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**ENVIRONMENTAL PROTECTION
COMPLIANCE AND ENFORCEMENT**

Freshwater Wetlands Protection Act

Proposed amendments: N.J.A.C. 7:7A-1.4, 10.1, 10.2 16.1, 16.9, 16.10, and 16.11,

Proposed new rule: N.J.A.C. 7:7A-16.19

Authorized by: Lisa P. Jackson, Commissioner
Department of Environmental Protection

Authority: N.J.S.A. 13:9B-1 et seq., and 13:1D-1 et seq., P.L.
1995, c. 296 (N.J.S.A. 13:1D-125 et seq.)

Calendar Reference: See summary below for explanation of exception to
calendar requirement.

DEP Docket No: _____

Proposal Number: PRN 2006-_____

Submit written comments by (no later than 60 days after publication) to:

Gary J. Brower, Esq.
Attention: DEP Docket Number _____
Office of Legal Affairs
P.O. Box 402
Trenton, New Jersey 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on disk or CD as well as on paper. Submittal of a disk or CD is not a requirement. The Department prefers Microsoft Word 6.0 or above. Macintosh™ formats should not be used. Each comment should be identified by the

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applicable N.J.A.C. citation with the commenter's name and affiliation following the comment.

This rule proposal document can be viewed or downloaded from the Department's web page at www.state.nj.us/dep.

The agency proposal follows:

Summary

As the Department has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

The Department regulates activities located within the freshwater wetlands, State open waters and freshwater wetlands transition areas of New Jersey pursuant to the Freshwater Wetlands Protection Act, N.J.A.C. 13:9B-1 et seq., and its implementing rules at N.J.A.C. 7:7A. The general goal of the Freshwater Wetlands Protection Act and its rules is to avoid, minimize, ameliorate, and mitigate the detrimental effects of development within and around these environments, to protect the safety, health and general welfare of the people of the State.

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The Department is proposing to make several amendments to the Freshwater Wetlands Protection Act Rules, including amendments to categorize violations of the Freshwater Wetlands Protection Act and/or the Rules as either minor or non-minor for the purpose of providing grace periods in accordance with N.J.S.A. 13:1D-125 et seq., commonly known as the Grace Period Law. The proposed rule and amendments set forth how the Department will respond to any violation identified as minor.

On December 22, 1995, the Legislature enacted the Grace Period Law, N.J.S.A. 13:1D-125 et seq., which requires the establishment of procedures to ensure the consistent application of grace (compliance) periods for minor violations of certain environmental statutes. Pursuant to the Grace Period Law, the Department is required to designate, as minor or non-minor violations, violations of rules contained in sixteen environmental statutes. Under the Grace Period Law, any person responsible for a minor violation is afforded a period of time to correct the violation. This period of time is known as a grace period. If the minor violation is corrected as required, then the Department will not seek to impose a penalty. In those cases where a violation is not corrected within the grace period, the Department may pursue enforcement action in accordance with its statutory authority including, but not limited to, the imposition of penalties as may be appropriate within the exercise of the Department's traditional, judicially recognized enforcement discretion.

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The Grace Period Law does not affect the Department's enforcement authority, including the exercise of enforcement discretion, to treat a violation as minor. In those situations where a violation is labeled as minor in this proposed rule and amendment, but in fact the specific violation as it occurred does not fulfill all the statutory requirements for a minor violation (N.J.S.A. 13:1D-129(b) and proposed N.J.A.C. 7:7A-16.19(d)), the Department reserves its discretion to treat the violation as non-minor.

The Department interprets the Grace Period Law to give it the flexibility to re-classify a minor violation as non-minor if one or more of the Grace Period Law requirements have not been met. For instance, the Department believes that the Legislature did not intend for a violation which actually results in serious harm to the public, the environment or to natural resources to be considered minor for grace period purposes. This is because one of the criteria for a minor violation is that it impose minimal risk to public health, safety and natural resources. Since the statute intends that the Department consider the circumstances of a particular violation to determine, for example, whether there has been a similar or the same violation in the preceding twelve months or a pattern of illegal conduct, it is consistent with the legislative intent to allow the Department the flexibility to re-classify a violation as non-minor under the particular circumstances of a violation.

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In designating, through rulemaking, types or categories of violations as minor, the Department must apply the criteria set forth in the law at N.J.S.A. 13:1D-129(b). These criteria are as follows:

(1) The violation is not the result of the purposeful, knowing, reckless or criminally negligent conduct of the person responsible for the violation;

(2) The violation poses minimal risk to the public health, safety and natural resources;

(3) The violation does not materially and substantially undermine or impair the goals of the regulatory program;

(4) The activity or condition constituting the violation has existed for less than 12 months prior to the date of discovery by the Department or a local government agency;

(5) In the case of a permit violation, the person responsible for the violation has not been identified in a previous enforcement action by the Department or a local government agency as responsible for a violation of the same requirement of the same permit within the preceding 12 month period;

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(6) In the case of a violation that does not involve a permit, the person responsible for the violation has not been identified in a previous enforcement action by the Department or a local governmental agency as responsible for the same or a substantially similar violation at the same facility within the preceding 12 month period;

(7) In the case of a violation of the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq.; the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq.; the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq. or any rule or regulation promulgated thereunder, or permit issued pursuant thereto, the person responsible for the violation has not been identified in a previous enforcement action by the Department or a local government agency as responsible for the same or a substantially similar violation at the same site or any other site within the preceding 12-month period;

(8) In the case of any violation, the person responsible for the violation has not been identified by the Department or a local government agency as responsible for the same or substantially similar violation at any time that reasonably indicates a pattern of illegal conduct and not isolated incidents on the part of the person responsible; and

(9) The activity or condition constituting the violation is capable of being corrected and compliance achieved within the period of time prescribed by the Department.

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The Grace Period Law also requires the Department establish the length of the grace period, which may be no fewer than 30 days or more than 90 days (unless extended), based upon the nature and extent of the minor violation and a reasonable estimate of the time necessary to achieve compliance. The Department may establish a special class of minor violations that, for public health and safety reasons or regulatory mandates, must be corrected within a period of 30 days or less. The Department has determined that none of the violations proposed to be designated as minor would have health and safety ramifications requiring a special class of minor violations necessitating less than 30 days to comply. Therefore, the Department is not proposing to establish such a special class of minor violations for the Freshwater Wetlands Protection Act Rules.

Of the criteria provided by the Grace Period Law, only criteria (2), (3) and (9), as listed above, may pertain to all violations of a particular regulatory requirement. Therefore, the Department has determined that those violations of the Freshwater Wetlands Protection Act and Rules that pose minimal risk to public health, safety, and the environment, do not undermine or impair the goals of the program, and can be corrected within a time period of up to 30 days, should be designated as minor in Table A at N.J.A.C. 7:7A-16.19(f).

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The additional statutory criteria, (1), (4), (5), (6), (7), and (8) above, regarding respectively, the intent of the violator, the duration of the violation, and whether it is a repeat offense, are fact-specific for each violation and must be considered on a case-by-case basis. Thus, each violation listed at N.J.A.C. 7:7A-16.19(f) Table A that is identified as minor will be eligible for a grace period only if it meets the additional statutory criteria set forth in proposed new N.J.A.C. 7:7A-16.19(d)1 through 6.

To implement the Grace Period Law and develop this proposal, the Department utilized the criteria established by the Grace Period Law and the priorities of the freshwater wetlands protection program to review each potential violation of the Freshwater Wetland Protection Act Rules to determine if the violation should be classified as minor. In order to obtain assistance in the development of this proposal, the Department initiated an informal process to discuss the potential rules and receive input from interested parties. As part of this process, the Department developed a discussion document which set forth a proposed list of non-minor violations of the Freshwater Wetlands Protection Act Rules. Any violations not identified in the discussion document as non-minor would be designated as minor by default. The discussion document was posted on the Department's Compliance and Enforcement website on January 3, 2005 as a Compliance Advisory. On January 24, 2005, the Department conducted an informal workshop regarding the discussion document and accepted public comment. The Department accepted written comments on the discussion document until February 4, 2005. The Department received several written

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comments. The most frequent comment received questioned the appropriateness of the promulgation of any grace period rules for land use programs, and questioned the Department's decision to identify only non-minor violations and designate all other violations as minor by default.

In response to the comments regarding the inappropriateness of establishing any land use grace period rules, the Department notes that the Grace Period Law mandates that the Department promulgate rules designating minor and non-minor violations for enumerated environmental laws, including the Freshwater Wetlands Protection Act, CAFRA, the Wetlands Act of 1970, and the Flood Hazard Area Control Act. In response to the comments questioning the Department's identification of only non-minor violations in the discussion document, the Department in this proposal has identified Freshwater Wetland Protection Act Rules violations, and designated them as either minor or non-minor pursuant to the criteria identified in the Grace Period Law. (See proposed N.J.A.C. 7:7A-16.19(f), Table A.) If a person commits a violation not specifically identified in Table A, the Department will determine whether the violation is minor or non-minor by comparison with the violations identified in Table A in accordance with proposed N.J.A.C. 7:7-16.19(c).

Violations identified by the Department as having the potential to impact the physical resources in any way are proposed to be classified as non-minor. Violations

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designated as non-minor comprise the majority of potential violations of the Freshwater Wetlands Protection Act and Rules. Violations proposed to be classified as minor include the failure to submit certain documents to the Department in a timely manner. For example, a permit issued pursuant to the Freshwater Wetlands Protection Act Rules may require a permittee to submit documentation to the Department as prescribed in the permit. Generally, submittal of documents is an administrative requirement. While the information contained in the document is important, a short delay in providing documentation to the Department will not have immediate environmental consequences. Therefore, it is appropriate under the Grace Period Law for the Department to allow a grace period to enable the violator to come into compliance by submitting the documents. If the permittee responsible for submitting the documents fails to produce and submit the required documents within the grace period, the Department may, in accordance with the provisions of the Act and this chapter, seek to impose a penalty that is retroactive to the date the notice of violation was issued.

It should be noted that even violations designated as minor must be corrected. However, in accordance with the Grace Period Law, those responsible for minor violations are afforded a period of time to come into compliance prior to the imposition of penalties.

The Department proposes to add a definition of the term "grace period" at N.J.A.C. 7:7A-1.4. A grace period is the period of time afforded under the Grace Period Law for a

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person to correct a minor violation in order to avoid imposition of a penalty that would otherwise be applicable for such violation.

The Department also proposes to amend N.J.A.C. 7:7A-10.1(f) to explicitly specify that the applicant's professionals (engineers and surveyors as well as other consultants) are also subject to penalty liability pursuant to N.J.A.C. 7:7A-16.9 for the submission of false information. The Department requires that professionals such as consultants certify information included in an application as true, accurate and complete under N.J.A.C. 7:7A-10.10. The Department is proposing to make explicit that civil administrative penalties may be imposed upon those professionals who submit false or inaccurate information. The Department's permit writers spend substantial time reviewing the documentation submitted in support of land use applications and rely on the veracity of this information to make important regulatory decisions. Inaccurate, incomplete, or false information in application materials submitted pursuant to this subchapter can result in either a flawed regulatory decision or a delayed decision if additional information is needed from the applicant during the review process.

The Department understands that an applicant often submits an application in reliance upon the knowledge and application of the rules by a paid professional. Although many land use permitting matters are subject to professional discretion, disagreement, and discussion, the applications submitted pursuant to N.J.A.C. 7:7A-10 require complete and

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accurate land use documentation. The Department does not intend to penalize applicants and their professionals for information contained in applications that fall within the range of professional opinion and diligence. However, the Department has received applications that contain (or fail to contain) information concerning the presence or location of regulated land types, the presence of historic structures, and information otherwise needed to determine compliance with the Rules that are negligently or deliberately false, misleading, or incomplete. It is these types of violations that the Department intends to pursue.

Proposed N.J.A.C. 7:7A-10.1(f) also makes explicit that the applicant, its consultants, engineers, surveyors or agents must provide information of which they are aware or reasonably should have been aware. Examples of information that the Department considers to fall in this category include existing site conditions of regulatory interest, information available publicly, information available through professional resources, or information otherwise available upon reasonable inquiry. .

The Department similarly proposes to amend N.J.A.C. 7:7A-10.2(b)7 to make explicit that those potentially liable for penalties for false or inaccurate submissions include the applicant, its consultants, engineers, surveyors and agents, for the reasons stated above.

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The Department is proposing an amendment at N.J.A.C. 7:7A-16.1 that provides that the proposed new grace period provisions at N.J.A.C. 7:7A-16.19 will apply when the Department takes enforcement action. Proposed new N.J.A.C. 7:7A-16.19, described in detail below, sets forth the grace period requirements.

The Department is proposing to amend N.J.A.C. 7:7A-6.9, N.J.A.C. 7:7A-6.10, N.J.A.C. 7:7A-16.11 to specify that violations under the sections are non-minor; accordingly, the violations will not be subject to a grace period. A violation of any of the provisions of these sections prevents the Department from determining compliance with the Freshwater Wetlands Protection Act and would materially and substantially undermine or impair the goals of the freshwater wetlands protection program, making the violations ineligible for a grace period under N.J.S.A. 13:1D-129(b)3.

Proposed N.J.A.C. 7:7A-16.19(a) specifies that a violation of the Rules that qualifies as a “minor violation” shall not result in imposition of a penalty provided the violation is corrected during the applicable grace period in accordance with the requirements of the section.

Proposed N.J.A.C. 7:7A-16.19(b) specifies that each violation identified in Table A by an “NM” is a non-minor violation and does not qualify for a grace period.

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Proposed N.J.A.C. 7:7A-16.19(c)1 through 5 sets forth the procedure for determining the minor or non-minor designation of a violation that is not listed on Table A. The Department proposes that where a violation is comparable to a violation listed in Table A, the Department will ascertain whether the violation is eligible for grace period treatment based upon whether the comparable violation is a minor or non-minor violation and whether it meets the applicable criteria at N.J.A.C. 7:7A-16.19(d). If the comparable violation is minor and meets the criteria of N.J.A.C. 7:7A-16.19(d)1 through 6, then the violation at hand will also be minor and will be subject to a grace period as provided at N.J.A.C. 7:7A-16.19(e). Proposed N.J.A.C. 7:7A-16.19(c)2 provides that if a violation is not comparable to a violation on Table A, then the violation must meet the criteria at (d)1 through 9 to be considered minor. Proposed N.J.A.C. 7:7A-16.19(c)5 describes how comparability is determined and clarifies that in no case will a violation be considered comparable to a violation designated as minor if it does not meet the criteria of N.J.A.C. 7:7A-16.19(d)7 through 9.

Proposed N.J.A.C. 7:7A-16.19(d)1 through 6 set forth the statutory criteria of N.J.S.A. 13:1D-129 that apply on a fact-specific basis to determine if a violation is minor, as discussed previously.

Proposed N.J.A.C. 7:7A-16.19(d)7 through 9 set forth the statutory criteria of N.J.S.A. 13:1D-129 that apply to all violations considered minor.

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Proposed N.J.A.C. 7:7A-16.19(e)1 requires the Department to issue a notice of violation to the person responsible for the minor violation. The notice must identify the violation, the statutory or regulatory provision violated, and the length of the grace period. The notice is necessary to advise the person responsible for the violation of the applicability of the grace period and the need to correct the violation.

If the person responsible for a minor violation demonstrates that he or she has corrected the violation within the applicable grace period, then proposed N.J.A.C. 7:7A-16.19(e)2 provides that no penalty will be sought for the violation.

Proposed N.J.A.C. 7:7A-16.19(e)3 provides that a person responsible for a minor violation must submit information describing the corrective action taken prior to expiration of the grace period to achieve compliance within the grace period. The responsible person must submit, in writing, information certified to be accurate detailing the corrective action taken or how compliance was achieved. The Department may perform an investigation to determine that the information submitted is accurate and that compliance has been achieved.

The Grace Period Law recognizes that, in certain limited circumstances, it may be appropriate to allow additional time for compliance to be achieved without penalty. Under

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proposed new N.J.A.C. 7:7A-16.19(e)4, if a person responsible for a minor violation seeks additional time beyond the standard grace period of 30 days to achieve compliance, the person responsible for the violation must submit a written request for an extension to the Department at least one week prior to the expiration of the initial grace period, and explain why additional time is needed. The Department may, in its discretion, issue a written extension to the grace period specified in the notice of violation. No more than 90 additional days may be granted. In exercising its discretion to approve a request for an extension, the Department may consider whether the violator has taken reasonable measures to achieve compliance in a timely manner, whether the delay has been caused by circumstances beyond the control of the violator, whether the delay will pose a risk to the public health, safety and natural resources, and whether the delay will materially and substantially undermine or impair the goals of the Freshwater Wetlands Protection Act.

If the person responsible for the violation fails to demonstrate to the Department that compliance has been achieved within the period of time specified in the notice of violation, or any approved extension of the grace period, then under proposed new N.J.A.C. 7:7A-16.19(e)5, the Department may seek to impose a penalty retroactive to the date on which the notice of violation was issued.

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A person responsible for a violation may submit no more than one extension request for a violation specified in a notice of violation pursuant to proposed N.J.A.C. 7:7A-16.19(e)6.

Proposed N.J.A.C. 7:7A-16.19(f) provides that the descriptions of violations in Table A at proposed N.J.A.C. 7:7A-16.19(f) are provided for informational purposes only and, if there is a conflict between a violation description in the table and the rule to which the violation description corresponds, then the rule shall govern.

Table A at proposed N.J.A.C. 16.19(f) sets forth the rule citation, the violation description, and the Grace Period “Type of Violation” designation. The “Type of Violation” column identifies the violation as either minor (“M”) or non-minor (“NM”). A violation of the specific provision identified in Table A at N.J.A.C. 7:7A-16.19(f) as minor would qualify for a grace period, provided that the violation meets the statutory criteria of N.J.S.A. 13:1D-129(b) (1), (4), (5), (6), (7), and (8) which are set forth in proposed N.J.A.C. 7:7A-16.19 (d)1 through 6.

Social Impact

The proposed rule and amendments will provide a positive social impact by helping encourage a greater sense of cooperation between the Department and the regulated

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community, including homeowners. By removing the threat of penalties for certain types of violations which pose a minimal risk to the environment and do not undermine the regulatory goals of the program (and which are herein defined as minor), and where compliance is achieved within the time specified, the proposed rule and amendments will encourage the regulated community to take positive action toward achieving compliance. By making explicit penalty liability for false or inaccurate submission to the Department, the proposed amendment to Subchapter 10 will encourage the regulated community to submit applications which can be more readily reviewed, thereby shortening the length of time for an applicant to receive a Department decision.

Economic Impact

The establishment of grace periods for certain violations of the Freshwater Wetlands Protection Act Rules will provide an incentive to violators to correct these violations by not seeking penalties if correction occurs within the time required. As the proposed rule and amendments do not affect the violator's existing responsibility to correct noncompliance, they will not impose any additional requirements upon the regulated community and, therefore not impose any additional economic burden. The proposed rule and amendments are anticipated to have a positive economic impact by avoiding the imposition of monetary penalties for certain types of minor violations where compliance

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has been achieved as required. Only those entities that have committed violations of environmental statutes will be liable for a penalty.

The amendments to Subchapter 10 explicitly specify the Department's authority to assess civil administrative penalties against consultants, engineers, surveyors and agents who provide false, inaccurate or incomplete information on a freshwater wetland permit application.. As the proposed rule and amendments do not affect the existing requirement to provide true complete and accurate information to the Department during the application review process, they will not impose any additional requirements upon the regulated community and, therefore not impose any additional economic burden during the application process. Only those people or entities that have committed violations of these rules will be liable for a penalty.

Environmental Impact

The Freshwater Wetlands Protection Act Rules have had and will continue to have a positive environmental impact by providing comprehensive regulation and management of freshwater wetlands, State open waters and transition areas and assuring that work in and around freshwater wetlands and State open waters is regulated to protect their natural resources. The penalty provisions of the existing rules will continue to provide a deterrent to those who would violate the regulatory requirements. However, by allowing an eligible violator an opportunity to correct minor, non-repetitive violations and thus avoid penalty, it

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is anticipated that this proposed rule and amendments will encourage the regulated community to correct certain types of violations in a more timely manner. Prompt correction will reduce the potential risk that minor violations may have created and thus will have a positive environmental impact.

It is anticipated that the amendments to subchapter 10 will have a positive benefit on the comprehensive regulation and management of freshwater wetlands, State open waters and transition areas and assuring that work in and around freshwater wetlands and State open waters is regulated to protect their natural resources. The submission of accurate, complete and thorough applications under N.J.A.C. 7:7A-10 will allow the Department to make faster and more informed regulatory decisions involving the authorization to conduct regulated activities in and around freshwater wetlands and/or freshwater wetland transition areas. The inclusion of complete and accurate information in the permit applications will ensure that the Department is provided all pertinent environmental information known about a site, thus allowing the Department to better assess the regulatory or environmental impact such activities may have to on-site or off-site areas. The proposed amendments will provide a deterrent to those who would violate the regulatory requirements of the permit application process by explicitly specifying the ability of the Department to assess civil administrative penalties against professionals who submit faulty applications.

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Federal Standards Analysis

N.J.S.A. 52:14B-23 requires State agencies that adopt, readopt, or amend any rule or regulation to provide a comparison with Federal law and to provide further discussion and analysis (including cost-benefit analysis) if the standards or requirements imposed by the agency exceed standards or requirements imposed by Federal law.

The Department has conducted such an analysis of this proposed Grace Period rule and amendments and has determined that they contain no provision or standard that exceeds any standards or requirements imposed by Federal law. While the Grace Period rule and amendment do not exceed Federal standards, the Freshwater Wetlands Protection Act Rules do exceed the standards of the Federal 404 program of the Federal Clean Water Act (33 USC 1344) governing waters of the United States, including wetlands, because New Jersey's rules regulate more activities in freshwater wetlands and also activities in transition areas, or buffers surrounding freshwater wetlands. New Jersey freshwater wetlands regulations have been in place since 1988 and the transition area provisions since 1989. The Department assumed the Federal 404 permitting program on March 2, 1994.

The proposed Grace Period rule does not impact the scope of New Jersey's regulations, but only identifies certain violations which warrant a grace period. The Department has determined that the proposed rule and amendment to implement the Grace Period statute contain no provision or standard that exceeds any standards or requirements imposed by Federal law. In accordance with state transfer regulations (40 C.F.R. 233.16)

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and the Memorandum of Agreement governing the administration of New Jersey's assumed Section 404 program, EPA has the authority to review proposed rules and draft general permits for a state-assumed program, to determine whether such changes represent a substantial revision to the state program and to ensure that the state-assumed program remains at least as stringent as the Federal program. Substantial revisions, as defined at 40 C.F.R. 233.16, include, but are not limited to, revisions that affect the area of jurisdiction, scope of activities regulated, criteria for review of permits, public participation, or enforcement capability.

The explicit inclusion of consultants, engineers, surveyors and agents as potential recipients of civil administrative penalty assessments makes clear the Department's enforcement authority to penalize those professionals who have submitted false, inaccurate, or incomplete freshwater wetland applications to the Department

The U.S. EPA has commented upon the proposed Grace Period rule and has determined that, if adopted, New Jersey's Freshwater Wetlands Protection Act program would continue to meet the minimum requirements of Section 404 of the Clean Water Act.

There are no Federal Grace Period rules or Federal equivalent corresponding to this proposed rule and amendments. There are no Federal rules that specifically assess civil administrative penalties against consultants, engineers, surveyors and agents for the submission of false or inaccurate information in freshwater wetland permit applications. Therefore, no further analysis is necessary.

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Jobs Impact

The proposed rule and amendments will not result in either the generation or loss of jobs within the State. No facility or individual will incur any costs unless the facility or individual commits a violation that results in a penalty.

Agriculture Industry Impact

In accordance with N.J.S.A. 4:1C-10.3, the Right to Farm Act, the Department has reviewed the proposed rule and amendments and has determined that the proposed rule and amendments will have little or no impact on the agriculture industry. If there is any effect at all upon members of the agricultural industry, it is anticipated that such effect will be to afford those members the same opportunity as others to correct certain types of violations in a manner as provided by the rule and amendments and thereby avoid a possible penalty. If a violation of the Freshwater Wetlands Protection Act Rules occurs as a result of farming operations, the proposed rule and amendments will not change in any way the violator's responsibility to achieve compliance. The proposed rule and amendments may have a potential positive impact by eliminating potential penalties for certain minor violations if compliance is achieved in a timely manner.

Regulatory Flexibility Analysis

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In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., small businesses are defined as those that are independently owned and operated, not dominant in their field and employ fewer than 100 full-time employees. Some businesses that conduct activities in regulated areas may come within the definition of small business.

Small businesses will incur the penalties established under the Freshwater Wetlands Protection Act Rules only if they are determined to be in violation of N.J.A.C. 7:7A. The establishment of grace periods will allow a small business responsible for a violation to avoid penalties if the violation is corrected within the time provided. It is, therefore, anticipated that the proposed rule and amendments will encourage violators to achieve compliance in a timely fashion without the need for professional services and avoid repetition of the violation. The proposed rule and amendments impose no reporting or recordkeeping requirements. Grace periods are not provided based on business size, thereby ensuring a fair, efficient and effective penalty scheme.

The proposed amendments to Subchapter 10 impose no reporting or recordkeeping requirements. Liability is not determined based on business size, thereby ensuring a fair, efficient and effective penalty scheme.

Smart Growth Impact

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Executive Order No. 4 (2002) requires State agencies that adopt, amend or repeal any rule adopted pursuant to Section 4(a) of the Administrative Procedure Act, to describe the impact of the proposed rulemaking on the achievement of smart growth and implementation of the New Jersey State Development and Redevelopment Plan (State Plan). The Department has evaluated this rulemaking to determine the nature and extent of the proposed rule and amendments' impact on smart growth and the implementation of the State Plan. The proposed rule and amendments do not change land use policies or infrastructure development, but only provide a grace period for certain minor violations, and explicitly specify the applicability of penalty liability to professionals for failure to submit true, accurate and complete freshwater wetland permit applications, as is currently required.

Since the proposed rule and amendments will encourage protection of the freshwater wetlands and State open water resource in New Jersey, the proposed rule and amendments support the conservation and environmental protection goals and policies underlying the State Plan.

Full text of the proposed amendment and new rule follows (additions indicated in underlined boldface **thus**; deletions indicated in brackets [thus]):

7:7A-1.4 Definitions

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The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. Additional definitions specifically applicable to N.J.A.C. 7:7A-15, Mitigation, are set forth at N.J.A.C. 7:7A-15.1.

...

“Grace period” means the period of time afforded under the Grace Period Law, N.J.S.A. 13:1D-125 et seq., for a person to correct a minor violation in order to avoid imposition of a penalty that would otherwise be applicable for such violation.

...

N.J.A.C. 7:7A-10.1 Basic application information

(a) - (e) (No change.)

(f) Failure to provide [all required] complete and accurate information **required in this subchapter** of which the applicant, its consultants, **engineers, surveyors** or agents [is] **are, or reasonably should have been** aware may result in denial or termination of the permit under N.J.A.C. 7:7A-14.5, and may subject the applicant, **its consultants, engineers, surveyors and/or agents** to penalties for submittal of false information under N.J.A.C. 7:7A-16.9.

(g) - (p) (No change.)

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

(a) (No change.)

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(b) The application checklist for every application covered by this subchapter shall require the following:

1. – 6. (No change.)

7. Information and/or certifications regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources, or other features on the site that are relevant to determining compliance with the requirements of this chapter. Failure to provide all such information of which the applicant, its consultants, **engineers, surveyors** or agents [is] **are, or reasonably should have been** aware may result in denial or termination of the permit under N.J.A.C. 7:7A-14.5, and may subject the applicant, **its consultants, engineers, surveyors and/or agents** to penalties for submittal of false information under N.J.A.C. 7:7A-16.9;

8. – 9. (No change.)

(c) – (d) (No change.)

7:7A-16.1 General Provisions

(a) – (b) (No change.)

(c) If the Department finds that a person is or has been violating any applicable law and/or condition, the Department may take one or more of the following actions:

1. Issue an administrative order under N.J.A.C. 7:7A-16.3;
2. Bring a civil action under N.J.A.C. 7:7A-16.4;

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3. Assess a civil administrative penalty under N.J.A.C. 7:7A-16.5 through 7:7A-16.12, **and in accordance with the grace period requirements set forth at N.J.A.C.**

7:7A-16.19;

4. Bring an action for a civil penalty under N.J.A.C. 7:7A-16.13; and/or

5. Bring a criminal action under N.J.A.C. 7:7A-16.14.

(c) – (f) (No change.)

7:7A-16.9 Civil administrative penalty amount for submitting inaccurate or false information

(a) - (f) (No change.)

(g) A violation under this section is non-minor and, therefore, not subject to a grace period.

7:7A-16.10 Civil administrative penalty amount for failure to allow entry and inspection

(a) - (d) (No change.)

(e) A violation under this section is non-minor and, therefore, not subject to a grace period.

7:7A-16.11 Civil administrative penalty amount for failure to pay a civil administrative penalty

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(a) - (c) (No change.)

(d) A violation under this section is non-minor and, therefore, not subject to a grace period.

7:7A-16.19 Grace Period Applicability; Procedures

(a) Each violation identified in Table A at (f) below by an “M” in the Type of Violation column, for which the conditions of (d)1 through 6 below are satisfied, and each violation determined under (c) below as minor for which the conditions of (d)1 through 9 below are satisfied, is a minor violation and is subject to a 30-day grace period as described at (e) below.

(b) Each violation identified in Table A at (f) below by an “NM” in the Type of Violation column is a non-minor violation and is not subject to a grace period.

(c) If a violation is not listed in Table A at (f) below, the designation of the violation as minor or non-minor is determined as follows:

1. If the violation is not listed in Table A at (f) below but is comparable to a violation designated as “M” in Table A and the violation meets all of the criteria of (d)1 through 6 below, then the violation is minor. The minor violation shall be subject to a grace period of 30 days as described at (e) below.

2. If the violation is not listed in Table A at (f) below and is not comparable to a violation listed in Table A but the violation meets all of the criteria of (d)1 through

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9 below, then the violation is minor. The minor violation shall be subject to a grace period of 30 days as described at (e) below.

3. If the violation is not listed in Table A at (f) below but is comparable to a violation designated as “NM” in Table A, then the violation is a non-minor violation and is not subject to a grace period.

4. If the violation is not listed in Table A at (f) below and is not comparable to a violation listed in Table A, and the violation does not meet all of the criteria at (d)1 through 9 below, the violation is non-minor and is not subject to the grace period.

5. Comparability of a violation to a violation in Table A at (f) below is based on the nature of the violation[s] (for example, recordkeeping, accuracy of information provided to the Department, amount and type of impacts to the protected resources). A violation shall not be considered comparable to any violation designated as “M” in Table A unless the violation also meets the criteria at (d)7 through 9 below.

(d) The Department shall provide a grace period of 30 days for any violation identified as minor provided the following conditions are met:

1. The violation is not the result of the purposeful, knowing, reckless or criminally negligent conduct of the person responsible for the violation;

2. The activity or condition constituting the violation has existed for less than 12 months prior to the date of discovery by the Department or local government agency;

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3. In the case of a violation that involves a permit, the person responsible for the violation has not been identified in a previous enforcement action by the Department or a local government agency as responsible for a violation of the same requirement of the same permit within the preceding 12 month period;

4. In the case of a violation that does not involve a permit or waiver, the person responsible for the violation has not been identified in a previous enforcement action by the Department or a local government agency as responsible for the same or a substantially similar violation at the same facility within the preceding 12 month period;

5. In the case of a violation of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., or any rule or regulation promulgated thereunder, or permit or waiver issued pursuant thereto, the person responsible for the violation has not been identified in a previous enforcement action by the Department or a local government agency as responsible for the same or a substantially similar violation at the same site or any other site within the preceding 12-month period;

6. In the case of any violation, the person responsible for the violation has not been identified by the Department or a local government agency as responsible for the same or substantially similar violations at any time that reasonably indicate a pattern of illegal conduct and not isolated incidents on the part of the person responsible;

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7. The violation poses minimal risk to the public health, safety and natural resources;

8. The violation does not materially and substantially undermine or impair the goals of the regulatory program; and

9. The activity or condition constituting the violation is capable of being corrected and compliance achieved within the time prescribed by the Department.

(e) For a violation determined to be minor under (a) or (c) above, the following provisions apply:

1. The Department shall issue a notice of violation to the person responsible for the minor violation that:

i. Identifies the condition or activity that constitutes the violation and the specific regulatory provision or other requirement violated; and

ii. Specifies that a penalty may be imposed unless the minor violation is corrected and compliance is achieved within the specified grace period of 30 days.

2. If the person responsible for the minor violation corrects that violation and demonstrates, in accordance with (e)3 below, that compliance has been achieved within the specified grace period, the Department shall not impose a penalty for the violation.

3. In response to a notice of violation, the person responsible for the minor violation shall submit to the Department, before the end of the specified grace period, written information, signed and certified to be true by the responsible person or his

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or her designee, detailing the corrective action taken or how compliance was achieved.

4. If the person responsible for the minor violation seeks additional time beyond the specified grace period to achieve compliance, the person shall request an extension of the specified grace period in writing no later than one week before the expiration of the specified grace period. The request shall include the anticipated time needed to achieve compliance, the specific cause or causes of the delay, and any measures taken or to be taken to minimize the time needed to achieve compliance. The request shall be signed and certified to be true by the responsible party or their designee. The Department may, in its discretion, approve in writing an extension which shall not exceed 90 days, to accommodate the anticipated delay in achieving compliance. In exercising its discretion to approve a request for an extension, the Department may consider the following:

i. Whether the violator has taken reasonable measures to achieve compliance in a timely manner;

ii. Whether the delay has been caused by circumstances beyond the control of the violator;

iii. Whether the delay will pose a risk to the public health, safety and natural resources; and

iv. Whether the delay will materially and substantially undermine or impair the goals of the regulatory program.

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5. If the person responsible for the minor violation fails to demonstrate to the Department that the violation has been corrected and compliance achieved within the specified grace period, or within any approved extension, the Department may, in accordance with the provisions of this chapter, impose a penalty that is retroactive to the date on which the notice of violation under (e)1 above, was issued.

6. The person responsible for a minor violation shall not request more than one extension of a grace period specified in a notice of violation.

(f) The designations of violations of the Freshwater Wetlands Protection Act Rules as minor (“M”) or non-minor (“NM”) are set forth in Table A below. The violation descriptions are provided for informational purposes only. In the event that there is a conflict between a violation description in Table A and the rule to which the violation description corresponds, the rule shall govern.

Table A

<u>Rule Citation</u>	<u>Violation Description</u>	<u>Type of Violation</u>
<u>N.J.A.C.7:7A-2.1(a), 2.2(a-b), 2.5(f), 2.6(a)</u>	<u>Conducting regulated or prohibited activities in a freshwater wetland, transition area and/or State open water without prior Department approval</u>	<u>NM</u>

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<u>N.J.A.C. 7:7A-4.3</u>	<u>Failure to comply with conditions of a Department permit or authorization not related to submission of documentation to the Department.</u>	<u>NM</u>
<u>N.J.A.C. 7:7A- 4.3</u>	<u>Failure to submit to the Department documentation as required by a permit condition.</u>	<u>M</u>
<u>N.J.A.C. 7:7A- 6.1 (h)</u>	<u>Failure to execute and record the required conservation restriction prior to the beginning of activities authorized under a transition area waiver, or transfer of the site.</u>	<u>NM</u>
<u>N.J.A.C. 7:7A-10.1(f)</u>	<u>Failure to provide in the application all information required in this chapter of which the applicant, its consultants, engineers, surveyors, or agents is or should be aware</u>	<u>NM</u>
<u>N.J.A.C. 7:7A-10.9</u>	<u>Failure to provide appropriate public notice during the permit application process</u>	<u>NM</u>

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<u>N.J.A.C. 7:7A-13.1</u>	<u>Failure to comply with conditions of a Department permit or authorization not related to submission of documentation to the Department.</u>	<u>NM</u>
<u>N.J.A.C. 7:7A-13.1</u>	<u>Failure to submit to the Department documentation as required by a permit condition.</u>	<u>M</u>
<u>N.J.A.C. 7:7A-14.4(a)</u>	<u>Failure to comply with a permit suspension order</u>	<u>NM</u>
<u>N.J.A.C. 7:7A-14.5(b)</u>	<u>Failure to comply with a permit termination order</u>	<u>NM</u>
<u>N.J.A.C. 7:7A-15.2(b),</u>	<u>Failure to conduct mitigation as required by a Department approval or administrative order</u>	<u>NM</u>
<u>N.J.A.C. 7:7A-15.3(a)</u>	<u>Failure to conduct mitigation as required by a Department approval or administrative order</u>	<u>NM</u>
<u>N.J.A.C. 7:7A-15.11(a),</u>	<u>Failure to submit a mitigation proposal to the Department as required by a Department approval or order</u>	<u>NM</u>

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<u>N.J.A.C. 7:7A-15.16(a)</u>	<u>Failure to execute and record the conservation restriction that meets the requirements of N.J.A.C. 7:7A-15.14 prior to the start of mitigation activities</u>	<u>NM</u>
<u>N.J.A.C. 7:7A-15.16(b)</u>	<u>Failure to submit a construction completion report within the required timeframe of completion of construction and planting of a restoration, creation or enhancement project</u>	<u>M</u>
<u>N.J.A.C. 7:7A-15.16(c)</u>	<u>Failure to submit an annual post-planting report at the required intervals following the completion of the construction and planting associated with mitigation</u>	<u>M</u>
<u>N.J.A.C. 7:7A-15.16(d)</u>	<u>Failure to demonstrate to the Department at the end of the post-planting monitoring period that the mitigation project is successful</u>	<u>M</u>
<u>N.J.A.C. 7:7A-15.17(c) 1</u>	<u>Failure to transfer the mitigation area in fee simple to a government agency or charitable conservancy within 60 days</u>	<u>NM</u>

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	<u>after the Department declares mitigation through upland preservation successful</u>	
<u>N.J.A.C. 7:7A-15.17(c) 2</u>	<u>Failure to provide the government agency or charitable conservancy with a maintenance fund for the mitigation area transferred to the government agency or charitable conservancy</u>	<u>NM</u>
<u>N.J.A.C. 7:7A-15.18(a)</u>	<u>Failure to apply to the Wetlands Mitigation Council for approval of the amount of monetary contribution following the Department's determination that monetary contribution is an appropriate mitigation alternative</u>	<u>NM</u>
<u>N.J.A.C. 7:7A-15.19(a)</u>	<u>Failure to apply to the Wetlands Mitigation Council for approval of the particular parcel of land to be donated following the Department's determination that land donation is appropriate mitigation alternative</u>	<u>NM</u>

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