text in bold): "The Department will not determine a vernal habitat is present by only observing the presence of **one of the additional** turtle species …" The first sentence referred to by the commenter remains an accurate description of the criteria for classifying a vernal habitat. The presence of *any* two or more facultative species can result in the Department classifying a

wetland as a vernal habitat, as long as the other necessary criteria are met. Because the presence of either one of the added turtle species is not enough *by itself* to lead to an area's classification as a vernal habitat, the Department still anticipates very minor effects from the addition of the two turtle species.

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

General

479. COMMENT: The rulemaking represents rollbacks in flood hazard rules. (173)

RESPONSE: The only amendments proposed to the FHACA Rules under this rulemaking are amendments to general permit 1 to reflect the January 11, 2016, amendments to the Stream Cleaning Act, N.J.S.A. 58:16A-67, effectuated by P.L. 2015, c. 210, and amendments to notice requirements for sediment removal projects, which are identical to amendments made in the FWPA Rules. These amendments do not roll back any protective requirement in the FHACA Rules and, in the case of amendments to general permit 1, are required to effectuate the Legislature's intent in N.J.S.A. 58:16A-67.

N.J.A.C. 7:13-9.1, General Permit 1

480. COMMENT: The amendments to N.J.A.C. 7:13-9.1(a)7i, ii, and iii, which provide greater flexibility for local government sediment removal projects, are supported. (255)

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

Impact Statements

Economic Impact

481. COMMENT: The proposed rules will have a negative impact on the economy of New Jersey (346).

RESPONSE: The Department has concluded that the adopted amendments, repeals, and new rules will have a generally positive impact on the economy of the State while minimizing adverse impacts to the functions and values of freshwater wetlands and State open waters. As explained in the Economic Impact statement, the Department expects the implementation of the proposed rules to reduce time and expense spent on preparing, submitting, and reviewing a permit application for regulated activities in freshwater wetlands, State open waters, and transition areas, which will reduce the cost of preparing a complete application. The alignment of land use rules will streamline the permitting process by creating consistency between land use programs and will be especially beneficial in cases where more than one type of permit is required for a regulated activity. Changes to the mitigation rules will allow flexibility, which will increase compliance and reduce the cost of mitigation and enforcement.

482. COMMENT: The elimination of the $500.00 fee for the transfer of a permit when ownership of a site changes, discussed in the Economic Impact statement as having a minor positive economic impact, is opposed. (346).

RESPONSE: The review of a request to transfer a permit does not involve sufficient time or resources to warrant a $500.00 fee. The FHACA Rules and CZM Rules do not charge a fee for a permit transfer. In order to ensure consistency between the three land use rule chapters and to ensure the fees charges are commensurate with the staff time and resources needed to review an application, the Department has determined that it is appropriate to eliminate the $500.00 fee.

Jobs Impact

483. COMMENT: Only lawyers will receive business as a result of the proposed rule changes. The people of New Jersey will not see any jobs benefits. (346)

RESPONSE: The Department concluded, in the Jobs Impact statement in the notice of proposal, that the amendments, repeals, and new rules presently adopted will not have a significant impact on jobs. The adopted changes are intended to align the FWPA, CZM, and FHACA Rules while simplifying language and processes. The Department does not anticipate any significant increase or decrease in the numbers of jobs for lawyers or any other profession as a result of this rulemaking.

Agriculture Industry Impact

484. COMMENT: The agricultural changes proposed will negatively impact the environment. The proposed changes allow profiteering by the agricultural community. (346)

RESPONSE: The adopted amendments relating to agriculture are adopted to reflect the Legislative amendments to the FWPA made by P.L. 2014, c. 89, and P.L. 2015, c. 272. The amendments exempting certain temporary farm structures will not negatively impact the environment. These structures, such as hoophouses and polyhouses, are very minor, temporary, and involve no permanent footings or other disturbance. These activities are only exempt within established, ongoing agricultural operations that were actively cultivated on or before July 1, 1988. The amendments that exempt activities considered normal maintenance of cranberry bogs and blueberry fields and activities considered renewal or rehabilitation of cranberry bogs will have similarly minor impacts. Again, the activities exempted are only exempt on land that is in

established, ongoing agricultural use, and has been since July 1, 1988. There will be no new disturbance to wetlands as a result of the amendments related to agricultural exemptions.

Regulatory Flexibility Analysis

485. COMMENT: There is no flexibility in the flexibility analysis (346).

RESPONSE: The Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., directs New Jersey agencies developing and proposing a rule for adoption to "utilize approaches which will accomplish the objectives of applicable statutes while minimizing any adverse economic impact of the proposed rule on small businesses of different types and of differing sizes." The Regulatory Flexibility Act provides examples of such approaches including establishing different requirements to take into account the resources available to small businesses, using performance (rather than design) standards, and exempting small businesses from rule provisions provided public health, safety, or general welfare is not endangered. N.J.S.A. 52:14B-19 requires that a notice of proposal of rules that impose reporting, recordkeeping, or other compliance requirements on small businesses include a regulatory flexibility analysis that describes methods used to minimize any adverse economic impact on small businesses. A small business is any business that is resident in New Jersey, independently owned and operated, and not dominant in its field, which employs fewer than 100 full-time employees. As explained in the Regulatory Flexibility Analysis in the notice of proposal, a number of contractors, builders, and property owners affected by amendments, repeals, and new rules adopted herein are small businesses according to this definition. The adopted rules apply to any entity owning property containing freshwater wetlands, transition areas, and/or State open waters, intending to engage in a regulated activity. These rules will have the same impact on a small business in any industry as

they will on any person or entity proposing such activities in freshwater wetlands, transition areas, and/or State open waters. Since the amendments and new rules are the minimum necessary to protect public health and safety and the environment, adopting differing standards applicable to small businesses is neither appropriate nor sufficiently protective of the residents of New Jersey from the deleterious impacts of damage to freshwater wetlands, transition areas, and/or State open waters.

Smart Growth

486. COMMENT: The proposed rule allows for overdevelopment, not smart growth. (346)

487. COMMENT: Redeveloping previously-developed areas is preferable to allowing development in wetlands. The rules should not be weakened to allow for new development in wetlands that destroys natural resources. (88, 175, 213, and 238)

RESPONSE TO COMMENTS 486 AND 487: The FWPA Rules, as amended herein, contain detailed procedures, standards, and criteria for development within freshwater wetlands, wetland transition areas, and State open waters throughout the State. The adopted rules are consistent with the law and policy of New Jersey to promote smart growth and to reduce the negative effects of sprawl and disinvestment in older communities. A specific general permit (general permit 26 at N.J.A.C. 7:7A-7.26) and a special activity transition area waiver (at N.J.A.C. 7:7A-8.3(f)) promote redevelopment of existing developed sites to minimize sprawl and encroachment of development on currently undeveloped sites. The general permit for redevelopment has been amended to add that the area on which a project is proposed must be identified as an area of redevelopment by the municipality and formally designated as such by the New Jersey

Department of Community Affairs to ensure appropriate use of this general permit and to facilitate high-priority redevelopment projects.

The adopted rules promote State Plan General Policy 4, Prevention of Water Pollution. Wetlands protect and preserve drinking water supplies, purify surface and groundwater resources, provide a natural means of flood and storm damage protection, reduce flooding, and provide essential breeding, spawning, nesting and wintering habitats for fish and wildlife, including migratory birds, endangered and threatened species, and commercially and recreationally important species. The regulatory framework in the FWPA Rules ensures that developments are constructed to avoid random, unnecessary, or undesirable alteration or disturbance to wetlands, transition areas, and State open waters.

The State Plan policy also identifies the protection and enhancement of water resources through coordinated planning efforts aimed at reducing sources of pollution and other adverse effects of development, encouraging designs in hazard-free areas that will protect the natural function of stream and wetland systems, and optimizing sustainable resource use. The rules contain provisions to achieve this State Plan policy, including stringent limitations on encroachment into wetlands, State open waters, and wetland transition areas, which result in protecting water quality and often reducing the size and impacts of development.

The adopted rules further advance the State's smart growth policies by providing clear standards and guidance to the regulated public. Many of the amendments adopted are intended to align the language, processes, and requirements of the FWPA Rules with the CZM and FHACA Rules as much as enabling statutes allow to create a consistent, predictable, and efficient permitting process. In addition, the incorporation of electronic application processes for several

permits and Letters of Interpretation leverages technology to expedite the review and approval process.

Summary of Agency-Initiated Changes:

The Department is modifying the rules on adoption to make the changes below:

1. Various cross-references to the FWPA Rules in the CZM Rules are impacted by the adopted recodifications. The Department is making changes to correct recodifications in the following CZM Rule provisions: N.J.A.C. 7:7-9.27(a)4 and (b)1, 17.11(f)1 and (g), and 17.14(c)1 and 2 and (d).

2. The Department is changing N.J.A.C. 7:7A-1.1(d) on adoption to replace the word "chapter" with the word "section" to correctly identify the scope of this provision. As indicated in the notice of proposal Summary at 49 N.J.R. 842, this provision was intended to be relocated from N.J.A.C. 7:7A-1.6(c) with no change in text.

3. Although not proposed for amendment, the definition of "Best Management Practices" at recodified N.J.A.C. 7:7A-1.3 contains an outdated reference to the "Department's Technical Manual for Stream Encroachment." To reflect the FHACA Rules technical manual and maintain consistency with the FHACA Rules, the outdated reference is replaced with a reference to the Department's "Flood Hazard Area Technical Manual." The Department is additionally changing this definition to reflect the current heading of the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13.

4. The definition of "individual permit" is changed on adoption to change the term "alternatives test" to "alternatives analysis" to create consistency with the requirements for individual permits at N.J.A.C. 7:7A-10.2, which requires an "analysis of alternatives."

5. The definition of "project" is changed on adoption to correct the term "right of ways" to "rights-of-way."

6. The Department is deleting the phrase "or easement" from recodified N.J.A.C. 7:7A-2.3(b) for consistency with changes made throughout the chapter and with the adopted definition of "conservation restriction," which has been amended from the previous definition of "conservation restriction or easement" to eliminate reference to "or easement" since easements are included within the definition (see 49 N.J.R. 843).

7. General permit 15 authorizes mosquito control activities in freshwater wetlands, transition areas, and State open waters. These activities are subject to specific public notice requirements contained within the permit, and not to the notice requirements for other general permits. N.J.A.C. 7:7A-7.15(f) explains these public notice requirements. The Department is correcting the citation to the public notice subchapter from "N.J.A.C. 7:7A-10.17" to "N.J.A.C. 7:7A-17" in this subsection.

8. Proposed N.J.A.C. 7:7A-8.1(e)2i inadvertently deleted language essential to understanding the provision. On adoption, the phrase "was recorded" is not deleted; the phrase "or easement" is deleted as proposed.

9. N.J.A.C. 7:7A-8.1(i) is changed on adoption to correct a grammatical error.

10. N.J.A.C. 7:7A-11.24(a) is changed to specify the ILF "Program" Instrument for clarity; ILF Program Instrument is a term defined at N.J.A.C. 7:7A-11.1.

11. The Department is modifying N.J.A.C. 7:7A-11.24(c)2 to capitalize "Instrument" in "ILF Program Instrument" for consistency with the definition at N.J.A.C. 7:7A-11.1 and other uses of the term in the subchapter.

12. The Department is correcting a typographical error at N.J.A.C. 7:7A-11.24(c)2v by changing "Letters of Interpretations" to "Letters of Interpretation."

13. The Department is changing N.J.A.C. 7:7A-16.1(b) to refer to "authorizations under" general permit 24 and general permit 25, to accurately reflect the mechanism of approval when using a general permit to authorize an activity.

14. The Department is correcting N.J.A.C. 7:7A-16.7(a)4 to remove a redundant application requirement. State plane coordinates are required by N.J.A.C. 7:7A-16.7(a)5; N.J.A.C.

7:7A-16.7(a)4v, which required State plane coordinates under the requirements for a site plan, is, therefore, deleted.

15. The Department is correcting a citation at N.J.A.C. 7:7A-17.3(b)6.

16. The Department is modifying N.J.A.C. 7:7A-18.1(b) on adoption to add an administrative modification to the list of applications that do not require a fee. Administrative modifications address very minor changes to issued permits, such as correcting typographical errors. As stated in the notice of proposal Summary at 49 N.J.R. 868, the Department did not intend for these types of modifications to require a fee in recognition of the very minor nature of the changes involved.

17. Table 18.1 is changed to replace the proposed $500.00 fee for an administrative modification with "no fee." In accordance with adopted N.J.A.C. 7:7A-20.6(a), an authorization under a general permit that is valid in accordance with N.J.A.C. 7:7A-5.6 may be modified through an administrative modification, a minor technical modification, or a major technical modification. Table 18.1 is also changed on adoption to reflect that general permit authorizations may be modified by a major technical modification, and to specify that major modifications are a type of technical modification, to reflect the adopted requirements at N.J.A.C. 7:7A-20.6(e) and 20.7(d).

18. The Department is correcting a citation at N.J.A.C. 7:7A-19.3(b).

19. N.J.A.C. 7:7A-11.26(c)7 and 11.12(f) and (g) are changed on adoption to correct a cross-reference.

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 that adopt, readopt, or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a comparison with Federal law. The Department's authority for regulating development within freshwater wetlands and State open waters is derived from Federal and State law.

The Department's authority for regulating development within freshwater wetlands and State open waters is derived from Federal and State law. The Freshwater Wetlands Protect Act, N.J.S.A. 13:9B-1 et seq., requires rules to be promulgated to govern the removal, excavation, disturbance, or dredging, drainage, or disturbance of water level or water table, dumping, discharging, or filling with any materials, driving of pilings, and placing obstructions in a freshwater wetland, and the destruction of vegetation, which would alter the character of a freshwater wetland. The FWPA Rules, N.J.A.C. 7:7A, fulfill this purpose and also regulate the discharge of dredge and fill material in State open waters, as well as govern activities in transition areas.

New Jersey’s freshwater wetlands program operates in place of the Federal 404 program (Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq.). The Department, under Section 404(g), has assumed the Federal permitting authority. The United

States Environmental Protection Agency (USEPA) oversees the Department's wetlands program in accordance with the Federal Clean Water Act and a Memorandum of Agreement between the Department and the USEPA. The requirement imposed by the Federal Clean Water Act on a state assuming the Federal permitting authority is that the state implements regulatory standards at least equally stringent as those currently in place for the Federal 404 program for the protection of waters of the United States, including wetlands.

The adopted amendments, repeals, and new rules add flexibility where appropriate; address implementation issues; provide consistency with other Federal, local, and State requirements; align procedures with flood hazard and coastal permitting procedures where possible; and simplify language to improve the permitting process and reduce the cost of compliance. The proposed changes retain the appropriate level of stringency to ensure compliance with Federal law.

Full text of the adopted recodifications, amendments, and new rules follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

CHAPTER 7

COASTAL ZONE MANAGEMENT RULES

SUBCHAPTER 9. SPECIAL AREAS

7:7-9.27 Wetlands

(a) Wetlands or wetland means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation.

1. – 3. (No change.)

4. All tidal and inland wetlands, excluding the delineated tidal wetlands defined pursuant to N.J.A.C. 7:7-2.3, shall be identified and delineated in accordance with the USEPA three-parameter approach (that is, hydrology, soils***,*** and vegetation) specified under N.J.A.C. 7:7A-*[1.4]****1.3*** of the Freshwater Wetlands Protection Act Rules.

(b) Development in wetlands defined under the Freshwater Wetlands Protection Act is prohibited unless the development is found to be acceptable under the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A, except as provided at (b)1 below. Pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-6, coastal activities under the jurisdiction of the New Jersey Meadowlands Commission shall not require a Freshwater Wetlands permit, or be subject to transition area requirements of the Freshwater Wetlands Protection Act, except that discharge of dredged or fill materials may require a permit issued under the provisions of Section 404 of the Federal Water Pollution Control Act of 1972 as amended by the Federal Clean Water Act of 1977, or under an individual or general permit program administered by the State under the provisions of the Federal Act and applicable State laws. Accordingly, under this rule the Department does not exert jurisdiction under the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., in the Hackensack Meadowlands District. However, the Department shall, in

accordance with N.J.S.A. 13:9B-6 and applicable law, review any such coastal activity or development as follows:

1. For the purposes of reviewing a coastal activity or development that proposes the placement of dredged or fill materials in wetlands located waterward of the mean high water line in the Hackensack Meadowlands District under the Waterfront Development Law, N.J.S.A. 12:5-3, Federal Consistency provisions of the Federal Coastal Zone Management Act, 16 U.S.C. *[§§1451]* ***§§ 1451*** et seq., or water quality certification under Section 401 of the Federal Clean Water Act, 33 U.S.C. *[§§1251]* ***§§ 1251*** et seq., the Department shall use the conditions, limits, and requirements governing activities or developments in wetlands set forth in the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-*[4, 5, and 7]***5, 7, 9, and 10***. For the purposes of reviewing a coastal activity or development that proposes the placement of dredged or fill materials in wetlands landward of the mean high water line that does not require a zoning certificate, resolution**,** or statement of consistency from the New Jersey Meadowlands Commission pursuant to N.J.A.C. 7:7-9.43(c) in the Hackensack Meadowlands District under the Federal Consistency provisions of the Federal Coastal Zone Management Act, 16 U.S.C. *[§§1451]* ***§§ 1451*** et seq., or water quality certification under Section 401 of the Federal Clean Water Act, 33 U.S.C. *[§§1251]* ***§§ 1251*** et seq., the Department shall use the conditions, limits, and requirements governing activities or developments in wetlands set forth in the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-*[4, 5, and 7]****5, 7, 9, and 10***.

i. (No change.)

(c)- (j) (No change.)

7:7-17.11 Requirements for intertidal and subtidal shallows and tidal water mitigation

(a) – (e) (No change.)

(f) If mitigation for the filling of intertidal and subtidal shallows or tidal waters as described at (e) above is not feasible, then mitigation shall be in the form of one or both of the following, as determined in consultation with the Department:

1. Upland preservation in accordance with the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-*[15.9]***11.13***; or

2. (No change.)

(g) If mitigation for the filling of intertidal and subtidal shallows or tidal waters as described at (f) above is not feasible, then mitigation shall be in the form of a land donation in accordance with the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-*[15.19]***11.15***.

(h) – (i) (No change.)

7:7-17.14 Wetlands mitigation hierarchy

(a) – (b) (No change.)

(c) If mitigation as described at (b) above is not feasible, then mitigation shall be required in the form of one or more of the following, as determined in consultation with the Department:

1. Monetary contribution in accordance with the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-*[15.18]***11.16***;

2. Upland preservation in accordance with the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-*[15.9]***11.13***; or

3. (No change.)

(d) If mitigation as described at (c) above is not feasible, mitigation shall be in the form of a land donation in accordance with the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-*[15.19]***11.15***.

CHAPTER 7A

FRESHWATER WETLANDS PROTECTION ACT RULES

SUBCHAPTER 1. GENERAL PROVISIONS

7:7A-1.1 Purpose and scope

(a)-(c) (No change from proposal.)

(d) This *[chapter]* ***section*** shall not, however, preclude municipal advice to the Department concerning letters of interpretation or other matters.

(e)- (f) (No change from proposal.)

7:7A-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. Additional definitions specifically applicable to N.J.A.C. 7:7A-11, Mitigation, are set forth at N.J.A.C. 7:7A-11.1.

...

"Best Management Practices" or "BMPs" means methods, measures, designs, performance standards, maintenance procedures, and other management practices which prevent or reduce adverse impacts upon or pollution of freshwater wetlands, State open waters, and adjacent aquatic habitats, which facilitate compliance with the Federal Section 404(b)(1) guidelines (40 *[C.F.R.]* ***CFR*** Part 230), New Jersey Department of Environmental Protection Flood Hazard Area Control *[rules]* ***Act Rules***, N.J.A.C. 7:13; the Department's Storm Water Management Regulations, N.J.A.C. 7:8; the Standards for Soil Erosion and Sediment Control in New Jersey, promulgated by the New Jersey State Soil Conservation Committee at N.J.A.C. 2:90; and effluent limitations or prohibitions under Section 307(a) of the Federal Act and the Department's Surface Water Quality Standards, N.J.A.C. 7:9B. Examples include practices found at 33 *[C.F.R.]* ***CFR*** 330.6, 40 *[C.F.R.]* ***CFR*** 233.35(a)6, the Department's *[Technical Manual for Stream Encroachment]* ***Flood Hazard Area Technical Manual***, and "A Manual of Freshwater Wetland Management Practices for Mosquito Control in New Jersey." The manuals included in this definition are only a partial listing, and interested persons should contact the Department for the most up to date list.

...

"FW1 waters" means waters designated as FW1 waters in the Department's Surface Water Quality Standards, N.J.A.C. 7:9B. *[As of September 4, 2001 N.J.A.C. 7:9B-1.15 defines FW1 waters as those fresh waters wholly within Federal or State lands or special holdings, that are preserved for posterity, and are not subject to wastewater discharges of human origin.]*

...

"Individual permit" means a freshwater wetlands permit or open water fill permit that is issued by the Department after an alternatives *[test]* ***analysis*** and other site-specific and project-specific reviews required at N.J.A.C. 7:7A-10.

...

"Project" means the following:

1. (No change from proposal.)

2. For the purpose of a transition area exemption under N.J.A.C. 7:7A-2.4, based on the application for or the grant of a preliminary subdivision approval:

i.-ii. (No change.)

iii. The following are examples of how the Department will determine the "project" exempted on the basis of the application for or grant of preliminary subdivision approval:

(1) – (4) (No change.)

(5) Where land is subdivided but requires further subdivision, other than *de minimis* changes for road *[right of ways]* ***rights-of-way*** or other infrastructure, before the applicant can proceed to the next step of municipal approval (either building permits or site plan approvals), there is no evidence of intended economic development at the time of initial subdivision application or approval, because the proposed economic development only comes into being with the subsequent, untimely subdivision. Therefore, there is no basis for exemption.

...

SUBCHAPTER 2. APPLICABILITY AND ACTIVITIES FOR WHICH A PERMIT IS REQUIRED

7:7A-2.3 Regulated activities in transition areas

(a) (No change.)

(b) Notwithstanding (a) above, the following activities are not regulated in transition areas and do not require Department approval under this chapter, provided that the activities are performed in a manner that minimizes adverse effects to the transition area and adjacent freshwater wetlands, and provided that the transition area is not contained within a conservation restriction. If the transition area is contained in a conservation restriction *[or easement]*, none of the following activities are allowed unless explicitly stated in the conservation restriction:

1.- 3. (No change from proposal.)

(c) (No change from proposal)

7:7A-2.4 Activities exempted from permit and/or waiver requirement

(a) – (b) (No change from proposal)

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

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

i. (No change.)

ii. The discharge of material for the purpose of installing ditching or other such water control

facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries, or other wetland crop species, where the farming activities and the discharge occur in wetlands and waters that are in established use for such agricultural and silvicultural wetlands crop production. Any discharge of material into wetlands or waters, excavation of wetlands, or draining of wetlands or waters, that are not in established use for such agricultural and silvicultural wetlands crop production requires a permit. For example, the construction of ditches within the confines of an established cranberry bog is an exempt activity. However, the construction of ***new*** ditches in wetlands or waters located outside of the established cranberry bog requires a permit;

iii. – v. (No change from proposal)

2.- 6. (No change from proposal.)

(d) – (i) (No change from proposal.)

SUBCHAPTER 4. LETTERS OF INTERPRETATION

7:7A-4.2 General provisions

(a) – (g) (No change from proposal.)

(h) Except for a presence/absence LOI for an entire site under N.J.A.C. 7:7A-4.3(c)1, all LOI *[recipients]* ***applicants*** shall provide the Department with a survey *[of the approved]* ***in accordance with N.J.A.C. 7:7A-16.3(e). If the Department requires adjustments to the*** delineated wetlands and/or State open waters boundary *[line]* after the *[LOI is issued.]* **survey is submitted, the applicant shall resurvey the delineated boundary after the adjustments are made and the Department has approved the boundary. The issued LOI will reference the approved and surveyed boundary line.***

SUBCHAPTER 5. GENERAL PROVISIONS FOR GENERAL PERMITS-BY-CERTIFICATION AND GENERAL PERMITS

7:7A-5.4 Use of more than one general permit or general permit-by- certification on a single site

(a) A person may undertake more than one regulated activity on a single site. The activities may be authorized under one or more general permits-by-certification and/or general permits, provided:

1. The individual limits of each general permit-by-certification and/or general permit are complied with. If activities under one general permit-by-certification and/or general permit are conducted in more than one place on a site, the total disturbance caused by all activities at all locations onsite under that general permit-by-certification and/or general permit shall be summed in order to determine if the limits in the general permit-by-certification and/or general permit are met. For example, if an applicant seeks authorization for more than one outfall structure under general permit 11 (N.J.A.C. 7:7A-7.11) on a site, the impacts from all of the structures shall be summed and the total must be no greater than 0.25 acres, which is the acreage limit for that general permit (see N.J.A.C. 7:7A-7.11(c)1). In a second example, if an applicant proposes a minor road crossing under general permit 10B (N.J.A.C. 7:7A-7.10B) and two outfall structures under general permit 11 on the same site, the minor road crossing cannot exceed 0.25 acres, which is the acreage limit for that general permit (see N.J.A.C. 7:7A-7.10B(b)2), and the combined impact of the two outfall structures cannot exceed the 0.25-acre limit for general permit 11. Other than the combination of general permits 6 and 6A, the Department shall not authorize the combination of two different general permits-by-certification or general permits, or combination thereof, for a single activity. For example, if an applicant seeks authorization for a

road crossing that will have an impact of 0.60 acres, an individual permit will be required because the Department will not authorize 0.25 acres under general permit 10B to be combined with 0.35 acres under general permit 6, which has a one-acre limit (see N.J.A.C. 7:7A-7.6(a)1) for a minor road crossing of 0.60 acres. In addition, other than the combination of ***an access transition area waiver (see N.J.A.C. 7:7A-8.1(a)5),*** a transition area waiver averaging plan (see N.J.A.C. 7:7A-8.2), a special activity transition area waiver for linear development (see N.J.A.C. 7:7A-8.3(e)), or a special activity waiver for redevelopment (see N.J.A.C. 7:7A-8.3(f)), with a general permit, the Department shall not authorize the combination of a general permit or general permit-by-certification with a transition area waiver for a single activity ***if the combined effect of the transition area waiver and general permit authorization would be to expand the general permit activity beyond the limits set forth in the general permit****;

2.-4. (No change from proposal.)

(b)-(d) (No change from proposal.)

7:7A-5.7 Conditions applicable to an authorization pursuant to a general permit-by-certification or a general permit

(a) (No change from proposal.)

(b) The following conditions apply to all activities conducted under the authority of a general permit-by-certification or general permit:

1.– 4. (No change from proposal)

5.The activities shall not adversely affect properties which are listed or are eligible for listing on the New Jersey or National Register of Historic Places unless the applicant demonstrates to

the Department that the proposed activity avoids or minimizes impacts to the maximum extent practicable or the Department determines that any impact to the affected property would not impact the property's ability to continue to meet the criteria for listing at N.J.A.C. 7:4-2.3 or otherwise negatively impact the integrity of the property or the characteristics of the property that led to the determination of listing or eligibility. The Department shall not issue a conditional permit if it finds that the mitigation proposed is inadequate to compensate for the adverse effect. Any permit for an activity which may adversely *[effect]***affect*** a property listed or eligible for listing on the New Jersey or National Register of Historic Places shall contain conditions to ensure that any impact to the property is minimized to the maximum extent practicable and any unavoidable impact is mitigated.

6. – 15. (No change from proposal.)

(c) – (f) (No change from proposal.)

SUBCHAPTER 7. GENERAL PERMITS

7:7A-7.15 General permit 15—Mosquito control activities

(a)- (e) (No change.)

(f) A county agency applying for authorization under general permit 15 shall provide public notice of the application in accordance with this subsection, and shall not be subject to the public notice requirements found at N.J.A.C. 7:7A-*[10.17]***17*. The county agency shall publish a

display advertisement describing the proposed general permit activities. The advertisement shall be:

1.-3. (No change from proposal.)

(g) (No change from proposal.)

SUBCHAPTER 8. TRANSITION AREA WAIVERS

7:7A-8.1 General provisions for transition area waivers

(a)-(d) (No change.)

(e) Transition area waivers may be conditioned on the recording of a Department-approved conservation restriction in accordance with the requirements at N.J.A.C. 7:7A-12, restricting future activities in the remaining transition area.

1. (No change from proposal.)

2. In the case of a subdivision for which a transition area waiver was approved, if one or more lots remain undeveloped when the transition area waiver expires, the following shall apply with regard to the transition area:

i. If no activities have been conducted on a lot which was part of a larger subdivision, regardless of whether or not a conservation restriction ***was recorded***, the permittee shall apply for a new transition area waiver for the lot, using the same plan that was used to obtain the transition area waiver for the subdivision as a whole. That is, if a transition area waiver averaging plan was obtained for the subdivision as a whole and that transition area waiver

averaging plan expires, the individual lot owner shall apply for a transition area averaging plan for the individual lot using the original averaging plan for the subdivision as a whole. The Department shall consider proposed changes to the originally approved plan only if the conservation easement or restriction was recorded and the changes meet the standards for a *de minimis* modification at N.J.A.C. 7:7A-12;

3. (No change from proposal.)

(f) – (h) (No change from proposal.)

(i) With the exception of *[an]***a*** transition area waiver for access approved in accordance with (a)5 above or a transition area waiver meeting the requirements for an individual permit at N.J.A.C. 7:7A-8.3(g), a transition area waiver shall not be approved to allow encroachment within 75 feet of an exceptional resource value wetland.

SUBCHAPTER 9. INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

7:7A-9.2 Duration of an individual permit

(a) An individual permit for any regulated activity *[other than those identified at (b) below]* is valid for five years from the date of issuance, and may be extended one time for five years pursuant to N.J.A.C. 7:7A-20.4.

[(b) An individual permit for a linear activity or project that is greater than 10 miles in length, a flood control project, or a quarry or mining operation is valid for 10 years from the date of issuance, and shall not be extended.]

[(c)] ***(b)*** (No change in text from proposal.)

SUBCHAPTER 10. REQUIREMENTS FOR ALL INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

7:7A-10.1 General provisions for individual permits

(a) – (b) (No change from proposal.)

(c) Each individual permit applies to the entire site upon which permitted activities occur. An applicant shall not segment a project or its impacts by applying for general permit authorization for one portion of the project and applying for an individual permit for another portion of the project. Similarly, an applicant shall not segment a project or its impacts by separately applying for individual permits for different portions of the same project *[on the same site]*.

(d) (No change.)

SUBCHAPTER 11. MITIGATION

7:7A-11.4 Property suitable for mitigation

(a) – (b) (No change from proposal)

(c) The following shall not constitute mitigation under this subchapter:

1. The installation of ***a new public facility***, or improvement to*[,]* an existing public facility****, that is**** intended for human use, such as a ball field, nature trail, or boardwalk; or

2. (No change from proposal)

(d) – (j) (No change from proposal)

7:7A-11.10 Mitigation hierarchy for a larger disturbance

(a)-(b) (No change from proposal.)

(c) Mitigation for a larger disturbance shall be performed through restoration, creation, or enhancement onsite or, if that is not feasible, then offsite in the same watershed management area as the disturbance or through the purchase of credits from a mitigation bank with a service area that includes the area of disturbance. In determining the feasibility of onsite or offsite mitigation for a larger disturbance, the Department shall consider the following factors regarding the proposed mitigation area:

1. (No change from proposal.)

2. Location in relation to other preserved open space. A mitigation area adjacent to public land or other preserved areas is more likely to be environmentally [*benficial]* ***beneficial****;

3.-5. (No change from proposal.)

(d)-(e) (No change from proposal.)

7:7A-11.12 Requirements for restoration, creation, or enhancement

(a) – (e) (No change from proposal.)

(f) In addition to the construction completion report required under *[(d)]* ***(e)*** above, the mitigator shall submit a post-construction monitoring report to the Department each year for five years after completion of construction, unless a different timeframe for submittal is specified in the approved mitigation proposal. The Department may modify the frequency and/or duration of required reporting if it determines that such modification is necessary to ensure the success of the mitigation. Post-construction monitoring shall begin the first full growing season after the mitigation project is completed.

(g) The post-construction monitoring reports required under *[(e)]***(f)*** above shall be submitted to the Department by December 31 of each reporting year, and shall include:

1.- 4 (No change from proposal).

(h) – (j) (No change from proposal.)

7:7A-11.24 New Jersey In-Lieu Fee Mitigation Program grant funding procedures

(a) The Program Administrator shall publish, on the Department's website, a request for grant proposals for the water regions in which funding is available in the Wetland Mitigation Fund in accordance with the ILF ***Program*** Instrument.

(b) (No change from proposal.)

(c) If the Council determines that a conceptual proposal is eligible to be submitted as a full proposal, the full proposal shall be submitted within 90 days after conceptual approval and shall include:

1. (No change from proposal.)

2. The following information prepared in accordance with the ILF Program *[instrument]***Instrument***:

i. -iv. (No change from proposal.)

v. An appendix that includes any prior permits or Letters of Interpretation*[s]* issued for the property; maps, aerial photographs, photographs, plans, or drawings of the proposed project, a map of known contaminated sites, and a landscape map for the project area.

(d) – (f) (No change from proposal.)

7:7A-11.26 Application for a mitigation bank

(a) – (b) (No change from proposal.)

(c) To obtain Department approval of a proposed mitigation bank, an applicant shall submit the information required by the wetlands mitigation bank proposal checklist, available from the Department at the address set forth at N.J.A.C. 7:7A-1.4. The checklist shall require a draft mitigation banking instrument that includes the following:

1. – 6. (No change from proposal.)

7. For a bank proposal that includes creation, restoration, and/or enhancement of wetlands or waters, a projected water budget prepared in accordance with N.J.A.C. 7:7A-*[11.6(j)]* *__11.6(i)__*;

8. – 20 (No change from proposal.)

(d) (No change from proposal.)

SUBCHAPTER 16. APPLICATION REQUIREMENTS

7:7A-16.1 Purpose and scope

(a) (No change from proposal.)

(b) The application requirements for the following are set forth elsewhere in this chapter:

1. – 2. (No change from proposal.)

3. For ***an authorization under*** general permit 24, see N.J.A.C. 7:7A-7.24;

4. For *[a]* ***an authorization under*** general permit 25, see N.J.A.C. 7:7A-7.25;

5. – 7. (No change from proposal.)

7:7A-16.7 Additional application requirements for an authorization under a general permit, for an individual permit, or for a transition area waiver

(a) In addition to meeting the requirements at N.J.A.C. 7:7A-16.2, an application for an authorization under a general permit, for an individual permit, or for a transition area waiver shall include the following material, in the number and format specified in the appropriate application checklist:

1.-3. (No change from proposal)

4. Site plans, certified in accordance with N.J.A.C. 7:7A-16.2(j), which include the following, both on and adjacent to the site, as applicable:

i.-ii. (No change from proposal)

iii. Existing and proposed topography where necessary to demonstrate that the proposed regulated activity or project meets the requirements of this chapter. All topography shall reference NGVD or include the appropriate conversion factor to NGVD;***and***

iv. Details of any proposed soil erosion and sediment control measures; *[and]*

[v. State plane coordinates for a point at the approximate center of the site, except for a linear activity or project as provided at (a)5i below. The accuracy of the State plane coordinates shall be within 50 feet of the actual center point for the site;]

5.-13. (No change from proposal).

(b) (No change from proposal.)

7:7A-17.3 Contents and recipients of public notice of an application

(a) (No change from proposal.)

(b) For any of the applications listed in N.J.A.C. 7:7A-17.1(a), the applicant shall provide notice of the application to all of the persons or entities at (b)1 through 6 below, in accordance with the timeframe specified at N.J.A.C. 7:7A-17.2. The notice shall include the information specified at (e) below.

1.- 5. (No change from proposal.)

6. All owners of real property, including easements, located within 200 feet of the site of the proposed regulated activity, in the manner set forth in the Municipal Land Use Law at N.J.S.A. 40:55D-12.b, unless the regulated activity or project is one of those listed at (c)1 through *[4]* ***5*** below, in which case the notice shall be provided as set forth in (c) below. The owners of real property, including easements, shall be those on a list that was certified by the municipality. The date of certification of the list shall be no earlier than one year prior to the date the application is submitted to the Department.

(c) - (d) (No change from proposal.)

SUBCHAPTER 18. APPLICATION FEES

7:7A-18.1 Application fees

(a) (No change from proposal.)

(b) There is no application fee for:

1.-3. (No change.)

4. An emergency authorization pursuant to N.J.A.C. 7:7A-14; *[or]*

5. The transfer of an emergency authorization, authorization under a general permit, a transition area waiver, or an individual permit pursuant to N.J.A.C. 7:7A-20.5*[.]***; or***

6. An administrative modification pursuant to N.J.A.C. 7:7A-20.6.

(c) - (f) (No change from proposal.)

Table 18.1

APPLICATION FEES

...

Modification of an authorization under a general permit, a transition area waiver or a freshwater wetlands or open water fill individual permit pursuant to N.J.A.C. 7:7A-20.6

	Fee
Administrative modification	*[$500.00]* ***No fee***
Minor technical modification	$500.00

Major ***technical*** modification of a transition area waiver, ***general permit authorization,*** freshwater wetlands or open water fill individual permit	30 percent of the original application fee or $500.00, whichever is greater

SUBCHAPTER 19. APPLICATION REVIEW

7:7A-19.1 General application review provisions

(a) – (b) (No change from proposal.)

(c) An applicant may submit a revised application at any time during the application review process. Except for applications for authorization under general permit 25 for minor channel cleaning for local government agencies at N.J.A.C. 7:7A-7.25, the applicant shall send a copy of the revised portions of the application to the municipal clerk of each municipality in which the site is located and shall provide notice explaining the revisions to any person listed at N.J.A.C. 7:7A-17.3(b) whom the Department determines would likely be affected by the revised application. The applicant shall provide documentation in accordance with N.J.A.C. 7:7A-17.5 that the notice was provided.

1. If an applicant submits a revised application less than 30 calendar days prior to the deadline for Department decision established pursuant to N.J.A.C. 7:7A-19.7(b), the revised application shall state that the applicant consents to a 30-calendar day extension of the decision

deadline in accordance with N.J.A.C. *[7:13-19.7(c)]* ***7:7A-19.7(c)****.

(d) – (g) (No change from proposal.)

7:7A-19.3 Department review and decision on an application for authorization for maintenance of a stormwater management facility, including a wetland constructed in uplands for stormwater management purposes, under general permit 1 and repair of a malfunctioning individual subsurface sewage disposal system under general permit 24

(a) (No change from proposal.)

(b) If the application is administratively complete, the Department shall have 30 days after receipt of the complete application to notify the applicant that the activities are not authorized under general permit 1 or general permit 24, or that the activities may be authorized but require a full application review under N.J.AC. 7:7A-19.2. If the Department does not so notify the applicant, the application for authorization under general permit 1 or general permit 24 shall be deemed approved, subject to conditions applicable to all general permits in accordance with N.J.A.C. 7:7A-5.7 and the conditions applicable to all permits at N.J.A.C. 7:7A-*[20.3]****20.2****.

(c) (No change from proposal.)

7:7A-20.4 Extension of an authorization under a general permit, a transition area waiver, and an individual permit

(a) (No change from proposal.)

(b) The Department shall issue an extension only if:

1. A person submits a request for extension that meets the requirements of (c) below and that is received by the Department ***at least 90 calendar days*** prior to the expiration of an *[authorization,]* individual permit*[,]* or transition area waiver, ***and at least 30 calendar days prior to the expiration of a general permit authorization***. The Department shall not accept a request for extension received more than one year prior to the expiration of an authorization, transition area waiver, or individual permit;

2. The person requesting the extension demonstrates that there has been no significant change in the overall condition of the site***, including the wetlands boundary and resource value classification***;

3. – 4. (No change from proposal.)

(c) – (g) (No change from proposal.)

CHAPTER 13
FLOOD HAZARD AREA CONTROL ACT RULES

SUBCHAPTER 2. APPLICABILITY AND ACTIVITIES FOR WHICH A PERMIT OR AUTHORIZATION IS REQUIRED

7:13-2.1 When a permit or authorization is required

(a) – (b) (No change.)

(c) Undertaking a regulated activity in a regulated area does not require an approval listed at (b) above in the cases listed in (c)1 through 4 below. For the purpose of this subsection, each

distinct construction activity in a project, such as each building, road, or utility crossing, is considered a distinct regulated activity.

1.- 2. (No change.)

3. The regulated activity is part of a project that was subject to neither the requirements of this chapter, nor N.J.A.C. 7:7, prior to November 5, 2007, and both of the following apply:

i. The regulated activity is located within the *[Hackensack]* Meadowlands District; and

ii. The regulated activity is authorized under a valid zoning certificate issued by the New Jersey Meadowlands Commission ***(predecessor to the New Jersey Sports and Exposition Authority)*** prior to November 5, 2007, pursuant to N.J.A.C. 19:4-4.2; or

4. (No change.)