ENVIRONMENTAL PROTECTION
LAND USE MANAGEMENT
DIVISION OF LAND USE REGULATION

Flood Hazard Area Control Act Rules
Coastal Zone Management Rules
Ninety-Day Construction Permits
Coastal Permit Program Rules

Adopted Repeal and New Rules: N.J.A.C. 7:13
Adopted Repeal: N.J.A.C. 7:7E Appendix 1, Figure 6
Adopted Amendments: N.J.A.C. 7:1C-1.2, 1.3, 1.5, 1.7, 1.9 and 1.12; 7:7-7.2, 7.7, 7.8, 7.9, 7.13 and 7.27; and 7:7E-3.17, 3.18, 3.19, 3.25, 3.26, 3.34, 3.48, 7.2, 7.5, 7.8 and 8.21

Proposed: October 2, 2006 at 38 N.J.R. 3950(a)

Adopted: 2007 by Lisa P. Jackson, Commissioner,
Department of Environmental Protection

Filed: 2007 as R. d. with substantive and technical change not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3)


DEP Docket Number: 16-06-08/70
The Department of Environmental Protection (Department) is adopting the repeal of the Flood Hazard Area Control rules and replacement of these rules with the new Flood Hazard Area Control Act Rules, N.J.A.C. 7:13. The Department is additionally adopting amendments to the Coastal Zone Management Rules (N.J.A.C. 7:7E); Ninety-Day Construction Permit Rules (N.J.A.C. 7:1C); and Coastal Permit Program Rules (N.J.A.C. 7:7). The proposal was published on October 2, 2006. The comment period closed on December 31, 2006.

Summary of Hearing Officer’s Recommendation and Agency Response

The Department held public hearings on the proposal on November 20, 2006 at 7:00 P.M., at the New Jersey Highlands Council offices in Chester, New Jersey; November 27, 2006 at 1:00 P.M. in the DEP Public Hearing Room in Trenton, and on December 4, 2006 at 7:00 P.M. at the Richard Stockton College of New Jersey in Pomona. Vincent Mazzei was the hearing officer. Twenty people attended and eight gave testimony. The hearing officer recommended that the proposal be adopted as proposed with the changes described below in the Summary of Public Comments and Agency Responses and the Summary of Agency Initiated Changes. The Department accepts the recommendation.

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

Office of Legal Affairs
Attn: DEP Docket No. 16-06-08/70
Department of Environmental Protection
401 East State Street, Floor 4
P.O. Box 402
Trenton, New Jersey, 08625-0402.
Summary of Public Comments and Agency Responses

The Department accepted comments on the proposal through December 31, 2006. Sixty-nine people provided individual written and/or oral comments. The following individuals provided individual comments:

1. Alexander, Karen; New Jersey Utilities Association
3. Andreassen, Carl; County of Somerset, Department of Public Works
4. Ardman, F. Mitchel; The Reynolds Group Inc.
7. Brogan, David H.; New Jersey Business and Industry Association
9. Buente, Stephen M. New Jersey Turnpike Authority
10. Carluccio, Tracy; Maya K. van Rossum; Delaware Riverkeeper
11. Cerchiaro, J. Russell; Schering-Plough
12. Charette, David; Langan Engineering and Environmental Services, Inc.
13. Ciminiello, Mary Lee
14. Connolly, William M.; State of New Jersey, Department of Community Affairs
15. Dauber, Karl; Parsons, Brinckerhoff, Quade and Douglas, Inc.
16. DiLodovico, Tony; Schoor Depalma Inc.
17. Dressel, Jr., William G.; New Jersey State League of Municipalities
18. Egenton, Michael A.; New Jersey State Chamber of Commerce
19. Eppley, Daren; DeCottis, Fitzpatrick, Cole and Wisler, LLP
20. Fair, Abigail; Association of New Jersey Environmental Commissions
21. Fariello, Leonardo; Wildlife Preserves, Inc.
22. Furnari, Russell J.; PSEG Services Corporation
23. Gauger, William H.; Cherokee Northeast, LLC
24. Gentile, Samuel J. and Jane
25. Gentile Jr., Samuel J.
27. Graham, Michael; John A. Miller; New Jersey Association for Floodplain Management
28. Green, Elkins; State of New Jersey, Department of Transportation
29. Guthrie Sr., Douglas L.; Monmouth County Mosquito Extermination Commission
30. Hebert, Susan
31. Hencheck, Barbara
32. Hencheck, John
33. Hrabal, Valerie A.
34. Joanow, Nick; Bloomfield Third River Bank Association
35. Jost, Charles
36. Jubic Jr., Robert J. Atlantic City Electric Company
37. Kennedy, Susan M.; American Littoral Society
38. Kibler, William S.; South Branch Watershed Association
39. Kieser, John; National Association of Office and Industrial Properties
40. Kozinski, Jane; Saul Ewing Attorneys at Law on behalf of New Jersey Concrete and Aggregate Association
41. Kraham, Susan J.; New Jersey Audubon Society
42. Lacey, Ronald K.; Jersey Central Power and Light Company
43. Lavine, Ethan: Environment New Jersey
44. Lescavage, Mark; CME Associates, Inc.
45. McDonald, Betsy; NY/NJ Baykeeper
46. McGuinness, Michael G.; National Association of Industrial and Office Properties
47. McMorrow, Brian; Bohler Engineering, P.C.
48. McNicholas, Kelly; New Jersey Chapter of the Sierra Club
49. Miller, John A.; Michael Graham; New Jersey Association for Floodplain Management
50. Miller, Richard A.; County of Warren Planning Department
51. Molnar, Thomas; West Amwell Township
52. Musa, Christine P.; Warren County Mosquito Control Commission
53. O’Keefe, Patrick J.; New Jersey Builders Association
54. Pringle, David S.; New Jersey Environmental Federation
55. Purcell, Monique; State of New Jersey, Department of Agriculture
56. Sachau, B.
57. Sears, Michael P.; Dewberry on behalf of the American Council of Engineering Companies of New Jersey
58. Shannon, Harry M.
59. Skupien, Joseph J.; Storm Water Management Consulting, LLC
60. Somers, Julia; New Jersey Highlands Coalition
61. Stockton, Andrew R.; Maser Consulting P.A.
62. Tallon, Bob; Crafts Creek Spring Hill Brook Watershed Association
63. Tittel, Jeff; Sierra Club, New Jersey Chapter
64. Toft, Dennis M.; Wolff and Samson on behalf of Viridian Partners
65. Toft, Dennis M.; Wolff and Samson on behalf of the Oaks at Glennwood and the Brunetti Organization
66. Van Abs, Daniel J.; New Jersey Water Supply Authority
67. Van Rossum, Maya K., Tracy Carluccio; Delaware Riverkeeper
68. Waltman, James R.; The Stony Brook-Millstone Watershed Association
69. Wolfe, Bill; New Jersey Public Employees for Environmental Responsibility
70. Zimmermann, E. Neal; Waters, McPherson, McNeill

The timely submitted comments and the Department’s responses are summarized below. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

GENERAL

1. COMMENT: Regulations and laws often do not achieve the intention of the writers. However, this particular rule proposal appears to accomplish what the authors intended, which is
to protect the environment, protect property owners, and allow for the responsible development of currently undeveloped land. I applaud your efforts and look forward to seeing the adoption of these new rules. (13)

2. COMMENT: We support enhancements to the rule. These enhancements bring New Jersey ahead of other states in the Delaware River Watershed in effective flood damage reduction. (10, 67)

3. COMMENT: We support the rule's recognition of the connection between flooding, water quality, wildlife and vegetation, as well as the connection between development, obstructions in the flood hazard areas and impacts to adjacent vegetated areas. We support the establishment of the riparian zone as a regulated area. (10, 43, 67)

4. COMMENT: The proposed new rules are focused in the right direction at the right time to protect New Jersey residents. We have seen repeated drastic losses due to heavy flooding over the past several years. This new program will take an important step forward to ensure that our homes, families and communities, drinking water supply, as well as our environment, are protected. (43, 48)

5. COMMENT: We are pleased that the Department is proposing to address important flood hazard issues, which concern the safety and welfare of New Jersey residents. (17)

6. COMMENT: Having witnessed the devastation families have endured with flooding and watching developers have their way with wetlands and flood plains in the State, it is extremely important for these regulations to be enacted. Protecting the rivers and stream are important for their own good, but by protecting streams, we are also protecting families and businesses. (30)

7. COMMENT: We support the commitment of the Governor and his Cabinet and the Department's efforts in promoting regulation to protect the citizens, property and economy of the State. (27, 49)
8. COMMENT: Overall, I am pleased with the rules, and appreciate the Department’s efforts to protect the environment. Additionally, I would like the Department to know that I support these rules. (45)

9. COMMENT: We support the proposal’s protection of pristine areas while focusing on previously disturbed areas for development. We also support no net-fill requirements, protection of the riparian corridor, encouraging redevelopment, protection of endangered species habitat, updated mapping, and protection of coastal areas. These rules provide new important protection against flooding and will help to get people out of harms way. (43, 54, 60, 63)

RESPONSE TO COMMENTS 1 THROUGH 9: The Department acknowledges these comments in support of the adopted new rules. It is the Department’s expectation that promulgation of the adopted new rules will help to ease and improve upon flooding problems in flood prone areas, and prevent future flooding in areas the in that past have not been flood prone.

10. COMMENT: We support amendments to related regulations to enhance consistency. (10, 67)

RESPONSE: The Department acknowledges the comment in support of the adopted new rules. The Department believes that consistency among regulations enhances environmental protection, enhances protection of areas regulated under the Flood Hazard Rules, and assists the regulated community in complying with regulations.

11. COMMENT: The emphasis that the Department has placed on limiting development near rivers and streams, as the most effective means to minimize damage from flooding, is appreciated. (68)
RESPONSE: The Department acknowledges the comments in support of the rules. It should be noted that limiting development near rivers and streams not only minimizes damage from flooding but also provides for higher water quality due to the buffering of riparian areas.

12. COMMENT: The proposed new rules strike the appropriate balance between the State's need for clean water and allowing development in the right places. The new rules appropriately recognize the following: First, that development within the flood hazard areas increases the intensity and frequency of flooding by reducing flood storage area, increasing stormwater runoff and obstructing the movement of flood waters. Second, the unchecked disturbance of vegetation adjacent to surface waters increases this problem by causing bank destabilization and an increase in erosion and sedimentation, both of which also lead to a decrease in surface water quality. And third, that structures that are improperly built in flood hazard areas are continually subject to flood damage and threaten the public safety, health and general welfare of those who occupy them. (37)

RESPONSE: The Department acknowledges the comment in support of the rules, and agrees that protection of the flood hazard area and riparian vegetation are both extremely important for environmental protection, and protection of residential and commercial interests. The Department also agrees that improperly built structures in the flood hazard areas have the negative impacts described by the commenter. Additionally, improperly built structures can collapse and/or dislodge during a flood, creating buoyant debris which causes increased flood damage potential to residents of flood hazard areas throughout the State.

13. COMMENT: Please consider the traumatic negative ramification of the proposed Flood Hazard Area Control Act Rule changes, and the devastating impact they will have on most property rights throughout our great State of New Jersey. As proposed, the Rule should not be adopted because it will do little to cure flooding, or to provide protection from flooding. Its purpose will serve only to add yet another cumbersome layer of regulatory permitting requirements, and additional application fees for regulatory oversight. The negative impact on development projects of all types, and in particular the dramatic increased costs the rules will add
to home prices, is cause for great concern. The commenter opposes this rule proposal, and the burden that it will create. (61)

14. COMMENT: The proposed new rules will not achieve the asserted objective of reducing hazards associated with flooding in the State. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 13 AND 14: The Department’s rules are not intended to “cure flooding” since flooding is a natural phenomenon resulting from precipitation, snow melt, topography, soils, vegetation and the timing of precipitation. However, the Department does not agree that its regulations will not reduce the hazards of, or provide residents with protection from, flooding. The Department’s rules will provide protection from flooding by discouraging development in flood prone areas. In those areas where development is undertaken, the rules will ensure that permitted development is constructed in a manner to protect inhabitants and their property from flood damage and to protect down stream inhabitants and their property from worsened flooding resulting from upstream development in flood prone areas. Consequently, the Department believes that its rules protect property owners of all income groups by ensuring them a safe and healthy environment in which to build a habitable residence.

With regard to the impact that the adopted new rules will have on the price of new homes, the Department does not anticipate that the added cost of complying with the new rules will be substantially different than the added cost of complying with the repealed rules. Both the new rules and the repealed rules prevent development in certain areas that the State has deemed to be hazardous, and the new rules expand the areas within which construction is restricted. The Department expects there will be a positive economic benefit by establishing the improved construction standards and safety factors of the new rules, which are designed to further reduce the potential for loss of life and property as compared with the repealed rules. Improper construction in flood hazard areas can subject housing, businesses and public infrastructure to flood damage and other related problems many years after construction, leaving home and business owners, or taxpayers, to pay for correction and remediation rather than the original developer. Furthermore, unrestricted development within flood hazard areas exacerbates flooding. As the depth and frequency of flooding increases, so does the economic impact of such
floods. Therefore, the Department believes that the adopted new rules will have an overall positive economic benefit for New Jersey.

15. COMMENT: In its response to comments associated with the adoption of the Flood Hazard Area Control Act rules on May 21, 1984, the Department stated that to establish a complete or nearly complete prohibition against near-stream development appears to be beyond the scope of what was intended by the Flood Hazard Area Control Act and the Water Pollution Control Act. The two Acts have not been amended since then to address buffers and in fact the Freshwater Wetlands Protection Act was enacted since then which specifically imposes buffers on wetlands and not on open waters. We must therefore conclude that the proposed new rules exceed their statutory authority. (7, 16, 18, 46, 53)

16. COMMENT: The proposed creation of “riparian zones” and the regulation of activities within “riparian zones” are not related to flood control and, therefore, all sections of the proposed new rules concerning “riparian zones” should be eliminated. (7, 18, 33, 46, 53)

RESPONSE TO COMMENT 15 AND 16: While the Flood Hazard Area Control Act is the primary enabling legislation for the Flood Hazard Area Control Act rules, the rules are also adopted under the authority of the Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.), the Highlands Water Protection and Planning Act (N.J.S.A. 13:20-1 et seq.), the Water Quality Planning Act (N.J.S.A. 58:11A-1 et seq.), N.J.S.A. 13:1D-33, and the Ninety Day Construction Law (N.J.S.A. 13:1D-29 et seq.). These laws provide the authority to protect water quality through varying mechanisms including the protection of buffers for the preservation of vegetation. As indicated in the response to comment 129 above, the Department’s ability to protect the environment, including flora and fauna, as it implements the Flood Hazard Area Control Act rules, was affirmed by the Appellate Division Court in 1985. Society for E.E.D. v. New Jersey DEP, 208 N.J. Super. 1 (App. Div., 1985). In addition, the Department’s authority to use stream buffers to protect water quality was affirmed in, “In the Matter of Stormwater Management Rules, 384 NJ Super. 451, cert. denied 188 NJ 489 (2006).” Since the Freshwater Wetlands Protection Act is an entirely different law and not one of the enabling statutes, the lack
of buffers for open waters is irrelevant to the Department’s authority to establish a riparian zone under the Flood Hazard Area Control Act rules.

17. COMMENT: The proposal appears to allow and encourage flawed project segmentation, and to continue the Department’s program by program piecemeal site characterization, regulatory review, and permit approval practices. The Department needs to move to site-wide integrated permit review practices, and begin to do so starting with acknowledging the problem, and pledging to make reforms in the adoption document of this rule. For example, the Department needs to begin to follow the lead of the Highlands Water Planning and Protection Act, which was a major step forward in mandating site wide resource characterization, and consolidated Department site approval.

For example, under the proposed new rules, a developer could come in for a permit approval for infrastructure and stream road crossings, without disclosing the full upland project to be served by the infrastructure and road crossing. Such segmentation practices completely frustrate meaningful public participation, and Department review of the totality of the impacts associated with a project, including site wide impacts, regional impacts, and secondary and cumulative impacts. Additionally, developers often use Department permit approvals to whipsaw and leverage the land use review of local governments, for example by arguing that Department has signed off on the development, or that any local site plan modifications would force a Department permit modification, with the associated review. (69)

RESPONSE: The acts that the adopted new rules implement provide considerable authority to protect natural resources within the context of this particular permitting program. Furthermore, as noted in the response to comments 15 and 16 above, the Department’s ability to protect the stream environment, including flora and fauna, as it implements the Flood Hazard Area Control Act rules, was affirmed by the Appellate Court in 1985. To the extent that an entire project requires a review for stormwater management under the Stormwater Management Rules at N.J.A.C. 7:8, applicants for a flood hazard area permit under these rules will be required to disclose the entire project to the Department, which should result in minimizing impacts to the flood plain. However, the Department does not believe it is appropriate under these rules to
review aspects of a project that are outside the flood plain and the riparian zone in the absence of the need to perform a stormwater review. Regarding the use of the Department’s permit approval to leverage and “whipsaw” local governments, the Department’s rules do not supersede local government approvals. Thus local government agencies have the ability to establish and require whatever they deem appropriate within their own legal authority, and should not be influenced by Department permit approvals.

18. COMMENT: The proposed new rules apply only to development and redevelopment and do nothing to address the existing flooding conditions across the State as a result of existing development. (7, 16, 18, 46, 53)

19. COMMENT: Not only should the Department move forward with the proposed new rules, which appropriately protect the areas that need to be protected, but we should also look for other ways and opportunities to restore historically degraded flood hazard areas. (37)

20. COMMENT: In some ways the proposed regulations are like closing the door after the horse has left the barn. New Jersey already has already built too much on sensitive lands. We can only hope that plans to return built floodplains to their natural state will begin. (30)

RESPONSE TO COMMENTS 18 THROUGH 20: The Department’s rules are mainly intended to address new development which constitutes a “regulated activity” as described at N.J.A.C. 7:13-2.4, proposed in regulated areas as described at N.J.A.C. 7:13-2.3. Consequently, the rules tend to address new development to ensure that it does not contribute to existing flooding problems or create new problems where they do not yet exist. However, the Department’s rules do contain several provisions to help alleviate existing contributions to flooding. N.J.A.C. 7:13-7.2(a)3 provides a permit-by-rule to allow the elevation of a lawfully existing building in order to reduce flood damage potential. N.J.A.C. 7:13-7.2(a)5 provides a permit-by-rule to allow the use of machinery to remove a major obstruction from a regulated water that cannot be removed by hand. N.J.A.C. 7:13-7.2(b)2 is a permit-by-rule allowing the removal of any lawfully existing structure from a flood fringe. General permit 1 at N.J.A.C. 7:13-8.3 authorizes stream cleaning.
General permit 4 at N.J.A.C. 7:13-8.6 authorizes the maintenance, repair and replacement of lawfully existing stormwater management structures and conveyances. General permit 5 at N.J.A.C. 7:13-8.7 authorizes the relocation of a building to reduce flood damage. General permit 6 at N.J.A.C. 7:13-8.8 allows the reconstruction of a damaged or destroyed residence but requires the reconstructed building to be located outside the floodway, that it be constructed with the lowest finished floor at least one foot about the flood hazard area design flood elevation, and that the area below the lowest finished floor remain open to flood waters in accordance with N.J.A.C. 7:13-11.5(l). All of these provisions make it easier to correct or remove buildings or obstructions and may lead to improvements in a particular flood hazard area.

21. COMMENT: The proposed new rules fail to provide any meaningful analysis of the potential impact adoption would cause to the ability of municipalities to satisfy their constitutional obligation to provide for their fair share of the regional need for low and moderate income housing throughout the State. (7, 18, 33, 46, 53)

RESPONSE: The Department’s rules are intended to reduce the hazards of flooding and provide all residents with protection from flooding regardless of their socioeconomic status. The Department’s rules will provide protection from flooding by discouraging development in flood prone areas. In those areas where development is undertaken, the rules will ensure that permitted development is constructed in a manner to protect inhabitants and their property from flood damage and to protect down stream inhabitants and their property from worsened flooding resulting from upstream development in flood prone areas. Consequently, the Department believes municipalities need to plan their fair share low and moderate income housing in consideration of the Flood Hazard Area Control Act rules since low and moderate income residents are entitled to a safe and healthy environment in which to reside.

22. COMMENT: The proposed new rules will render development opportunities in the State meaningless and minimal. (7, 18, 33, 46, 53)
RESPONSE: All prospective development should be located in areas that are safe from, and which do not contribute to, flooding. It is not economically prudent for the owners of residential or commercial development, or the public at large, to locate new development in areas known to be subject to repeated flooding since this would also subject them to repeated loss or damage to property and business. Therefore, the Department’s rules are intended to redirect development out of such areas and into suitable areas free from the threat of flooding.

23. COMMENT: The proposed new rules fail to allow the scientific and engineering community appropriate flexibility to achieve the intended purposes of the rules without the corresponding economic hardship that will occur as a result of its implementation. (7, 18, 33, 46, 53)

24. COMMENT: The proposed new rules will prevent effective planning because of its discretionary standards. (7, 18, 33, 46, 53)

25. COMMENT: The proposed new rules should provide greater regulatory flexibility in order to mitigate against the severe negative economic impacts that adoption will have on development and the State’s economy. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 23 THROUGH 25: The commenters do not indicate what provisions in the rules they perceive to be inflexible and those perceived to be discretionary. The comments seem to indicate that while there is not enough flexibility to avoid hardship, there is too much flexibility for good planning. The rules are intended to protect the public from development that will contribute to flooding and damage to the water quality of a waterbody. To the extent that the Department can provide the public with simplified options for applications in the rules, all of which provide equivalent protection, the Department has provided such options. For example, an applicant has the ability to undertake, by way of a general permit, certain activities in the flood hazard area if they meet prescribed standards. To the extent that an absolute standard is necessary to ensure an adequate level of protection such a standard is established. For example, the zero percent net fill limitation is such a standard because the Department believes it is a critical factor for ensuring the success of the rules. The Department
further believes that the rules provide the right balance between strict standards necessary for protection and flexibility that will assist in the successful planning and design of a site. Finally, it is not positive for the State’s economy when the owners of residential or commercial development locate new development in areas known to be subject to repeated flooding since this would also subject them to repeated loss or damage to property and business.

26. **COMMENT:** The proposed new rules will impede due diligence inquiries and frustrate project design, thereby deterring investment in the State. (7, 18, 33, 46, 53)

**RESPONSE:** It is unclear why the commenters believe that the rules will impede due diligence and frustrate project design. In fact, the Department has increased the number of methods available for determining the flood hazard area and floodway thus making it easier to conduct due diligence and project design. The repealed rules provided three ways to determine the limits of a flood hazard area: the use of a Department delineation, use of FEMA mapping in limited instances, and the submittal of detailed calculations. Department delineations or FEMA mapping are available only for some waters, and submittal of detailed calculations is often time-consuming and costly.

The adopted rules contain several additional options in Subchapter 3 for determining the limits of the flood hazard area on a site. First, the rule provides a method for determining flood hazard area and/or floodway limits based on FEMA information in fluvial areas (see N.J.A.C. 7:13-3.4(e)). This method will expand and greatly simplify the use of FEMA information for determining the flood hazard area on many sites. Second, the rule provides a method for approximating the flood hazard area limits on a site (see N.J.A.C. 7:13-3.5). This method will assist applicants who want a conservative approximation of the regulated areas on a site and do not want or need to expend the time and resources to perform detailed calculations to determine this. Third, the rule simplifies the method of determining the flood hazard area and floodway limits through calculations (see N.J.A.C. 7:13-3.4(f)). Under the repealed rules, when an applicant determines the flood hazard area limit through calculations, the Department requires an applicant to assume full development of the watershed. This can require considerable effort and tends to result in an overestimation of the size of the flood hazard area in sparsely developed
areas. Under the adopted rule, the calculation method does not require this assumption but instead adds a standard factor of safety of 25 percent to the 100-year flow, which approximates full development conditions and is the same method used to map the Department delineations.

Finally, the Department has also provided a “verification” process at N.J.A.C. 7:13-6 to allow an applicant to request a verification of the limits of the flood hazard area and/or floodway in advance of planning and designing a complete project. This process will facilitate project design by allowing an applicant to obtain information about the extent and location of regulated areas before spending time and money on project design and permit applications.

27. COMMENT: The proposed new rules do not implement planning on a watershed basis, which is how flooding issues should be addressed. (7, 18, 33, 46, 53)

RESPONSE: The standards adopted within the Flood Hazard Area Control Act rules provide sufficient protection to all watersheds. The basic concepts, identifying the extent of the flood hazard area, establishing a riparian zone, and regulating certain activities within the regulated areas, will work to protect water quality and against flooding in any watershed in the State since it focuses the regulatory requirements on the area that is prone to flooding. The area that is regulated is a function of the specific watercourse, its water quality classification, and the extent of its flood hazard area. It is not clear what alternative method, applied on a watershed basis, the commenters believe would better protect against flooding.

28. COMMENT: While the proposed regulations take the place of existing regulations, the number of new permits and the expansion of regulations will discourage business and economic expansion in the State of New Jersey. (39, 46)

RESPONSE: With the exception of the wider riparian zones, intended to protect both water quality and quantity for both residents and businesses, and the amendments to the Coastal Zone Management rules to ensure that development in tidal and fluvial flood hazard areas receive appropriate oversight, the adopted regulations primarily replace and reorganize those that were repealed. Further, the Department believes that the regulation of riparian zones and fluvial flood
hazard areas is necessary since it will discourage residents and businesses from locating in hazardous areas.

The creation of “new permits” is intended to make it easier to obtain the appropriate level of review and approval depending upon the proposed level of impact in or near a waterway. Under the repealed rules, when an activity was regulated, it required a complete review and approval by the Department as either a minor or major project before activities could legally commence. However, by making certain activities subject to the requirements of a permit-by-rule, for example, the majority of activities qualifying for permits-by-rule need only be in compliance with the Department’s rules and do not require prior notice (with the exception of those listed at N.J.A.C. 7:13-7.2(a)), or approval by the Department.

Consequently, the Department believes that the adopted new permits, together with the greater variety of methods available for determining the flood hazard area and floodway described in response to comment 26 above, will not discourage business or economic expansion.

29. COMMENT: In dealing with regulations designed to protect the environment, it is important to get public support and cooperation. In some instances, conforming to the proposed new rules may be overwhelming and costly, which may lead to less public support and cooperation. (21)

RESPONSE: When developing its rules, the Department draws on its experience in reviewing and processing the thousands of permit applications that it receives annually. Further, the Department has an ongoing relationship with Rutgers University and other professional organizations through which it provides public education on its rules. All rules, when new, may appear overwhelming, but with time and outreach, the regulated community becomes more familiar with the rules and their implementation. The Department is confident the Flood Hazard Area Control Act rules will be no exception.

30. COMMENT: Compliance with the proposed new rules can certainly become an issue during the planning and approval process, but afterwards there are not enough enforcement agents to enforce such stringent rules. (21)
RESPONSE: Once the regulated public and local government planners, planning boards and construction officials familiarize themselves with the Flood Hazard Area Control Act rules, the Department is confident that they will provide an additional level of enforcement at the local level, as they have done with these and other Department land use rules in the past.

31. COMMENT: Some of the regulations appear overly complicated and technical. The proposed new rules should be made simpler and fairer so as to be more easily understood by the ordinary citizen. What is perceived as overregulation, often leads to frustration and disregard for the regulations. Simpler rules would ensure public compliance. (21)

RESPONSE: The Flood Hazard Area Control Act rules necessarily contain an engineering component requiring the knowledge and technical expertise of a professional trained in calculating hydrology and hydraulics of waterways. Consequently, while the Department provides education and outreach for this and all of its regulatory programs through Rutgers, the State University, and other professional organizations, all aspects of the Flood Hazard Area Control Act rules are not amenable to the level of simplification suggested by the commenter. The Department has attempted to make the rules clear and comprehensible while preserving the necessary level of technical detail. For example, many aspects of the rule, such as the adopted permits-by-rule, should be readily understood without the need to consult professionals. However, all residents need to be aware that activities not covered under a permit-by-rule, which are located in an area suspected of flooding and/or within 300 feet of a waterway, may be regulated by the Department, and should therefore seek professional assistance and guidance before pursuing such activities.

32. COMMENT: When the upstream portion of a stream or waterway has been substantially developed and degraded, the regulations should first mandate the creation of riparian buffers upstream before unduly regulating downstream properties. Unless upstream developed properties are made to comply, downstream property owners who have previously protected stream buffers
should not be unduly regulated without being compensated. The regulations should therefore be more flexible. (21)

RESPONSE: The Department’s adopted rules require the establishment of a riparian zone along all regulated waters except along the Atlantic Ocean or any manmade basin or lagoon, or on any oceanfront barrier island, spit or peninsula (see N.J.A.C. 7:13-2.3(a)2). As such, all other waterways have a riparian zone, whether or not they are substantially developed or degraded, or upstream or downstream from other undeveloped properties because of the important values and functions that a riparian zone provides. In cases where a watershed has been substantially developed, and the functionality of the riparian zone has been impaired as a result, the Department believes that it is especially important to protect the remaining vegetation along all portions of the affected stream. Further, all proposed regulated activities within the flood hazard area and/or riparian zone are subject to the adopted rules regardless of whether they are upstream or downstream from an undeveloped property. The Department believes that it will provide the necessary protection to the waterway by requiring that all regulated activities proposed within regulated areas comply with the rules.

33. COMMENT: Where there are vacant lots adjoining or in between developed lots, the vacant lots should not be unduly regulated unless the developed lots are also made to comply. A vacant lot along a stream should not be rendered undevelopable where adjoining lots are developed. Special consideration should be given to lots between or next to developed lots, or else all lots should be made to comply. (21)

RESPONSE: As the Department stated in the summary of the proposal of the new Flood Hazard Area Control Act rules at 38 N.J.R. 3971-3, the Department has determined that riparian zone vegetation serves a number of vital ecological functions, and should therefore be preserved and protected from unwarranted destruction. In cases where previous development in the riparian zone has resulted in the loss of some vegetation, the Department believes that preservation of the remaining riparian zone vegetation is extremely important. The presence of some previous development within riparian zones does not justify the removal of the remaining vegetation. The
adopted new rules therefore establish stringent standards designed to preserve riparian zone vegetation under N.J.A.C. 7:13-10.2, regardless of the level of development adjacent to the vegetation.

34. COMMENT: While there is some value in reworking the format of the regulations to be consistent with other programs, such as the waterfront development and freshwater wetlands rules, which also have general and individual permits, the proposed new rules make this particular program more cumbersome and less efficient. A comprehensive review should be taken of the consistency of all land use regulation programs to promote efficiency and avoid duplication. For example, although the rules distinguish between fluvial and tidal flooding, the Department has imposed both permit requirements in certain tidal rivers as a matter of policy. The rules should provide more clarity in this regard. (46)

RESPONSE: While initially there may be a period during which the regulated community will need to adjust to the changes in the rules' structure, the Department believes that any adjustment period will be minimized because the changes in structure make these rules consistent with other Department rules. This consistency means that the regulated community will be working in a familiar format. In addition, after adoption outreach and education will help to minimize the regulated community’s adjustment timeframe. Further, the public will more readily understand, at least in concept if not in detail, how the adopted new rules are structured.

The Department has undertaken a comprehensive review of its land use regulations and concluded that, although they have similarities, they are based upon statutes that are unique, with individual jurisdictions, objectives and requirements. The Department has attempted to be consistent in as many cases as the individual statutes will permit. For example, to the extent that a coastal permit is required for an activity that also requires a Flood Hazard Area permit, the Department is applying the standards from the Flood Hazard Area Control Act rules through the Coastal rules and is not requiring a separate Flood Hazard Area permit.

With regard to the application of regulations in both fluvial areas and tidal areas, the Department has determined that the residents of the State are entitled to protection from all flooding, regardless of whether its source is tidal or otherwise. Therefore, the Department has
adopted design and construction standards appropriate for each area. For instance, the Department recognizes that tidal flooding is not exacerbated by flood storage displacement, so development in tidal areas is exempt from the zero-percent net-fill requirements of the chapter, pursuant to N.J.A.C. 7:13-10.2(d)1.

35. COMMENT: The proposed new rules are preempted by Federal law if applied to railroad operations.

Railroads are defined as "railroad carriers" at 49 U.S.C. 20102 of the Federal Railroad Safety Act (FRSA), and are subject to regulation by the United States Secretary of Transportation. Furthermore, "rail carriers", as defined at 49 U.S.C. 10102(5) of the Interstate Commerce Commission Termination Act (ICCTA), are subject to the exclusive jurisdiction of the Surface Transportation Board with respect to "transportation" including "the construction, acquisition, operation, abandonment, or discontinuance of . . . tracks, or facilities, even if the tracks are located, or intended to be located, in one State." 49 U.S.C. 10501 (b). Each of these Federal statutes contains a provision that expressly preempts State laws and regulations.

In the case of FRSA, statewide regulation of a "subject matter" relating to railroad safety is preempted once the Secretary has regulated the same subject matter as the statewide law. To the extent that a proposed State rule regulates a subject matter that relates to railroad safety under FRSA, including subjecting the Railroads' activities in installing, maintaining, constructing and/or reconstructing/renewing/repairing their tracks and roadbed or crossing signal systems to DEP permitting regulations, the DEP regulations would be preempted under FRSA.

In the case of ICCTA, any State regulation of "transportation", as that term is defined in ICCTA, is preempted. The term "transportation" has been defined to include, among other things, a railroad "yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." Accordingly, any State law or regulation that has the effect of regulating railroad "transportation," directly or indirectly, including preconstruction permitting requirements regulating the construction of a "new railroad" or construction/expansion/reconstruction of a railroad yard or facility, are preempted under ICCTA.
Accordingly, the proposed new rules should be modified to eliminate references to railroad facilities and operations and explicitly exclude railroad facilities and operations from their scope. (2, 5, 6)

RESPONSE: The Department recognizes that Federal law, especially the Interstate Commerce Commission Termination Act of 1995, may in some cases have an impact on application of these regulations to railroads. The Department intends to apply these regulations to railroads in conformity with ICCTA and the developing case law thereunder. For example, if a railroad contends that a project constitutes “transportation by rail carrier” and claims that its project is exempt, in whole or in part, from regulation under these rules, it should submit to the Department the kind of information required by the Supreme Court in Ridgefield Park v. NYSW&R, 163 N.J. 446 (2000), when it is undertaking an activity for which another entity would require a permit. Ridgefield Park at 460. Should the Department agree with the claim, it would proceed accordingly. Accordingly, N.J.A.C. 7:13-2.1 has been modified on adoption to include at new N.J.A.C. 7:13-2.1(e) a provision that if railroad activities proposed in a flood hazard area or riparian zone are exempt from State regulation under Federal law, no permit shall be required under N.J.A.C. 7:13 for that activity. Adopted new N.J.A.C. 7:13-2.1(e) also provides that in such a case, the railroad undertaking the activity shall provide the Department with the application material normally required for the proposed activity at least 90 calendar days prior to the railroad commencing the activity. However, for emergency activities, the information described at N.J.A.C. 7:13-12.1(c) shall in stead be provided to the Department via telephone and/or fax, as listed at N.J.A.C. 7:13-1.1(f), as soon as possible after the emergency is discovered, and in no event later than the day the activity is authorized or commences, whichever occurs first. This is necessary in order for the Department to be able to determine if the proposed activity will adversely impact public safety, health, general welfare or the environment.

36. COMMENT: These rules are really intended for pollution control but since flooding is a more public concern, these rules are masquerading as flood protection rules. This constitutes a taking of the land by inverse condemnation and a violation of our Fourth Amendment Rights. (32)
RESPONSE: As stated in response to comments 15 and 16, the Department’s Flood Hazard Area Control Act rules are adopted under several authorities that require the Department to provide protection for the public against flooding, and that also provide for the protection of waterways and their biota. Consequently, there is no need to disguise the intent of the rules since they are intended both for flood protection and pollution control.

The adoption of regulations that require review and approval of an activity before it can legally commence does not constitute a taking of property without just compensation. Many cases have found that a takings claim is premature before the agency finally decides how property can be used, in response to a permit application. (See OFP LLC v. State, 395 NJ Super. 571 (App. Div. 2007); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 US 172 (1985); MacDonald, Sommer & Frates v. County of Yolo, 477 US 340 (1986); Palazzolo v. Rhode Island, 533 US 606, 617 (2001); United Savings Bank v. DEP, 360 NJ Super. 520 (App. Div.), certif. den. 177 NJ 574 (2003)). Further, the regulatory scheme contained within the Flood Hazard Area Control Act rules provides many permits to accommodate appropriate types of development in the flood hazard area while protecting current and prospective residents from flooding impacts. Further, at N.J.A.C. 7:13-9.8, the Department provides a hardship exception for the issuance of an individual permit. The hardship exception is intended for circumstances where there is no feasible and prudent alternative to the project, the cost of complying is unreasonably high in relation to the benefits, or the Department and the applicant have agreed to alternative requirements that the Department determines will provide equal or better protection of the environment and public health, safety, and welfare.

37. COMMENT: The Residential Site Improvement Standards and Stormwater Management rules do not apply to properties of less than one acre or one quarter acre of impervious surface. Therefore, statutes already exist that recognize that small infill projects do not contribute to flooding or contribute to pollution. (31, 32)

RESPONSE: Neither the Residential Site Improvement Standards nor the Stormwater Management rules are designed to establish appropriate controls for the flood hazard area, or to
control stream encroachments, as the Department is required to do in accordance with the Flood Hazard Area Control Act. Consequently, while the other standards and rules cited by the commenter may not require the regulation of projects of a certain scope, all projects proposed within regulated waters, as defined at N.J.A.C. 7:13-2.2, have the potential to affect flooding and should therefore be regulated by the Flood Hazard Area Control Act rules. The Department has, however, provided several permits-by-rule and general permits for activities that the Department believes will result in minimal impacts to the flood hazard area if they are conducted within the prescribed limits.

38. COMMENT: According to experts, the past three flooding events along the Delaware River were caused by: (1) Heavy snows in Pocono Mountains that melted quickly with rainfall; (2) Heavily moisture-laden air from the south meeting colder air over headwaters of the Delaware River then falling on the steep un-developable solid rock slopes of the watershed; and (3) Northeastern winds preventing the tides from flipping, backing up the Delaware Bay, raising levels of the river terminus and greatly reducing bay water output. Also, Senator Lance in the Hunterdon County Democrat questioned water release from a dam in New York while others speculated that development in Lehigh County, Pennsylvania, lacked sufficient storm water management tools and therefore contributed to the problem. The Department should therefore recognize these contributing factors in its proposal to further regulate flooding in New Jersey.

RESPONSE: With the exception of the water release from a dam in New York, the factors the commenter provides all involve natural phenomena that cannot be controlled by humans. Consequently, there is no mechanism or regulatory process that the Department could propose that would alter those events. However, the Department can strive to ensure that when such natural events occur, they result in the least damage to life or property, and unavoidable impacts are minimized. The Department is doing this by adopting regulations which discourage development in areas subject to flooding and which ensure any construction undertaken in these areas is done in a manner to avoid or minimize flooding damage. Furthermore, recent history demonstrates that flooding has increased in intensity and damage in New Jersey, and the actions
the Department is taking are necessary to ensure that impacts from flooding are reduced to the maximum extent possible.

39. COMMENT: According to representatives from Department, the proposed new rules were first prepared in 1999. If this rule change was not needed during the last seven years of record housing starts in the State, then why was it needed now? Such a delay indicates that these rules were not in fact necessary. (31, 32)

RESPONSE: To the contrary, the rule amendments were of such importance that the draft proposal was repeatedly updated in attempts to improve it, and to address new concerns as they arose. This is reflected in the fact that the adopted new rules are more comprehensive and protective of flood prone areas than what was first envisioned and drafted in 1999. This improvement from 1999 to the present was possible because the existing rules remained in place, and in fact were readopted without change specifically to enable completion of the new rules.

40. COMMENT: The flood of 1955 was absolutely devastating to the State of New Jersey. The solution to that was building the Tocks Island Dam project. If a dam could stop the flood of 1955, then the recent three floods would not have occurred and the Tocks Island project would have served its purpose. (32)

RESPONSE: The commenter assumes that the Tocks Island Dam project would have been successful. In fact, the project was never built because of high costs, anticipated environmental damage, and a significant degree of skepticism regarding the success of the project. Regardless, the project was not built and New Jersey’s present flooding problem is very real. The adopted, new rules are the Department’s attempt to assure, to the greatest extent possible, public safety, health and general welfare Flood Hazard Area Control Act.

41. COMMENT: During these last three floods, water from the Delaware River backed up into many of its tributaries and caused additional flooding because water from each tributary could not flow out. What is being proposed in Lambertville on Swan Creek is the equivalent of a back
flow valve as is typically used in coastal areas to prevent the bay water from flowing into storm drains. The system proposed in Lambertville would be a large one, and its purpose would be to shut out the Delaware River. If these streams contribute to flooding, how can I not question if the Delaware River is blocking the streams? How can the streams be contributing to flooding? One of the major rules of plumbing is water does not flow uphill, and we are downstream from what occurred uphill. But the most important issue is that unabated development has taken place and is taking place in Pennsylvania in the Poconos. It is apparent that Pennsylvania is New Jersey's answer to affordable housing. Therefore, we have far more people in Pennsylvania that are more interested in getting development in than worrying about their downstream neighbors. (32)

RESPONSE: The Department is aware of the proposed project along Swan Creek to prevent backwater from the Delaware River from entering Lambertville, and is currently working with the city and their consultants to develop an effective solution that will reduce local flooding while avoiding adverse environmental impacts to Swan Creek and its surrounding areas. With regard to impacts from development within the Delaware River Basin outside of New Jersey, the Governors of the four states that comprise the basin assembled a team of experts to discuss regional flooding and to make recommendations on initiatives to help mitigate future flood damages along the Delaware and its tributaries. To this end, the Delaware River Basin Interstate Flood Mitigation Task Force released its final report in July 2006, which recommended a number of regulatory changes, many of which were modeled after draft versions of the Flood Hazard Area Control Act rules that are being adopted at this time.

42. COMMENT: As a home owner, I look to the government for protection. I don't look to government to facilitate a developer's taking of my property by virtue of the fact that developers have greater financial resources. The Department of Environmental Protection must live up to its title, “protection” and not “facilitation.” Homeowners will lose their homes because of prospective development in the flood plain which will have negative repercussions for every home owner on, off and down stream. A regional approach needs to be taken. Once educated, there is accountability and responsibility to act for the public's health, welfare and safety. These recommendations do not go far enough. There should be no development of flood plains. There
has been enough research that says, “no adverse impact” but we have seen the impacts from development in the flood plain. (34)

RESPONSE: The Department’s adopted rules have the effect of law and are not recommendations. The Department shares the commenter’s concern for the impacts that result from poorly located and designed development, but believes that its adopted rules will discourage development in the flood hazard area and will ensure that construction is undertaken in a manner to avoid or minimize flooding damage. The Department agrees and, in fact, provided documentation in its proposal demonstrating that flood damage has continued to occur despite previous regulations (see table of flooding claim payments by year at 38 N.J.R. 4001). By regulating the flood hazard area plus a riparian zone, the rules constrain new development in flood prone areas and protected water quality. Applicants seeking to locate new development in the flood hazard area will have to satisfy zero net fill standards for the placement of fill. The changes to the net fill provisions at N.J.A.C. 7:13-10.4 are specifically designed to prevent increases in the frequency and intensity of flooding. Further, when complying with the zero net fill rule, all offsite flood storage that is created to compensate for fill must be created in the flood hazard area of the same regulated water as the proposed fill in order to ensure that the created flood storage is effective. The Department believes that this method will provide both the local and regional protection against flooding the commenter desires.

Finally, those seeking a hardship exception from the Department’s regulations will be required to demonstrate that the exception is intended for circumstances where there is no feasible and prudent alternative to the project, the cost of complying is unreasonably high in relation to the benefits, or the Department and the applicant have agreed to alternative requirements that the Department determines will provide equal or better protection of the environment and public health, safety, and welfare.

43. COMMENT: Although we agree that the prevention of flooding is certainly an important goal for all New Jersey residents, it is our understanding that there is no scientific study, scientific basis, nor engineering determinations of these regulations on any flooding in New Jersey and particularly the Delaware River. (39)
44. COMMENT: The new regulations establish riparian zones on streams. They mandate the evaluation of 10-year flood zones. They require zero fill in place of twenty percent net-fill. They restrict the development of threatened and endangered species habitat as they are defined via the landscape project. All of these proposed regulations should be predicated upon scientific facts and studies and a basis of the real impact of regulations on flooding. We are in favor of regulations which prevent flooding, but unnecessary regulatory infringement on the growth of the New Jersey economy will certainly have a detrimental impact on all of the residents of the State of New Jersey. (39)

RESPONSE TO COMMENTS 43 AND 44: As stated in response to comments 15 and 16, the Department’s mandate is both to protect the public from impacts due to flooding and to protect the water quality and biota of the stream. The establishment of riparian zones is important to protect New Jersey’s natural resources and water supply and also provides flood storage capacity, as detailed in the Department’s proposal at 38 N.J.R. 3951. The protection for threatened and endangered species was contained in the repealed rules and is continued in the new rules at N.J.A.C. 7:13-10.6 and updated to reflect current methods for identifying and protecting threatened and endangered species and their habitats. The zero net fill requirement, and requirement to perform flood storage calculations for both the flood hazard area design flood and the 10-year flood, are both intended to restrict the loss of flood storage. Thus, all of the rules cited by the commenter are necessary to fulfill the Department’s statutory mandate.

As more fully explained in the summary of the proposal, the Department analyzed the impact of the rules that were previously in place, the history of flooding despite those rules and the potential protections to be gained from proposed amendments such as greater restriction on increases in net fill and more stringent requirements for the disturbance of riparian zone vegetation. For example, although the repealed rule included requirements such as 20 percent net fill, which has been in effect since 1984 throughout the State, and the imposition of modest stream buffers, flooding in New Jersey has worsened (see table of flooding claim payments by year at 38 N.J.R. 4001). Consequently, the new rules are designed to keep development further
away from waterways, and to more closely regulate development proposed in flood prone areas, in order to better protect health, public safety, general welfare and the environment.

45. COMMENT: The new rules should be implemented in concert with a focus by the Department to put a priority and increased funding into the Bureau of Flood Plain Management, so that in the areas of the State where maps are not adequate, they can be updated as a priority on a consistent basis. (48)

46. COMMENT: Updates of the Department’s flood hazard area mapping is required, as evidenced by the age of the current maps and the fact that land use/land cover and hydrological factors have changed dramatically since the maps were adopted. Current flood hazard area maps greatly underestimate flood risks and allow inappropriate development to continue. The Department should make specific commitments to secure monetary resources so that it can update existing floodplain delineations to reflect current hydrological and land use/land cover conditions, and to adopt new flood hazard area maps where none currently exist. (69)

RESPONSE TO COMMENTS 45 AND 46: The Flood Hazard Area Control Act rules are designed to protect the residents of the State from the increased impacts of flooding and environmental degradation that would otherwise be caused by unregulated development in flood hazard areas and riparian zones. Creating and adopting State flood hazard area mapping is a separate and independent process, which extends beyond the scope of the adopted new rules. Furthermore, updating the Department’s existing flood mapping for the entire State would be cost prohibitive. However, the Department does attempt to update flood mapping as new information becomes available through several mechanisms. To this end, the Department has included in the rules at N.J.A.C. 7:13-13.4 a process for an applicant to revise a flood hazard area design flood elevation, flood hazard area limit, floodway limit and/or other related feature on a flood hazard area delineation that has been promulgated by the Department. In addition, N.J.A.C. 7:13-13.5 provides a process for the Department to revise or suspend an existing delineation if it underestimates the extent of the floodway and/or flood hazard area and is in the best interest of public safety, health and general welfare to revise the delineation.
47. COMMENT: In addition to mitigating floodwaters, maintaining the quality of water entering wetlands and streams appears to be a major goal of these proposed new rules. Exemption status should be granted to lands that fall within the new proposed buffers if it can be demonstrated that they do not have a watershed that is contributory to the wetlands or streams within that buffer. Without such an exemption, some properties would lose all of their development rights. (58)

RESPONSE: As stated in the Department’s proposal, healthy riparian zone vegetation is essential for maintaining bank stability and water quality. The indiscriminate disturbance of such vegetation can destabilize channels, leading to increased erosion and sedimentation that exacerbates the intensity and frequency of flooding. The loss of vegetation near surface waters also reduces filtration of stormwater runoff and thus degrades the quality of these waters. Furthermore, as noted in the proposal summary at 38 N.J.R. 3971-3, riparian zones serve a number of other important functions, such as flood storage, wildlife habitat, aesthetics, recreation and education. Protecting riparian zone vegetation is therefore important even in cases where development would not directly drain into the surface water being protected. Consequently, the adopted new rules incorporate more stringent standards for development adjacent to surface waters in order to mitigate the adverse impacts to flooding and the environment that can be caused by such development.

Notwithstanding the above, the Department recognizes that a lot created prior to the October 2, 2006, proposal date of these rules could lie wholly within the adopted new riparian zones, or that access through a riparian zone must occur in order to reach the lot. N.J.A.C. 7:13-10.2 therefore includes a number of provisions allowing the construction of public and private roadways within or through riparian zones, provided a number of requirements are satisfied to demonstrate that unwarranted disturbances are avoided. The construction of one private residence is also allowed on a lot that lies within a riparian zone, provided similar requirements are satisfied. In this way the preservation of riparian zones is balanced with the needs and rights of property owners. Finally, in cases where a development activity within a riparian zone does
not meet the requirements at N.J.A.C. 7:13-10.2, an applicant can request a hardship exception from strict compliance of the adopted new rules, pursuant to N.J.A.C. 7:13-9.8.

48. COMMENT: I am fully in support of any efforts by the government to try to improve problems with flooding along the rivers. The town I live in is over 95 percent developed. There is five percent of open space left and much of that is along the river. The local government is intent on building huge buildings that cover all the property in the flood plain because it is the only place left to build. In the meantime, the water that is not flowing to the natural flood plains is ending up in residents’ basements, and people are losing property and possessions due to flooding. While we may have to accept the fact that houses are located in areas where they should never have been built, we should not be making things worse for the people who live there. (30)

RESPONSE: The Department acknowledges this comment in support of the rules. The new rules will provide protection from flooding by discouraging development in flood prone areas. In those areas where development is undertaken, the rules will ensure that the permitted development is constructed in a manner to protect existing inhabitants and their property from flood damage and to protect downstream inhabitants and property from worsened flooding resulting from upstream development in flood prone areas.

49. COMMENT: The Department should enforce its rules. “Deep pockets” should not enable someone to change the law and municipalities should be required to abide by the Department’s rules. (30)

RESPONSE: The Department’s rules apply to anyone, including a municipality, proposing regulated activities as described at N.J.A.C. 7:13-2.4 in regulated waters and areas (see N.J.A.C. 7:13-2.2 and 2.3 respectively). The Department’s rules, and not an applicant’s ability to pay, provide the standards by which the Department reviews development applications. In those cases where a project meets all standards, the project is approved. If the project cannot meet the standards, it will be denied.
50. COMMENT: The Department should not grant any stream encroachment approvals. (56)

RESPONSE: The Flood Hazard Area Control Act gives the Department the authority to “control” stream encroachments but not to eliminate them. Therefore, to the extent that the Department agrees that a proposed development in the flood hazard area or riparian zone is designed in compliance with its rules, such development will be approved.

51. COMMENT: The Department should prohibit any proposed activities in Freshwater Wetlands. There is a project at Morristown Airport proposing to disturb 8 acres of wetlands for a new hangar that should be denied. (56)

52. COMMENT: The Department should protect all wetlands, including those proposed to be disturbed in Rock GW development in Park Avenue in Florham Park. Exxon previously had few buildings on that site, and the proposed paving of the entire site should be denied since global warming results in increased runoff intensity. (56)

53. COMMENT: Stringent protection of freshwater wetlands and wildlife species areas are necessary. (56)

RESPONSE TO COMMENTS 51 THROUGH 53: To the extent that freshwater wetlands or wildlife species occur in or adjacent to the waterway, these rules do provide protection to these resources. For example, the Department is providing stringent protection for the protection of fish species and threatened or endangered species that are critically dependent on the regulated water to survive, in accordance with the adopted rules at N.J.A.C. 7:13-8.1, standards applicable to all general permits, 10.5 (requirements for a regulated activity in or along a water with fishery resources), and 10.6 (requirements for a regulated activity in a documented habitat for threatened or endangered species). In addition, at adopted N.J.A.C. 7:13-4.1(d), the Department states that compliance with the riparian zone of the Flood Hazard Area Control Act rules does not constitute compliance with the requirements of the Freshwater Wetlands Protection Act (FWPA)
rules, N.J.A.C. 7:7A. Therefore, activities in the flood hazard area that are also in freshwater wetlands are required to comply with the FWPA rules in addition to the Flood Hazard Area Control Act rules. Areas containing freshwater wetlands that are not in the flood hazard area are governed by the FWPA rules. Regarding the commenter’s suggestion that a particular project should be denied due to increases in runoff resulting from global warming, the Department requires the use of new rainfall data, as reported by the National Oceanic and Atmospheric Administration (NOAA) for all storm events, for any hydrologic calculations submitted to the Department in support of a permit application.

54. COMMENT: The removal of structures from the floodplain, the restoration of natural floodplain function, limiting development and reduction of runoff is the most effective way to address existing flooding and also provide benefits to the community. (10, 67)

RESPONSE: The Department’s Flood Hazard Area Control Act rules are adopted to control new development within flood hazard areas to protect the public from the hazards of flooding, preserve the quality of surface waters and protect the wildlife and vegetation that exist within and depend upon such areas for sustenance and habitat. Thus, the Department believes its rules will appropriately limit development within the flood hazard area to that which is properly designed and by maintaining a riparian zone, will reduce runoff. The Department encourages activities that will reduce the potential impacts of existing development that was previously, legally constructed in the flood hazard area. For example, the Department has established a permit-by-rule at N.J.A.C. 7:13-7.2(a)3 to elevate a building above the flood hazard area design flood elevation, as well as a permit-by-rule at N.J.A.C. 7:13-7.2(b)2 for the removal of a structure from a flood fringe. Furthermore, the Department has adopted a general permit at N.J.A.C. 7:13-8.7 for the relocation of a building to reduce flood damage. While the Department does not have the resources to achieve restoration of all floodplains, in some areas subject to particularly frequent flooding, programs have been initiated in the Passaic River Basin and along Assunpink Creek in the Trenton area. The Department continues to support and encourage such efforts.
55. COMMENT: While changes in terminology make the proposed new rules more consistent to other New Jersey Administrative Code terms, these changes will nevertheless cause confusion (for example, loss of the term “stream encroachment”, change from “minor” and “major” permits to “general” and “individual”). (27, 49)

RESPONSE: While initially there may be a period during which the regulated community will need to adjust to the terminology changes, any adjustment period should be minimal because the new terminology makes these rules consistent with other Department rules. This consistency means that the regulated community will be working in a familiar format. In addition, post adoption outreach and education will help to minimize the regulated community’s adjustment timeframe.

56. COMMENT: The impact of seasonal variations are not addressed in the proposed regulations. The threat of flooding is substantially lower during dry seasons than it is during seasons of high precipitation. The proposed regulations do not take into account the well-documented seasonal variations in precipitation, stream flows and groundwater levels and the diminished likelihood of flooding during dry seasons. For example, proposed regulation N.J.A.C. 7:13-7.2(e) lists six permits-by-rule for the storage of secured and unsecured materials in certain flood areas. The proposal should be amended to permit the temporary storage of materials on an interim basis in the outer fringes of regulated areas that are not subject to flooding during dry seasons. Due to the low risk of such activities being affected by floodwaters during dry seasons, it is appropriate to regulate such activities through permits-by-rule. The Department should revisit all of the proposed use restrictions set forth in the proposed regulations to identify those areas where they should be amended to account for periods where the risk of flooding is lower than at other times. (40)

RESPONSE: The Department’s rules are intended to address the year round impacts of flooding on development and presume that if proposed development can sustain flooding when it occurs, it will certainly be safe when flooding does not occur. The Department does not agree that it should allow additional, temporary activities to occur in the flood hazard area by way of permits-
by-rule. Despite the threat of flooding being lower during dry seasons this does not preclude a flooding event from occurring during unanticipated times. Further, flooding can be localized, affecting only one town or location. Consequently, in the scenario suggested by the commenter, if permittees were not extremely vigilant, secured and unsecured materials could be caught in an unanticipated, localized flood event and result in damage and other negative impacts to the waterway and downstream residents that the Department’s regulations seek to avoid.

57. COMMENT: Although the proposed new rules are well intentioned, in many cases the proposal would nevertheless deny property owners the right to build upon their land. Specifically, the proposal to increase setbacks on rivers and streams to 300 feet and along bays to 50 feet would deprive many property owners of their right to build on their land.

Consider a piece of vacant land, currently taxed at $8,200 per year and valued at $750,000, which an owner has paid taxes on since 1959. Said parcel is 75 feet deep and borders Raritan Bay. Local ordinances require a setback of 25 feet from the roadway. If the State requires a 50-foot setback from the bay, none of the land on this parcel can be built upon legally and the property owner has been denied all of their property rights. (24, 25)

58. COMMENT: While the U.S. Supreme Court recently validated the government’s right to take private property for "public good", they also require that such property can be taken only "with just compensation." Just compensation would become an issue for a jury of peers to decide, and could arguably include the value of the land plus all taxes, survey fees, brokerage fees, legal fees and all other costs related to what has gone into the property since it was purchased, plus interest. Furthermore, to require taxes to be paid all these years on vacant land, and then to later deny the right to build on this land, could equate to racketeering and fraud because the taking of the property was a concerted effort by a large group who plotted together to defraud the owner of land ownership rights. Recent opinion polls and surveys indicate that over 95 percent of our population is opposed to taking of private property by government. This would indicate that over 95 percent of all juries would be very sympathetic in deciding what "just compensation" really amounts to. What value would a jury place upon the property, combined with a value for the unfulfilled dreams and emotional stress of property owners? Is it
possible for a jury to decide if just compensation on a vacant lot could actually be ten or one hundred times the assessed value? Anything is possible. (25)

59. COMMENT: The Department’s legal staff should very carefully review all of the U.S. Supreme Court rulings on land use and property owner rights before another blunder is made. The proposed new rules would deem many lots as non-buildable, and the property owner would be entitled to “just compensation” because the State would be taking the property owner’s rights away for the public good. The words “just compensation” by no stretch of the imagination means the appraised or book value of the land. It means exactly what it says “just compensation” as the Supreme Court pointed out in its recent ruling. If our forefathers as framers of the U.S. Constitution or our current Supreme Court wanted property owners to get “market value” that is how they would have worded the constitution. But instead they used the words “just compensation” The government has no right to determine what just compensation is. That issue is entirely up to a jury of peers to decide. Hopefully the State has the billions of dollars on hand to pay “just compensation” for taking away the tens of thousands of property owners’ rights to build along rivers and streams. (24)

60. COMMENT: The State of New Jersey position on Roman Law and English Law is entirely meaningless, since neither was written into the Constitution of these United States of America. It is well known, established and recorded in history and the Bill of Rights, that our forefathers migrated from Europe to the colonies to escape tyranny and be free from Roman and English Laws. Had our forefathers been content to live under English Law, there never would have been an American Revolution. Please do not attempt to insult the American people by mentioning Roman or English Law, which we abolished when we formed our own more perfect union. Yes, the State has the power to enact laws which take private property owners rights away from them, but does the State have the tens of billions of dollars to pay "just compensation"? (25)

RESPONSE TO COMMENTS 57 THROUGH 60: The adoption of regulations that require review and approval of an activity before it can legally commence does not constitute a taking of property without just compensation. Courts have long held that the government must first be
given an opportunity to make a final determination as to what development is permissible on the
property under the relevant regulations, before a legal claim for a constitutional taking can be
brought. (See OFP LLC v. State, 395 NJ Super. 571 (App. Div. 2007); Williamson County Reg'l
County of Yolo, 477 US 340 (1986); Palazzolo v. Rhode Island, 533 US 606, 617 (2001); United
determination is made in an administrative process which commences when the property owner
submits a permit application to the Department.

The regulatory scheme contained within the Flood Hazard Area Control Act rules
provides many permits to accommodate appropriate types of development in the flood hazard
area while protecting current and prospective residents from flooding impacts. Further, at
N.J.A.C. 7:13-9.8, the Department provides a hardship exception for the issuance of an
individual permit. The hardship exception is intended for circumstances where there is no
feasible and prudent alternative to the project, the cost of complying is unreasonably high in
relation to the benefits, or the Department and the applicant have agreed to alternative
requirements that the Department determines will provide equal or better protection of the
environment and public health, safety, and welfare.

Further, an applicant who encounters local setback ordinances has the opportunity to apply
for a variance in accordance with the Municipal Land Use law. The Department is confident that
the adopted new rules achieve the statutory mandate of protecting public safety, health and
general welfare, while allowing that property can be put to appropriate uses.

61. COMMENT: The Department should consider requiring all structures along streams, rivers
and tidal waters to be elevated on strong reinforced concrete pilings to enable flood waters to
pass beneath the structure, which may include additional regulations to determine the size,
height, spacing and strength requirements for the concrete pilings. The regulations could prohibit
the placement of all impervious surfaces with the exception of concrete pilings, and instead
required crushed stone and gravel both of which would still permit rapid infiltration. Roof
downspouts can be required to be placed in underground cisterns equaling one-half gallon of
storage for every square foot of roof, which for a 2000 square foot roof would result in a 1000
gallon tank. The water can then be reused to reduce the water usage demands upon municipal water systems. If done correctly, the stored water may also be used for toilet bowls at waterfront structures to further reduce demand on municipal water systems. These recommendations will protect personal property rights by permitting all new construction, will preserve the land and scenic views of the water, will prevent flood damage to waterfront structures, and will satisfy as well as State’s responsibilities for environmental protection. (25)

62. COMMENT: A far more reasonable solution would be to require that all waterfront property owners be allowed to build if they elevate the structure on reinforced concrete pilings above expected flood levels and that none of the waterfront property may be paved over with concrete or asphalt, thus allowing stone or gravel for driveways or as fill under structures. This solution would be best because it would not get the State caught up in extensive and expensive property taking lawsuits. (24)

RESPONSE TO COMMENTS 61 AND 62: The use of pilings to reduce the flood storage displaced by structures within the floodplain has been one of the methods historically utilized to minimize the fill within the flood fringe. This is not acceptable in the floodway where the velocities are higher and where structures significantly impact the stream hydraulics. The Department recognizes the reduction in runoff associated with the use of gravel as opposed to pavement, and it is recognized in the runoff computation methodologies of the Stormwater Management rules at N.J.A.C. 7:8-5.6, which is referenced by this rule. The use of cisterns for water reuse is one of the recognized means for water conservation. However, although cisterns, permeable surfaces, and pilings can provide benefits of reduced runoff, enhanced water conservation and flood storage, these alone will not be sufficient to ensure the protection of the receiving waters addressed by these standards.

63. COMMENT: Many times municipal leaders become drunk with development, and do whatever they can to help build whatever project they can within their borders. Thus, without education of, and enforcement by local level staff and elected leaders, either projects will be built without Department oversight, or else the Department will have to review the projects to issue
the "NO" the local leaders should have issued. And it appears, from rumors and observations, that the Department doesn't necessarily say "NO" when it should. (30)

RESPONSE: It is not clear when the commenter believes the Department should have said “no” to a project but has instead approved it. The rules provide the standards by which the Department reviews development applications. The Department’s ability to say “no” to a project depends upon whether or not the project satisfies all Department rule standards. In those cases where a project meets all standards, the project is approved. If the project cannot meet the standards, the Department frequently allows the applicant the opportunity to revise the project to meet the standards before denying it. If the project is revised and meets the standards, it will be approved. If it remains inconsistent with the standards, it will be denied.

64. COMMENT: The Department is likely to encounter projects where perhaps five percent of the site is in a floodplain. Will this cause a scenario whereby flood hazard areas are whittled away one acre at a time? (30)

RESPONSE: With the exception of certain development activities listed at N.J.A.C. 7:13-10.4(d), all development in flood hazard areas must comply with the new zero-percent net fill requirements of N.J.A.C. 7:13-10.4. This requirement is designed to ensure that the overall volume of the flood fringe after development is equal to or greater than the overall volume of the flood fringe prior to development. The Department has determined that preserving flood storage is essential for ensuring that flooding will not exacerbate over time due to development. Thus, regardless of the percentage of a site that lies within a flood hazard area, all existing flood storage volume must be maintained, and so the State’s flood hazard areas will not be eliminated in small increments.

65. COMMENT: Development within Flood Hazard Areas must be more stringently controlled. (51)
RESPONSE: The Department is adopting the new Flood Hazard Area Control Act rules because it believes that the rules do provide necessary and more stringent control of development within flood hazard areas.

66. COMMENT: Governor Corzine, in his August 22, 2006, announcement of the proposed new Flood Hazard Area Control Act rules, stated that his administration will support the inclusion of funding within the Garden State Preservation Trust for the purchase of low-lying properties prone to flooding, through a program known as Blue Acres. I support this action by the administration. (51)

RESPONSE: The inclusion of funding for a Blue Acres program is not part of the Department’s Flood Hazard Area Control Act rules. However, the Department supports legislative efforts to provide funding for the purchase of properties prone to flooding through this program, and has therefore included a permit-by-rule at N.J.A.C. 7:13-7.2(b)2 to facilitate the removal of structures and fill from such areas.

67. COMMENT: There are numerous references to re-stabilization of disturbed areas that do not reference the New Jersey Standards for Soil Erosion and Sediment Control. These Standards contain detailed information for establishing permanent and temporary vegetation on disturbed soils. (55)

RESPONSE: All activities authorized under a general permit or individual permit must conform to the New Jersey Standards for Soil Erosion and Sediment Control at N.J.A.C. 2:90, pursuant to N.J.A.C. 7:13-8.1(b)5 and 11.1(c), respectively.

PUBLIC INPUT

68. COMMENT: Given the scope and potential impact of these rules, they should be subject to open discussion in public workshops that would enable stakeholder input. Why did the Department not hold public workshops on this proposal, which has significant and broad
application, given the Department’s practice of doing so in other comparably extensive
rulemakings which would also impose drastically different requirements than those under
existing rules? (1)

69. COMMENT: The proposed new rules should be abandoned or withdrawn, and a new
proposal should be published only after the Department’s intentions have been properly vetted
by various stakeholder groups. (7, 18, 33, 46, 53)

70. COMMENT: The proposed regulations should be withdrawn and the Department should
assemble a committee of qualified and experienced professionals to develop amendments to the
rules that balance the needs of local communities and the State’s mandate to protect areas from
flooding. (16)

71. COMMENT: At no time during the process of developing these new rules did the
Department conduct stakeholder workshops or public information meetings to provide an
opportunity for the exchange of pertinent information. The Department should have engaged in a
stakeholder process prior to proposing such a fundamental and far-reaching change in
regulations, and should do so prior to finalizing the proposal. Otherwise, the proposal should be
withdrawn and subject to a stakeholder process. (22)

72. COMMENT: Given the complex Federal and State regulatory scheme governing the
delivery of electric and gas delivery service, it can only be concluded that the Department should
withdraw the proposal and conduct a stakeholder process prior to advancing a regulatory
proposal that completely revises the existing regulations promulgated under the Act. To have the
Department adopt such a complete change to the existing rules, without having the full
participation of affected regulated industries, such as the electric and gas utilities and the power
generation industry, is undesirable.

In the past, the Department has conducted stakeholder processes in developing far reaching
legislative and regulatory initiatives. When those initiatives have affected the utility and
generation sectors, the commenter has been an active participant in stakeholder processes,
resulting in preserving New Jersey’s excellent and nationally recognized electric and gas reliability, while advancing important public policy initiatives. The commenter strongly believes that the proposal is such an initiative that requires a stakeholder process prior to adoption of a new rule revamping the existing regulations under the Act. If the Department wishes to continue to pursue this flood protection initiative, the Department should withdraw the proposal and conduct a stakeholder process involving affected industries. Given the impact on industries, such a stakeholder process should include discussions with representatives of New Jersey Bureau of Public Utilities to help ensure that there is no regulatory overlap, and that the proposal does not impede the continued provision of safe, adequate and proper service. (22)

73. COMMENT: A proposal of this complexity and magnitude should not be drafted without technical input from industry stakeholders. Given the questionable scientific basis, undue burden and adverse impact of these rules on targeted smart growth areas, especially redevelopment projects in proximity to waterways, these proposed new rules should either be withdrawn or the comment period be extended for at least another 90 days to provide a sufficient period of time to allow for a thorough technical analysis and discussion with all stakeholders. (46)

74. COMMENT: The proposed new rules need a longer review period. (50)

75. COMMENT: The rule proposal is too broad to be interpreted in a consistent and predictable manner as is needed for proper design and regulatory review. As such, it should be withdrawn and re-written with input from affected stakeholders, municipalities, and other governmental agencies, in a manner that would promote creative and efficient project designs. (61)

RESPONSE TO COMMENTS 68 THROUGH 75: The Department appreciates the commenters’ concerns regarding the solicitation of public input from stakeholders, the regulated community and qualified and experienced professionals to balance the needs of local communities, with that of the State’s mandate to protect areas from flooding. During development of the rules and prior to proposal, the Department did hold several advertised workshops to solicit ideas from the public, and also vetted possible rule changes with various public agencies. In addition, on August
22, 2006 the Department posted the proposed rule on the internet, and published it in the New Jersey Register on October 2, 2006. Once published, a 90 day comment period was given (30 more days than the required 60 days). Subsequent to publication, the Department held three advertised public hearings in various parts of the State to solicit public comment and input. Through this process, the regulated community had approximately 132 days to review, discuss and comment on the rule. The Department received 960 comments as a result. As such, the Department believes it acted diligently to solicit ideas and develop a rule which reflects the concerns and ideas from various sectors of New Jersey’s regulated community, and that the public had sufficient time to provide a wide range of comments covering virtually every aspect of the rules.

REDEVELOPMENT AND SMART GROWTH

76. COMMENT: The proposed new rules will severely hamper the State’s redevelopment efforts. Most existing development is located within a flood hazard area or the proposed riparian zone and the proposal does not exempt redevelopment activities. (7, 16, 18, 46, 53)

77. COMMENT: The proposed rule will have a significant negative effect on brownfield remediation efforts and redevelopment projects throughout the State. The Department has failed to provide any meaningful analysis of the potential impact of the proposed new rules on development and redevelopment activities, which should be consistent with public policy objectives and sound planning. (7, 18, 33, 46, 53)

78. COMMENT: The placement of fill is required for purposes of completing remediation and redevelopment on many brownfields sites. The proposed new rules relating to changes in the net-fill requirements and increases in the size of riparian buffers will have a chilling effect on the remediation and redevelopment of brownfields properties. The rules should contain specific provisions for brownfields redevelopment that allow flexibility in application of requirements in the rules as necessary for redevelopment of these sites. (64)
79. COMMENT: In order to justify investment in brownfields sites, it is important that redevelopment be maximized to the greatest extent possible. There are also times when capping or installation of other engineering controls is necessary up to the banks of streams depending upon the extent of contamination on a particular site. Consideration needs to be included in the rules for the particular economics of brownfields redevelopment projects. (64)

80. COMMENT: The rules should incorporate a general permit for the brownfields redevelopment, similar to a general permit 4 under the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-5.4. (64)

81. COMMENT: The proposed new rules will have a severe and chilling effect on redevelopment in the State of New Jersey. Specifically, the limited grandfathering and exceptions provisions of the proposed new rules will have an adverse impact on developers’ ability to engage in brownfields redevelopment projects. In order for the private sector to make the investments necessary to undertake the voluntary remediation of brownfields sites, there must be an associated ability to redevelop the remediated property in order to recoup the remediation and other costs, and to realize a return on those investments. As many of these projects are still in the remediation phase, it is not possible for the developer of future phases to obtain a Department land use permit or municipal building permit prior to the effective date of the new rules, thereby subjecting these projects to the proposed new rules. An example of how the proposed rule will affect redevelopment is as follows. If the planned future phases of a brownfields redevelopment project were to fall within a riparian zone, the developer would be required to apply for a flood hazard area permit, a requirement that could not have been foreseen at the time that the phased redevelopment was planned. Due to the environmental standards imposed by the proposed new rules in the riparian zone, the redevelopment would be severely constrained or impossible to build. The reduction in density of the planned redevelopment would render the project unprofitable, despite the vast amount of money invested by the developer in the site remediation phase, an outlay that was made based on the expectancy of a return on that investment resulting from the economic value generated by the future redevelopment. As such, the impact of the proposed new rules will affect the investment community’s willingness and
ability to fund and undertake important redevelopment projects in the future. Hence, site remediation will become unfeasible and sites will continue to lay fallow. Such a result directly contravenes the State Planning Act (N.J.S.A. 52:18A-196 et seq.) as well as the State’s goals of facilitating brownfields and urban redevelopment. (23)

82. COMMENT: The proposed flood hazard rules do not appear to support smart growth principles for redevelopment. As stated in the preface to the rules, Executive Order No. 4 states that New Jersey requires sound and integrated planning in order to conserve natural resources, revitalize urban centers, protect the environment and provide needed housing and adequate public services, all at a reasonable cost, and all while promoting beneficial economic growth, development and renewal. The Executive Order also encourages redevelopment, repair, rehabilitation and replacement of existing facilities. These goals are reflected, but not explicitly stated, in the proposed new rules. In fact, there is no mention of redevelopment or brownfield development. The commenter encourages redevelopment, and believes that the rules should provide incentives rather than barriers to encourage such, and should explicitly support redevelopment. An example of how to encourage redevelopment is to relax the zero net-fill requirement in previously developed areas that are within planning area 1. (3)

83. COMMENT: The Department had developed a "Smart Growth" policy and a State Development and Redevelopment Plan policy map that was promulgated with the intention that new development in rural areas would be discouraged through more stringent environmental regulations and that redevelopment in urban areas would be encouraged through a more relaxed interpretation of the environmental regulations. The new Flood Hazard Area Control Act rules fail to consider "Smart Growth" in any form, particularly for the redevelopment of the State's urban areas, including redevelopment in flood fringe areas and future riparian zones. This failure to address the needs of the municipalities with active development or redevelopment plans is a serious financial setback and will be extremely costly to the future of the redevelopment plans. In view of the planning efforts already undertaken (in many cases adopted redevelopment plans) in numerous municipalities, particularly those with urban zones, how does the Department intend to address the impact on active municipal redevelopment plans? (44)
84. COMMENT: The proposal fails to encourage “smart growth” in the areas of the State identified for hosting the State’s population, such as Planning Areas 1 (PA-1), Planning Area 2 (PA-2) and “designated centers” under the State Development and Redevelopment Plan (SRDP). The State continues to promote consistency with the SDRP, yet the proposal provides no consideration to the SDRP and the impacts of the proposal on those developed areas critical to the success of the SDRP. (19)

85. COMMENT: The proposal fails to encourage redevelopment opportunity within the urban and suburban areas of the State. In fact, redevelopment is discouraged. For example, at proposed N.J.A.C. 7:13-10.2(v), redevelopment projects are required to remove impervious surface in order to obtain approval. Consistent with the SDRP, the proposal should be amended to retain the characteristics of the existing program for PA-1, PA-2, and designated centers, including “Existing Regional Centers” such as Morristown, in order to encourage redevelopment opportunities in the State’s urban and suburban areas. (19)

86. COMMENT: The redevelopment initiatives within Somerville Borough are comprehensive in scope and size, and include the former landfill, comprised of land in the Raritan River flood zone, wetlands and other challenged areas. This site and the related planning activities have been recognized statewide as an example of smart growth. The proposed new rules will effectively stop the transformation of this unattractive, unused and contaminated site into an engine for economic, cultural and community growth. The overall impact of the proposed new rules on Somerville Borough will be devastating. In the landfill area alone, the expansion of buffers to 50 feet would mean the reduction of over one-third of what is currently redevelopable land. The same will apply to urban centers across the state, and with sites along or bisected by waterbodies, many of which serve primarily as stormwater channels. (46)

87. COMMENT: One main focus of recent Department regulations in reducing impact to ‘green fields’ has been to encourage redevelopment of town centers. How much analysis has been given to the impact of these regulations on established towns and cities throughout the State? (4)
RESPONSE TO COMMENTS 76 THROUGH 87: In developing the rules adopted at this time, the Department has sought to provide opportunities for appropriate activities, such as brownfields redevelopment and other activities mentioned by the commenters. The Department developed the adopted new rules governing development in flood hazard areas and riparian zones because it concluded that more stringent new design and construction standards are necessary to protect the residents of the State from the increasing hazards of flooding and also to preserve the integrity of the State’s surface waters. Protecting public safety, health and general welfare, as well as the environment, was the primary objective behind these new rules. Redevelopment projects, like other large projects proposed in flood hazard areas or riparian zones, can result in serious adverse impacts on flooding or the environment if not designed and constructed properly. As such, it is necessary that all construction in flood hazard areas and riparian zones, which increases risks to public safety as well as potential property damage from flooding, including brownfields and other redevelopment projects, should be subject to the requirements of this chapter.

While the Department does not believe it would be appropriate to exempt redevelopment projects from the requirements of this chapter, the new rules do include several provisions intended to encourage and facilitate appropriate redevelopment projects in a number of ways. These provisions include:

1. The new standards designed to preserve riparian zones vegetation would not impact a site that is devoid of vegetation due to previous, lawful development. Except for N.J.A.C. 7:13-10.2(v), which requires restoration of riparian zone vegetation for some redevelopment projects located within 25 feet of the top of bank or edge of water, redevelopment that will not disturb riparian zone vegetation is not affected by the riparian zone standards of N.J.A.C. 7:13-10.2.

2. The new restrictions on flood storage displacement at N.J.A.C. 7:13-10.4 allow for the creation of additional flood storage through the removal of previous, lawful development in the flood fringe. Thus, if an applicant removes old development from the flood fringe on a site, a volume of flood storage is created, which can be applied to the future redevelopment of the site. For example, if an existing building that displaces 10,000 cubic feet of flood storage is removed from the flood fringe, a new building that displaces up to 10,000 cubic feet of flood storage can
be erected onsite under the adopted new rules. Thus, redevelopment activities can take credit for the removal of unused material from the flood fringe. Only that volume of flood storage that is proposed in excess of the existing flood storage displacement onsite would need to be compensated for under the adopted new rules.

3. Several permits-by-rule are established at N.J.A.C. 7:13-7.2 which facilitate redevelopment activities without the need for a permit application to the Department, such as the reconstruction of an existing structure under N.J.A.C. 7:13-7.2(a), the removal of an existing structure under N.J.A.C. 7:13-7.2(b)2 and the repair of an existing structure under N.J.A.C. 7:13-7.2(b)4.

The Department believes provisions such as these, which seek to encourage appropriate redevelopment while ensuring that public safety, health and general welfare are protected from the impacts of flooding, establish an important balance between protection of public safety and the environment, and the goals and requirements of the Department’s Smart Growth Policy, the State Development and Redevelopment Plan, and redevelopment in urban areas.

88. COMMENT: The proposed new rules do not recognize the distinction between an undeveloped floodplain and a developed floodplain. Numerous jurisdictions throughout the country have developed separate ordinances for these two areas. The Department should withdraw the proposal and consider proposing new rules which would incorporate different design requirements for developed floodplains and undeveloped floodplains, since such a proposal would encourage redevelopment. (7, 18, 33, 46, 53) (16)

RESPONSE: The Department does not believe that drawing a distinction between developed and undeveloped flood hazard areas, and adopting separate design and construction standards in each area, would provide any benefit. Preservation of flood storage is equally important in developed and undeveloped areas, as well as protection of riparian zone vegetation, water quality and riparian habitat. As noted in the response to 76 through 87, the Department has adopted these new rules governing development in flood hazard areas and riparian zones because it has concluded that stringent new design and construction standards are necessary to protect the residents of the State from the increasing hazards of flooding and also to preserve the integrity of
the State’s surface waters. Redevelopment projects, like other large projects proposed in flood hazard areas or riparian zones, can result in serious adverse impacts on flooding or the environment if not designed and constructed properly. As such, the Department maintains that all construction in flood hazard areas and riparian zones should be subject to the requirements of this chapter. However, as further detailed in response to comments 76 through 87, the Department has incorporated provisions in the rules that do seek to encourage appropriate redevelopment. The Department believes the adopted rules establish an important balance between protection of public safety and the environment, and the goals and requirements of the Department’s Smart Growth Policy, the State Development and Redevelopment Plan, and redevelopment in urban areas.

89. COMMENT: The proposed new rules would negatively impact the master plan, updated zoning map and ordinances in Carneys Point Township, Salem County. In developing these plans, maps and ordinances, the Township has expended significant efforts to balancing its economic development, farmland preservation, environmental remediation, natural resource conservation, affordable housing development and flood mitigation, as well as other issues through sound and comprehensive planning. These planning efforts were coordinated with the State Plan and Redevelopment Plan, and include the designation of a Redevelopment Area, adoption of a Redevelopment Plan, and the execution of a Redeveloper Agreement. (16)

90. COMMENT: The proposed new rules would significantly impact the Carneys Point Township Redevelopment Area, which was the subject of considerable time and resources. A redeveloper has already begun to acquire properties to implement the Redeveloper Agreement, which includes reduction in permitted lot sizes to increase density, remediation of longstanding contamination, and recreational areas. Nevertheless, the proposed new rules would limit the developable area in Carneys Point Township, including the area on which the Redevelopment Plan depends. These changes could effectively eliminate this Redevelopment project from occurring even though it is critically necessary to the economic well being of the Township and the surrounding region. (16)
RESPONSE TO COMMENTS 88 AND 89: The commenter did not specifically identify how the requirements of the adopted new rules would negatively impact the municipal master plan for Carney's Point Township, or the Carney's Point Redevelopment Area, so it is difficult to respond with specificity to this comment. However, the Department does recognize that a number of municipalities have expended considerable time, cost and effort establishing plans and ordinances to guide future development, often in partnership with the Department and the Department of Community Affairs. Where applicants can demonstrate that a provision in the adopted new rules presents obstacles in cases where such extensive, coordinated planning has taken place, consistent with the Department's development and redevelopment goals and policies, the hardship exception provisions at N.J.A.C. 7:13-9.8 allow the Department to consider special circumstances in applying the rules. For example, exceptions may be approved for cases in which the Department determines that there is no feasible and prudent alternative to the proposed project that would avoid or substantially reduce any anticipated adverse impacts and where the exception is consistent with the reasonable requirements of the public safety, health and general welfare, or for cases in which the Department determines that the costs of strict compliance are unreasonably high in relationship to the benefits achieved by strict compliance.

91. COMMENT: The proposed new rules should not include provisions that negatively impact the implementation of Carneys Point Township’s Redevelopment Plan. The Department should support municipal and county planning efforts based on Smart growth. Changing land use regulations without evaluating the implications of these changes discourages proactive efforts at the local and regional level. (16)

RESPONSE: The Department fully supports municipal and county planning efforts that are consistent with the statutory goals and requirements of the Flood Hazard Area Control Act and will continue to recognize these planning efforts during the implementation of the newly adopted rules. The adopted rules represent a refinement of the repealed rules to better protect the natural and beneficial functions of floodplains. The adopted rules promote the public safety, health and general welfare of the public by mitigating the adverse impacts of flooding to people and property, and maintain and enhance water quality along New Jersey's surface water systems.
92. COMMENT: The new rules encourage redevelopment and are supported. Permits by rule and other provisions encourage and facilitate redevelopment of areas as long as they meet stringent design standards which will help prevent flooding. (48)

RESPONSE: The Department acknowledges the comment in support of the rules. Redevelopment is preferable to development of previously undisturbed areas, since developed areas have already lost their capability to provide the benefits of flood hazard areas and riparian zones.

DEPARTMENT WORKLOAD

93. COMMENT: Has any analysis been done as to the expected increase in applications to the Department generated by the proposed new rules? Certainly the proposed new 300-ft buffers and requirements for permits for ‘minor developments’ will require numerous properties and projects which were previously outside of the Department’s jurisdiction to obtain permits. Is there any increase in staff projected to handle this workload? By all accounts, the present staff has more work than can be handled. (4)

94. COMMENT: The Department is already unable to process permit applications to administer existing programs. The administration of these new regulations would put an undue burden on the Department and extend an already unacceptable review period for most permits regarding the development of new properties. (39)

95. COMMENT: The promulgation of almost 800 pages of new regulations belies Governor Corzine's efforts to make New Jersey more business friendly. The proposed new rules expand the area of jurisdiction and types of applications (such as line verifications, applicability determinations, general permits, etc.) at a time when the Department is struggling to manage its current workload and responsibilities. (46)
RESPONSE TO COMMENTS 93 THROUGH 95: While the adopted rules do expand the area subject to the rules, various provisions are designed to allow the Department to focus its resources on those activities with the most significant impacts. For example, the Department has developed 46 permits-by-rule, which do not require prior Department approval, and 16 general permits, which require minimal Department oversight. These provisions will allow the Department to focus staff resources on individual permit applications and issues. The Department is committed to allocating sufficient and proper staff resources to handle anticipated workloads and anticipates that it will be able to adequately handle all permit applications in a timely and reasonable fashion.

96. COMMENT: At various places throughout the proposed new rules, the Department has inserted the phrase “workload permitting” to condition the timeframe within which the Department is required to take action on various applications. The Department should have a definitive timeframe for making a decision on an application. The reference to “workload permitting” is vague and unenforceable and highly prejudicial to applicants as this discretionary standard will allow the Department to delay action on permit applications for unlimited periods of time without any repercussion. The proposed new rules should therefore include definitive timeframes for the Department to make decisions on applications. (7, 18, 33, 46, 53)

97. COMMENT: The term “workload permitting” should be deleted and replaced with a definitive timeframe throughout the rule proposal. (33)

98. COMMENT: The proposed new rules include the phrase "workload permitting" to give the Department unlimited time (with no repercussions) to render decisions on applications. Without substantial numbers of new personnel, further delays in review and action are inevitable, adding even more cost and uncertainty to the development process. At some point, there must be a relationship between the scope of regulatory programs and the cost to administer them. (46)

RESPONSE TO COMMENTS 96 THROUGH 98: As indicated in response to comments 93 through 95, the Department is committed to allocating sufficient and proper staff resources to
handle anticipated workloads and believes it will be able to adequately handle applications in a timely and reasonable fashion. The Department has utilized the new term “workload permitting” in various instances to indicate anticipated timeframes for reviewing certain types of applications that are not covered by the 90-day review period specified in the Construction Permits Law, N.J.S.A. 13:1D-29 et seq. It is the Department’s intention that these timeframes, while not binding, will give the regulated community more certainty of when they may anticipate Department responses that are not covered by the 90-day review period of N.J.S.A. 13:1D-29 et seq. The Department has also developed 46 permits-by-rule, which do not require prior Department approval, and 16 general permits with a 45-day review. Furthermore, verifications under this chapter will be subject to a 90-day review like individual permits.

99. COMMENT: All references to “default approval under this section shall not prevent the Department from taking enforcement action...” should be deleted. If the Department fails to take written action on a permit and thereby causes the application to be approved by “default”, then the Department must also be precluded from taking enforcement action. (33)

RESPONSE: The Construction Permits Law, N.J.S.A. 13:1D-29 et seq. provides that the Department must render timely decisions on permits issued under the Flood Hazard Area Control Act. If the Department fails to take action on a flood hazard area permit within the prescribed time period under this statute, the permit is deemed to be automatically approved. However, a permit approved in such a way is not a license to violate the requirements of the Flood Hazard Area Control Act rules, which have been adopted to protect public safety, health and general welfare from the hazards of flooding. An activity may be undertaken via any permit only to the extent that the Flood Hazard Area Control Act rules are not violated. This is both necessary and appropriate, since the fact that the Department has not met the requirements of the Construction Permits Law does not entitle a permittee to undertake an activity that could threaten public safety, health and general welfare.

TRAINING
100. COMMENT: Municipal engineering and building officials, as well as planning and zoning officials, will require substantial training to absorb and enforce the proposed new rules. Therefore, we request that the Department provide understandable materials and training for municipal officials on these rules. The commenter and its affiliates would be pleased to assist the Department on the education of officials. It is very important that the Department ensures that any such training is provided before these new rules become effective. (17)

101. COMMENT: The Department needs to provide training on the new rules to planning and zoning boards, municipal engineers, consulting engineers, zoning officials, building code officials, floodplain managers, county review agencies, and a host of other professionals. The commenters offer their assistance in this mission. (27, 49)

RESPONSE TO COMMENTS 100 AND 101: The Department agrees that training assists in successful implementation of any regulatory program. Subsequent to rule proposal and prior to adoption, the Department held numerous forums with interested parties to discuss and field questions regarding the rules. The Department believes that these training sessions have helped to educate many professionals and government employees regarding the salient issues of the adopted new rules. The Department also provides education and outreach for this and all of its regulatory programs through professional organizations such as the Rutgers University Office of Continuing Professional Education, which lists a number of courses of study at www.cookce.rutgers.edu. The Department encourages all who may have involvement with these adopted new rules to participate in the available training opportunities.

WATER QUALITY AND CATEGORY ONE WATERS

102. COMMENT: The provisions of the proposed new rules, which are justified as water quality measures, are duplicative of and inconsistent with the water quality provisions of the Department’s Stormwater Management rules at N.J.A.C. 7:8, and should therefore not be adopted. (7, 18, 33, 46, 53)
RESPONSE: While the commenters do not identify specifically those sections of the rules they believe are inconsistent, the Department assumes the commenters are referring to the established riparian zone, and does not agree that the rules duplicate, or are inconsistent with, other existing Department rules. As the Department stated in its summary of the proposal of the new Flood Hazard Area Control Act rules at 38 N.J.R. 3951, the Stormwater Management rules establish a 300-foot Special Water Resource Protection Area along Category One waters “only when a major development, as defined at N.J.A.C. 7:8-1.2, is proposed.” In contrast, the Flood Hazard Area Control Act rules apply to “any activity that requires approval under this chapter, which includes a larger set of activities than that which is regulated under the Stormwater Management rules.” Further, the Flood Hazard Area Control Act rules establish a 150-foot buffer and a 50-foot buffer along waters that do not receive such protection under the Stormwater Management rules. The Stormwater Management rules also include specific standards related to the quality of stormwater runoff from developed sites at N.J.A.C. 7:8-5.5, which is not included in N.J.A.C. 7:13. While both N.J.A.C. 7:8 and N.J.A.C. 7:13 derive authority from the Water Pollution Control Act, N.J.A.C. 7:13 also derives statutory authority from the Flood Hazard Area Control Act. It is appropriate, therefore, for the Department to establish additional standards under N.J.A.C. 7:13 which are designed to preserve channel integrity and prevent flooding. The Stormwater Management rules and the Flood Hazard Area Control Act rules are intended to work in unison to ensure that development will not cause or exacerbate flooding, erosion or ecological degradation of New Jersey’s surface waters. Consequently, the Flood Hazard Area Control Act rules neither duplicate nor are inconsistent with the Stormwater Management rules.

103. COMMENT: The proposed rule is in violation of the requirements for uniform protection of Category 1 Waters under the Federal and State standards at 40 CFR 131 and N.J.A.C. 7:9B-1 by proposing non-uniform standards in Category 1 waters. The adoption of different standards for Category 1 Waters is arbitrary since the proposed rules do not provide the basis for differential protection. (69)

104. COMMENT: Since the Surface Water Quality Standards at N.J.A.C. 7:9B did not include the Federally mandated implementation requirements of the Water Pollution Control Act
(WPCA), this rule (as well as other State regulations) serve to implement the WPCA mandates. The proposal fails to state that the environmental and water quality provisions of these rules legally and technically constitute implementation of the antidegradation procedures mandated by applicable Federal and State SWQS. In order to rectify this inconsistency, the commenter recommends addition of language similar to N.J.A.C. 7:8-1.5(a) reserving the Department’s authority to make case-by-case protective decisions to implement the antidegradation policies and enforce SWQS. “Nothing in this chapter shall be construed as preventing the Department or other agencies or entities from imposing additional or more stringent stormwater management requirements necessary to implement the purposes of any enabling legislation including those measures necessary to achieve the Surface Water Quality Standards at N.J.A.C. 7:9B.” (69)

105.COMMENT: The proposed new rules must require the submission of scientifically valid studies to demonstrate compliance with the following requirements of the Surface Water Quality Standards: That “existing uses shall be maintained and protected” for all waters at N.J.A.C. 7:9B-1.5(d)2. That Category One waters “shall be protected from any measurable change to water quality” under N.J.A.C. 7:9B-1.5(d)6.iii. That under N.J.A.C. 7:9B-1.5(d)6.iv., C2 waters “shall be maintained to protect the existing/designated uses, as determined by studies acceptable to the Department, relating existing/designated uses to water quality. Where such studies are not available or are inconclusive, water quality shall be protected from changes that might be detrimental the attainment of the designated uses or maintenance of the existing uses. Water quality characteristics that are generally worse than the water quality criterion shall be improved to meet the water quality criteria.” (69)

106.COMMENT: The proposed rule fails to mandate that all activity under the proposed rules comply with the requirement that Category One waters “shall be protected from any measurable change to existing water quality” at N.J.A.C. 7:9B-1.5(d).iii. This standard must apply uniformly to all Category 1 waters regardless of the basis for designating those waters (i.e. trout production, water supply, exceptional ecological, fisheries, recreational values, etc.) (69)
107. COMMENT: The proposal fails to mandate that existing and designated uses be protected from changes in water quality that may be detrimental. The proposed rule must be modified upon adoption to include this requirement. (69)

108. COMMENT: The Department may not selectively pick and choose to apply the designation of a stream for the purposes of stream encroachment permit requirements, without recognizing all the protections afforded that Category One or C2 designation; and b) second, the SWQS and antidegradation policies apply directly to all waters of the state, even in the absence of the proposed rule. Equally, those SWQS and antidegradation policies apply to actions by the Department that may impact water quality, including proposal and adoption of regulations – so the Department’s rulemaking activity is regulated by these SWQS rules. (69)

RESPONSE TO COMMENTS 103 THROUGH 108: The Flood Hazard Area Control Act is the primary enabling legislation for the Flood Hazard Area rules. However, the rules are also adopted under the authority of the Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.), the Highlands Water Protection and Planning Act (N.J.S.A. 13:20-1 et seq.), the Water Quality Planning Act (N.J.S.A. 58:11A-1 et seq.), N.J.S.A. 13:1D-33, and the Ninety Day Construction Law (N.J.S.A. 13:1D-29 et seq.). These laws provide the authority to protect water quality through varying mechanisms including the protection of buffers for the preservation of vegetation. Under the authority of these statutes, these rules are promulgated to address flooding, protect water quality, and provide protection of natural resources. Point source discharges, which are subject to the antidegradation provisions of the Surface Water Quality Standards, are regulated through another Department program, the New Jersey Pollutant Discharge Elimination System (NJPDES) program. Non-point source pollution is addressed by the Department’s Stormwater Management rules (N.J.A.C. 7:8), which are implemented through several Department regulatory programs, including the Flood Hazard Area Control Act rules. For further information on the Stormwater Management rules and how they relate to the antidegradation policy in the Surface Water Quality Standards, see 36 N.J.R. 670 (February 2, 2004). The Department notes that the Surface Water Quality Standards do not control this rulemaking. The
Flood Hazard Area Control Act rules implement the cited statutory authorities and are adopted in compliance with the Administrative Procedure Act.

109. COMMENT: The commenter supports the differentiation between Category 1 and Category 2 waters as consistent with the antidegradation policy. (69)

RESPONSE: The Department acknowledges the commenter’s support.

110. COMMENT: The Department must repeal the proposed hardship waiver provision related to the cost benefit test since such a hardship benefit conflicts with Federal Clean Water Act and New Jersey Surface Water Quality Standards regulations and would allow applicants to avoid compliance with water quality requirements solely on the basis of economic hardship. The hardship waiver would allow a lowering of water quality without any public demonstration of justification, as required by Federal rules that state that “The antidegradation policy allows States to lower water quality in higher-quality waters only if it is necessary to accommodate important economic or social development.” The proposal does not require any public demonstration of justification for lowering water quality as necessary to accommodate important economic or social development. (69)

RESPONSE: N.J.A.C. 7:13-9.8(a)2 enables the Department to approve a hardship exception if the cost of compliance with the rule is unreasonably high in relation to the environmental benefit. This provision requires the Department to consider environmental benefit, such as the maintenance of water quality, when determining whether to issue an exception. Therefore, the hardship exception does not allow an “applicant to avoid compliance solely on the basis of economic hardship” as stated by the commenter.

According to Section 4.5 (“Protection of Water Quality in High-Quality Waters”) of the Environmental Protection Agency’s Water Quality Standards Handbook, which is available at http://www.epa.gov/waterscience/standards/handbook/, the Federal Water Quality Standards do “not mandate that States establish controls on nonpoint sources” but requires the implementation of best management practices where established. The adopted riparian zone requirements are
considered a best management practice that is designed to address nonpoint source pollution and their implementation is, consistent with Federal regulation. In addition, as the commenter correctly notes, the Federal Water Quality Standards also allow for the State to accommodate some economic and social development where it finds it is necessary. The Department uses the hardship exception to determine when a deviation from the strict compliance with the rule, including the Riparian Zone provisions, is necessary. It should also be noted that pursuant to N.J.A.C. 7:13 – 10.2(s) a hardship exception will require mitigation so that the impacts are balanced against the environmental benefit of mitigation.

The provision cited by the commenter applies to point source discharges regulated pursuant to the New Jersey Pollutant Discharge Elimination System (N.J.A.C. 7:14A). The Department may not issue a NJPDES permit that would lower water quality unless the Department determines that the project is necessary to accommodate important economic or social development. The Department believes that the hardship waiver and the requirement to implement mitigation measures is an appropriate adjustment to the BMP imposed on regulated activities in the floodplain.

**IMPACT ON MINING INDUSTRY**

111. **COMMENT:** The proposed regulations should contain an exemption for extractive industries such as mining. The removal of sand, gravel, rock and other earthen materials from the subsurface results in increased flood storage capacity of the mined area. Therefore, quarries are advantageous in that they help control water during flooding. For this reason, mining operations in New Jersey present little or no adverse impact on the environment in terms of flooding and the proposed regulations should contain a broad exemption for all extractive industries such as mining. (40)

**RESPONSE:** The Flood Hazard Area Control Act rules are concerned not just with flooding, but also with impacts to water quality resulting from activities in or adjacent to waterways, and with protecting threatened or endangered species that are critically dependent on the regulated water to survive. The regulation of the riparian zone is very important for keeping sediments, nutrients
and pollutants, which may result from mining activities, away from the adjacent waterbody. Consequently, the Department does not agree that the Flood Hazard Area Control Act rules should contain an exemption for mining activities.

112. COMMENT: Some requirements of the Flood Hazard Area Control Rules will affect ongoing mining operations, including reclamation, if strict application of riparian zones are implemented. Regulatory delays associated with permitting requirements and lengthy review procedures may delay reclamation activities that are intended to mitigate for adverse environmental impacts of mining. (26)

RESPONSE: Most excavated areas for mining operations would not likely be in areas regulated under this chapter. However, if a mining operation involves fill in a flood hazard area or removal of riparian zone vegetation, then the mining activity would be subject to the requirements of this chapter. This is appropriate, since the disturbance and fill associated with mining operations could adversely impact flooding or the environment, and therefore should be subject to the requirements of this chapter in order to protect public safety, health and general welfare.

The adopted rules however, contain permits-by-rule for various activities within the riparian zone that may be used for mining activities in certain cases. The adopted permits-by-rule do not require submittal of applications to the Department so long as the criteria outlined in the permit-by-rule is met. For example, the permit-by-rule at N.J.A.C. 7:13-7.2(a)2 allows for certain activities at or below grade in a previously-disturbed riparian zone, which could apply to mining operations. Furthermore, the permit-by-rule at N.J.A.C. 7:13-7.2(e)4 allows the storage of unsecured material in a flood hazard area for ongoing commercial facilities, such as a mining operation that stores piles of gravel in a flood hazard area. These types of authorizations were established to facilitate the application process for projects that have little to no adverse environmental impacts and for projects with beneficial environmental impact such as for those activities that may be associated with mining reclamation. Mining operations that exceed the requirements of a permit-by-rule under this chapter would be subject to the individual permit requirements of N.J.A.C. 7:13-10 and 11.
113. COMMENT: New Jersey already regulates the environmental, health and safety aspects of mining operations through such programs as the Mine Safety Act, N.J.S.A. 34:6-98.1, et seq., Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., Water Quality Certification (Section 401 of the Federal Clean Water Act), Federal Consistency Determinations (Section 307 of the Federal Coastal Zone Management Act) and through the Pinelands Comprehensive Management Plan, N.J.A.C. 7:50-1.1 et seq. These programs are sufficient to ensure that permitted mining operations do not adversely impact their surrounding environment. (40)

RESPONSE: Each of the laws cited by the commenter has its own scope and authority, and mining activities which fall within the scope and authority are regulated. The scope and authority of the Flood Hazard Area Control Act empowers the Department of Environmental Protection to delineate and mark flood hazard areas, to adopt land use regulations for the flood hazard area, and to control stream encroachments (see N.J.S.A. 58:16A-50b). Therefore, to the extent that mines are located within the jurisdiction of the Flood Hazard Area Control Act rules, they are regulated and must comply with the appropriate permitting standards.

IMPACT ON PUBLIC UTILITIES

114. COMMENT: The proposed new rules unnecessarily impose a new and highly complex regulatory program on utility functions that are already comprehensively regulated under a number of other State and Federal programs and which are conducted in conformance with recognized engineering standards and codes. When it readopted the former rules in February 2006 without change, the Department itself concluded that, “Based on a review of the programs of other states, the design and construction standards contained in these rules, as well as the limits on flood storage displacement, are among the most stringent in the nation. The Department believes that the existing rules satisfactorily carry out the directives of the Flood Hazard Area Control Act.” (See 38 N.J.R. 948 response to comments 15 through 22). We see no change in circumstances that dictate the need for the modifications included in these proposed new rules. (1)
115. COMMENT: The proposed regulations, as they would apply to much of New Jersey’s electric utility transmission and distribution infrastructure, are unexplained and unjustified and therefore an unlawful departure from the current Flood Hazard Area Control regulations. That conclusion is directly supported by the Department’s own conclusion in February 2006 that utility lines and poles should remain exempt from these regulations. Aside from that fundamental shortcoming, the proposed regulations also err by: (1) Ignoring the fact that the purpose of the Flood Hazard Area Control Act is inapposite to many (if not essentially all) aspects of electric utility transmission and distribution activity; and (2) Unnecessarily imposing a new and highly complex regulatory program on electric utility functions that are otherwise comprehensively regulated under a number of other State and Federal programs. These improper actions could have been minimized (or avoided entirely) through interaction between the Department and the affected stakeholders prior to publication of the proposed regulations. (36, 42)

RESPONSE TO COMMENTS 114 AND 115: The adopted new rules are the only rules in New Jersey that specifically and thoroughly regulate activities in flood hazard areas. As such, they are necessary to protect human health and the environment by alleviating and minimizing damage from flooding. In promulgating the Flood Hazard Area Control Act rules, the Department has established requirements reflecting the degree of risk to the health, safety, general welfare and the environment associated with a proposed activity. Reflecting this intent, in the case of utilities, the adopted new rules at N.J.A.C. 7:13-7.2(c) provide six permits-by-rule for activities associated with the construction and maintenance of utility lines. These permits-by-rule cover overhead utility lines on poles and towers, as well as underground pipes and cables. Prior notification of the Department is not required before undertaking the activities authorized under these permits-by-rule if all parts of the proposed activities satisfy the requirements specified in the rules. In addition, the adopted new general permit 8 allows the construction of a utility line across or along a water draining less than 50 acres. This general permit, which has minimal Department review, along with the permits-by-rule, should cover many activities undertaken by utility companies. Any other activities will be subject to the individual permit at N.J.A.C. 7:13-
11.9. to assure that they are conducted in a manner that protects the public safety, health, general welfare and the environment as required by the statutory framework these rules implement.

Finally, while the Department did make the statements cited by the commenter in response to comments 16 through 21 regarding the sufficiency of the previous rules on readoption of those rules at 38 N.J.R. 947, in that same response the Department went on to indicate, “Nevertheless, the Department also recognizes the importance of properly analyzing and revising these rules in order to ensure that the most current, stringent and reasonable standards are in place to protect the public from the hazards of flooding as well as to ensure the health of the State’s riparian systems. To this end, the Department has taken great care to analyze the nature and causes of both flooding and the degradation of riparian corridors in order to propose a comprehensive repeal and repromulgation.” The Department explained that the readoption was intended to avoid expiration of the rules to continue necessary regulation of activities in the flood hazard area and indicated the anticipated schedule for proposal of the repeal and repromulgation of the chapter. The Department’s current adoption reflects the results of that analysis. Furthermore, the severe and repeated flooding along the Delaware River in 2005 prompted Acting Governor Codey to form a Flood Mitigation Task Force to study and implement measures to reduce future impacts of flooding in New Jersey communities. On August 22, 2006, Governor Corzine released the final report of this task force, which concluded that the repealed Flood Hazard Area Control rules required major reforms in order to safeguard the State’s residents from the increasing hazards of flooding. In response to this report, the Department proposed new rules on October 2, 2006, which incorporated the recommendations of the Flood Mitigation Task Force.

116.COMMENT: Due to numerous new regulatory standards and prohibitions regarding the placement and maintenance of utility lines and easements, the proposed new rules violate New Jersey’s Administrative Procedure Act, N.J.S.A. 52:14B-1, et seq., and are contradictory and unnecessary. The Department’s deficiencies under this proposal require publication of a revised proposal to amend the proposed new rules, as well as a new public notice and renewed opportunity for public comment. (36, 42)
117. COMMENT: The proposal violates New Jersey’s Administrative Procedure Act and is otherwise duplicative and unnecessary. The proposal is a complete change in the way utilities and utility related equipment are regulated under the Act. (22)

RESPONSE TO COMMENTS 116 AND 117: The Flood Hazard Area Control Act rules are promulgated under the authority and to implement the mandates of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq., and the Construction Permits Law, N.J.S.A. 13:1D-29 et seq. In compliance with the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1, et seq., the Department summarized the proposed new rules, analyzed anticipated impacts of the rules and sought public comment on all aspects of the rules, including provisions that may impact utilities, by scheduling three public hearings and providing a 90 day public comment period. Accordingly, after consideration of all comments received and with changes reflected herein, in compliance with the Administrative Procedure Act the Department is adopting these new rules.

118. COMMENT: Although the Department’s current rules categorize utility poles and towers in floodways and flood fringe areas as non-regulated uses under N.J.A.C. 7:13-1.3(e)2viii and (f)2iv, the proposed amendments would unlawfully change course and require extensive regulation of electric utility activities that have been excluded from the existing rules for many years. Furthermore, the proposal offers nothing to explain the Department’s changed position with regard to electric utility infrastructure in floodways and flood fringe areas. (36, 42)

119. COMMENT: Currently, the Department generally categorizes utility poles and towers in floodways and flood fringe areas as non-regulated uses, under N.J.A.C. 7:13–1.3(e)2.viii and (f)2.iv. The proposal significantly changes this long-standing and appropriate precedent, and requires extensive regulation of utility activities that have been excluded from the regulations for over 20 years. The Department does this without explanation of, or justification for, its change in course. (22)
RESPONSE TO COMMENTS 118 AND 119: Many of the “non-regulated” uses under repealed N.J.A.C. 7:13-1.3(e) and (f) have been adopted in the new Flood Hazard Area Control Act rules as permits-by-rule under new N.J.A.C. 7:13-7.2. If the proposed activity satisfies the criteria for the particular permit-by-rule, prior written approval from the Department is not required. The Department believes that it is appropriate to consider all construction activities within flood hazard areas to be regulated under this chapter, and to then adopt various permits-by-rule to cover those activities which the Department has determined will not adversely impact flooding or the environment. For example, whereas repealed N.J.A.C. 7:13-1.3(e)2viii exempted the placement of utility poles in a floodway, the adopted new permit-by-rule at N.J.A.C. 7:13-7.2(c)1 allows the placement of utility poles in a floodway with certain restrictions. The Department does not consider the establishment of permits-by-rule in place of previously non-regulated uses to be “extensive regulation of electric utility activities.” Where there has been any increase in regulation under the new rules, the review or conditions required are those believed to be necessary to protect the public safety, health, general welfare and the environment.

120.COMMENT: The proposed FHA regulations contradict other State and Federal regulatory standards and otherwise lack factual justification or basis. For example, the proposed restrictions on tree maintenance (pruning, cutting, etc.) at N.J.A.C. 7:13-7.2(c), contradict the recent Vegetation Management (Tree Trimming) Standards of the New Jersey Board of Public Utilities (BPU). See Adopted Amendment: N.J.A.C. 14:5-6.1, et seq., 38 N.J.R. 5396 (December 18, 2006). In furtherance of those purposes, the BPU’s tree trimming regulations provide, among other things, that electric utilities must ensure compliance with the following: a clear area is required under transmission lines wide enough such that no vegetation or parts of vegetation will grow or fall into the transmission lines; no vegetation can be taller than 15 feet at maturity anywhere within a transmission line right-of-way; no woody plants that naturally mature above three feet are allowed in the “wire zone” without prior notice and inspection by the electric utility’s vegetation manager; no woody plant species that naturally mature above 15 feet are allowed in the “border zone”; and only grass vegetation not exceeding a height of 18 inches is permitted within three feet of any structure in a right-of-way. However, N.J.A.C. 7:13-7.2(c)1iii
and 2iv state that no trees are to be “cleared, cut or removed in a riparian zone” in association with the placement of a utility pole or open-frame tower, which directly contradicts the requirements in N.J.A.C. 14:5-8.6(e), supra, to remove vegetation under a variety of very common conditions. Similarly, a prohibition on application of herbicides as part of property maintenance under N.J.A.C. 7:13-7.2(b)1ii(4) would hamstring electric utilities’ ability to implement the requirement in N.J.A.C. 14:5-8.6(e)8 to eliminate “from the entire right of way” invasive species that are not indigenous to New Jersey where such species pose a hazard to electric transmission infrastructure. (36)

121. COMMENT: This proposal directly conflicts with utility industry standards necessary for the safe and reliable transmission of electricity throughout the State and the Northeast. As the Department is aware, safe and reliable transmission is a very important issue facing the utility industry. Recently, the New Jersey Board of Public Utilities (NJBPU) and the Federal government proposed and enacted new regulations which will help support the utility industry’s ability to provide for the safe and reliable transmission of electricity. NJBPU has enacted vegetation management regulations requiring electric utility companies within the State of New Jersey to remove all vegetation from a transmission right-of-way which has the ability to grow to a height exceeding fifteen (15) feet at mature growth. N.J.A.C. 14:5-8.1 et seq. These regulations were enacted to avoid an area wide regional black-out similar to the August 14, 2003 blackout of the Northeast which was caused, in significant part, by overgrown trees in the area of overhead transmission power lines in Ohio. See U.S. Canada Power System Outage Task Force: Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations, April, 2004 (“Task Force Report”). As stated by the Task Force:

Vegetation maintenance is critical to any utility company that maintains overhead energized lines. It is important to the August 14 events because electric power outages occur when trees, or portions of trees, grow up or fall into overhead power lines. While not all outages can be prevented (due to storms, heavy winds, etc. . . .), many outages can be mitigated or prevented by managing vegetation before it becomes a problem. When a tree contacts a power line it causes a short circuit, which is read by the lines and is relayed as a ground fault. Direct physical contact is not necessary for a short circuit to occur. An electric arc can occur between a part of a tree and a
nearby high-voltage conductor if a sufficient distance separating them is not maintained. Arcing
distances vary based on such factors such as voltage and ambient wind and temperature
conditions. Arcs can cause fires as well as short circuits and line outages.

Furthermore, the Federal Energy Regulatory Commission is currently contemplating
proposing its own vegetation management regulations for transmission right-of-way. (22)

122. COMMENT: PSE&G is a member of PJM (Pennsylvania-Jersey-Maryland Regional
Transmission Organization). PJM has developed design criteria, which are necessary for every
new transmission facility constructed within the PJM network. Pursuant to PJM’s Design of
Overhead Transmission Lines 69kV and above, all design and operations must meet the
requirements of the National Electric Safety Code, which provide a clearance requirement from
vegetation of 16 feet. See PJM Design and Application of Overhead Transmission Lines 69kV
and Above, Section 5.0 (Revised, Sept. 9, 2001)(“PJM Design Criteria”). The appropriate width
of vegetation must be removed from a transmission right-of-way to assure proper blow-out (i.e.
lateral swing of transmission lines during high winds) of the transmission circuits. Furthermore,
PJM’s design criteria require transmission right-of-ways have widths of 150 feet for 230kV lines,
and a width of 200-300 feet for 500kV lines. These widths are required to be cleared of all
vegetation to allow access to the right-of-way for line repair and maintenance. In order to
perform this repair and maintenance, it is necessary for PSE&G to access the right-of-way using
an 80,000 pound truck with a turning radius of seventy-five (75) feet. There are many other
Federal and State regulations, and industry safety and design standards that conflict with this
proposal, which clearly have not been considered. (22)

RESPONSE TO COMMENTS 120 THROUGH 122: The Department recognizes that there will
be situations where applicants are required by other regulatory agencies to conduct activities that
may be inconsistent with the provisions of the newly adopted Flood Hazard Area Control Act
rules. In recognition of these situations, the regulatory provisions in the FHACA rules,
specifically the hardship exception provisions at N.J.A.C. 7:13-9.8, allow the Department to
consider special circumstances in applying the requirements of the rules. The Department may
approve exemptions from strict compliance with the requirements of the adopted new rules for
cases in which the Department determines that there is no feasible and prudent alternative to the proposed project which would avoid or substantially reduce any anticipated adverse impacts and where the waiver is consistent with the reasonable requirements of the public safety, health and general welfare. The Department's implementation of the Flood Hazard Area Control Act rules will continue to acknowledge the critical importance of electrical transmission systems and the necessity for utilities to maintain infrastructure, including electrical transmission lines and rights-of-way, through a program of appropriate vegetative management within these areas.


RESPONSE: The regulations, statutes, and permits cited by the commenter regulate resources other than those regulated by the new adopted rules. For instance, the Freshwater Wetland Protection Act Rules, N.J.A.C. 7:7A regulate activities in freshwater wetlands and their buffers (transition areas), and do not address flood hazard area and riparian zones. While it may be true that at times transition areas and riparian zones overlap (for instance, transition areas adjacent to stream related wetlands may occupy the same lands as a stream related riparian zone), often times these areas are mutually exclusive. As such, separate regulations are required for Department oversight of environmentally protective riparian zones, and Flood Hazard areas that serve to mitigate the damage caused by flooding.

124. COMMENT: There is a serious gap between the purpose of the Flood Hazard Area Control Act, which is focused on hazards to public safety, health and general welfare due to flooding, and the requirements that the proposed new rules would impose on maintenance and operation of public utility infrastructure, such as prohibitions on the use of herbicides, restrictions on
vegetation management, and mandatory use of underground power lines, such as described at N.J.A.C. 7:13-7.2. Thus, while it is incorrect to suggest that pollution prevention is a focus of the Flood Hazard Area Control Act, see 38 N.J.R. at 3960/2 (Department’s FHA rulemaking proposal suggests pollution prevention as a justification for the proposed amendments), the more important point for present purposes is that pollution prevention is already comprehensively addressed by other programs. (36, 42)

RESPONSE: The Flood Hazard Area Control Act rules are promulgated under the authority of and implement the mandates of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., as well as the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq., and the Construction Permits Law, N.J.S.A. 13:1D-29 et seq. These statutes provide the Department with the authority to regulate under these rules activities that can adversely affect water quality. In addition, the Department has historically prohibited groundwater pollution and adverse effects on wells under repealed N.J.A.C. 7:13-2.6(a)2. The adopted new rules are broadened in order to prevent adverse effects to groundwater, in addition to pollution or adverse effects on wells.

125. COMMENT: The Department’s proposed expansion of the Flood Hazard Area Control Act rules ignores recognition by the Department of the efficacy and positive environmental stewardship of other regulatory and non-regulatory (utilities’ own voluntary) initiatives in protecting the same interests to which the proposed expansion of the regulations is directed, for example, maintaining natural vegetation, and protecting slopes and drainage areas. A recent example (with which the Department is familiar) would be the Best Management Practices (BMPs) for Atlantic Electric’s Oyster Creek to Cedar 230 kV Transmission Line Project. Those BMPs implement Atlantic Electric’s Integrated Vegetation Management (IVM) program (the IVM program retains compatible vegetation to provide wildlife food and cover, streamside riparian buffers and rare plant habitat). (36)
RESPONSE: The Department recognizes and supports environmental stewardship of any and all agencies, and the newly adopted Flood Hazard Area Control Act rules do not run counter to sound management of vegetation and habitat throughout New Jersey. In fact, provisions of the newly adopted rules seek to enhance this protection and management, such as the permit-by-rule at N.J.A.C. 7:13-7.2(b)1, which allows for many activities associated with normal property maintenance, the six permits-by-rule at N.J.A.C. 7:13-7.2(c) to facilitate certain construction projects by utilities, and the individual permit provisions at N.J.A.C. 7:13-11.9(f), which cover any maintenance, repair and replacement activities within an entire utility network for a five-year period.

126.COMMENT: The design of substations does not displace a significant volume of water. Therefore, substations should also be exempt from regulation under the proposed new rules. Substations are necessary at designated intervals for electric power transmission and distribution systems, as determined based on good engineering practice and established criteria for electric power transmission and distribution systems. Such structures are essential to operation of the bulk power system and their location is dictated by engineering constraints from which there can be little, if any, variation. For example, see the Highlands Water Protection And Planning Act Rules at N.J.A.C. 7:38-9.5(a)3.iv, which recognizes the relationship of power substations to linear development. (36, 42)

127.COMMENT: The Department outlines a proposal that treats all flood hazard areas equally, both fully urbanized and undeveloped, without regard to each area’s differing development. This blanket regulatory policy discounts the fact that previously constructed infrastructure related to energy generation and delivery systems represents a significant investment on behalf of ratepayers that must be maintained, repaired and replaced in a timely and effective manner to maintain electric and gas safety and reliability. (22)

128.COMMENT: Alternative actions, relocation or construction of new or replacement utility line infrastructure outside the flood hazard zone will be impracticable in most cases due to cost and will also often require actions that will result in greater environmental impacts. Importantly,
the utility infrastructure represents a significant investment that needs to be maintained, repaired and replaced in a timely and effective manner in order for each utility to provide safe, reliable service to all of the citizens of this State. Within this proposal the Department should acknowledge the need for utilities to maintain and upgrade their existing system of infrastructure, similar to the way this was recognized in the Highlands Water Protection And Planning Act Rules. (42)

RESPONSE TO COMMENTS 125 THROUGH 128: Many energy related structures referred to by the commenters have not historically been exempt from the Flood Hazard Area Control Act rules, and the Department believes that they should not now be exempt even if they are in already developed areas. Substations and other structures in flood hazard areas can obstruct flow in floodways and cause flood storage displacement in flood fringes. Improperly constructed structures can be subject to flooding which could displacement or damage the structure and cause unintended offsite impacts. Furthermore, substations and other structures in the riparian zone can cause adverse environmental impact through clearing of vegetation and displacement of habitat. The Department therefore believes it is appropriate that energy related structures in flood hazard areas and riparian zones, just like any development, adhere to the requirements of the adopted new rules. The Department believes, however, that with proper planning and cooperation between the Department and utility companies, the maintenance, repair, relocation and replacement of energy generation and delivery systems can be completed in a timely and effective manner.

129. COMMENT: The proposal is too broad, goes well beyond providing the flood protection it is intended to provide, may cause significant safety and reliability issues, and may be inimical to the activities essential to provide electric generation service and safe, adequate and reliable electric and gas transmission and distribution service. (22)

RESPONSE: As noted in the response to comments 15 and 16, the Flood Hazard Area Control Act rules are promulgated under the authority and to implement the mandates of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., the New Jersey Water Pollution Control
Act, N.J.S.A. 58:10A-1 et seq., the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq., and the Construction Permits Law, N.J.S.A. 13:1D-29 et seq. The authority of the Department to deal comprehensively, in a single set of regulations, with problems such as flood hazards, water pollution and preservation of plant and animal life dependent upon waters has been upheld. Society for E.E.D. v. New Jersey DEP, 208 N.J. Super. 1 (App. Div. 1985). The Department has chosen in the past, and continues in the adopted new rules, to deal with these issues comprehensively in the Flood Hazard Area Control Act rules. The Department does not believe that either the repealed rules or the adopted new rules will preclude the provision of safe, reliable and adequate electric and gas transmission and distribution services and will work with utilities to assure that such services can be provided in a manner that provides appropriate protection to public safety, health, general welfare and the environment.

130. COMMENT: The Department should recognize that utility activities and infrastructure, specifically linear development, serve the greater public good and that by their very nature must pass over, under or through the flood hazard area. For most public utility services (electric, gas, water, etc.) the utility infrastructure must be physically connected to the customers they serve via wires or pipelines. Public utilities do not dictate where their customers (residential, commercial, industrial or institutional) construct their respective homes or facilities, but regardless of where such facilities are located, the public utility has a legal obligation to run its wires or pipelines to each facility to serve that customer. Serving those customers will inevitably require utility infrastructure to cross a waterway. Alternative actions, relocation, or construction of new facilities outside the flood hazard zone will be impracticable in most cases due to the nature of utility facilities, will significantly increase the cost to utility ratepayers, and will also often require actions that will result in greater environmental impacts. (22)

131. COMMENT: The need for new transmission facilities is an extremely important issue as evidenced by the recent Federal legislation creating national interest electric transmission corridors (16 U.S.C. 824). This proposal will limit the ability of electric utility companies to propose new transmission right-of-ways within a “riparian zone”, and will curtail the ability of
utility companies to locate new facilities in the most appropriate areas. Likewise, the new proposal will impede new transmission facilities because the proposal directly conflicts with the requirements for new transmission facilities from an industry design standard. (22)

132. COMMENT: Given the unique considerations in the utility industry, the Department should acknowledge the need for utilities to maintain and upgrade their existing system of infrastructure similar to the way this was recognized in the Highlands Rules. See N.J.A.C. 7:38-2.3(a)11. In fact, the Department’s recent re-adoption of the Flood Hazard Area Control regulations unequivocally restated its previous conclusion that placement of utility poles, jacking of utility lines, etc., “are of an insignificant nature and do not exacerbate flooding or adversely impact the environment,” and “accordingly, should remain exempt from requiring a permit.” Rule Adoptions, Readoption: N.J.A.C. 7:13, Flood Hazard Control Area, 38 N.J.R. 947, 949/2 (Feb. 6, 2006). The Department further explained its position as follows: “Examples of activities that the Department has historically exempted … include the placement of utility poles, jacking of utility lines beneath channels and the construction of minor residential additions and/or appurtenant structures on previously disturbed areas that do not displace a significant volume of flood storage. Since these activities, when done properly, do not contribute to flooding or environmental degradation, the Department is not considering removing all such exemptions from the chapter.” (22)

RESPONSE TO COMMENTS 130 THROUGH 132: The Department does not intend to force public utilities to remove or relocate structures outside flood hazard areas and riparian zones. The Department recognizes that these structures must often be located in regulated areas and, as indicated in response to comments 114 and 115, has created a number of permits-by-rule at N.J.A.C. 7:13-7.2(c) to facilitate various routine activities. Furthermore, a utility company can apply for an individual permit under N.J.A.C. 7:13-11.9(f) to cover any maintenance, repair and replacement activities within an entire utility network, which is not covered under the adopted permits-by-rule, for a five-year period. The Department believes that the adopted new rules are appropriately sensitive to the needs of the energy industry, while assuring that potential impacts
from activities are sufficiently reviewed to assure protection of public safety, health, general welfare and the environment.

133. COMMENT: The proposal does not take into consideration the many Federal and State regulations, and industry standards to which the utility industry is currently subject. In fact, many of the proposed amendments directly conflict with safety and reliability standards in the utility industry. For example, pursuant to United States Department of Transportation Pipeline Safety Regulations, each underground natural gas transmission and distribution line must have valves and other supporting appurtenances spaced along the transmission line necessary for safe and reliable operation. 49 CFR Part 192.179 (a) et. seq. These requirements are minimum standards and are typically exceeded by PSE&G due to its long-standing practice and commitment to providing additional safety requirements. Additionally, 49 CFR Part 192.179 states:

(b) Each sectionalizing block valve on a transmission line, other than offshore segments, must comply with the following: (1) The valve and the operating device to open or close the valve must be readily accessible and protected from tampering and damage. (2) The valve must be supported to prevent settling of the valve or movement of the pipe to which it is attached.

Furthermore 49 CFR Part 192.181- Distribution line valves - requires:

(a) Each high-pressure distribution system must have valves spaced so as to reduce the time to shut down a section of main in an emergency. The valve spacing is determined by the operating pressure, the size of the mains, and the local physical conditions. (c) Each valve on a main installed for operating or emergency purposes must comply with the following: (1) The valve must be placed in a readily accessible location so as to facilitate its operation in an emergency. (2) The operating stem or mechanism must be readily accessible.

As a result of these requirements, valves and other supporting equipment may be required to be located within the riparian and/or flood hazard areas. While the impact of this equipment on floodplain capacity will be de minimis, readily available access is required for maintenance and security surveillance, which may result in minimal permanent vegetative disturbances to the riparian zone. (22)
RESPONSE: While the Department acknowledges the many Federal and State requirements that govern energy transmission, the Department does not believe that these rules alone adequately prevent adverse impacts to flooding or the environment, which may be caused by the placement and maintenance of public utility infrastructure. Through the Flood Hazard Area Control Act rules, the Department is mandated to control flooding and protect the riparian zone environment around New Jersey’s surface waters from adverse impacts. The Department believes the new rules adequately balance the needs of public utilities to construct and maintain infrastructure with the preservation of the environment and the protection of the public from the hazards of increased flooding.

134. COMMENT: The current proposal, if adopted, or any proposed rule developed pursuant to a stakeholder process, should at a minimum provide an exemption from requiring a permit for utility services. Accordingly, similar to the exemption for public utilities in the Highlands Act regulations, the following new exemption is suggested: “Projects or activities involving the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights-of-way, or systems, by a public utility are exempt from the requirements of this chapter, but are required to comply with all other Federal, State and local requirements that may apply to the proposed project”. (22)

RESPONSE: The Department does not believe that it is appropriate to exempt the public utility industry from regulation under the adopted new rules, since improperly constructed infrastructure can exacerbate flooding risks and cause adverse impacts to the public safety, health, general welfare and the environment.

DATUM

135. COMMENT: Since most surveys are now performed using the NAVD 88 datum, and the Federal Emergency Management Agency's flood studies are now being performed in NAVD 88, it is suggested that the rules be changed to require that the topography reference the datum used
in the State adopted study, which in the future may be NAVD 88 instead of NGVD 29. This may facilitate the use of the NAVD 88 datum for new State adopted studies. (9)

136. COMMENT: The current standard for topographic mapping is NAVD 1988 datum. The references to NGVD should be deleted throughout the rule proposal. (33)

137. COMMENT: The Department should update the datum to NAVD 1988 instead of continuing to reference NGVD 1929. (27, 49)

RESPONSE TO COMMENTS 135 THROUGH 137: The Department recognizes that topographic information in use today varies and that not all mapping refers to the same geodetic datum. The National Geodetic Vertical Datum of 1929 (NGVD 1929) is the vertical control datum established for vertical control in the United States by the general adjustment of 1929. The North American Vertical Datum of 1988 (NAVD 88) is the vertical control datum established in 1991 by the minimum-constraint adjustment of the Canadian-Mexican-U.S. leveling observations.

All of the Department’s flood hazard area maps, promulgated under Appendix 2, reference NGVD 1929. As such, it is essential that all topography submitted to the Department either conform to NGVD 1929 or else show the appropriate conversion to NGVD 1929. This is necessary because, without reference to the same datum, the Department will not be able to determine in many cases whether the flood hazard area limits on a submitted drawing are accurate. It is furthermore the Department’s experience that conversion between NGVD 1929 and NAVD 1988 is not difficult or expensive. Therefore the Department believes that requiring the use of, or a reference to, NGVD 1929 is appropriate.

COASTAL ISSUES

138. COMMENT: With regard to coastal flood hazard areas, the rule proposal stretches the Department jurisdictional limits of regulatory review to include a duplicative permitting layer that is presently administered efficiently by the Federal Emergency Management Agency
(FEMA), National Flood Insurance Program (NFIP) and local building officials. In this regard, the proposed new rules provide vast inconsistencies with the FEMA NFIP. There is a general missing theme in the rule proposal that is necessary when administering coastal construction as done under the current FEMA NFIP. The proposed rule seems to shoehorn stream encroachment permitting requirements for fluvial stream corridors into the coastal regions, without sufficient consideration between the two. (61)

RESPONSE: The NFIP is not a permitting program as suggested by this commenter. Rather, the NFIP provides a mechanism to insure developed properties located in a floodplain against damages caused by floods. FEMA does not require, review or approve/disapprove of any development applications. In order to participate in and qualify for insurance under the NFIP, municipalities must adopt and enforce minimum floodplain management ordinances and minimum design and construction standards identified by FEMA. However, post-storm surveys and studies by FEMA and numerous professionals have documented that these minimum construction standards are insufficient to fully protect people and property from flood damages. It is for this reason that FEMA at 44 C.F.R. 60.1(d) encourages municipalities and states to adopt construction standards that exceed these minimum NFIP standards. The Department has adopted the new Flood Hazard Area Control Act rules, consistent with the statutory requirements of the Flood Hazard Area Control Act to control development within floodplains in order to avoid or mitigate the detrimental effects of development upon the environment and the public safety, health and general welfare of the people of the State.

139. COMMENT: There will be many instances where Department review will be required in coastal regions, causing undue burden on individual property owners and municipalities. For instance, N.J.A.C. 7:13-1.2 includes in the definition of unsecured material "materials placed on the ground, which would likely become buoyant", and "vehicles". N.J.A.C. 7:13-7.2(e)2 allows for certain storage of unsecured materials associated with a lawfully existing private residence, but specifically excludes an inordinate amount of vehicles and roll-off containers. N.J.A.C. 7:13-11.16 seems to require an individual permit from the Department for parking more than one or two cars, or storing boats, in an otherwise lawfully permitted manner on a property in a coastal
flood hazard area. N.J.A.C. 7:13-11.16 also seems to require an individual permit from the Department in order to obtain a roll-off container as would typically be needed for minor construction improvements or even for a good spring cleaning. Another example of the missing theme pertaining to coastal regions is N.J.A.C. 7:13-11.15, which requires an individual permit for sediment and debris removal. In coastal regions, this seems to require an individual permit after every storm event, or even after significant high tide events that leave sediment or debris washed up in road or yard areas that happen to exist below the base flood elevation. (61)

RESPONSE: The requirement to obtain a flood hazard area permit for certain activities located in the coastal regions of the State is based on the need to mitigate adverse impacts of flooding on people, property and the environment, and to promote the public safety, health and general welfare of residents in these areas. As provided at N.J.A.C. 7:13-2.1(b)5, obtaining a CAFRA or waterfront development permit will satisfy the permitting requirements of the adopted new rules, without the need for a separate flood hazard area permit. This is appropriate because all of the substantive standards for development in flood hazard areas and riparian zones have been incorporated into the Coastal Zone Management rules at N.J.A.C. 7:7E.

With regard to the design and construction standards adopted in the new Flood Hazard Area Control Act rules which, in turn, will apply in coastal areas through CAFRA and waterfront development permits, the Department believes these new standards are necessary to prevent adverse impacts from flooding on people and the environment and to preserve the quality and integrity of our surface waters. The standards specified by the commenter are not intended to be overly-restrictive. N.J.A.C. 7:13-7.2(e)2, for instance, which allows for certain storage of unsecured materials associated with a lawfully existing private residence, does specifically exclude an inordinate amount of vehicles and roll-off containers. This is appropriate since it is the Department experience that a significant amount of flood damage occurs when large numbers of vehicles or containers become buoyant during a flood, are transported downstream by rushing floodwaters and damage homes, businesses and infrastructure. The rules are not intended to prevent the normal use of properties, even when those properties are located in flood hazard areas. The rules do, however, seek to prevent potentially hazardous uses in flood hazard areas,
such as stockpiling large quantities of debris, which could become dislodged during a flood and cause extensive offsite damages.

The Department believes that the adopted new rules strike an appropriate balance between the need for ongoing uses and development in flood hazard areas and the protection of the public from the increased hazards of flooding that can accompany these uses.

COASTAL PERMIT PROGRAM RULES

140. COMMENT: N.J.A.C. For consistency with the proposed revisions to the Flood Hazard Area Control Act rules, the “Coastal general permit for geotechnical survey borings” at N.J.A.C. 7:7-7.27(a)6 should be modified to include a reference to the “Standards for Soil Erosion and Sediment Control in New Jersey.”. (55)

RESPONSE: The coastal general permit cited by the commenter is required to meet the “requirements for a regulated activity in an area with acid-producing soils in the Flood Hazard Area Control Act rules.” All activities authorized under a general permit or individual permit must conform to the New Jersey Standards for Soil Erosion and Sediment Control at N.J.A.C. 2:90, pursuant to N.J.A.C. 7:13-8.1(b)5 and 11.1(c), respectively. Therefore, an activity under the coastal general permit at N.J.A.C. 7:7-7.27(a)6 must meet the requirements of the “Standards for Soil Erosion and Sediment Control in New Jersey”, N.J.A.C. 2:90.

COASTAL ZONE MANAGEMENT RULES

141. COMMENT: We support that consistency between the Coastal Permitting Program and Flood Hazard Area Permitting. The proposed new rules include amendments to both the coastal rules and the flood hazard rules necessary to address discrepancies between the rules and ensure that the more comprehensive Flood Hazard Area standards are applied to flood hazard areas statewide, regardless of their tidal or non-tidal nature. The proposed rules actually require projects in tidal flood hazard areas to be reviewed under all three standards - Federal Flood Hazard Reduction, Uniform Construction Code and Flood Hazard Area standards. (37)
142. COMMENT: We support the amendments to certain Coastal general permits to cross reference and require compliance with the new Flood Hazard Area Control Act rules. To further ensure consistency in the various regulatory programs, the Department is proposing amendments to several coastal general permits to require that activities authorized under the general permits also comply with the new Flood Hazard Area Rules., including the new riparian zone rule. (37)

143. COMMENT: The amendments to the coastal area rules align the protections against flooding in the coastal areas with the rest of the State. (48)

RESPONSE TO COMMENTS 141 THROUGH 143: The Department acknowledges these comments in support of the adopted new rules.

N.J.A.C. 7:7E-3.26 – riparian zones

144. COMMENT: It is unclear whether the threatened and endangered species buffer will extend from the edge of the riparian area, the regulated water itself or the actual critical habitat for species in question. (26)

RESPONSE: At N.J.A.C. 7:7E-3.26(b), the Department outlines how the riparian zone is to be measured. The riparian zone includes the land and vegetation within the regulated water as well as the land and vegetation within a certain distance of each regulated water. Regardless of whether endangered and/or threatened wildlife or plant species habitat is present in the riparian zone, the portion of the riparian zone that lies outside of a regulated water is measured landward from the top of bank. If there is no discernible bank then the riparian zone is measured as outlined at N.J.A.C. 7:7E-3.26(b)1 through 4.

145. COMMENT: The term “regulated water” is not to be defined in the Coastal Zone Management rules, which could lead to confusion. (26)
RESPONSE: Although the term “regulated water” is not defined in the Coastal Zone Management rules, N.J.A.C. 7:7E-3.26(g) states that “For any term used in this section that is not defined or otherwise described in this chapter but that is defined or described in the Flood Hazard Area Control Act rules at N.J.A.C. 7:13, the definition or description in N.J.A.C. 7:13 shall apply.” The term “regulated waters” is defined in the Flood Hazard Area Control Act rules at N.J.A.C. 7:13-1.2.

FLOOD HAZARD AREA CONTROL ACT RULES

Subchapter 1: General Provisions

N.J.A.C. 7:13-1.1 Purpose and scope

N.J.A.C. 7:13-1.1(a)

146. COMMENT: We support the establishment of two regulated areas: flood hazard area and the riparian zone. We support the finding that healthy vegetation in riparian areas is beneficial for stream bank stabilization, water quality and flooding. (10, 67)

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

N.J.A.C. 7:13-1.1(b)

147. COMMENT: We strongly support that the proposal implements multiple laws. It ensures that the regulations complement each other and work together for a more efficient review process. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Department acknowledges this comment in support of the rules.
COMMENT: The Flood Hazard Area Control Act (FHACA) authorizes the Department to “delineate and mark flood hazard areas” and to “adopt land use regulations for the flood hazard area, [and] to control stream encroachments.” The purpose of the FHACA is to protect public safety and the environment against damage from flooding. To this end, the FHACA directs the Department to develop rules to regulate development in flood hazard areas for the purpose of maintaining the flood storage capacity of waterbodies. To implement this statutory directive, the current and proposed new rules, among other things, regulate development in the flood hazard area, which consists of the floodway and flood fringe, and regulate the amount of fill that can be deposited into a waterbody. Such provisions are proper exercises of the Department’s rulemaking power because they implement the directive of the enabling statute.

The proposed new rules, however, propose to extend the Department’s jurisdiction through significant expansion of the riparian zone. Under the current rules, this buffer area extends laterally from the top of the stream bank for 25 to 50 feet. Under the proposed new rules, this buffer would increase from 50 to 300 feet, depending on the particular characteristics of the site. Often, the riparian zone along a waterbody will extend well beyond the limits of the flood hazard area. The proposed new rules limit development in the riparian zone for the purpose of preserving the amount of vegetation in these areas. The primary rationale for the expansion of the riparian zone is to prevent degradation of water quality. The summary that accompanies the proposed new rules lists ten benefits of a healthy, vegetated riparian zone. Of the ten benefits listed, only two are directly related to maintenance of flood storage capacity: (1) the moderation of storm flow to streams; and (2) the impact of vegetation on flood storage and groundwater recharge. A third benefit, stabilization of soil, is more tenuously related. The balance of the list is concerned with benefits that maintain water quality and provide habitat for wildlife.

The proposed new rules have been promulgated to implement the FHACA. In doing so, the Department must develop rules based on the parameters of the enabling statute. As the FHACA does not direct the Department to promulgate rules concerning water quality, it is improper for the Department to do so in this manner; it is an ultra vires action and should not be adopted. If the Department wishes to safeguard water quality through the creation of an expanded riparian zone, it should proceed with a separate rulemaking pursuant to the Water Pollution Control Act (WPCA) and amend the current WPCA rules.
This improper rulemaking is particularly apparent in instances when a waterbody will have a riparian zone, but not a flood hazard area. Under the proposed new rules, regulated waters with less than 50 acres of drainage area do not have a flood hazard area. This same exception, however, does not apply to the riparian zone. Consequently, there are waterbodies that do not have flood hazard areas, but the adjacent lands will still be regulated under the proposed new rules because they will be located within a riparian zone. Such a situation is illustrative of how the proposed new rules exceed the statutory authority pursuant to which they are promulgated. (23)

149. COMMENT: Fundamentally, the proposal may go beyond the Department’s statutory authority. The proposal violates the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq. (the “Act”) and the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. (“APA”). The creation of “riparian zones” is unnecessary and beyond the regulatory authority granted by the Act. (22)

RESPONSE TO COMMENTS 148 AND 149: While the Flood Hazard Area Control Act is the primary enabling legislation for the adopted new rules, they are also adopted under the authority of the Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.), the Highlands Water Protection and Planning Act (N.J.S.A. 13:20-1 et seq.), the Water Quality Planning Act (N.J.S.A. 58:11A-1 et seq.), N.J.S.A. 13:1D-33, and the Construction Permits Law (N.J.S.A. 13:1D-29 et seq.). These laws provide the authority to protect water quality through varying mechanisms including the protection of buffers for the preservation of vegetation. Further, as indicated in the response to comment 129 above, the Department’s ability to protect the environment, including flora and fauna, as it implements the Flood Hazard Area Control Act rules, was affirmed by the Appellate Division Court in 1985. Society for E.E.D. v. New Jersey DEP, 208 N.J. Super. 1 (App. Div., 1985).

In addition, the Department’s authority to establish stream buffers to protect water quality was affirmed in, “In the Matter of Stormwater Management Rules, 384 NJ Super. 451, cert. denied 188 NJ 489 (2006).” Regarding the regulation of riparian zones around certain waters that have a contributory drainage area of less than 50 acres, the Department believes that it is
appropriate to establish riparian zones around waters for which the riparian zone will provide water quality protection. Certain waters, listed at N.J.A.C. 7:13-2.2(a)3, are not regulated waters for the purposes of these rules due to their small contributory drainage area and lack of a discernible channel. Furthermore, certain tidal waters do not have a riparian zone under N.J.A.C. 7:13-2.3(a)2. For all other regulated waters, the Department has determined that riparian zones will provide important water quality benefits, and therefore activities in the riparian zones on these waters are appropriately regulated under this chapter.

Further, it is unclear in what way the commenter believes that the Administrative Procedure Act has been violated. Adequate notice was given of this rulemaking, there was a sufficient comment period including three public hearings, and the Department is responding to all comments received within the designated comment period.

N.J.A.C. 7:13-1.1(c)2

150.COMMENT: The term "native" should be added to describe vegetation to clarify that turf, crops and silviculture are not considered healthy vegetation. (10, 67)

RESPONSE: While the Department prefers the use of native vegetation for bank stabilization, adapted and non-native vegetation, which is not treated with herbicides or pesticides, can also serve to maintain bank stability and provide filtration for water quality. Vegetation root systems help hold soil particles together, increasing bank stability, and inducing sediment deposition to aid in protection of water quality. Woody vegetation is usually best suited for shoreline stabilization, but ground cover can also provide protection. Additionally, grasses (or turf) produce an extensive root system to stabilize the bank. The general schematic of a healthy, vegetative stabilized shoreline has a gradient of grasses proceeding to woody shrubs leading to forest vegetation. Given the above, the adopted new rules make no distinction as to the type of vegetation within a riparian zone, so long as the vegetation serves to stabilize the bank and aids in water quality.
151. COMMENT: The Department should define “healthy vegetation.” Does all vegetation not showing signs of distress qualify, whether native or invasive? What if vegetation is present but not particularly suited to soil stabilization? If healthy, is the Department advocating keeping existing invasive species with poor erosion/soil stability qualities, rather than allowing an applicant to demonstrate that a reduced zone width could improve conditions if appropriately re-vegetated and/or bioengineered? (26)

RESPONSE: The intent of N.J.A.C. 7:13-1.1(c)2 is to explain that all riparian zone vegetation serves a number of important environmental functions, which include maintaining bank stability and water quality. The rules are intended to preserve these environmental functions by preventing the indiscriminate disturbance of vegetation along surface waters. The Department does not intended to imply that some vegetation is “unhealthy” and therefore not essential or/ or unworthy of protection under this chapter. Nor is N.J.A.C. 7:13-1.1(c)2 meant to indicate what type of vegetation is considered “healthy.”. The preservation and protection of the riparian zone will promote the health of the vegetation within these areas by allowing natural succession of plant growth and species which, in turn, will benefit both the environment, and all flora and fauna that depend on clean water to survive.

N.J.A.C. 7:13-1.1(e)

152. COMMENT: The Flood Hazard Control Act states at N.J.S.A. 58:16A-62, that, "any municipal or other entity vested with authority to adopt rules and regulations concerning the development and use of land may adopt requirements more restrictive than those contained in the rules and regulations adopted by the department for the floodway and those contained in the minimum standards promulgated by the department." Since the new rules are being promulgated under several authorities, for the sake of clarity it is important that the new rules should restate, at N.J.A.C. 7:13-1.1(e), the passage from the Flood Hazard Control Act quoted above. (68)

RESPONSE: The Flood Hazard Area Control Act rules do not preclude local governments from adopting more stringent standards for development within riparian zones and flood hazard areas,
or for establishing riparian zone or flood hazard areas that are larger than those established under this chapter. Furthermore, given the statutory provision referenced by the commenter, the Department does not believe that further clarification is necessary.

N.J.A.C. 7:13-1.2 Definitions

153. COMMENT: The term “acid producing soil” should be defined. (50)

RESPONSE: The adopted rule includes a definition for this term.

154. COMMENT: The proposed definition of “acid producing soils” should be revised to establish a procedure that would permit an applicant to demonstrate the presence or absence of acid producing soils on a site by site basis. The proposed definition should not make Soil Conservation District maps jurisdictional without some procedure to test the validity of those maps on a case by case basis using site specific conditions. (7, 18, 33, 46, 53)

155. COMMENT: The definition of “acid producing soils” as proposed should be modified to include a reference to the “Standards for Soil Erosion and Sediment Control in New Jersey” This manual contains a specific Standard (Standard for Management of High Acid Producing Soils, 1-1) which provides comprehensive assessment and treatment methodologies for proper handling of acid producing deposits. This Standard also includes a generalized map of New Jersey depicting where these deposits are likely to be found. (55)

RESPONSE TO COMMENTS 154 AND 155: The definition of “acid producing soils” is intended to describe what acid producing soils are and to explain where information regarding their location can be obtained. A reference in therefore made to the “local Soil Conservation District offices,” since these offices can offer guidance on how to determine whether acid producing soils are present on a site, which may include investigation of available soil mapping as well as field investigation of the actual soils present on a site.
The definition of “acid producing soils” is also intended to identify those areas that would cause a regulated water to have a 150-foot riparian zone under N.J.A.C. 7:13-4.1(c)2iv, and also to identify those areas which, if disturbed, are subject to the requirements of N.J.A.C. 7:13-10.7. The Soil Conservation District mapping is evidence that acid producing soils are present on a site unless the local Soil Conservation District makes an alternative finding based on soil conditions present on that site.

However, the definition of “acid producing soils” is not intended to establish procedures on how to address the managing of such soils. Such procedures are appropriately established at N.J.A.C. 7:13-10.7, which sets forth specific design and construction standards that apply to any regulated activity proposed in an area containing acid producing soils. N.J.A.C. 7:13-10.7 furthermore explains that additional guidance on minimizing adverse effects of exposing acid-producing soils can be found in the Flood Hazard Area Technical Manual, which in turn recommends that applicants seek assistance from the local soil conservation district in dealing with acid producing deposits. Finally, all activities authorized under a general permit or individual permit must conform to the New Jersey Standards for Soil Erosion and Sediment Control at N.J.A.C. 2:90, pursuant to N.J.A.C. 7:13-8.1(b)5 and 11.1(c), respectively. Therefore, it is unnecessary to include a further reference to the Standard for Management of High Acid Producing Soils, 1-1 in the definition of “acid producing soils.”

156. COMMENT: The definition in these rules of “actively farmed” is inconsistent with the USDA definition. The USDA identifies “actively farmed” areas as “regularly tilled or regularly harvested areas. For grazed land, it must be quality forage.” This definition should be revised to be consistent with Federal terminology. (26)

157. COMMENT: The word “active” should be deleted from the definition of “actively farmed” to avoid confusion where agricultural land may be fallow. For example, fallow agricultural lands enrolled in conservation programs, which may be in place longer than five years, should not be precluded from future agricultural use. Our agencies should coordinate efforts to prevent the misapplication of the relevant portions of this rule. In addition, there are other agricultural purposes recognized by the USDA that are not included in the rules. (55)
RESPONSE TO COMMENTS 156 AND 157: The definition of “actively farmed” was adopted in these rules in order to maintain consistency with the use of the term in the Department’s Freshwater Wetlands Protection Act Rules, and references land areas that are currently and continually in use for cultivation, grazing or any other agricultural purposes that are recognized as “agricultural” by the USDA. The definition is necessary to identify those farms that are under active agricultural use from those that have been abandoned and should not benefit from the proposed permits-by-rule and general permits. The five-year limit on fallow areas is taken from the definition of "established, ongoing farming, ranching or silviculture operation" from the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4. The adopted definition is broader than the USDA definition in that it applies to land areas on which any agricultural activity, recognized as such by USDA, is undertaken. The term “actively farmed” applies only to the four permits-by-rule at N.J.A.C. 7:13-7.2(f) and the seven general permits at N.J.A.C. 7:13-8.4, which have been adopted to facilitate ongoing agricultural activities. Agricultural activities that do not meet the definition of “actively farmed” are not precluded under these rules. However, like any other activity that does not qualify for a permit-by-rule or general permit, an individual permit would be required for agricultural activities that do meet the definition of actively farmed.

158.COMMENT: We support a definition for “actively farmed” lands. (10, 67)

RESPONSE: The Department acknowledges this comment in support of a definition for “actively farmed”.

159.COMMENT: Five years is too long a period when demonstrating an actively farmed area, and should be limited to one year. Furthermore, the laxity of many regulations associated with farming activities is cause for concern. (56)

RESPONSE: The five year time period is consistent with other rules and statutes in the State including, but not limited to, the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A.
The Department believes that it is appropriate to use a definition that is consistent with other Department rules.

Relative to the commenter’s second concern regarding laxity of regulations associated with farming activities, the stringent new standards of the adopted new rules apply to all projects proposed in flood hazard areas or riparian zones, including agricultural activities. For four cases where the Department has identified that a particular agricultural activity will cause no adverse impact to flooding or the environment, the Department has adopted permits-by-rule at N.J.A.C. 7:13-7.2(f). The Department has also identified seven agricultural activities that are of a minor nature and are therefore eligible for a general permit under N.J.A.C. 7:13-8.4. Under each of these general permits, activities are limited to only those cases where an applicant can demonstrate that there is an environmental benefit (such as bank stabilization or stream cleaning project, or the construction of various features intended to keep vehicles and livestock outside of a regulated water) and also that the project will not adversely impact flooding. Agricultural activities that do not meet the requirements of these permits-by-rule or general permits must be authorized under an individual permit pursuant to N.J.A.C. 7:13-9, 10 and 11, and will be subject to the same design and construction standards as any non-agricultural activity proposed in a regulated area. Thus, the Department believes that the adopted new rules will prevent agricultural activities from being undertaken in a flood hazard area or riparian zone if the activity will adversely impact public safety, health, general welfare and the environment.

160. COMMENT: –This definition for “anadromous water” is based solely on gross mapping. Will an applicant be able to dispute with fishery studies? (26)

RESPONSE: The definition of “anadromous water” is not based on mapping. The definition for anadromous at N.J.A.C. 7:13-1.2 guides the reader to N.J.A.C. 7:13-10.5(b), where detailed information is given on how to identify anadromous fish species and their locations. Furthermore, the Department will review all studies and information submitted with an application pertaining to anadromous waters. If the studies demonstrate conclusively that the
waters in question cannot support anadromous fish, the Department will consider take that
determination into consideration when rendering its decision on a permit application.

161. COMMENT: Please include the following definition: “Bankfull” means the stage at which a
stream first overflows its natural banks formed by floods with 1- to 3-year recurrence intervals
(Langbein and Iseri, 1960; Leopold and others, 1964). (66)

RESPONSE: The Department acknowledges this request, but does not find it necessary to define
the word “bankfull” since the term is not used in the adopted new rules.

162. COMMENT: Please include the following definition: “Canal” or “canal transmission
complex” means a linear transportation or water supply utility facility constructed for the
purpose of transporting water or materials between points within a manmade structure that
includes embankments, the canal walls and bed, structures such as culverts and bridges over
features such as streams, lakes and roads, and ancillary features such as access paths or
walkways directly adjacent to the canal. (66)

RESPONSE: N.J.A.C. 7:13-2.2(a)1 provides that any “manmade canal” is not subject to the
requirements of this chapter, and the permit-by-rule at N.J.A.C. 7:13-7.2(b)18 allows “the repair,
maintenance or dredging of the channel and/or embankments of a manmade canal, which passes
through a regulated area. . .” As indicated in the proposal summary, a canal is understood to be a
manmade feature that does not have a distinct flood hazard area or riparian zone, and which is
often maintained by a government agency. The Department also agrees that a canal includes the
entire manmade structure that supports and confines the canal, including embankments, the canal
walls and bed, structures such as culverts and bridges over features such as streams, lakes and
roads, and ancillary features such as access paths or walkways directly adjacent to the canal. The
Department therefore believes that the term “canal” is sufficiently clear and does not require a
definition under N.J.A.C. 7:13-1.2.
163. COMMENT The proposed definition of “channel” should be revised to require that the linear topographic depression must have a defined bed and bank, because in the absence of a defined bed and bank, the determination of the location of a channel is an arbitrary and subjective determination. (7, 18, 33, 46, 53)

RESPONSE: The definition of “channel” specifies that a channel includes both bed and banks. Therefore, a topographic feature that does not contain bed and banks is not a channel for the purposes of this chapter.

164. COMMENT: The definition for “channel” is vague and is loosely defined as a “linear topographic depression”. It is similar in wording to the definition of a swale in the Freshwater Wetlands Protection Act Rules, which do not have an associated buffer. The term channel is not specifically referenced under “riparian zones” and as such it should be clarified that riparian zones are not to be associated with swales as defined in the Freshwater Wetlands Protection Act Rules. The Department should clearly state what types of “channel” will be subject to the riparian zones and that swales are not subject to riparian buffers. (26)

165. COMMENT: The Department’s definition of “channel” implies that a “ditch”, “canal” or other manmade water transportation mechanism, could be considered a “channel.” Since the Department clearly does not consider those mechanisms to be regulated waters under this proposal, the definition of channel should be revised to read as follows: “A channel can be naturally occurring or can be of human origin through excavation or construction. Manmade ditches, canals or other water transportation mechanisms not part of regulated waters are not considered channels under these regulations.”

RESPONSE TO COMMENTS 164 AND 165: As noted in the response to comments 271 and 272 below, the definition of “channel” has been modified on adoption to mean a linear topographic depression that continuously or intermittently confines and/or conducts surface water, not including transient erosional gullies and other ephemeral features that temporarily form after heavy rainfall. A channel can be naturally occurring or can be of human origin.
through excavation or construction, and a channel includes both bed and banks. In accordance with this definition, the Department could consider a ditch or other manmade water transportation mechanism to be a channel. This is appropriate since ditches and other manmade features that have a large contributory drainage area can contribute to flooding to the same extent as naturally occurring features. However, not all waterways that meet the definition of a channel are “regulated waters.” Regulated waters are outlined at N.J.A.C. 7:13-2.2. Furthermore, N.J.A.C. 7:13-2.2(a)1 specifically exempts manmade canals from regulation. Additionally, N.J.A.C. 7:13-2.2(a)3ii excludes from regulation any feature (regardless of whether a channel exists) that drains less than 50 acres and which is “confined within a lawfully existing, manmade conveyance structure or drainage feature, such as a pipe, culvert, ditch, channel or basin. . .” Since the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4 defines a swales as a feature which, among other characteristics, drains less than 50 acres and does not have a bed and bank, swales meet the requirements of N.J.A.C. 7:13-2.2(a)3i, and are therefore exempt from this chapter. Intermittent streams, however, are excluded from the definition of swale and could constitute a channel under the adopted definition.

166. COMMENT: Please include the following definition: “Delaware and Raritan Canal Water Supply Transmission Complex means the water supply canal operated by the New Jersey Water Supply Authority pursuant to the provisions of the New Jersey Water Supply Authority Act (N.J.S.A. 58:1B-1).” (66)

RESPONSE: The Department does not believe that it is necessary to define the phrase “Delaware and Raritan Canal Water Supply Transmission Complex” since the term is not used in this rule.

167. COMMENT: Please include the following definition: "Desnag" means to remove any floatable or non-sediment materials that may cause a decrease in the designed conveyance capacity of a culvert or bridge opening. (66)
RESPONSE: The definition provided by the commenter for the term “desnag” is limiting. The Department uses “desnag” in these rules under general permit 1 at N.J.A.C. 7:13-8.3 to apply broadly to the removal of any object other than accumulated sediment, which constitutes a hazard to navigation or obstruction to flow in a given waterway not just to culverts or bridge openings.

168. COMMENT: The term “documented habitat for a threatened or endangered species” should be defined consistent with the definition of “documented habitat for threatened or endangered species” set forth in the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A-1.4. (7, 18, 33, 46, 53)

RESPONSE: The adopted definition for "documented habitat for threatened or endangered species" is essentially identical to the definition of the same term in the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4.

169. COMMENT: The application of the proposed new rules to a particular activity is dependent upon whether or not the activity takes place in a "regulated area" which is, in turn, entirely dependant upon the size of the drainage area associated with a regulated water. Because of its significance to a determination of the Department's jurisdiction, it would be helpful if the term "drainage area" was defined in the definitions section. (37)

RESPONSE: The new rules do include a definition for the term "drainage area".

170. COMMENT: Please include the following definition: “Embankment” means an area of fill created to support, contain or protect a manmade canal, roadway, railroad or other conveyance system. A lawfully existing embankment is not considered to be part of the riparian zone for any regulated water. (66)

RESPONSE: The Department believes that the meaning of word embankment as used throughout the Flood Hazard Area Control Act rules is obvious, i.e. a bank, mound dike, or the
like, raised to hold back water, carry a roadway, etc. Therefore, the Department does not find it necessary to define the word embankment. Furthermore, it is the Department’s intent that all areas that lie within a riparian zone would be considered part of the riparian zone. This would include embankments, roadways, parking areas, building etc. regardless of whether the structures are vegetated or not. Therefore, the Department believes that it is not appropriate to exclude embankments from riparian zones in the adopted Flood Hazard Area Control Act Rules. (Please also see response to comment 202.)

171. COMMENT: The definition for the term “fill” is broad in the proposed new rules. No scientific basis is given for the claim that a vegetative planter two to three hundred feet from a Category One water would affect flood storage volume and displacement and as such it should be eliminated. (26)

172. COMMENT: The difference between piles and landscape material (mulch, stone, fabric, pavers etc.) under the definition of “fill” is vague. In addition, it is unclear whether lawn ornaments, statues, religious icons, sculpture and other solid works of art or craft commonly present in yards will be considered fill. (26)

173. COMMENT: Under the proposed definition of “fill”, gravel and paving blocks should be added to the list of types of fill because gravel, parking lot and roadway materials are not commonly regarded as fill. (10, 67)

RESPONSE TO COMMENTS 171 THROUGH 173: "Fill" is defined at N.J.A.C. 7:13-1.2 to mean to deposit or place material on the surface of the ground and/or under water. "Fill" also means the material being deposited or placed. Fill includes, but is not limited to, concrete, earth, pavement, rock, sand, soil, structures or any stored material such as building material, construction equipment, landscaping material, piles of soil, stone or wood, trash, vegetation in planters and/or root balls, and vehicles. Fill does not include vegetation rooted in the ground, whether naturally occurring or planted.
The Department intended this definition to be broad. The definition clearly states that materials considered as fill are not limited to those listed. Except for vegetation rooted in the ground, virtually any material placed on the surface of the ground and/or under water would be considered fill. This would include lawn ornaments, statues, etc. and may also include gravel, parking lot and roadway materials if they are placed on the surface of the ground and/or under water. It is important that the definition for “fill” include anything that is placed aboveground and could therefore displace flood storage volume. Each of the listed items, however insignificant they may seem individually, cumulatively can displace significant amounts of flood storage volume, creating a threat to public safety, health, general welfare and the environment.

However, even though the Department has adopted a broad definition for the term "fill", N.J.A.C. 7:13-7.1 provides 46 permits-by-rule, which require no general permit or individual permit, for a large number of activities that involve the placement of fill. These activities are covered by permits-by-rule because the Department has determined that, if the regulated activities are undertaken as prescribed in the respective permits-by-rule, the impact on flooding and the environment will be de minimis.

One of these permits-by-rule, found at N.J.A.C. 7:13-7.2(b)3, allows for the one-time placement of five cubic yards of fill or multiple placements of fill over time that cumulatively do not exceed five cubic yards which could be used for landscaping or other purposes provided all requirements for the permit-by-rule are satisfied. Another permit-by-rule found at N.J.A.C. 7:13-7.2(e)2 allows the storage in a regulated area of unsecured material incidental to a lawfully existing private residence (such as lawn and garden equipment and materials, shelters for animals, trash receptacles, toys, vehicles and wood piles) provides that all of the requirements for the permit-by-rule are satisfied. This permit-by-rule could be used for lawn ornaments, statues, etc.

In view of the above, the Department believes that the definition of fill is appropriate as adopted and that no revision to the definition is necessary.

174. COMMENT: "Fill-credits" are mentioned in the proposed new rules, but the term is not defined under the definitions section. What is the difference, if any, between wetland mitigation
credits and fill credits? Can fill credits be acquired through a wetlands mitigation bank, and will there be flood mitigation banks? (21)

RESPONSE: An explanation of the term “fill credits” can be found at N.J.A.C. 7:13-10.4(s). In accordance with the Flood Hazard Area Control Act Rules, a fill credit is a unit of flood storage volume that has been created by excavation and/or removal of fill in the Central Passaic Basin and which can be sold to a permittee to compensate for proposed fill elsewhere in the same basin. In accordance with the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-15.23, wetlands mitigation credits are credits purchased from a mitigation bank for the purpose of compensating for the loss for freshwater wetlands pursuant to the issuance of a freshwater wetlands permit or other authorization.

The Department has previously permitted several facilities to create flood storage fill credits. However, as the rule states, the Department will no longer accept new applications to allow a person or facility to create additional fill credits in this manner. In order for fill credits to be valid, an application to create the fill credits must have been received by the Department prior to October 2, 2006 and the fill credits, once approved, must be lawfully created by the applicant prior to October 2, 2011. Fill credits to compensate for the loss of flood storage volume cannot be acquired through the freshwater wetlands mitigation banking system.

It would be possible, however, for a person to create flood storage within or adjacent to a flood fringe, as described at N.J.A.C. 7:13-10.4(o), and then sell rights to the created flood storage to another party, provided the requirements of N.J.A.C. 7:13-10.4(p) are satisfied. However, given the limitations on the location of compensatory flood storage under N.J.A.C. 7:13-10.4(p), the sale of such credits would be limited to properties in close proximity to the fill, unlike fill credits in the Central Passaic Basin, which are available to all persons within the basin as defined at N.J.A.C. 7:13-1.2.

175.COMMENT: We support the definition of “flood control project,” which limits such projects to those which are performed for the public benefit and undertaken by a public entity. (10, 67)
RESPONSE: The Department acknowledges this comment in support of the definition for “flood control project”.

176. COMMENT: The references to both tidal and fluvial flooding in the proposed definition of “flood hazard area” are too vague. Furthermore, the term "primarily" is undefined. The boundary line between a tidal flood hazard area and a fluvial flood hazard area should be defined as the point where the tidal "stillwater" elevation intersects the fluvial flood profile calculated without tailwater consideration. (15, 57)

RESPONSE: The definition of flood hazard area has been modified on adoption to indicate that in a tidal flood hazard area, the flood hazard area design flood elevation is governed by tidal flooding from the Atlantic Ocean. Flooding in a tidal flood hazard area may be influenced or contributed to by stormwater runoff from inland areas, but the depth of flooding generated by the tidal rise and fall of the Atlantic Ocean is greater than the depth of flooding from any fluvial sources. Similarly, the definition has been modified on adoption to indicate that in a fluvial flood hazard area, the flood hazard area design flood elevation is governed by stormwater runoff. While flooding in a fluvial flood hazard area may be influenced or contributed to by elevated water levels generated by the tidal rise and fall of the Atlantic Ocean, the depth of flooding generated by stormwater runoff is greater than flooding from the Atlantic Ocean.

177. COMMENT: On what science is the definition for the term “flood hazard area” based? (26)

RESPONSE: The “flood hazard area” means land, and the space above that land, which lies below the flood hazard area design flood elevation. The definition is not based on “science” but rather simply that a given flood will cover a given amount of land adjacent to a regulated water. Since the “flood hazard area design flood” is the flood regulated under this chapter, the “flood hazard area” is the area that will be inundated by that flood and which, therefore, is the area regulated under the jurisdiction of this chapter.
178. COMMENT: The proposed definition of “flood hazard area design flood” should be revised to limit the definition to “a flood equal to the 100-year flood,” which is consistent with the jurisdiction conferred by the Flood Hazard Area Control Act. The remaining proposed language of the definition should not be adopted. The proposed inclusion of “expected runoff increases due to future development of the drainage area” within the definition improperly assumes that upstream future development will occur. The definition fails to take into account situations where upstream areas have been fully developed, or situations where limitations exist that will preclude upstream development, such as areas subject to the Highlands Water Protection and Planning Act or other areas that can not be developed. (7, 18, 33, 46, 53)

179. COMMENT: The proposed new rules are based on an assumption of full development upstream from a project site without stormwater controls. There is no basis for this assumption; indeed, it is contrary to the Department’s Stormwater Management rules. Those portions of the proposed new rules that are based on this erroneous premise should not be adopted. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 178 AND 179: The Flood Hazard Area Control Act at N.J.S.A. 58:16A-50 states that “It is in the interest of the safety, health, and general welfare of the people of the State that legislative action be taken to empower the Department of Environmental Protection to delineate and mark flood hazard areas, to authorize the Department of Environmental Protection to adopt land use regulations for the flood hazard area, to control stream encroachments, to coordinate effectively the development, dissemination, and use of information on floods and flood damages that may be available, to authorize the delegation of certain administrative and enforcement functions to county governing bodies and to integrate the flood control activities of the municipal, county, State and Federal Governments.” Furthermore, the definition of flood hazard area under N.J.S.A. 58:16A-51(e) does not limit the flood hazard area to the 100-year flood without a safety margin, as suggested by the commenter. The Department believes that it is appropriate to establish a regulatory flood, along non-delineated waters, that is equal to the 100-year flood plus an additional factor of safety in order to protect public safety, health and general welfare from future increases in flooding that may occur.
The Department acknowledges that any number of changes in the hydrologic and hydraulic characteristics of a watershed can increase expected flood flows at a given location. Upstream development, removal or modification of upstream bridges and dams, channel improvements, sediment removal projects, changes in hydrologic conditions in portions of a watershed and alterations in weather patterns may all contribute to exacerbate flooding. Therefore, in order to clarify that other factors in addition to “expected runoff increases due to future development of the drainage area” can cause flooding to exacerbate, the definition of “flood hazard area design flood” has been modified on adoption to mean “a flood equal to the 100-year flood plus an additional amount of water in fluvial areas to account for “possible future increases in flows due to development or other factors.”

Due to the wide range of factors that can affect the hydrologic and hydraulic response of a given watershed, flood plain modeling of fluvial systems is necessarily based on many factors and assumptions that cannot always be precisely measured or accurately predicted. For these reasons, when the Department has undertaken the delineation of flood hazard areas for its jurisdictional mapping, a flow rate of 25 percent greater than the 100-year flood has been used historically. This 25 percent factor of safety for flood modeling is appropriate given the need to preserve public safety in light of the inherent inability of riverine modeling to provide an exact prediction of future flood conditions. The list of State delineated waters in Appendix 2 of this chapter indicates the thousands of miles of streams and rivers for which the Department has delineated both the 100-year flood and the more conservative flood hazard area design flood. Given this approach to riverine modeling, which has been maintained throughout the entire history of the Department’s flood mapping efforts, it is reasonable to require the same assumptions and factors of safety to modeling performed by the public sector in absence of State flood hazard area delineation. By adopting a regulatory flood that is equal to the 100-year flood plus an additional safety margin, and by establishing regulatory standards for development within the area inundated by this regulatory flood, the Department believes it is fulfilling this statutory mandate. This added factor of safety is represented in a number of ways in the various modeling options available under subchapter 3.
180. COMMENT: Previous terminology referred to a “floodway” and a “flood plain”, but now the regulations reference a “floodway” and a “flood fringe”. What is the difference, if any, between a flood fringe and a flood plain? (21)

RESPONSE: A “flood plain” is an entire area inundated by a given flood. A flood plain is comprised of an inner part, called a “floodway,” and an outer part, called a “flood fringe.” The terms “floodway” and “flood fringe” are defined under N.J.A.C. 7:13-1.2, and are equivalent in meaning to the same terms in the repealed rules.

The flood regulated under the Flood Hazard Area Control Act rules is referred to the “flood hazard area design flood” and the flood plain of this flood is called the “flood hazard area.” In the repealed rules, two different terms were used to identify the regulated flood plain along a water, resulting in some confusion. If the water had been delineated by the Department, the repealed rules referred to the regulated flood plain of that water as a "flood hazard area", a term that was not defined. If the water was not Department delineated, the repealed rules referred to the regulated flood plain as a "100-year flood plain." For simplicity, in the adopted new rules, the distinction between delineated and non-delineated waters has been omitted from the terminology used for the regulated area and the term "flood hazard area" is used to denote the regulated flood plain adjacent to either a Department delineated or a non-delineated water. The term “flood hazard area” thus replaces the term “flood plain.”

181. COMMENT: The definition of “hydraulic capacity” must be improved. The Department may have intended this term to actually be “conveyance”, which is not defined in N.J.A.C. 7:13-1.2. (27, 49)

RESPONSE: The definition of "hydraulic capacity" is substantively the same as the definition of "flood carrying capacity" found in the repealed rule. The term "hydraulic capacity" describes the ability of any natural or man-made channel, conveyance structure or water control structure to pass water under various flow conditions. Thus, for the purposes of the adopted new rules, the hydraulic capacity of a feature describes the feature’s ability to convey water, and is therefore equivalent in meaning to “conveyance” as noted by the commenter.
182. COMMENT: We support the inclusion of gravel or stone roadways and parking areas as examples of an “impervious surface” under the proposed definition. (10, 67)

RESPONSE: The Department acknowledges this comment in support of the definition for “impervious surface”.

183. COMMENT: The definition for “impervious surface” needs to be clarified, specifically in referenced to the statement that “in some instances densely” packed gravel/stone roadways and parking areas are to be included in the definition. The current definition is impermissibly vague. It should also be specified that decorative stone specifically used in landscaping for low traffic areas as part of weed control or stormwater infiltration (low flow channels) should be exempted. (26)

184. COMMENT: The definition of “impervious surface” should be revised to read “In some instances, the Department will also consider densely packed gravel and stone public roadways and parking areas to be impervious for the purposes of this chapter.” Private roadways and parking areas do not get the level of use of public roadways or parking areas and therefore when constructed of gravel do not generally become “densely packed” as do public roadways and parking areas. (22, 42)

185. COMMENT: The definition of "impervious surface" should be expanded and modified to clarify what is meant by "densely packed gravel or stone". For instance, a gravel material such as dense graded aggregate is generally highly impervious, while "densely packed" 2 1/2 inch stone will remain highly permeable. (3)

186. COMMENT: The definition of "impervious surface" is too vague. The instances in which gravel surfaces are considered "impervious" must be clarified to ensure consistent implementation. (15, 57)
187. COMMENT: Compacted soil should be included in the examples of “impervious surfaces” under the proposed definition. (10, 67)

RESPONSE TO COMMENTS 183 THROUGH 187: It is the Department’s experience that gravel can possess a wide degree of permeability depending on how tightly it is packed, the presence of other material between each stone and to what uses the gravel is subjected. Gravel consisting of primarily larger stones tends to retain small void areas between each stone, which generally allows stormwater to infiltrate through the gravel layer. The void areas between gravel consisting of smaller stones, however, can become filled with sediment and other material over time, thus forming a relatively impervious layer. Consequently, for the purposes of this definition, the phrase “in some instances” is necessary to explain that gravel surfaces can be considered either pervious or impervious depending on numerous factors, which cannot all be listed in the definition. Due to the high degree of variability of gravel’s permeability, the Department will accept information and data from applicants who wish to demonstrate that a particular area of gravel is pervious or impervious. Furthermore, while the Department agrees that in some circumstances densely graded aggregate, compacted soils or other similar materials may act as impervious surfaces, it would not, however, be possible to list all forms of impervious surfaces and the circumstances under which they would meet the criteria in the adopted new rules. The examples listed in the definition of “impervious surfaces” are necessarily not all-inclusive.

188. COMMENT: Please include the following definition: “intermittent stream” means a stream channel that does not constantly carry surface flow, but provides habitat for aquatic species. (66)

RESPONSE: The term “intermittent stream” appears at proposed N.J.A.C. 7:13-17.1(g), which provides guidance for determining the length of features that lack a discernible channel in order to properly calculate application review fees. In order to be consistent with the definitions of the term “channel” and “regulated water,” both of which cover the concept of intermittent streams, N.J.A.C. 7:13-17.1(g) has been modified on adoption to provide that, along “regulated waters”
where no channel is discernible, the length of the channel (for calculating fees under this section) shall be determined by measuring the approximate centerline of the “regulated water.”

189. COMMENT: Utilities that are considered linear development consisting of public utility infrastructure are a public necessity, which necessarily pass through the flood hazard area. Accordingly, a definition of “linear development” should be added as follows: “Linear Development means infrastructure, utilities and the rights-of-way therefore, such as gas and water pipelines; electric, telephone, and other distribution and transmission lines; and the rights-of-way therefore. ‘Infrastructure’ includes access roads and drives. Linear development shall not include residential, commercial, office, institutional, or industrial buildings.” (22)

190. COMMENT: The Department should include in the regulations the following definition of linear development and because of the minimal impact of public utility linear development on the flood carrying capacity of a flood hazard area, exempt public utility linear development from the requirements of the proposed new rules. “Linear Development means infrastructure, utilities and the rights-of-way therefore, such as the distribution, transmission and transportation facilities of public utilities including gas and water pipelines, electric, telephone, and other distribution and transmission lines and/or conduits and the appurtenances thereto, and the rights-of-way therefore, as well as structures such as electric utility substations, rights-of-way and related access roads and other means of ingress and egress; provided, however, that the term shall not include residential, commercial, office, institutional, or industrial buildings.” (36, 42)

RESPONSE TO COMMENTS 189 AND 190: The Department notes that the commenters have submitted comments requesting that linear utility development be exempt from regulation (see response to comments 114 and 115). As indicated in response to these comments, the Department does not believe such an exemption would be appropriate, but has made provision to streamline the permit process where impacts are minor (see response to comments 130 through 132). As the term “linear development” is not used in the adopted new rules, no definition is necessary.
191. COMMENT: The definition of “low flow aquatic passage” at N.J.A.C. 7:13-1.2 is subjective. The Department must identify the standard applicable to demonstrating satisfactory “fish passage” and indicate which Division within the Department will be responsible for the review of applications concerning this provision. (19)

RESPONSE: Low-flow aquatic passage means the ability of aquatic species to travel upstream and downstream in a waterway without impediment during low-flow conditions in the channel. In natural channels, what constitutes this passage can vary greatly from channel to channel, and even along reaches of the same channel. Engineering designs necessary to ensure low flow aquatic passage can also vary greatly. Given the wide variations in possible channel configurations, and for the purposes of the adopted new rules, it is not possible to completely describe the exact shape, size, depth, slope and other physical characteristics of a channel that provide low-flow aquatic passage. The standard that must be satisfied, as expressed in the definition, is that there be no impediment to passage during low flow conditions. The Flood Hazard Area Technical Manual includes guidance on the design of bridges, culverts and other man-made structures in order to provide low-flow aquatic passage.

With regard to which Department division is responsible for the review of low-flow aquatic passage, the Division of Fish and Wildlife provides guidance to the Division of Land Use Regulation on this issue. However, the final responsibility for the review of any permit under this chapter lies with the Division of Land Use Regulation.

192. COMMENT: The proposed new rules should include a definition of “municipal building or construction permit” to refer to a permit issued under the Uniform Construction Code Act (UCCA) and its regulations. Parenthetically, there is no definition of a “Building Permit” under the UCCA regulations or a “municipal permit.” (7, 18, 33, 46, 53)

RESPONSE: The terms “municipal building or construction permit” appeared in the proposed rule at N.J.A.C. 7:13-2.1(c)3, and were intended to describe a type of municipal approval that would grandfather a project from regulation under the adopted new rules, as described in the proposal summary at 38 N.J.R. 3964-5. As discussed in detail in the response to comments 241
through 251, N.J.A.C. 7:13-2.1(c) has been modified on adoption to clarify the types of approvals that would qualify a project to be grandfathered from the adopted new rules.

193. COMMENT: The definition of "100-year flood" proposed in the rule reinforces confusion among practitioners regarding "design storm" and "design flood". The Flood Hazard Area Design Flood Elevation is based on a design flood, not a design storm. The design flood could result from an infinite number of storms of various combinations of duration, rainfall depth, and rainfall distribution and there are many recognized methods for determining the magnitude of a design flood of a particular recurrence interval. Consequently, the definition of "100-year flood" is incorrect, and this term should be redefined as "the peak discharge which has a one percent chance of being equaled or exceeded in any given year." This definition is consistent with existing hydrologic practices and allows for use of the different methods, including the design storm method. (15, 57)

RESPONSE: The Department acknowledges that there is an important distinction between a storm event that has a one percent chance of occurring in a given area and a flood that has a one percent chance of occurring in that same area. It is incorrect to assume that a storm event that has a one percent probability will result in a flood that has an equal occurrence interval. For example, a large storm event could occur, but the ground could be very dry and absorb a significant amount of runoff so that the resulting flood is minimal. Conversely, a less significant rainfall event could occur over the same geographic area when the ground is quite saturated, and the resulting flood may be much greater. So, while there is an obvious relationship between storm events and flooding, there are other hydrologic factors involved that can affect the amount of flooding that may occur from a given storm event. Therefore, the definition for "100-year flood" has been modified on adoption to conform with the nationally-accepted and scientifically accurate understanding that it is a flood that has a one percent chance of being equaled or exceeded in a one-year period, and not a flood resulting from a storm that has a one percent chance of being equaled or exceeded in a one-year period.
194. COMMENT: The proposed definition of the “100-year flood” fails to adequately address climatic changes which increase the frequency to greater than one percent in a given year. (56)

RESPONSE: The Department acknowledges that future climatic changes may occur which could increase rainfall amounts for a given storm frequency. As such, the Department requires that all submitted hydrologic calculations shall be based on the most current rainfall data from National Oceanic and Atmospheric Administration (NOAA) for a particular storm event, which takes into account any such climatic changes. This assures that all submitted stormwater runoff and flood hazard areas calculations are properly adjusted to reflect the most current data, in order to not underestimate the potential adverse impacts of flooding due to any proposed development within the jurisdiction of this chapter.

195. COMMENT: For clarification, please add a definition of “public utility” as follows: “Public Utility means the same as that term is defined in N.J.S.A. 48:2-13.” (22, 42)

RESPONSE: The term “public utility” is not used in the adopted new rules, and therefore a definition is not necessary.

196. COMMENT: What compensation is available to persons not meeting the “reconstruction” requirements, as defined at proposed N.J.A.C. 7:13-1.2? (26)

197. COMMENT: Please revise the definition of “reconstruct” to read: “Reconstruct means, except as herein excepted, to patch, mend, replace … For all other structures, except electric utility poles, towers and wires, the percentage of replacement … to the total area of the structure. For electric utility poles, towers and wires, 100 percent of the structure may be reconstructed.” While an individual electric utility pole, tower or wire is only a small percentage of an entire electric utility line, when an individual pole, tower or line must be reconstructed the entirety of that individual pole, tower or wire often has to be reconstructed. Without this exception to the definition, an electric utility’s ability to reconstruct an individual utility pole to restore electric
service or assure the continued maintenance of electric service to an area would be greatly impeded. (22, 42)

198. COMMENT: Please revise the definition of “repair” to read: “Repair means, except as herein excepted, to patch, mend, replace … For all other structures, except electric utility poles, towers and wires, the percentage of replacement … to the total area of the structure. For electric utility poles, towers and wires, 100 percent of the structure may be repaired.” While an individual electric utility pole, tower or wire is only a small percentage of an entire electric utility line, when an individual pole, tower or line must be repaired the entirety of that individual pole, tower or wire often has to be repaired. Without this exception to the definition, an electric utility’s ability to repair an individual utility pole to restore electric service or assure the continued maintenance of electric service to an area would be greatly impeded. (22, 42)

RESPONSE TO COMMENTS 196 THROUGH 198: The definitions of both “reconstruct” and “repair” are provided at N.J.A.C. 7:13-1.2 in order to distinguish between projects where structures are being largely replaced and/or somewhat altered (and thus possibly causing adverse impacts to flooding and the environment) from projects where structures are simply being repaired. This distinction is necessary in order to determine whether a given repair or reconstruction project is eligible for various permits-by-rule and general permits under this chapter, or whether the project must be reviewed under an individual permit. For example, the reconstruction of a lawfully existing structure is permitted-by-rule at N.J.A.C. 7:13-7.2(a)1, and the repair of a lawfully existing structure is permitted-by-rule at N.J.A.C. 7:13-7.2(b)4. Each permit-by-rule includes different thresholds for disturbance and other requirements that are appropriate for the type of work being proposed, as well as to ensure that no adverse impacts to public safety, health, general welfare and the environment will occur.

With regard to the reconstruction or repair of various structures associated with public utilities, many reconstruction or repair activities can be covered under the above referenced permits-by-rule, as well as the permits-by-rule at N.J.A.C. 7:13-7.2(c)1 and 2. Therefore, the Department does not believe that it is necessary to define the reconstruction or repair of
structures associated with public utilities differently than the definition of these terms for all other structures.

199. COMMENT: The definition of “reconstruction” may apply to roads. The Department should clarify how the percentage of replacement will be determined. (27, 49)

200. COMMENT: The definition of “repair” may apply to roads. The Department should clarify how the percentage of repair will be determined. (27, 49)

RESPONSE TO COMMENTS 199 AND 200: As defined, the term “reconstruct” applies in cases where greater than 50 percent of a structure is replaced and/or the size, shape or location of a structure is altered. The term “repair” applies in cases where no more than 50 percent of a structure is replaced and the size, shape and location of the structure is not altered. For all structures other than buildings, the percentage of replacement (for both terms) is to be determined by comparing the area of the structure being reconstructed or repaired to the total area of the structure. In the case of a roadway, the total area of the structure is equal to the total area of the roadway under the control of the public (or private) entity that has jurisdiction (or ownership) of the roadway in question.

201. COMMENT: Please include the following definition: “Riffle” means a reach of stream that is characterized by shallow, fast-moving water broken by the presence of rocks and boulders. (66)

RESPONSE: The word "riffle" is not used in the adopted new rules, and therefore it is not necessary or helpful to add a definition for this term.

202. COMMENT: The reference in the proposed definition of “riparian zone” to “land and vegetation” is potentially confusing, particularly in the context of redevelopment or rebuilding. It should be revised to clarify that it applies to “land with vegetation.” (7, 18, 33, 46, 53)
RESPONSE: In order to clarify the Department’s jurisdiction under this chapter, regulatory authority is established over two distinct yet partially overlapping areas: the flood hazard area and the riparian zone. The riparian zone measures outward a certain distance from a regulated water, as defined at N.J.A.C. 7:13-4.1, and the chapter establishes stringent standards to safeguard riparian zone vegetation from unwarranted disturbance. The riparian zone sometimes extends outside the flood hazard area. Adopting the commenter’s language could create confusion as to the Department’s jurisdiction over development in any unvegetated portions of a riparian zone that lies outside a flood hazard area. While some redevelopment projects in such a case might cause no adverse environmental impact, others, such as the construction of a new stormwater outfall, could cause unintended impacts and should therefore be subject to review by the Department. Furthermore, in cases where no riparian zone vegetation exists, redevelopment or reconstruction is generally facilitated by the adopted new rules. The Department therefore believes that the adopted definition of riparian zone is appropriate.

203. COMMENT: Electric generating facilities historically have been located on properties that may be the subject of this proposal. These properties could become locations for the construction of a new generating facility due to the presence of related and supporting public utility infrastructure. Accordingly, the Department should add a definition for the term “redevelopment” and define it as follows: “Redevelopment means the development of a new use on a property where the previous use, residential, commercial or industrial, has ceased and which has not been used for a five year period following cessation of those operations; or a property upon which an electric generating facility has operated.” (22)

RESPONSE: The word "redevelopment" is not used in the adopted new rules. Furthermore, the adopted new rules do not provide specific or additional standards designed for the redevelopment of any area, except for the requirements at N.J.A.C. 7:13-10.2(v), which address cases where an applicant proposes to redevelop a site within 25 feet of any top of bank or edge of water. Since the cited provision is sufficiently clear in meaning, the Department does not agree that adopting the suggested definition would be helpful or necessary.
204. COMMENT: The definition of “soil bioengineering” as proposed should be modified to include a reference to the “Standards for Soil Erosion and Sediment Control in New Jersey”. This manual contains a specific Standard (Standard for Soil Bioengineering, 28-1), which provides methods for properly analyzing and designing such stabilization. (55)

RESPONSE: Activities that incorporate soil bioengineering measures are eligible for general permit 2A under N.J.A.C. 7:13-8.4(c)1 as well as an individual permit under N.J.A.C. 7:13-11.14. All activities authorized under a general permit or individual permit must conform to the New Jersey Standards for Soil Erosion and Sediment Control at N.J.A.C. 2:90, pursuant to N.J.A.C. 7:13-8.1(b)5 and 11.1(c), respectively. Therefore, the Standard for Soil Bioengineering, 28-1, are incorporated by reference.

205. COMMENT: The term “structure” should be defined to include utility poles in order to be consistent with the inclusion of other utility infrastructure items, such as towers and wires. (22)

RESPONSE: The definition for “structure” has been clarified to indicate that a utility pole is another example of a structure.

206. COMMENT: In the definition for “suitably anchored”, the text does not clarify if a structure or other feature which is required to be “suitably anchored” will trigger a requirement for municipal building permit. (26)

RESPONSE: The adopted new rules set forth requirements that must be satisfied in order to receive a permit under this chapter. Whether a particular activity will trigger a requirement for a municipal building permit is not relevant to the definition of "suitably anchored" at N.J.A.C. 7:13-1.2.

207. COMMENT: The definition of "temporary" should be revised from six months to at least one year. In construction activities (such as a bridge replacement), the extent of the work involved and the seasonal restrictions to working in the stream often necessitate longer overall
construction contracts. The six month time limit will place an undue burden on the contractor, and will result in needlessly higher construction costs. (3)

RESPONSE: Adopted N.J.A.C. 7:13-1.2 defines "temporary" as a regulated activity that occupies, persists and/or occurs on a site for no more than six months. For example, a fill or structure is temporary if, within six months of its placement, the fill or structure is removed from the site and all disturbed regulated areas are restored to their original topography and vegetation. The adopted new rules allow certain activities to occur on a temporary basis in order to facilitate construction, or to allow property owners some flexibility in the use of their properties. The Department believes that a six month time period is an appropriate amount of time to consider an activity as temporary and that, if the definition for temporary activities were to be revised to one year or more as suggested, activities occurring for that period of time may cause adverse impacts to public health, public safety, and the general public welfare through increased flooding. Furthermore, the six month time period is consistent with the definition of temporary in the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4. In cases where an applicant demonstrates that a temporary disturbance must necessarily exceed six months, the Department may authorize longer periods of disturbance under an individual permit.

208. COMMENT: Please revise the definition of “temporary” to read, “Temporary means … and all disturbed regulated areas are restored to their original topography and measures have been implemented to restore the vegetative cover to the same or a similar vegetative state.” Restoration of the vegetation cover may take a number of weeks or months to occur after planting/reseeding has taken place. Depending upon the time of year that the temporary use has terminated, re-vegetation may even have to be delayed until the next proper re-seeding period. The definition should clarify that the time for re-establishing the final vegetation cover is not included in the six months of allowed temporary use. (42)

209. COMMENT: Restoration of the vegetation cover may take a number of weeks or months to occur after planting/reseeding has taken place. Depending upon the time of year that the temporary use has terminated, re-vegetation may even have to be delayed until the next proper
re-seeding period. The definition of “temporary” should therefore clarify that the time for re-establishing the final vegetation cover is not included in the six months of allowed temporary use. Accordingly, the definition should be revised to read as follows; “means … and all disturbed regulated areas are restored to their original topography and measures have been implemented to restore the vegetative cover to the same or a similar vegetative state.” (22)

RESPONSE TO COMMENTS 208 AND 209: The Department acknowledges that restoration of disturbed vegetation cover may take a number of weeks or months to occur after planting/reseeding has taken place, and that the temporary work may be completed in the non-growing season, not allowing for revegetation until the following growing season. Therefore, the definition of “temporary” has been modified on adoption to explain that a fill or structure is temporary if, within six months of its placement, the fill or structure is removed from the site, all disturbed regulated areas are restored to their original topography, and all necessary measures have been implemented to ensure that the original vegetative cover onsite is restored to its previous (or an improved) condition.

210.COMMENT: The expanded definition of “threatened and endangered species” now includes the New Jersey Plant List which identifies 802 species. This inclusion will be extremely difficult to address in a reasonable manner, particularly if the Department’s Natural Heritage program refuses to provide detailed information on location of documented occurrences of regulated plant species in the vicinity of the site. (26)

RESPONSE: The adopted definition of “threatened and endangered species” continues the definition from the repealed rules, which also referred to the Endangered Plant Species List at N.J.A.C. 7:5C-5.1. Adopted N.J.A.C. 7:13-10.6(c) also notes that, for endangered or threatened plant species … the Department shall rely on the New Jersey Natural Heritage Database for site-specific information.” A response to a Natural Heritage Data Request provides detailed information on plant locations. The cited rule also provides that, “Information regarding the Natural Heritage Program Database is available at: www.nj.gov/dep/parksandforests/natural/heritage/.” Furthermore, the Flood Hazard Area
Technical Manual includes a list of those endangered plant species that the Department has identified as being critically dependent on a regulated water for survival, for the purposes of determining the width of the riparian zone at N.J.A.C. 7:13-4.1(c).

211. COMMENT: The term “tributary” should be defined. (50)

RESPONSE: In the adopted new rules, the word “tributary” is used in its usual and customary manner to mean a stream or other surface water that contributes flow to another body of water. Therefore, the Department does not believe it is necessary to add a definition for this term.

212. COMMENT: The definition for “trout stocked water” is not consistent with the other regulations, including the Surface Water Quality Standards (N.J.A.C.7:9B-1.1 et seq.) and the Freshwater Wetlands Protection Act Rules (N.J.A.C.7:7A-1.1 et seq.). To what purpose has the Department added this definition and under what authority? Stocking a water with trout is not necessarily reflective of the environmental quality of that water. Waters not suited to long term trout survival or propagation may be stocked. Why would such waters be elevated in regulatory status? (26)

RESPONSE: The term “trout stocked” has been continued from the repealed Flood Hazard Area Control rules. This had been done in order to help applicants determine the appropriate timing restriction along such waters, as listed at N.J.A.C. 7:13-10.5(d), and also to identify Class A waters under N.J.A.C. 7:13-11.7(e), for which the Department has adopted specific construction standards to ensure that bridges and culverts are protective of aquatic habitat, and maintain low-flow aquatic passage.

213. COMMENT: The definition for “unsecured material” should be refined in order that items such as patio furniture are not to be considered regulated. (26)

214. COMMENT: The definition of “unsecured material” might apply to a footbridge or pedestrian bridge. More clarity is suggested in this definition. (27, 49)
RESPONSE TO COMMENTS 213 AND 214: Adopted N.J.A.C. 7:13-1.2 provides that unsecured material means a structure that is not suitably anchored (as also defined at N.J.A.C. 7:13-1.2), as well as any material placed on the surface of the ground, which would likely become buoyant, mobile or lifted by water during a flood, or otherwise be transported offsite by floodwaters. The adopted definition includes examples of unsecured material, such as building material, construction equipment, landscaping material, patio furniture, piles of soil, stone or wood, trash, vegetation in planters or root balls, and vehicles.

N.J.A.C. 7:13-2.4(a)4 provides that the storage of unsecured material in a flood hazard area or riparian zone is regulated under this chapter. Furthermore, as noted above, patio furniture is listed as an example of unsecured material in the adopted definition. However, N.J.A.C. 7:13-7.2(e) provides a permit-by-rule for the storage in a regulated area of unsecured material incidental to a lawfully existing private residence (such as lawn and garden equipment and materials, shelters for animals, trash receptacles, toys, vehicles and wood piles). The storage of patio furniture for a private residence would qualify for this permit-by-rule provided it satisfies the requirements listed at N.J.A.C. 7:13-7.2(e)1.

An application for a footbridge or pedestrian bridge can be authorized under General Permit 9 pursuant to N.J.A.C. 7:13-8.11 or under an individual permit pursuant to N.J.A.C. 7:13-11.8. Adopted N.J.A.C. 7:13-8.1(b)4 provides that a regulated activity shall be authorized under a general permit only if the Department determines that all structures are suitably anchored, and N.J.A.C. 7:13-11.4(b) similarly provides that the Department shall issue an individual permit to construct or reconstruct a structure only if the entire structure is designed and constructed to be suitably anchored. Since a footbridge or pedestrian bridge is a type of structure, it must be suitably anchored in order to qualify for a general permit or individual permit as outlined above. Therefore, a footbridge or pedestrian bridge does not fit into the definition of "unsecured material", and assuming such are suitably anchored, the Department believes that clarification of the definition is not necessary.

215.COMMENT: The proposed new rules should include a definition of “vegetation,” which precisely identifies what the term does and does not include. For example, the definition should
exclude areas of vegetation where previous development or disturbance has occurred (such as an area maintained as a lawn or garden, an area under agricultural use or an abandoned parking area that has partially revegetated). (7, 18, 33, 46, 53)

RESPONSE: The adopted new rules are intended to protect all vegetation within the riparian zones of the State, as defined at N.J.A.C. 7:13-4.1. The rules do not provide differentiated protection for one type of vegetation over another, and therefore no definition of “vegetation” is necessary. However, various permits-by-rule and general permits have been adopted which recognize that certain regulated activities warrant minor disturbance to riparian zone vegetation and/or encourage activities to be undertaken in portions of the riparian zone that have been previously disturbed. For example, the permit-by-rule at N.J.A.C. 7:13-7.2(b)5 allows the construction of a fence in certain cases, provided that “No vegetation is cleared, cut or removed in a riparian zone, except where previous development or disturbance has occurred (such as an area maintained as a lawn or garden or an abandoned parking area that has partially revegetated).” So, while all riparian zone vegetation is of value, a recognition is made in this permit-by-rule (and others) that, where disturbance must occur, it should take place in areas that have been previously developed or disturbed. The Department believes this hierarchal approach to preserving riparian zone vegetation is more appropriate, rather than defining certain types of vegetation as not being vegetation at all in certain cases.

216. COMMENT: The definition and use of the word “Water” is confusing and the Department should use the term “water feature” instead. (27, 49)

RESPONSE: The Department believes that the adopted definition of “water” is sufficiently clear as used in this chapter, and that adopting the suggested definition will not add clarity. Furthermore, the term “water” is defined primarily to assist in the understanding of the definition of “regulated water”, which is the term used throughout the rules to denote those surface waters that are subject to the flood hazard area and riparian zone requirements of the adopted new rules.
217. **COMMENT:** The second sentence of the proposed definition of “water” that reads “a water also includes the path or depression through which the water flows or is confined” should not be adopted. The proposed language would regulate every square foot of land of the State as every drop of water can theoretically be viewed as having an associated flow path that would be regulated under the proposed definition. Additionally, the third sentence of the proposed definition of “water,” which states that “a storm sewer is not a water unless it was constructed to replace or to divert a previously existing water” should not be adopted. The proposed language is so broad as to regulate any water that is modified or converted through piping, for example water piped to a sewerage treatment plant or beverage facility. (7, 18, 33, 46, 53)

218. **COMMENT:** With regard to riparian zones, the definitions at N.J.A.C. 7:13-1.2 for “water”, which includes "the path or depression through which water flows" is too vague and broad, especially since the Department proposes to regulate all waters regardless of drainage area with a riparian zone. Using this definition, it is certain that different Department reviewers will have differing interpretations of the riparian zone location, thereby leading to discretionary standards being applied to project sites. If the Department intends to regulate flood hazard area limits with riparian zone restrictions, the rule proposal should be amended to provide a tributary drainage area limit of 50 acres. This would provide a manner of consistency in determining which waters are intended to be regulated with riparian zones. (61)

219. **COMMENT:** The guidance at N.J.A.C. 7:13-4.1 is inadequate for determining the presence or location of a riparian zone on a given site. The riparian zone, which “exists along every regulated water”, relies upon the definitions of "water" at N.J.A.C. 7:13-1.2 and “regulated water" at N.J.A.C. 7:13-2.1. If "water" is defined as "a collection of water on the surface of the ground, including, but not limited to, a bay, brook, creek, ditch, lake, pond, reservoir, river, stream or swale (and) includes the path or depression through which the water flows or is confined”, then “waters” are everywhere because there is a flow path from every raindrop that falls in the State. As proposed, “regulated waters” will be present wherever the flow path from any given raindrop has a drainage area greater than 50 acres because “all waters in New Jersey are regulated”, as stated at N.J.A.C. 7.13-2.2. The only exception is “… any segment of water
that has a drainage area of less than 50 acres, with no definable channel.” As a result, riparian zones will exist virtually everywhere. (47)

220. COMMENT: The definition for “water” is broad and should be refined. The term “collection” insinuates that puddles may be regulated and should therefore be excluded from the definition. The phrase “a path which conveys surface water runoff” indicates that drift roads, trails, deer paths, and eroded hillsides (particularly apparent in high clay soil and Piedmont soils), in addition to other man-made features that unintentionally convey surface water, could be regulated. Also, this definition includes all piped waters that flow through urban areas, including much of the City of Trenton, for example. Specifically, the Assunpink Creek and Shady Brook flow under the City of Trenton prior to discharging into the Delaware River. These waters will now require a riparian buffer which will make it even more difficult to redevelop urban areas, even though most people are unaware of a stream existing underfoot and the fact that the above-ground riparian zones will do nothing to protect below-ground streams. (26)

RESPONSE TO COMMENTS 217 THROUGH 220: The adopted new rules are not intended to regulate the entire State. Although the definition of “water” is intentionally broad in order to capture all surface waters, not all waters are regulated under this chapter, as explained at N.J.A.C. 7:13-2.2. Under N.J.A.C. 7:13-2.2(a)3, for example, many waters having a drainage area of less than 50 acres are not considered “regulated waters” for the purposes of this chapter and are therefore not subject to its requirements. Jurisdiction under this chapter is appropriately limited to those surface waters that drain 50 acres or more (since the Department recognizes that such waters have a potential to cause flood damage), as well as naturally occurring channels that drain less than 50 acres (since the Department recognizes that such waters have ecological value that must be preserved).

It is also appropriate, under the definition of “water”, to indicate that “a storm sewer is not a water unless it was constructed to replace or to divert a previously existing water,” because the rule is not intended to regulate water conveyance systems that drain less than 50 acres, which are wholly manmade, such as many storm sewers, or water that is piped to a sewerage treatment plant or beverage facility, as noted by the commenter. However, some existing water conveyance
systems may actually have been created at one time by piping or diverting a previously-existing, naturally-occurring feature, which would have otherwise been regulated by the Department. Piping or diverting such a feature does not eliminate its potential to cause flooding. Furthermore, unchecked development along a diverted or piped feature can still cause adverse environmental impacts. Thus it is appropriate for the Department to regulate activities which could affect naturally-occurring surface water features, even if they have been previously diverted or piped. Given the above, and in order to clarify the Department’s intent, N.J.A.C. 7:13-2.2(a)3ii has been modified on adoption to explain that “any water that historically possessed a naturally-occurring, discernible channel, which has been piped, culverted, ditched or similarly modified” remains a regulated water for the purposes of this chapter regardless of the contributory drainage area of the water.

221.COMMENT: The definition for “water” does not exclude swales, which under the Freshwater Wetlands Protection Act Rules (N.J.A.C.7:7A-1.1 et seq.) are not subject to transition area requirements. It should be clarified that the Department does not intend to impose riparian zones on swales as defined in the Freshwater Wetlands Protection Act Rules. (26)

RESPONSE: The adopted definition of “water” is intentionally broad, so as to include all surface waters. However, not all waters are regulated under this chapter, and not all regulated waters possess a riparian zone. Regulated waters are defined at N.J.A.C. 7:13-2.2 and the flood hazard areas and riparian zones around each regulated water are defined at N.J.A.C. 7:13-2.3. Under the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4 a swale “drains less than 50 acres” and “has no definite bed and banks.” Thus a feature that meets the definition of a swale under N.J.A.C. 7:7A-1.4 also meets the requirements at N.J.A.C. 7:13-2.2(a)3i for a water that is not regulated under the Flood Hazard Area Control Act rules.

N.J.A.C. 7:13-1.3 Types of permits and approvals

N.J.A.C. 7:13-1.3(b)
222. COMMENT: Utilities should be treated in the same manner under the proposed regulations regardless of whether their interest is ownership of the affected property or an easement authorizing its use. Proposed N.J.A.C. 7:13-1.3(b) identifies three categories of persons or entities that are eligible for permits under the proposed regulations: owners of the property on which regulated activity would take place, the designated agent of such an owner and governmental entities exercising eminent domain authority. Quite often, however, public utility infrastructure is sited on property that is owned by another person who has conveyed an easement that enables the utility to conduct the necessary work on the property. The public utility’s use of the property is indistinguishable from the situation where the utility owns the affected land. (36, 42)

223. COMMENT: Proposed N.J.A.C. 7:13-1.3(b) should be modified to allow private landowners/developers to conduct necessary improvements on a right of way in certain instances. As currently drafted, this section limits who can perform activities under a permit and needs to be modified to address the above situation. (46)

RESPONSE TO COMMENTS 222 AND 223: The Department cannot authorize the use of a permit unless the proposed activities will occur on a property which the applicant owns or controls. This is the purpose of N.J.A.C. 7:13-1.3(b). The Department must be able to confirm that the owner of the property is aware and has consented to all proposed permit activities. The Department recognizes that utility companies do have authority by way of an easement and or other agreement to conduct activities in certain areas. Therefore, so long as the utility company can provide documentation that the easement will permit the conduct of the regulated activities proposed by the utility, the company will have the authority to obtain a permit under this chapter. In the case where the property owner wishes to conduct a regulated activity under a general permit or individual permit in an area that is subject to an easement, the Department will require a copy of the easement or a letter from the entity that holds the easement to confirm that there is no conflict between what the owner is proposing and what the easement will allow.
224. COMMENT: Public utilities often obtain easements to enable them to conduct their activities on property owned by others. Those easements generally include the types of activities that would be regulated by the proposal. In some instances, the utility may still be negotiating the final terms of an easement with a property owner during the period when an application needs to be filed with the Department to allow the utility to conduct an activity regulated under these regulations. In such instances, the utility would provide a written consent from the property owner so that the negotiations for the final easement and the review of the permit application package may proceed in parallel. In order to allow both the easement negotiation and regulatory process to proceed in parallel, a new item N.J.A.C. 7:13-1.3 (b)2 should be added as follows: “2. The owner(s) of a right-of-way or easement on which the regulated activity is proposed or conducted. The Department shall be provided with either written consent for the regulated activity from the owner(s) of the property or a copy of a valid easement showing that the owner(s) of the property have granted the owner(s) of the right-of-way or easement the authority to conduct the activity on the property.” To accommodate this new section, N.J.A.C. 7:13-1.3(b)2 and (b)3 should be renumbered as (b)3 and (b)4, respectively. (22, 36, 42)

RESPONSE: The Department does not believe that the suggested change is necessary in order to allow a utility to provide a permit application package simultaneously while negotiating for an easement. At N.J.A.C. 7:13-1.3(b)1, the Department states that “if the regulated activity is proposed or conducted within a right-of-way or easement, the Department shall be provided written consent for the regulated activity from the owner(s) of the right-of-way or easement.” The Department believes that this is sufficient to allow the utility to provide the easement documentation, if available, with language allowing the activity that the utility will be conducting by way of a flood hazard area approval, or a separate sign-off from the property owner if the easement negotiation is not yet completed.

N.J.A.C. 7:13-1.3(c)

225. COMMENT: The amendment that provides that the rules in place at the time of application should be applied is contrary to common practice. Amendments to the rule in place at the time of
decision should be applied to applications. Certain delays by an applicant could substantially delay review and render the regulations in place at the time of application inappropriate. (20, 38, 41, 54, 60, 63, 69)

226. COMMENT: In the adoption document, the Department should make a statement of intent to propose new rules, within 6 months, to revise the current time of decision policy so that any changes in rules or standards apply to projects in all phases of the review pipeline prior to final permit issuance. (69)

RESPONSE TO COMMENTS 225 AND 226: The permitting procedures of the Flood Hazard Area Control Act rules are governed by the 90-day Construction Law, N.J.S.A. 13:1D-29 et seq., which establishes the time frames for review of an application. Consequently, in order to make a timely decision in compliance with the law, the Department must review an application in accordance with the rules in effect on the day that a complete application is received by the Department. Once determined to be complete for review, neither the applicant nor the Department can substantially delay the review because of the statutorily-established time frames by which the Department must render a decision. Substantial delays by an applicant, in cases where revisions are necessary to bring a project into compliance with this chapter, will result in either a permit denial or withdrawal of the application by the applicant. An application that is withdrawn, if resubmitted to the Department for review, will be reviewed under the rules in place at the time the resubmission is received by the Department.

227. COMMENT: The Department should use the term “administratively complete application" at N.J.A.C. 7:13-1.3(c) instead of “complete application.” (27, 49)

RESPONSE: The Department does not believe it appropriate to distinguish between administrative and technical completeness at N.J.A.C. 7:13-1.3(c). While the distinction was made under the repealed rules, the Department’s goal is to review applications in the first 20 working days to determine whether all requirements for a permit application have been received and that the application is technically sufficient such that the application is “complete for
review,” for purposes of N.J.A.C. 7:13-9.3(b). In this way, the Department is attempting to reduce the number of applications that may contain all of the necessary components, but which, due to technical deficiencies, require substantial revisions in order to be approved within 90-days of receipt.

N.J.A.C. 7:13-1.3(d)

228.COMMENT: It is unreasonable to impose liability on applicants, consultants, engineers, surveyors or agents for the unknowing failure to submit necessary information to the Department. The proposed language in the last sentence of proposed N.J.A.C. 7:13-1.3(d) that reads “and may subject the applicant, its consultants, engineers, surveyors or agents to enforcement action under N.J.A.C. 7:13-19 for submittal for false information” could result in such potential liability and, therefore, should not be adopted. To the extent the proposed language is maintained, it should limit enforceable actions to the knowing submission of false information. Additionally, violations that are determined to have a minimal effect upon public health, safety or natural resources should be classified as minor consistent with the Grace Period Law. (7, 18, 33, 46, 53)

RESPONSE: N.J.A.C. 7:13-1.3(d) requires that “A person submitting an application under this chapter shall, to the extent that the person is aware, notify the Department of all facts relevant to the review of the application…” The provision is intended to require full disclosure of all facts related to an application that an applicant and its agents are aware of. The Department believes this provision is necessary in order to emphasize that withholding relevant information from the Department, as well as providing false information to the Department, is a violation of the chapter and may subject the perpetrator to enforcement action. The provision does not address failure to disclose information that the applicant or its agents are unaware of.

The rules at N.J.A.C. 7:13-1.2 and 19.2 identify violations of the Flood Hazard Area Control rules as either minor or non-minor for the purpose of providing grace periods in accordance with P.L. 1995, c. 296 (N.J.S.A. 13:1D-125 et seq.), commonly known as the Grace Period Law. However, it is important to note that the Grace Period Law establishes a minor violation as one
which poses minimal risk to public health, safety and the natural resource, and not a minimal effect, as suggested by the commenter (see N.J.S.A. 13:1D-129(b)(2)).

229. COMMENT: An applicant needs to be assured that there is some level of reasonableness to the amount of information about a site that a person can be expected to know, particularly information pertaining to historical events or damage that may have occurred a significant number of years prior, and that were only vaguely or obscurely recorded. Accordingly, N.J.A.C. 7:13-1.3(d) should be revised as follows: “A person… to the extent that the person is aware or could reasonably be expected to have been aware, notify the Department …” (22, 42)

RESPONSE: The provision at N.J.A.C. 7:13-1.3(d) that requires that a person notify the Department of all facts relevant to the review of the application “to the extent that the person is aware” is sufficiently clear and reasonable to require only the submittal of information about which the owner is knowledgeable. The section is intended to require the submission of all information about which the owner is aware, and to further inform the applicant, its consultants, engineers, surveyors or agents about the potential penalties for failing to submit such information or for submitting false information.

N.J.A.C. 7:13-1.4 Delegation of Authority

230. COMMENT: In accordance with the Flood Hazard Area Control Act, the existing and proposed new rules provide for the delegation of certain authorities to counties. The proposed new rules require a county that meets all requirements for such delegation to permanently retain, and make available for review by the Department, certain records to document that it has discharged its delegated duties for each application it processes. The proposed rule further provides that the Department shall review these records at least annually. We note that the statute states that the Department shall review this delegation "at least biannually", N.J.S.A. 58:16A-55.6, a mandate that should be reflected in the proposed new rules. (37)
RESPONSE: N.J.A.C. 7:13-1.4(c) has been amended to provide that the Department shall review records kept by a county governing body that has assumed delegation at least biannually in order to reflect the statutory requirement of N.J.S.A. 58:16A-55.6.

231. COMMENT: Delegation to counties should be discouraged. Counties lack the professional staff, resources and expertise, institutional capability, and incentives to appropriately manage protections that are obligations of the Department. Counties are inordinately influenced by political considerations. (69)

232. COMMENT: “Authority to take action” should not be delegated to a county governing body. Counties do not have the institutional knowledge or access to the information available to the Department professional. Counties do not have the experience to perform this review and the need to hire qualified professionals would burden the counties. In addition, counties may be too involved with the issue to be able to provide objective review of the application. (10, 67)

233. COMMENT: Delegation to counties, although provided for in the law, should be discouraged. Counties typically have “Flood Control Committees” and generally do not address ecological, nonstructural BMPS. They can also be inordinately influenced by political considerations. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 231 THROUGH 233: N.J.A.C. 7:13-1.4, delegation of authority, is provided in the Flood Hazard Area Control Act at N.J.S.A. 58:16A-55.6. However the act does not provide any detail of the standards to be met by an interested county, or the limits on such delegation, so the Department has provided those details in the adopted new rules. The Department will not delegate all or any portion of its authority to a county unless the county can demonstrate that it has the authority for such reviews, provided by way of an ordinance or resolution, and that it has personnel, physical resources and funding adequate to assume the delegated responsibilities. The adopted new rules at N.J.A.C. 7:13-1.4(a) therefore require any county seeking delegation to submit information to allow the Department to assure that the appropriate level of expertise and resources are available before delegation will occur. Further,
the Department will seek assurance, as part of the description of the responsibility that the county
seeks to assume, that all aspects of the review responsibility being sought will be addressed by
the county review agency. The Department has also ensured that counties will not have a conflict
of interest when reviewing a project, by excluding a county from the review of applications for
State agencies, applications by the county governing body itself, and individual permits that
include a hardship exception.

234. COMMENT: Although proposed N.J.A.C. 7:13-1.4 addresses delegation of Chapter
N.J.A.C. 7:13 authority to county government, there is no systematic mechanism for regulated
entities to know which counties have delegated authority. Therefore, it is recommended that
N.J.A.C. 7:13-1.4(b) and (c) be amended to require that: (1) the Department publish in the New
Jersey Register (and/or maintain on the agency’s website) a current list of all counties having
delegation of N.J.A.C. 7:13 authority; and (2) as a condition of such delegation, affected counties
are similarly required to post at their principal offices (and/or on their websites) a notice
identifying those aspects of N.J.A.C. 7:13 for which they have delegated authority. (36, 42)

235. COMMENT: The regulated community needs to know with whom they should be
interacting, either the Department or a county governing body, on actions covered under these
regulations. Accordingly, this section should be revised to include a new item 3 as follows: “3.
The Department shall publish in the NJ Register an identification of those county governing
bodies that have been delegated authority, specifying which aspects of the Department’s
authority has been delegated.” (22)

236. COMMENT: This section should be revised as follows: “(c) A county governing body…it
processes. Additionally, the county governing body shall maintain a posting in its permanent
location of business identifying those aspects of the Department’s authority that have been
delegated to the governing body. The posting shall be in a public and easily accessible location,
such as on a bulletin or notice board located at governing body’s permanent location of business.
The Department shall review…” (22)
RESPONSE TO COMMENTS 234 THROUGH 236: Despite the provision for delegation contained in the Flood Hazard Area Control Act and the Department’s rules for many years, to date no county has obtained delegation of any or all of the Flood Hazard Area rules. If a county obtains delegation in the future, the Department will post notice of such delegation in the DEP Bulletin, as well as on the Division of Land Use Regulation’s website, to ensure that applicants who may be affected by the delegation are fully informed.

N.J.A.C. 7:13-1.5 Creation of a county water resources association

237. COMMENT: County water resource associations should not be formed as they are an unnecessary layer of bureaucracy. County water resource associations may be politically influenced and the suggested members are not necessarily qualified to make decisions concerning flood control, environmental and ecological issues or regulation. (10, 67)

RESPONSE: Like the ability to obtain delegation of part, or all, of the Flood Hazard Area program, the authority to create a county water resource association is contained in the Flood Hazard Area Control Act at N.J.S.A. 58:16A-55.5. The terms and conditions for creating such an association and the members thereof contained in the Department’s rules at N.J.A.C. 7:13-1.5 are identical to those provided by the Flood Hazard Area Control Act. Consequently, counties with an interest in creating such an association are provided with the authority by way of the statute, and may include the members that are also identified by statute. Additional members can be added because both the statute and the Department’s rules at N.J.A.C. 7:13-1.5(b) allow the addition of “any other person with relevant experience or training.”

238. COMMENT: We appreciate the inclusion of soil conservation districts in county water resources associations, however, for consistency of terminology, it is recommended that the this section be modified to replace the term “county soil conservation district” with the term “local soil conservation district.” (55)
RESPONSE TO COMMENTS 237 AND 238: N.J.A.C. 7:13-1.5(d) has been modified on adoption to refer to the “local soil conservation district” in order to be consistent with the usage of the same term throughout the adopted new rules.

Subchapter 2: Extent of Regulatory Authority

N.J.A.C. 7.13-2.1 Permit requirement

239. COMMENT: The commenter suggests that wording similar to that in proposed N.J.A.C. 7:7-1.5(b) (DEP Docket Number 19-06-09/482 - proposed Public Trust Rights rule for coastal permitting program) regarding "responsible party, such as, the site operator or contractor", be included to this subsection of the proposed Flood Hazard Area Control Act rules. This would allow the responsible party, and not just the permittee, to be held responsible for violations, and be subject to enforcement actions. (28)

RESPONSE: At N.J.A.C. 7:7-2.1(a), the rule states that no person shall engage in a regulated activity in a regulated area without a permit listed at N.J.A.C. 7:13-2.1(b), and, furthermore, that initiation of a regulated activity without the necessary permits shall be considered a violation of this chapter and shall subject the party or parties responsible for the regulated activity to enforcement action, as set forth at N.J.A.C. 7:13-19. The language in the adopted new rules regarding the assessment of penalties makes clear that enforcement action, under N.J.A.C. 7:13-19, may be taken against any person responsible for undertaking a regulated activity not in conformance with one of the flood hazard area permits listed at N.J.A.C. 7:13-2.1(b).

N.J.A.C. 7:13-2.1 (b)

240. COMMENT: The Department should strive to have applicants apply for and obtain one land use permit, when feasible. For example, a flood hazard area permit should not be required if any other land use permit is required, such as a freshwater wetlands permit. In this example, the
freshwater wetland permit could then require compliance with the flood hazard area regulations, as necessary. (12)

RESPONSE: The Department agrees that duplicative reviews should be eliminated where possible. Therefore, the adopted rules eliminate the need for a flood hazard area permit for activities that have received a CAFRA or waterfront development permit, provided the CAFRA or waterfront development permit application was determined to be complete for review after the effective date of the new rules and, for activities proposed in fluvial flood hazard areas, the requirements of N.J.A.C. 7:13-9.6(a) are satisfied. This is appropriate because, under the amendments to the Coastal Permit Program rules at N.J.A.C. 7:7 and Coastal Zone Management rules at N.J.A.C. 7:7E adopted at this time, an activity requiring a CAFRA or waterfront development permit must comply with the requirements of N.J.A.C. 7:13. Accordingly, a second review of the same information applying the same standards as were applied during the CAFRA or waterfront development permit review is unnecessary. This is possible because the coastal permitting programs include a regulatory structure that required review of activities in flood hazard areas under N.J.A.C. 7:7E-3.25. The Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A, however, are promulgated specifically to regulate activities within freshwater wetlands, transition areas and State open waters. Unlike the coastal permitting programs, the freshwater wetlands permitting program does not, therefore, include a regulatory structure that would allow the review of potential impacts to flooding. As such, the Department determined that it could not require freshwater wetlands authorizations to comply with the requirements of N.J.A.C. 7:13. Therefore, while a flood hazard area permit is not required for activities that have received a CAFRA or waterfront development permit, activities authorized under the Freshwater Wetlands Protection Act rules must obtain a separate flood hazard area permit if the activity is regulated under N.J.A.C. 7:13. When possible, the Department will issue a freshwater wetlands and flood hazard area permit concurrently.

N.J.A.C. 7:13-2.1(e)
241. COMMENT: The proposed grandfathering provision at N.J.A.C. 7:13-2.1(c) fails to recognize the millions of dollars that are invested in developing plans for local approvals, many of which are designed specifically to avoid requirements for stream encroachment permits under existing the Department rules. Such projects should be exempt from the new rules or, at a minimum, be entitled to a hardship waiver based upon reliance upon the prior rules. (65)

242. COMMENT: The proposed grandfathering provision at N.J.A.C. 7:13-2.1(c) is inadequate. Under the proposed new rules, "something" will have to have been built for grandfathering to trigger, or a valid "final municipal construction permit" will need to have been issued. Using building permits as a benchmark does not recognize the substantial investment necessary to perform engineering and planning work, and obtain site plan approval, often a multi-year, multimillion dollar process. Investments made in good faith under existing rules and regulations will be at risk, which sends the wrong message at a time when New Jersey is viewed by many prospective employers and tenants as being hostile to business. (46)

243. COMMENT: Given that most waterways with drainage areas under 50 acres are now included, and stream buffers (riparian zones) are larger, a project could have received site plan approval and then be required to redesign if portions fall within a newly regulated area. The receipt of preliminary or final site plan approval (whichever is earlier) should be the trigger for grandfathering, as was the case with exemptions when the Freshwater Wetlands Act incorporating transition areas went into effect. (46)

244. COMMENT: The proposed new rules lack any meaningful explanation or analysis of the economic impacts of limiting the proposed grandfather exemption to only those projects for which “the regulated activity is currently approved under a valid final municipal building or construction permit” issued prior to the effective date of the proposed new rules. The proposal does not reflect an appreciation of the cost of applying for and obtaining municipal land use approvals, notwithstanding that such costs have been acknowledged in grandfathering provisions of other rules (such as the Freshwater Wetlands Protection Act rules). By adopting the proposed grandfathering provisions, many projects that have seen significant investment, but which have
not yet obtained a final municipal building or construction permit, will be unduly subject to the proposed new rules. Halting such projects will deny the State’s workforce much needed housing, workplaces and employment opportunities; it will extinguish investments made in a good-faith reliance on duly adopted plans and regulations; and it will exacerbate the State’s unfortunate reputation as being inhospitable to business interests. (7, 18, 33, 46, 53)

245. COMMENT: The grandfathering provisions of the proposed new rules are unduly restrictive and do not adequately respect the private sector’s good-faith reliance on the current rules. Rather than relying on the issuance of municipal building or construction permits, an event that occurs only after substantial investments of time and resources, the proposed grandfathering provision should apply where there is evidence of reliance and significant investment, irrespective of whether a building (or construction) permit has issued. A more reasonable threshold for grandfathering, which evidences substantial investments made in good-faith reliance, would be submission of a complete application for municipal review pursuant to the Municipal Land Use Law (N.J.S.A. 40:55D-1, et seq.) (7, 18, 33, 46, 53)

246. COMMENT: With regard to the proposed requirement that a project receive a “final municipal building or construction permit” in order to be grandfathered from the proposed new rules, the Department should strike the word “final” since this is not a clearly defined term in the context of construction permits. (7, 18, 33, 46, 53)

247. COMMENT: The proposal must be revised to provide relief for projects by public entities that have obtained preliminary or final site plan approval or preliminary or final subdivision approval that have been designed to meet the Department’s current standards. For example, public projects that have obtained necessary local approvals such as preliminary or final site plan approval may now require complete redesign, resulting in extended delays and increased expenses. Public entities are increasingly hard pressed to stay within budget constraints. Without relief through an appropriate “phase in” of the proposed requirements, the funds expended by municipalities to achieve the level of planning and design necessary to obtain local approval will
have been wasted only to be incurred yet again. This precipitous action, without the necessary “phase in”, will result in a waste of taxpayer dollars throughout the State. (19)

248. COMMENT: The Department should make provisions not to require a new flood hazard area permit for those projects that have preliminary or final subdivision approval at the local level prior to the adoption date consistent with the Freshwater Wetlands program. Approvals obtained from regional regulatory agencies, such as the New Jersey Meadowlands Commission, should also be accepted as reasons for not to require a new flood hazard area permit for a project. (12)

249. COMMENT: The Department should include specific provisions similar to those in the stormwater management rules at N.J.A.C. 7:8, which became effective on February 2, 2004. Under those rules, projects that did not require a Land Use Regulation permit were grandfathered so long as they received one of the following municipal approvals prior to February 2, 2004: (1) preliminary or final site plan approval; (2) final municipal building or construction permit; (3) minor subdivision approval where no subsequent site plan approval is required; (4) final subdivision approval where no subsequent site plan approval is required; or (5) preliminary subdivision approval where no subsequent site plan approval is required. N.J.A.C. 7:8-1.6(a)1. The grandfathering provisions under the stormwater management rules are far more reasonable and equitable than the narrow provision contained in the proposed new rules. The ability to be grandfathered under a preliminary site plan approval would allow for current multi-phase projects that are conducted pursuant to a municipal or county redevelopment plan to proceed without the severe unforeseen impact of the proposed new rules. (23)

250. COMMENT: Are all permits needed for grandfathering, or just those within the regulated area affected by the new rules? (46)

251. COMMENT: The proposed grandfathering provision at N.J.A.C. 7:13-2.1(c)3i states that a permit will not be required when the proposed activity was not subject to the rule prior to the rule adoption date, and where the activity is currently approved under a "final municipal building or
construction permit, which was approved prior to the date of rule adoption." Most rules state that, so long as site plan approval has been obtained prior to the rule adoption date, the landowner will not have to fulfill the requirements of the new rule. Landowners need to be able to rely upon their plans once they have been approved by a municipality or county, and there is frequently a gap between approval and the acquiring of a construction permit. Should the Department adopt the proposed new rules, many developers who have obtained preliminary or final site plan approval and have acted in accordance with current flood rules (i.e., have designed their projects to stay outside the current buffer areas and thereby avoid the need for a permit), but have not begun construction, will find that they must now obtain a variance from the Department, at considerable expense and delay. If the variance is not granted, all of the time, effort and expense in obtaining site plan approval will be for naught. (70)

RESPONSE TO COMMENTS 241 THROUGH 251: As noted in the summary of the proposal, 38 N.J.R.4001-2, flooding has been a chronic problem in New Jersey which has, in recent years, markedly increased in intensity and damage to property and the environment. This problem is due, in large part, to development within flood hazard areas throughout the State. New Jersey’s Fiscal Year 2004 Map Modernization Business Plan estimates that flood hazard areas encompass almost 35 percent of the State (http://www.floods.org/pdf/sbp_nj_04.pdf) and FEMA has declared flooding New Jersey's number one natural hazard (FEMA news release 1530-012, August 4, 2004). These facts, combined with New Jersey's dense population and its long history of development pressure, has led the Department to conclude that it is necessary to adopt more stringent Flood Hazard rules and apply them to all projects except those described in N.J.A.C. 7:13-2.1(c). The Department believes that the new rules fairly balance the public interest in minimizing flood damage and protecting against surface water degradation with the interest of individual property owners’ in completing projects that have, prior to adoption of these rules, progressed in planning and organization to the verge of construction or which have obtaining a site specific review for impact on flood hazard areas and surface waters as described below. If a project is not grandfathered under N.J.A.C. 7:13-2.1(c) and the applicant feels that strict compliance with the requirements of the adopted new rules would create an undue hardship, N.J.A.C. 7:13-9.8 sets forth a procedure by which an applicant can petition the Department for
an exception from strict compliance with one or more requirements of this chapter. This procedure addresses commenters’ concerns that inflexible application of the new rules might infringe upon investment-backed expectations and provides an administrative remedy for such claims to be examined on a case-by-case basis.

Because stream encroachment, CAFRA, and Waterfront Development permits include a site-specific review of a project’s potential adverse impact on flood hazard areas and surface waters, the Department believes that it appropriate to grandfather projects that have received these approvals under certain circumstances. While the Department stated its intention in the proposal summary to grandfather projects that had undergone a Department flood hazard area review prior to adoption of the new rules, some commenters expressed confusion over which portions of a development would be grandfathered.

N.J.A.C. 7:13-2.1(c), as modified on adoption, provides that, 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. This clarification is necessary since the grandfathering of a project, or any distinct portion of a project, as described below, is predicated on whether all necessary approvals have been obtained under the various rules or jurisdictions that have authority over a site prior to the effective date of these new rules; November 5, 2007.

N.J.A.C. 7:13-2.1(c)1, as modified on adoption, grandfathers in its entirety a project for which, prior to the effective date of these new rules, a permit issued pursuant to the repealed Flood Hazard Area Control rules was obtained or timely applied for, provided the permit covered all aspects of the project that required approval under the repealed rules. Projects for which a permit issued pursuant to the repealed rules was not obtained or timely applied for, or which permit did not cover all aspects of the project requiring a permit under the repealed rules, are grandfathered only as to the portions approved under a permit issued pursuant to a timely received application. Thus, assume that a ten-house development proposed under the repealed rules had only seven houses under Department jurisdiction under the repealed rules because those seven houses were located within the 50-foot buffer of a stream. With the adoption of these new rules, assume that the other three houses are now under Department jurisdiction because they are located within the new 150-foot riparian zone along the stream. If the applicant submitted a permit application under the repealed rules for all prior regulated portions of the
project (the seven homes), which was complete for review prior to the adoption of these new rules, and the application is subsequently approved, then all ten houses are grandfathered from the new rules for as long as the Flood Hazard Area Control rules permit is valid. The three houses that did not lie within the Department’s jurisdiction prior to November 5, 2007 (the effective date of these new rules) are grandfathered. In order for a project to be grandfathered, a complete application for the permit must have been received by the Department prior to (the effective date of these new rules). If the Department receives an application for a stream encroachment permit prior to (effective date of these new rules), and the application is complete for review before this date, the Department will review the application according to the Flood Hazard Area Control Act rules that were in effect on the date of application submittal. The Department can make its completeness determination after (effective date of these new rules). The application need only arrive at Department offices prior to (effective date of these new rules). All applications received on or after (effective date of these new rules) will be reviewed under the new rules. If an application is received prior to (effective date of these new rules) and is subsequently rejected as incomplete, or is denied or withdrawn, a revised application will be reviewed under the new rules if it is received by the Department on or after (effective date of these new rules).

In addition, the regulated activity must either be specifically approved under the permit or not have required a stream encroachment permit under the repealed rules and be part of a project that did require a stream encroachment permit. If an applicant applied for and obtains a stream encroachment permit for a project under the repealed rules, and that permit encompasses and approves the entirety of activities that were regulated under the jurisdiction of N.J.A.C. 7:13 at the time of application, then all regulated activities that are part of the project would be grandfathered. If, however, an applicant segments a development and applies to the Department for a permit for only some of the activities that would have been regulated under the repealed rules, only that portion of the project for which a permit was issued would be grandfathered. Any portions of the project that were subject to the repealed rules but which were not approved by the Department under the repealed rules, would require a permit under the newly adopted rules.

The Department does not agree with some commenters’ proposals to grandfather projects that obtained a freshwater wetlands permit from the Department prior to the effective date of
these rules. Such projects are not eligible for grandfathering under this chapter because neither the Freshwater Wetlands Act, N.J.S.A. 13:9B-1 et seq., nor its implementing rules at N.J.A.C. 7:7A require site-specific review of the project’s potential adverse impact on flooding and surface waters.

N.J.A.C. 7:13-2.1(c)2 grandfathers projects for which all necessary CAFRA or Waterfront Development Permits have been issued by (the effective date of these rules), or for which an administratively complete application for a CAFRA or Waterfront Development Permit has been received prior to (the effective date of these rules). Note that these coastal programs do not perform a site-specific review of potential flood hazard area impacts until the application has been declared by the Department as complete for final review. Thus, to be grandfathered under N.J.A.C. 7:13-2.1(c)2, the Department must have declared an application for a CAFRA or Waterfront Development Permit complete for final review prior to (effective date of these rules). If a CAFRA or Waterfront Development Permit application is received by the Department prior to (effective date of these new rules) but the Department has not declared the application complete for final review prior to (effective date of these new rules), the application will be reviewed under the newly amended Coastal Zone Management rules.

N.J.A.C. 7:13-2.1(c)2 further clarifies the Department’s intention to grandfather from these new rules only those coastal projects that were not eligible to receive a stream encroachment permit because of repealed N.J.A.C. 7:13-1.3(d), which exempted projects from stream encroachment permitting if they were located “within tidally influenced flood plains” (i.e., tidal flood hazard areas) regulated pursuant to the Waterfront Development Law or the Coastal Area Facilities Review Act (CAFRA). Under the repealed rules, a stream encroachment permit was not needed for projects in tidal flood hazard areas if a coastal permit was required. However, because projects located in non-tidal flood hazard areas were not exempt under repealed N.J.A.C. 7:13-1.3(d) they would have required a stream encroachment permit even if they did need a coastal permit as well. Since a project located in a non-tidal flood hazard area needed a stream encroachment permit the grandfathering provision of N.J.A.C. 7:13-2.1(c)1 would apply because that paragraph addresses projects that received a prior stream encroachment permit. Such a project would not be considered under N.J.A.C. 7:13-2.1(c)2 because that provision addresses projects in tidal flood hazard areas that received a prior coastal permit.
Projects that did not require any of the permits described above are grandfathered under N.J.A.C. 7:13-2.1(c)3 if the project required and now has a currently valid zoning certificate from the New Jersey Meadowlands Commission that was issued for the project prior to (the effective date of these rules). Grandfathering such projects is appropriate since the Meadowlands Commission conducts a site-specific review that includes potential adverse impacts to flood hazard areas and surface waters, just as the State does for stream encroachment, CAFRA and Waterfront Development Permit applications. N.J.A.C. 7:13-2.1(c)4 contains text originally proposed as part of N.J.A.C. 7:13-2.1(c)3, with certain clarifications. As proposed, N.J.A.C. 7:13-2.1(c)3i intended to grandfather regulated activities that were not subject to this chapter prior to (effective date of these new rules) but that, prior to this date, have received a local approval allowing a regulated activity (such as lot clearing, installation of utilities or foundations) to commence. To express this intention, N.J.A.C. 7:13:2.1(c)3i as proposed required a regulated activity to be authorized by a “valid final building or construction permit” in order to be grandfathered. Some commenters questioned whether it was the Department’s intention to exempt projects with site plan or subdivision approvals under the Municipal Land Use Law. However, such approvals can remain dormant or incomplete for years without work having to commence. It is the Department’s understanding that only a local construction permit or its equivalent allows regulated activities such as lot clearing and foundation work to commence. It is this lot-specific, local construction permit or equivalent approval authorizing a regulated activity that the Department requires in order to grandfather activities that would otherwise be regulated under the new rules. Thus, projects that did not require a stream encroachment permit, CAFRA permit or waterfront development permit are grandfathered pursuant to N.J.A.C. 7:13-2.1(c)4i only if a valid municipal approval enabling commencement of construction on a specific lot and/or easement was issued for the project prior to (the effective date of the rules). Where no such municipal approval is required to commence construction, such projects are grandfathered pursuant to N.J.A.C. 7:13-2.1(c)4ii (proposed as N.J.A.C. 7:13-2.1(c)3ii), if certain activities have commenced on-site.

Applying these new rules to pre-construction-phase projects not previously reviewed for flood and water degradation impacts affords the public the full protective benefit of the new rules. Furthermore, developers had more than one year’s notice to apply for and/or receive
construction approval that would meet the Department’s proposed grandfathering rule after the proposal was first announced by Governor Corzine on August 22, 2006, and the Department posted a draft of the proposed rules on its website.

252. **COMMENT:** The proposed new rules should be amended prior to adoption to include additional grandfathering provisions for brownfields redevelopment projects, projects conducted pursuant to a municipal or county redevelopment plan, or similar projects. In addition, an exemption from the requirements for an individual flood hazard area permit should be added to the rules to account for brownfields and urban redevelopment, as well as smart growth projects. (23)

253. **COMMENT:** The grandfathering requirements in the new rules will have a chilling effect on redevelopment in New Jersey. Redevelopment occurs in phases. Because many brownfields projects are in the remediation phase, the developer of subsequent phases will not be able to obtain the necessary DEP or municipal permit(s) prior to the effective date of the new rules. (46)

254. **COMMENT:** The proposed grandfathering provision at N.J.A.C. 7:13-2.1(c) fails to include relief for redevelopment projects pursued by local government. The proposal must be revised to include proposed or adopted redevelopment areas. (19)

**RESPONSE TO COMMENTS 252 THROUGH 254:** The Department developed the adopted new rules governing development in flood hazard areas and riparian zones because it concluded that more stringent new design and construction standards are necessary to protect the residents of the State from the increasing hazards of flooding and also to preserve the integrity of the State’s surface waters. Protecting public safety, health and general welfare, as well as the environment, was the primary objective behind these new rules. Brownfield development projects, like other projects proposed in flood hazard areas or riparian zones, can result in serious adverse impacts on flooding or the environment if not designed and constructed properly. As such, it is necessary that all construction in flood hazard areas and riparian zones that increases
risks to public safety as well as potential property damage from flooding, including brownfields and other redevelopment projects, should be subject to the requirements of this chapter.

However, as more fully described in the response to comments 76 through 87, under these adopted new rules, redevelopment is encouraged by provisions that allow unimpeded reconstruction in riparian zones that are devoid of vegetation, credit for flood storage displacement that is created due to the removal of historic fill and structures, and several new permits-by-rule. The Department believes that provisions such as these, which seek to encourage appropriate redevelopment while ensuring that public safety, health and general welfare are protected from the impacts of flooding, are more appropriate than further grandfathering or exemption of redevelopment projects from the requirements of the adopted new rules.

N.J.A.C. 7:13-2.1(c)1

255. COMMENT: Existing stream encroachment permits should not be allowed to continue. All existing permits should be required over time to come into compliance with the proposed regulations regardless of whether the encroachment is changed or expanded. The existing rules are inadequate and activities under these rules do not satisfy the statutory requirements of the Flood Hazard Control Act. (10, 67)

RESPONSE: Stream encroachment permits issued under this chapter prior to the adopted new rules are valid for five years. The Department believes that permittees should be able to rely on stream encroachment permits throughout this five-year period, and that unilateral revocation would create an undue hardship on many permittees who have made significant investments based on the receipt of their stream encroachment permit.

256. COMMENT: The proposed rule is not clear as to the extent of the grandfathering. Proposed N.J.A.C. 7:13-2.1(c)1 should clearly state that the regulated activity is grandfathered and subject only to the prior rules if the stream encroachment permit application was accepted for review prior to the effective date of the rules. If the Department stands by this provision, it also must
make provisions to allow impacted parties to submit and have their applications deemed complete on a timely basis prior to the rules becoming effective. (65)

RESPONSE: As noted in the response to comments 241 through 251 above, N.J.A.C. 7:13-2.1(c)1 grandfathers projects that are approved under a valid stream encroachment permit, provided the application for the permit was submitted to the Department prior to (effective date of these new rules), and provided the application is complete for review prior to (effective date of these new rules). Thus, any regulated activity that is part of a project, any element of which is covered by a valid stream encroachment permit issued prior to (effective date of these new rules) is grandfathered. Furthermore, any regulated activity that is part of a project for which a complete stream encroachment permit application is submitted prior to (effective date of these new rules), and which is subsequently approved by the Department, is similarly grandfathered.

Regarding the completeness of applications, the Department does not need to determine prior to (effective date of these new rules) that the received application was complete for review. The application must arrive at the Department prior to (effective date of these new rules) and subsequently be deemed to be complete for review as filed. All applications received on or after (effective date of these new rules) will be reviewed under the adopted new rules. Similarly, if an application is received prior to (effective date of these new rules), and it is subsequently rejected as incomplete or is denied or withdrawn, the revised application will be reviewed under the adopted new rules if the revised application is received by the Department on or after (effective date of these new rules).

257. COMMENT: The Department should make provisions to not require a flood hazard area permit for those projects underway or completed that have taken the effort to be outside a flood hazard area. These projects should not be penalized by having a riparian zone required under the new rules when they avoided the need for a stream encroachment permit under the old rules, especially when if they had impacts to the flood hazard area and obtained a stream encroachment permit they would be exempt. (12)
RESPONSE: The Department does not anticipate that there will be many projects that fall into this category. In order for this situation to occur, a project would have to be wholly located outside both the regulated flood hazard area and the 25-foot or 50-foot stream buffer under the repealed rules; and either (1) Located (wholly or in part) within a new riparian zone; or (2) Located (wholly or in part) within a tidal flood hazard area that was not previously regulated and where no coastal permit is required. Where this does occur, many of these projects may be covered under N.J.A.C. 7:13-2.1(c)4, which addresses situations where a regulated activity is part of a project that was not subject to the requirements of this chapter prior to the adoption of these new rules. In some cases, however, the Department acknowledges that a project could be located within an area of expanded jurisdiction, and also not meet the requirements of N.J.A.C. 7:13-2.1(c)4. In such a case, the Department believes it is appropriate for such a project to be subject to the adopted new rules. It is important to review projects in the area of expanded jurisdiction because such areas include riparian zones and, as stated in the proposal, healthy riparian zones are essential to the natural environment for many reasons including impacts to water quality and the health of fish and wildlife. It is important for the Department to review a proposed project in the coastal area where a coastal permit was not required to ensure the safety of the building itself, as opposed to the flooding impact the building could cause to other nearby properties.

258. COMMENT: The Department should make provisions to not require a new flood hazard area permit for projects presently under construction and be completed in accordance with the earlier stream encroachment permit regulations, even if their permit expires and needs to be renewed. (12)

RESPONSE: As noted in the response to comment 255, stream encroachment permits issued under this chapter prior to the adopted new rules are valid for five years. The Department believes that permittees should be able to rely on stream encroachment permits throughout this five-year period, and also that five years is sufficient to accommodate most private development. In cases where a permit expires prior to the completion of a project, a new flood hazard area permit under this chapter is required for work to continue. However, N.J.A.C. 7:13-9.4(c)2
affords some flexibility in such cases by requiring revisions of the project to meet the adopted new rules only where feasible. In determining the feasibility of compliance with the adopted new rules, the Department will consider the amount of construction that was completed onsite prior to the permit expiration, as well as whether continuing construction as originally approved would constitute an adverse impact on flooding or the environment.

N.J.A.C. 7:13-2.1(c)3

259. COMMENT: This paragraph should be expanded to also include public entity projects for which a contract has already been signed. Modifications to existing contracts (to accommodate the new rules) would result in unnecessary time delays and costs. (3)

RESPONSE: As noted in the response to comment 257, the Department does not anticipate that there will be many projects which are both (1) Wholly unregulated under rules prior to this adoption and, (2) Unable to qualify for grandfathering under N.J.A.C. 7:13-2.1(c)3. Should this occur, the Department believes it is appropriate for such a project to be subject to the adopted new rules, in order to best protect against adverse impacts to flooding and the environment.

N.J.A.C. 7:13-2.1(c)3i

260. COMMENT: The proposed new rules should clarify that the grandfathering provision applies to the entire project as long as at least one municipal building or construction permit is issued prior to the effective date of the proposed new rules. There can be a substantial and significant investment in a project in order to obtain a single municipal building and construction permit, and, therefore, the proposed rule should not require the issuance of all necessary final municipal building or construction permits for a project for the proposed exemption to be effective. (7, 18, 33, 46, 53)

261. COMMENT: The proposed new rules should clarify that the grandfathering provision applies when a municipal building or construction permit has been issued for any portion of a
project, rather than when a municipal building or construction permit is issued for that portion of a project that would constitute a regulated activity under the proposed new rules. If the Department finds that it is unable to make this clarification, then the proposed grandfathering provision should apply whenever one municipal building or construction permit is issued for at least one unit, building or structure within the regulated area of a project, rather than requiring that all units, buildings, structures or other regulated activities within the regulated area must obtain such approvals. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 260 AND 261: N.J.A.C. 7:13-2.1(c)4 contains text originally proposed as part of N.J.A.C. 7:13-2.1(c)3, with certain clarifications. As proposed, N.J.A.C. 7:13-2.1(c)3i intended to grandfather regulated activities that were covered by any valid municipal approval, which enables construction of a regulated activity to commence prior to the adoption of these new rules, provided it is part of a project that was not subject to the requirements of neither this chapter nor the coastal rules prior to (effective date of these rules). As indicated in the summary of N.J.A.C. 7:13-2.1(c)3i at 38 N.J.R. 3964, the Department does not believe that it is appropriate to apply the new standards to certain projects that satisfied the requirements that were previously in place. Where the activity had already been approved at the local level for construction, the Department determined that, because the project that the activity is part of would already have begun or will begin construction in the near future with a significant investment likely to have been made, it would be inappropriate to require redesign of the project to meet the new standards. Accordingly, subject to the restriction contained in N.J.A.C. 7:13-2.1(d), the project would be grandfathered and would continue to be subject to the prior regulatory framework. The Department is amending this and related provision in N.J.A.C. 7:13-2.1(c) to clarify this intent. However, as indicated in N.J.A.C. 7:13-2.1(d), if the project as originally approved is changed, the change may result in the project being reviewed under the new rules.

N.J.A.C. 7:13-2.1(c)3ii
262. COMMENT: As the regulated community has no way of knowing when the actual effective date of these rules will be, it is quite possible that a project that is not now regulated may be in construction when the effective date is announced and there will not be sufficient time to complete construction before the regulations become effective. This could be the result of inclement weather, equipment or material delays, or any of a number of other reasons outside of the control of the applicant. Provided the project is then substantially complete, the applicant should not be penalized and required to stop all activity while seeking a newly required permit. Accordingly, this section should be revised as follows: “The regulated activity…construction activities were substantially completed…” (22)

263. COMMENT: Regulated entities have no way of knowing when the proposed new rules will become effective. Nevertheless, during the interim, public utilities must continue with infrastructure maintenance and improvement. In that regard, the proposed regulations would, to a limited extent, “grandfather” certain construction activity. For example, under proposed N.J.A.C. 7:13-2.1(c)3ii, a project would be grandfathered if installation of all of the bedding material for a utility line had been completed prior to the effective date. As a practical matter, however, considerable time and resources (both financial and personnel resources) would be invested in a utility line project long before any bedding material is placed at the construction site. Accordingly, a fourth activity should be added to proposed N.J.A.C. 7:13-2.1(c)3ii as follows: “or (4) Right-of-way acquisition or project design for a regulated activity by a public utility is at least 25 percent complete based on the utility’s estimated total cost for such acquisition and design.” (36, 42)

RESPONSE TO COMMENTS 262 AND 263: While the Department acknowledges that unforeseen circumstances may prevent a project from completion as scheduled, the term “substantially completed” is vague and would not be helpful as recommended by the commenters. The projects that the commenters are referring to are those limited situations where a project is: (1) Wholly unregulated under this chapter, as well as N.J.A.C. 7:7 and N.J.A.C. 7:7E, prior to this adoption; (2) Unable to qualify for grandfathering under N.J.A.C. 7:13-2.1(c)4i because no municipal approval is required; and (3) None of the work described at
N.J.A.C. 7:13-2.1(c)4ii(1), (2) or (3) has been completed onsite. Under such circumstances, the Department believes it is appropriate for such a project to be subject to the adopted new rules, in order to best protect against adverse impacts to flooding and the environment. The Department does not believe that right-of-way acquisition or project design is a sufficient basis to allow a project to proceed without complying with the new rules since most construction projects involve acquisition and project design and the Department believes that the new rules are necessary and must apply to ensure the protection of health and safety and the environment.

N.J.A.C. 7:13-2.1(d)3

264. COMMENT: The proposed new rules can potentially eliminate the grandfathering provision under N.J.A.C. 7:13-2.1(c)3i if any revisions to a regulated activity are proposed because, for those projects that fit within the description of N.J.A.C. 7:13-2.1(c)3i, no review will have occurred by the Department under the current Flood Hazard Area Control Act rules or under N.J.A.C. 7:7 or 7:7E. The proposal should be revised to clarify that “new regulated activities” are limited to proposed changes to a project that would (1) constitute substantial changes and (2) occur within a regulated area. The term “onsite” should not be adopted to clarify that subsection 3 will not apply to proposed project changes that will occur outside of a regulated area. (7, 18, 33, 46, 53)

RESPONSE: As indicated in the summary of N.J.A.C. 7:13-2.1(d) at 38 N.J.R. 3965, it was the Department’s intent that the approval that qualified the project for grandfathering would continue to be valid as long as there wasn’t a modification that would result in a significant change in the project as previously approved. Accordingly, N.J.A.C. 7:13-2.1(d)3 was intended to reflect that, where an activity that was part of a project that had previously been subject to Department review and qualified for grandfathering under N.J.A.C. 7:13-2.1(c)1 or 2 was now being revised to include additional regulated activities that were not part of the previous review, the original approval would no longer serve to satisfy N.J.A.C. 7:13-2.1(c) and the Department review of the regulated activity would be required. The Department has amended N.J.A.C. 7:13-2.1(d)3 on adoption to more clearly express this intent.
N.J.A.C. 7:13-2.2 Regulated waters

265. COMMENT: Where is the historical and/or scientific data that supports the need to regulate all waterways (that are not man-made or isolated) when the drainage area is less than 50 acres? (46)

266. COMMENT: The proposed definition of regulated waters should be limited to water bodies that may have an impact on flooding. The proposed new rules will have the effect of subjecting essentially every surface water body within the State to regulation. The scope of the definition is overreaching and the proposed rule should not apply to water bodies that do not pose a threat to public safety, health and general welfare from the hazard of flooding, such as yard swales, ditches, and intermittent streams with drainage areas less than 50 acres. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 265 AND 266: As noted in the response to comment 217 through 220 above, the Department does not intend to regulate every surface water in New Jersey through this chapter. Under N.J.A.C. 7:13-2.2(a)3, many waters having a drainage area of less than 50 acres are not considered “regulated waters” for the purposes of this chapter and are therefore not subject to its requirements. Furthermore, N.J.A.C. 7:13-2.3(a)1 clarifies that “A flood hazard area exists along every regulated water that has a drainage area of 50 acres or more. If a regulated water has a drainage area of less than 50 acres, the water does not have a flood hazard area that is regulated under this chapter.” Flood hazard areas are established along only those surface waters that drain 50 acres or more because the Department recognizes that such waters have a potential to cause flood damage. Swales, ditches and other features that drain less than 50 acres do not possess a regulated flood hazard area, because flooding along such features does not pose a significant threat to public safety, health and general welfare.

267. COMMENT: We support the elimination of exemptions for certain tidal watercourses that are found in the existing Flood Hazard Area Control rules at N.J.A.C. 7:13-1.3(b)1ii, which exempts sections of 15 specific tidal watercourses, including portions of the Arthur Kill,
Hackensack River, Manasquan River and the Passaic River, as well as all tidal watercourses flowing into the Raritan Bay in portions of Monmouth County. The proposed new rules eliminate this exemption to ensure that the Flood Hazard Area rules apply as appropriate in all tidal and non-tidal flood hazard areas. This better reflects the intent of the Flood Hazard Area Control Act, which contains no such exemption for tidal waters. (37)

RESPONSE: The Department acknowledges the comment in support of the rules. The Department believes that elimination of the exemption for the 15 tidal watercourses will help to protect flood hazard areas and riparian buffers in these ecologically sensitive, and in many instances, heavily populated areas. This will help to alleviate and prevent flooding, better protect the public, and also better protect the environment.

N.J.A.C. 7:13-2.2(a)1

268. COMMENT: The reference to “canal” should be changed to “canal transmission complex,” and the latter should be defined as “the water supply canal operated by the New Jersey Water Supply Authority pursuant to the provisions of the New Jersey Water Supply Authority Act (N.J.S.A. 58:1B-1).” (66)

RESPONSE: In response to comment 162 above by the same commenter, the Department believes that the term “canal” is sufficiently clear and does not require a definition under N.J.A.C. 7:13-1.2. As such, a separate definition for “canal transmission complex” is not included in the rules, since the term “canal” already includes this concept.

N.J.A.C. 7:13-2.2(a)3

269. COMMENT: The proposed exception from regulated waters for segments of water that have a drainage area of less than 50 acres is, for all practical purposes, rendered meaningless by the proposed condition that the exception applies only if the segment of water “has no definable channel.” This condition is inappropriately broad as most waters can be found to have a
definable channel. Based on the definition of channel under the proposed rule, the condition would result in regulation of waters with a drainage area of less than 50 acres that are intermittent and that have no defined bed or bank. The Department has failed to provide any meaningful substantive analysis to support regulation of such waters for purposes of controlling flooding. Such waters do not pose a realistic or significant flood hazard concern and should not be subject to regulation, especially since development will be regulated under the Stormwater Management rules and other similar regulations. To the extent that waters with a drainage area of less than 50 acres are subject to regulation, the Department should provide language to confirm that the regulations are intended to be limited to drainage areas of less than 50 acres for waters that are not intermittent and that have a defined bed and bank. (7, 18, 33, 46, 53)

270. COMMENT: The proposed regulation of waters or segments of waters with drainage areas of less than 50 acres when there is a “definable channel” is unreasonable because the runoff from such small drainage areas is very small and is unlikely to cause a “flood hazard” that would need regulation or review under the scope of these rules. (33)

RESPONSE TO COMMENTS 269 AND 270: N.J.A.C. 7:13-2.2(a)3i establishes that a water that has a drainage area of less than 50 acres, which does not have discernible channel, is not subject to the requirements of this chapter. The definition of “channel” at N.J.A.C. 7:13-1.2 explains that a channel includes both bed and banks. Thus, a feature with no bed and bank does not have a channel, and is therefore not regulated under this chapter pursuant to N.J.A.C. 7:13-2.2(a)3i, provided the feature drains less than 50 acres. The Flood Hazard Area Technical Manual provides illustrations to help applicants discern whether a channel is present along various features. Department staff may also be contacted in case an applicant is unable to discern whether a channel is present on a site.

With regard to flood hazard areas, N.J.A.C. 7:13-2.3(a)1 explains that “if a regulated water has a drainage area of less than 50 acres, the water does not have a flood hazard area that is regulated under this chapter.” The rules therefore establish flood hazard areas along only those waters that have a drainage area of 50 acres or more, because the Department recognizes that waters with such drainage areas have a potential to cause flood damage.
271. COMMENT: The new rules cite all waters as regulated, except those at N.J.A.C. 7:13-2.2(a)3 which excludes any segment of a waterway that has a drainage area of less than 50 acres provided that the water has no definable channel. This indicates that the Department might regulate gullies that may have formed through erosion, since the gully is a natural waterway with a definable channel. It would also mean that said gully, if a tributary to a Category One water, may actually have a 300-foot riparian zone. How will the State separate the waters they truly wish to regulate from simple erosional features? (44)

272. COMMENT: The exception under N.J.A.C. 7:13-2.2(a)3 for any segment of a water that has a drainage area less than 50 acres provided that the water has no definable channel could, in effect, apply to gullies that may have formed through erosion, since it would meet the proposed definition of “channel,” thus severely limiting the intended exception. The Department must clarify its intent. (19)

RESPONSE TO COMMENTS 271 AND 272: Manmade features that drain less than 50 acres are exempt from regulation under N.J.A.C. 7:13-2.2(a)3, because the Department has determined that establishing a regulated flood hazard area and/or riparian zone along such features would not benefit the environment or be in the best interest of the public safety, health and general welfare. For similar reasons, it is not the Department’s intention to regulate under this chapter transient erosional gullies and other ephemeral features that temporarily form after heavy rainfall. For example, a small fissure can sometimes temporarily be created along an embankment across unstabilized earth or adjacent to a downspout from a gutter during a heavy rainstorm. While such features are not “manmade” and therefore do not qualify under the exemption at N.J.A.C. 7:13-2.2(a)3, the Department believes that it is important to draw a distinction between naturally-occurring channels that exhibit characteristics which imply existence apart from extreme storm events from features that temporarily appear after such events. Establishing a regulated flood hazard area and/or riparian zone along such ephemeral features would not benefit the environment or enhance public safety. As such, the definition of channel at N.J.A.C. 7:13-1.2 has been clarified to reflect the Department’s intent to not regulate such features.
273. COMMENT: The Department should provide a length for a water with no definable channel to ensure that areas with discontinuous defined channel, or where the water runs through rocks or other material (such as areas with karst topography), are protected by the riparian zone. (66)

RESPONSE: Pursuant to the definition of regulated waters at N.J.A.C. 7:13-2.2(a)3, a feature that has a drainage area of less than 50 acres, which has no naturally-occurring, discernible channel, is not subject to these rules. As such, in situations where a discernible channel appears and disappears along a feature that has a drainage area of less than 50 acres, only those portions of the feature that possess a discernible channel are subject to these rules. Therefore, a riparian zone is established around only those segments of the feature that do possess a discernible channel. Since the Department does not intend to regulate features that lack a discernible channel under this rule, there is no need to define a length of a water with no discernible channel.

274. COMMENT: This proposal “clarifies that a water draining less than 50 acres and has no definable channel is not regulated” because it does not meet the definition of a watercourse. This is contradictory to the definition of “channel.” The definition of “channel” should therefore be refined to exclude swales to be consistent with this rule. Under this interpretation, farm ditches and erosional features, which the Department can argue meet the definition of a channel, will be regulated and subject to riparian zones. Essentially no feature can be excluded from regulation based on this rule. There is no purpose of putting riparian zones on farm ditches, roadside ditches, swales and erosional features. (26)

RESPONSE: As noted in the response to comment 221, the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4 qualify that, among other characteristics, a swale “drains less than 50 acres” and “has no definite bed and banks.” Thus a swale under N.J.A.C. 7:7A-1.4 meets the requirements at N.J.A.C. 7:13-2.2(a)3i for a water that is not regulated under the Flood Hazard Area Control Act rules. Furthermore, as noted in the response to comments 271 and 272 above, the definition of “channel” at N.J.A.C. 7:13-1.2 has been clarified to reflect the Department’s intent to not regulate erosional features. A ditch, however, can have a discernible channel and/or
a drainage area of 50 acres or more. Ditches are therefore subject to the requirements of N.J.A.C. 7:13 in certain cases. This is appropriate, since ditches having a drainage area of 50 acres or more can cause flood damage equal to naturally-occurring channels of the same drainage area, and indiscriminate removal of vegetation along ditches can cause the same adverse environmental impacts as removing vegetation along naturally-occurring channels.

275. COMMENT: It appears that the proposed new rules do not regulate drainage of less than 50 acres where a defined stream bed or bank is not discernible. Upon adoption, the Department should include additional field criteria to allow for jurisdiction over these critical headwater drainages, and apply the riparian environmental requirements to these areas. The rules should allow the Department, local governments, or the interested public to require that an applicant perform site specific identification of these drainages. This is not a substantive change on adoption, as the new field criteria are within the legal and technical jurisdiction and scope, respectively, of the original proposal. (69)

276. COMMENT: The rules should protect headwater areas of streams that drain less than 50 acres, which are very important to protecting water quality and downstream flooding. (20, 38, 41, 54, 60, 63, 69)

277. COMMENT: The Department should strengthen the rules with regard to the protection of the headwater areas of streams and the drainages of less than 50 acres. Protection in these areas is crucial in order to protect the highest quality streams and water resources of our State. (48)

278. COMMENT: The rules should not exempt any segment of water that has a drainage area of less than 50 acres. Smaller water bodies are critical to stream systems, especially vulnerable, and generally poorly regulated. (10, 67)

RESPONSE TO COMMENTS 275 THROUGH 278: The Department agrees that naturally-occurring features that possess a discernible channel should be protected, regardless of contributory drainage area. As such, the channel and riparian zone of such features is subject to
regulation under the adopted new rules. However, pursuant to the definition of regulated waters at N.J.A.C. 7:13-2.2(a)3, a feature that has a drainage area of less than 50 acres, which has no naturally-occurring, discernible channel, is not subject to these rules. The Department has not applied a flood hazard area along features that drain less than 50 acres under this chapter, since such features have not historically been a source of significant flooding. The rules do, however, apply a riparian zone around features that drain less than 50 acres unless, as noted above, the feature lacks a discernible channel, as well as if the feature is lawfully confined within a manmade conveyance feature or is hydrologically isolated from another surface water (pursuant to N.J.A.C. 7:13-2.2(a)3). The Department believes that it is appropriate to exempt such features from the riparian zone requirements of this chapter for several reasons: First, through this rule, it is the Department’s intention to place a protective area around features that exhibit characteristics typical of a channel, except for erosional gullies, swales, piped waters and other such features that drain less than 50 acres. Headwaters that possess a discernible, naturally-occurring channel therefore do warrant the establishment of a riparian zone. However, without a clear distinction between features that do and do not possess a discernible channel, a riparian zone would be established around every perceivable surface water flow path, such as puddles, temporary gullies formed by drain spouts, manmade roadside ditches and areas where rain sheet flows across lawns. Thus the Department believes that, for the purpose of establishing riparian zones under this chapter, it is appropriate to distinguish between surface waters that do possess a discernible channel from those that do not. Second, given the stringent standards applied by these rules for projects situated within riparian zones, the Department believes that it is appropriate to make a clear distinction between features that possess a riparian zone and features that do not. Without a clear distinction, prospective applicants will not be able to determine whether a given project is subject to the riparian zone requirements at N.J.A.C. 7:13-10.2, and will thus be unable to adequately address the environmental requirements of this chapter. To this end, as noted in the response to comment 269, the Flood Hazard Area Technical Manual provides illustrations to help applicants discern whether a channel is present along various features. Department staff may also be contacted in case an applicant is unable to discern whether a channel is present on a site. Third, the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A regulate and restrict activities within swales, ditches, isolated waters and other features that drain less than 50 acres.
The Department does not believe that it is necessary to place additional restrictions on these features under N.J.A.C. 7:13

N.J.A.C. 7:13-2.3 Regulated areas

N.J.A.C. 7:13-2.3(a)

279. COMMENT: We support the establishment of two regulated areas: flood hazard area and the riparian zone. (10, 67)

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

N.J.A.C. 7:13-2.3(a)1

280. COMMENT: Upon adoption, the Department should clarify exactly how the proposed new rules impact a flaw in the Department’s interpretation of the applicability of the Stormwater Management Rules’ field definition of “special water resource protection areas” and the proposed new rules’ definition of “riparian areas”. As the Department is aware, maps and GIS data layers often do not accurately reflect actual field conditions, or the actual presence of natural resources. The Department is required by law to protect and regulate the actual existing conditions and designated uses of waterbodies and natural resources. Accordingly, the actual field condition supersedes any mapped or assumed condition. Both the Stormwater Management Rules and the proposed Flood Hazard Area Control Act Rules should apply to intermittent or ephemeral headwater streams that exist in the field, based on presence or evidence of discernible stream characteristics, even if they are not mapped on USGS or County Soil Survey maps. (69)

RESPONSE: The Flood Hazard Area Control Act rules establish flood hazard areas and riparian zones along actual features as they exist in the field. The rules do not rely on USGS quad maps, county soil survey maps or any assumed conditions to apply regulatory authority. Under N.J.A.C. 7:13-2.3(a)1, a flood hazard area exists along every water that has a drainage area of 50
acres or more, unless the water is exempt from regulation under N.J.A.C. 7:13-2.2. Furthermore, under adopted N.J.A.C. 7:13-2.3(a)2, a riparian zone exists along every regulated water, except there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon, stormwater management basin, or oceanfront barrier island, spit or peninsula. With regard to the Stormwater Management rules at N.J.A.C. 7:8, this rule adoption does not alter the application of the Special Water Resource Protection Area under N.J.A.C. 7:8-5.5(h). The new riparian zones at N.J.A.C. 7:13-4.1 apply to features that are regulated by this chapter, and are applied to projects in addition to any regulatory requirements that the Stormwater Management rules may entail, including Special Water Resource Protection Areas.

281. COMMENT: N.J.A.C. 7:13-2.3(a)1 states that "a flood hazard area exists along every regulated water that has a drainage area of 50 acres or more" and that if "a regulated water has a drainage area of less than 50 acres, the water does not have a flood hazard area that is regulated under this chapter." This would exclude from the jurisdiction and the protections of the proposed new rules headwater areas that drain less than 50 acres. Headwaters are crucial to the water quality and flood potential of their down-stream receiving waters, and should be included in the proposed rule definition of regulated waters and regulated areas. It is especially important that such headwaters be subjected to the new riparian zone provisions of the proposed new rules. (37)

282. COMMENT: We object to the proposal that a drainage area of less than 50 acres does not have a regulated flood hazard area. Standards are needed to protect these headwater areas from structural activities that could degrade them. Headwater areas are extremely vulnerable to activities that degrade water quality. Once lost, that water quality is rarely, if ever, recovered downstream. In the Great Swamp watershed, the only stream with high water quality is one that rises in a public park and is, therefore, protected. The other three streams where wetlands and floodplains have been damaged in the headwater areas are seriously degraded. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 281 AND 282: The potential for a surface water feature to cause flood damage is directly related to, and increases with, the size of the drainage area of the
feature. It has been the Department’s experience that features that drain less than 50 acres possess no significant flood damage potential. For this reason, the Flood Hazard Area Control Act rules have historically not established a regulatory flood hazard area along features that drain less than 50 acres. The adopted rules continue this distinction. With regard to riparian zones, N.J.A.C. 7:13-2.3(a)2 provides that a riparian zone exists along every regulated water regardless of drainage area, except there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon, stormwater management basin, or oceanfront barrier island, spit or peninsula. Therefore, a feature that drains less than 50 acres (such as many headwaters) will be protected with a riparian zone, unless the feature is exempt from regulation at N.J.A.C. 7:13-2.2(a)3 because it lacks a channel. As noted in the response to comments 275 through 278 above, the Department believes that it is appropriate to exempt such features from regulation under N.J.A.C. 7:13.

N.J.A.C. 7:13-2.3(a)2

283. COMMENT: Riparian zones should not exist along tidal waterways and should not overlap with areas that are otherwise regulated as transition areas, or under waterfront development or CAFRA regulations. It is not clear whether a riparian zone exists in an area along a waterway that drains less than fifty acres. If the intent is to extend riparian zones along all waterways, this rule vastly expands the scope of regulation under the Flood Hazard Area act in a way that is unrelated to flood hazards and hence, beyond the statutory authority of the Department to regulate. (65)

284. COMMENT: The Department lacks statutory authority under the Flood Hazard Area Control Act to establish the proposed “riparian zone” and, therefore, this provision of the regulation should not be adopted. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 283 AND 284: The Department believes that it is important to protect surface waters from adverse environmental impacts independent of whether the water is tidal or fluvial. In an effort to avoid duplicative permitting between the coastal regulatory
program and the flood hazard area regulatory program, the repealed Flood Hazard Area Control Act rules exempted many tidal waters from regulation. As noted in the summary of the proposal of the rules being adopted at this time, this resulted in many tidal waters having insufficient regulatory protection. The adopted rules apply riparian zone standards to both fluvial and tidal waters, whether the water is regulated under the coastal program or the flood hazard area program.

Furthermore, the presence of a riparian zone along a feature is independent of the feature’s drainage area. N.J.A.C. 7:13-2.3(a)2 establishes a riparian zone exists along every regulated water regardless of drainage area, except there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon, stormwater management basin, or oceanfront barrier island, spit or peninsula. Therefore, a feature that drains less than 50 acres will be protected with a riparian zone, unless the feature is exempt from regulation at N.J.A.C. 7:13-2.2(a)3 as noted in the response to comments 275 through 278.

With regard to the Department’s statutory authority to establish riparian zones, and as noted in the response to comment 148 above, these rules are promulgated under the authority of several statutes in addition to the Flood Hazard Area Control Act, which together establish the Department’s authority to protect surface waters in this manner. Specifically, statutory authority to establish riparian zones is derived from the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq. and N.J.S.A. 13:1D-1 et seq.

285. COMMENT: The Department should clarify if there is a riparian zone along the back bays between the barrier islands and the mainland. (15, 57)

RESPONSE: N.J.A.C. 7:13-2.3(a)2 provides that a riparian zone exists along every regulated water regardless of drainage area, except there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon, stormwater management basin, or oceanfront barrier island, spit or peninsula. Thus, a riparian zone does exist along the tidal bays that lie between the “mainland” and any barrier island, spit or peninsula, but the riparian zone does not extend onto any barrier island, spit or peninsula itself. For example, a riparian zone exists along Barnegat Bay but there
is no riparian zone on Long Beach Island itself. The riparian zone along Barnegat Bay applies only to the “mainland” side of the bay.

286. COMMENT: All tidal waters should not have a riparian zone requirement. Riparian zones should be restricted to non-tidal waters only. If the Department wants to create such a tidal water buffer zone requirement, then they should pursue it in the coastal zone program and not in the flood hazard area regulations. (12)

RESPONSE: The Department has determined that preserving riparian zone vegetation is important along many tidal waters in addition to non-tidal waters. As such both the Coastal Zone Management Rules at N.J.A.C. 7:7E-3.26(a) and the Flood Hazard Area Control Act rules at N.J.A.C. 7:13-4.1(a) establish a riparian zone along every regulated water, except there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon, stormwater management basin, or oceanfront barrier island, spit or peninsula. This is appropriate because, as discussed in the proposal summary at 38 N.J.R. 3955-6, the vegetation, topography, landscape and development along these features is significantly different from other riparian areas in the State, and also because the existing coastal policies that protect these unique tidal landforms recognize the types of impacts that are specific to these areas and therefore provide adequate protection to adjacent vegetation.

287. COMMENT: No area that drains less than 50 acres should be subject to a regulated riparian zone. (7, 18, 33, 46, 53)

RESPONSE: The importance of preserving riparian zone vegetation along surface waters does not diminish with the drainage area of the feature. Indeed, riparian zones provide all of the benefits cited in the proposal summary to all waterbodies, except for certain manmade features and tidal waters as discussed in the response to comment 286. The Department has determined that it is appropriate to establish a riparian zone along regulated waters independent of the feature’s drainage area.
288. COMMENT: Riparian zones should not be required adjacent to regulated waters that have wetlands or waters regulated under the Stormwater Management Rules. Freshwater wetland transition areas and Special Water Resource Protection Areas under the Stormwater Management rules provide the necessary vegetative buffer and water quality/quantity requirements for projects to protect areas adjacent to the water feature. (12)

RESPONSE: The Stormwater Management rules at N.J.A.C. 7:8-5.5(h) apply Special Water Resource Protection Areas only along Category One waters and certain tributaries in cases where a major development is proposed, as defined at N.J.A.C. 7:8-1.2. The Stormwater Management rules therefore do not establish any preservation area or riparian zone along most of the State’s surface waters. Furthermore, the transition areas established along freshwater wetlands under the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A are designed to preserve and protect freshwater wetlands and not surface waters in general. The flood hazard area riparian zones, however, are appropriately intended to protect surface waters from adverse environmental impacts, independent of the presence of freshwater wetlands or Category One waters. The Flood Hazard Area Control Act rules therefore establish riparian zones along all regulated waters, except certain tidal features as discussed in the response to comment 287. Not establishing riparian zones along waters that have freshwater wetlands or which possess a Special Water Resource Protection Area, as the commenter suggests, would result in an inconsistency in the protection of surface waters.

N.J.A.C. 7:13-2.3(b)

289. COMMENT: The illustrations set forth at Figures A and B do not depict a “typical water and its regulated areas.” The illustrations set forth at Figures A & B are either misleading or suggest that the Department is relying on an erroneous model as the predicate for its proposed new rules. A “typical” water and its regulated areas will often involve riparian zones that extend laterally, even perpendicularly, from the flood fringe. The Department has presented no empirical data to suggest otherwise or to demonstrate that Figures A & B represent “a typical water and its regulated areas.” Therefore, the proposed new rules are based on the improper
assumption that Figures A and B represent a typical water and its regulated area. As a result of this improper assumption, the Department’s evaluation of the potential impacts of the proposed new rules is fundamentally flawed and likely significantly underestimates the potential impacts of the proposed new rules. Accordingly, the proposed new rules should be withdrawn and reevaluated. (7, 18, 33, 46, 53)

RESPONSE: Figures A and B are intended to illustrate that there are two distinct regulatory areas (the flood hazard area and the riparian zone) and that these two areas generally overlap. The figures are also intended to help clarify the difference between the flood hazard area, floodway, flood fringe, channel and riparian zone, since these are distinct areas that the public sometimes confuses, and which are each subject to different regulatory standards. Figures A and B are not drawn to scale and are not intended to illustrate actual site conditions at a given location. The Department believes that it is helpful to provide such an illustration and does not agree that the figures are misleading.

290. COMMENT: With regard to Figure B in this section, how will general property owners be able to distinguish between a flood hazard area and a riparian zone? (26)

RESPONSE: As noted in the response to comment 289 above, these figures illustrate that the flood hazard area and riparian zone are distinct features that overlap. Subchapters 3 and 4 explain how to determine the flood hazard area and riparian zone on a site, respectively.

N.J.A.C. 7:13-2.4 Regulated activities

291. COMMENT: We support the clarification of the types of activities regulated under the Flood Hazard Area Control Act rules. The existing rules require a permit for any "development" in the flood plain, with the term development being defined as any construction activity or other manmade land disturbance." However, the terms "construction activity" and "manmade land disturbance" are not further defined in the existing rule, leading to some confusion as to exactly what activities are and are not regulated under the rules. The new rules attempt to clarify this
issue by specifying the following six regulated activities: (a) Any topographic alteration, such as excavation, grading or the placement of fill. Such activities can alter the available flood storage volume on a site or obstruct the flow of floodwater in a channel or floodway; (b) The clearing, cutting or removal of vegetation in a riparian zone; (c) The creation of impervious surface, which is a manmade land disturbance and increases stormwater runoff; (d) The storage of unsecured material in flood hazard areas, a significant contributor to damage caused by flooding when it becomes floating debris that crashes into downstream buildings and bridges, or gets caught on such structures and prevents the passage of flood waters; (e) The construction, reconstruction and/or enlargement of a structure; and (f) The conversion of any building into a private residence or public building, both of which ensure that new construction, reconstruction, or conversions of buildings will comply with the more stringent design and construction standards of the new rules. (37)

RESPONSE: The Department acknowledges the comment in support of the rules. It is important to make the meaning of terms clear for consistency within the rules as well as to facilitate understanding and compliance among the regulated community.

N.J.A.C. 7:13-2.4(a)

292. COMMENT: We support the listed regulated activities, particularly the inclusion of altered topography, placement of fill and/or grading, the creation of impervious surface, and the disturbance of vegetation in a riparian zone. (10, 67)

RESPONSE: The Department acknowledges this comment in support of the list of regulated activities at N.J.A.C. 7:13-2.4.

N.J.A.C. 7:13-2.4(a)2

293. COMMENT: The safety and reliability of utility service is a significant issue that cannot be compromised by the proposal. However, the proposal states that “The clearing, cutting and/or
removal of vegetation within a riparian zone;” is a regulated activity. Please clarify that maintenance of existing utility right-of-ways are exempt from these requirements. Further, remedial activities subject to the Department oversight should not be regulated, and installation, construction or reconstruction of equipment required by law at an electric generating facility should be exempt. For example, pollution control equipment that is required to be installed either by a permit or consent order should not be subject to this proposal. Accordingly, a new section should be added as follows:

“The following projects or activities are exempt from the requirements of this chapter, but are required to comply with all other Federal, State and local requirements that may apply to the proposed project or activity:

1. The routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights-of-way, linear development, or systems, by a public utility;
2. The remediation of any contaminated site pursuant to N.J.S.A. 58:10B-1 et seq.;
3. The installation, construction or reconstruction of any structure or equipment at an electric generating facility required to be installed, constructed or reconstructed pursuant to Federal, State or local statutes, rules, regulations, ordinances or orders.” (22)

294. COMMENT: The Department should add a new provision of the rules exempting the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights-of-way, linear development, or systems, by a public utility; and the remediation of any contaminated site pursuant to N.J.S.A. 58:10B-1 et seq. (42)

RESPONSE TO COMMENTS 293 AND 294: The adopted new rules are structured in order to:
(1) Establish two regulated areas under N.J.A.C. 7:13.2.3, namely the flood hazard area and the riparian zone; (2) Establish six regulated activities in these regulated areas under N.J.A.C. 7:13-2.4; and (3) Establish design and construction standards for these regulated activities under permits-by-rule, general permits and individual permits, under subchapters 7 through 11. All regulated activities are therefore covered by one of these permits and no regulated activity is
exempt from the adopted new rules. However, a number of activities that were non-regulated under the repealed rules are covered by permits-by-rule under N.J.A.C. 7:13-7.2. For example, while N.J.A.C. 7:13-2.4(a)2 establishes that the clearing, cutting and/or removal of vegetation in a riparian zone is a regulated activity, and is therefore subject to the requirements of the adopted rules, several permits-by-rule are established under N.J.A.C. 7:13-7.2(b)1 and (c)1 through 6 to facilitate normal property and utility maintenance activities within riparian zones. The Department believes that it is more appropriate to regulate these activities under permits-by-rule, where design standards can be established to provide sufficient safeguards to protect the environment from unintended adverse impacts, than to exempt such activities from regulation. A utility company can, furthermore, apply for an individual permit under N.J.A.C. 7:13-11.9(f) to cover any maintenance, repair and replacement activities within an entire utility network for a five-year period, which is not covered under the adopted permits-by-rule.

N.J.A.C. 7:13-2.4(a)5

295.COMMENT: Procedures exist for the government to condemn and purchase at fair market value houses in imminent threat. This rule seeks to effectively condemn properties without compensation in violation of the New Jersey and Federal Constitution. (26)

RESPONSE: N.J.A.C. 7:13-2.4(a)5 establishes that “the construction, reconstruction and/or enlargement of a structure” is a regulated activity and therefore subject to the design and construction standards of the adopted rules if undertaken in a regulated area. The rules further, through various permits-by-rule, general permits and individual permits, allow a variety of activities to be conducted within the flood hazard area and riparian zone, provided they are conducted in a way that does not threaten the public safety, health or general welfare, or the environment. The adopted rules do not condemn properties in any way, but rather ensure that structures in flood hazard area and riparian zones are designed and constructed to be safe, flood resistant and environmentally responsible.

N.J.A.C. 7:13-2.4(a)6
COMMENT: Regarding the proposed regulation of the conversion of a building into a private residence or a public building at N.J.A.C. 7:13-2.4(a)6, the concern should not be a public safety issue, but a property issue. The use of structures is irrelevant in the context of jurisdiction under this rule. What has been the loss of life or serious injuries from recent floods to justify this interpretation of authority? (26)

RESPONSE: N.J.A.C. 7:13-2.4(a)6 establishes that “the conversion of a building into a private residence or a public building” is a regulated activity and therefore subject to the design and construction standards of the adopted rules if undertaken in a regulated area. The adopted rules contain more stringent design and construction standards for residential structures than for non-residential structures. This is appropriate because, as discussed in the proposal summary at 38 N.J.R. 3967, flooding presents a greater danger to people in residential structures and public buildings. Flooding can occur at anytime of day or night, and people often become trapped inside their homes during a flood and are unable to leave or be easily accessed by emergency vehicles and personnel. There is a greater likelihood that a residential structure will be occupied during a flood than a non-residential buildings (such as commercial or industrial buildings) to be occupied during a flood. As such, the standards for safe access to private residences, and for the elevation of the lowest floor of private residences, are more stringent than for non-residential buildings. This is also true of structures defined as “public buildings” at N.J.A.C. 7:13-1.2, which includes schools, hospitals and police and fire departments.

The Department believes that it is highly important for such buildings to have safe access during floods and that these buildings are properly elevated to provide for the safety of occupants and to prevent damage to these buildings from flooding. If residential or public buildings are not properly elevated, there is a constant potential for loss of life or serious injuries to the building's occupants should flooding occur. Sadly, the potential loss of life became a reality in September 1999 during Hurricane Floyd when one man drowned in his basement in Little Falls and two people drowned in their home in Bound Brook. In both cases, these people were trapped within a residential building that was not properly elevated. A total of six New Jersey residents died during Hurricane Floyd, and two New Jersey residents died during Hurricane Isabel in...
September 2003. Tragically, Hurricane Ivan resulted in 121 deaths nationally in September 2004. Finally, a number of New Jersey residents were injured during the September 2004, April 2005 and June 2006 floods along the Delaware River, all as a result of housing situated below the design flood elevation.

The magnitude of these disasters underscores the extreme importance for residential and public buildings to be constructed safely above the design flood elevation. Nevertheless, despite the obvious safety risks resulting from not properly elevating such structures, it has been the Department's experience that people try to circumvent the stricter residential or public building requirements by obtaining a permit for a non-residential structure and then converting the building to residential or public use after it is constructed. Others purchase existing non-residential buildings and convert them into residences or public buildings without adding the safeguards to protect against flooding that would normally be required for such a building. The adopted rules therefore require a permit for the conversion of any building into a residential building or a public building, in order to ensure that a converted building includes the same flood safety features required of a new residence or public building.

Subchapter 3: Determining the Flood Hazard Area and Floodway

N.J.A.C. 7:13-3.1 General provisions for determining the flood hazard area and floodway along a regulated water

297.COMMENT: The updated mapping requirements are supported, because they are based on hydrological and survey studies and on science and in the areas. In areas where inadequate or old mapping exists, the Department has set up a method to require that the most accurate maps are used. (48)

RESPONSE: The Department acknowledges the comment in support of the adopted new rules, and agrees that updated mapping requirements are appropriate, because they present the most accurate information upon which to base permit applications and decisions.
N.J.A.C. 7:13-3.1 and 3.5

298. COMMENT: We support the provision for determination of the flood hazard area and floodway without the need for extensive hydrologic and hydraulic calculations. (57)

RESPONSE: The Department acknowledges this comment in support of proposed flood hazard area methods 1, 2, 3 and 5, which do not require hydraulic and/or hydrologic calculations.

N.J.A.C. 7:13-3.1, 6.1 and 9.6

299. COMMENT: The requirements under N.J.A.C. 7:13-3.1, 6.1 and 9.6 should be clarified to indicate whether a flood hazard area or floodway limit verification is required prior to application for an individual permit. If this is required, this would result in a 180 day review period (not including possible 30-day extensions) for review that is currently part of the 90-day review period. (57)

RESPONSE: In some cases a verification of the flood hazard area is required before the Department is able to issue a general permit or individual permit. A verification is necessary for certain projects where the flood elevation and/or floodway limits must be known in order for the Department to determine whether a project complies with the requirements of this chapter. For example, if a building is being constructed in a flood hazard area, the Department must know the flood hazard area design flood elevation in order to determine whether the building satisfies the requirements for floor elevations under N.J.A.C. 7:13-11.5. Similarly, since many construction activities are prohibited in floodways under N.J.A.C. 7:13-10.3, a delineation of the floodway limits on a site is sometimes necessary in order to demonstrate that the proposed activity is located outside the floodway. For general permits, under N.J.A.C. 7:13-8.1(k), a verification is not required prior to obtaining a general permit, except for certain cases as noted under general permits 5, 6 and 7 at N.J.A.C. 7:13-8.7, 8.8 and 8.9, respectively, which authorize the relocation and/or construction of a building in a flood hazard area. Under these general permits, the lowest floor of the building must be elevated one foot above the flood hazard area design flood
elevation. General permits 5 and 6 further require that the building not be located in a floodway, and so the floodway limits must also be known for these general permits. The Department cannot, therefore, evaluate and determine compliance for the activities covered under these general permits without knowing the depth and extent of flooding. For similar reasons, N.J.A.C. 7:13-9.6 sets forth the cases when a verification is required prior to obtaining an individual permit. In these cases, however, an applicant may apply for both a verification and a permit at the same time. There is no need to obtain a verification prior to submitting a permit application and, since verifications are subject to a 90-day review identical to individual permits, pursuant to N.J.A.C. 7:13-9.3, the Department would review the verification and individual permit applications concurrently.

N.J.A.C. 7:13-3.1(a)

300. COMMENT: The nomenclature "Methods 1, 2, 3, 4, 5 and 6" for determining the flood hazard area and floodway can be easily confused with the commonly used "Methods 1, 2, 3 and 4" used to define floodway computational methods by the Army Corps of Engineers. Alternate wording for the Department proposed "Methods" would be helpful to avoid this confusion. (3)

301. COMMENT: Clarification should be added to the terminologies “Method 1” through “Method 6” for computing floodway limits to ensure that they are not confused with the “Encroachment” Methods 1 through 6 used for floodway calculations in the Army Corps of Engineers hydraulic analysis methods. (57)

RESPONSE TO COMMENTS 300 AND 301: While the Department recognizes that certain Army Corps of Engineers hydraulic modeling systems refer to various encroachment “methods” by which floodways may be calculated, the Department does not anticipate that the adopted flood hazard area methods under N.J.A.C. 7:13-3 will be confused with the encroachment methods of the Army Corps of Engineers.
302. COMMENT: Changes to the methodologies of determining floodplain elevation will significantly impact future development at the commenter’s Kenilworth campus. The current floodplain elevation of 89.0 feet NGVD is based on a FEMA study, and therefore under the new regulations could be increased to 90.0 feet NGVD. This increase in the flood elevation will expand the area of the campus which falls into the floodplain, and will also impact the amount of fill compensation which would be required. (11)

RESPONSE: Under repealed N.J.A.C. 7:13-2.4(a), fluvial (non-tidal) flood hazard areas, which have not been delineated by the Department, were required to be based on a 100-year flood calculated with the assumption that the entire upstream watershed is completely developed. FEMA studies, including the study in the Borough of Kenilworth, are based on the 100-year flood assuming existing conditions rather than full build-out conditions. As such, FEMA maps could not be used in most cases to determine the extent of the regulatory flood hazard area under the repealed rules. Consequently, flooding on the commenter’s Kenilworth campus, as regulated under the repealed rules, would have been somewhat higher than the FEMA elevation.

The adopted new rules, however, allow the use of FEMA maps with an added one foot factor of safety instead of requiring the assumption that the entire upstream watershed is completely developed. This is appropriate, since it has been the Department’s experience that assuming full build-out conditions in a watershed typically raises the 100-year flood elevation by approximately one foot. Thus, while it may seem that the Department is expanding jurisdiction on the commenter’s Kenilworth campus, the adopted new rules are actually providing a more easily discernible regulatory limit than the repealed rules, which would have required the commenter to perform hydrologic and hydraulic calculations to determine the extent of the 100-year flood elevation assuming full build-out. In fact, the flood elevation determined under the previous method may have been even higher than that determined using the method provided under the adopted new rules.

303. COMMENT: FEMA flood plain mapping and flow rates should not be used since the values are from the 1920s and do not represent actual current flows. Further, the proposed rule does not
sufficiently address the impacts of global warming on increasing the frequencies of the 100, 200 and 500-year storm events. (56)

RESPONSE: In order to avoid possible errors in flood elevations reported by older flood studies, the adopted new rules at N.J.A.C. 7:13-3.4(b)2ii do not allow the use of FEMA studies that predate January 31, 1980. Furthermore, any changes in FEMA mapping that may be adopted due to future increases in rainfall or other climactic changes are automatically incorporated by the requirements of N.J.A.C. 7:13-3.4(b)2ii. The Department also acknowledges that global warming may increase rainfall amounts over time for a given storm frequency. As such, any future changes in rainfall data, as reported by the National Oceanic and Atmospheric Administration (NOAA) for a particular storm event, must be utilized in any hydrologic calculations submitted to the Department.

N.J.A.C. 7:13-3.1(c)

304.COMMENT: Verification of the flood hazard area and floodway limits should be required before obtaining a general permit authorization. Without such verification, projects that may need to be regulated under an individual permit might be allowed to proceed under a general permit due to lack of essential information. (10, 67)

RESPONSE: Whether a particular activity requires a permit-by-rule, general permit or individual permit is not dependent upon the location of the flood hazard area and associated floodway. Rather, the size and type of construction activity being proposed, as well as the location of that activity within the floodway, flood fringe and/or riparian zone, determines what design and construction standards the activity is subject to, as well as the type of permit the activity qualifies for under this chapter. The requirements for each general permit specify when verifications of a flood hazard area, flood hazard area design elevation and floodways are needed to demonstrate compliance with the general permit requirements. For example, under general permit 5 for the relocation of a building to reduce flood damage, at N.J.A.C. 7:13-8.7, the general permit is contingent upon demonstrating the location of the floodway and the flood hazard area design
elevation. In other cases, the extent of the flood hazard area, flood hazard area design elevation and floodway do not need to be known in order to determine whether the proposed activities qualifies for the particular general permit. For example, there is no need to know the extent of flooding to determine whether stream cleaning activities qualify under general permit 1 at N.J.A.C. 7:13-8.3.

N.J.A.C. 7:13-3.2 Selecting a method for determining the flood hazard area and floodway along a regulated water

N.J.A.C. 7:13-3.2(a)

305. COMMENT: The proposed new rules make reference to “The Flood Hazard Area Technical Manual.” This new manual has not been made available for review and comment. The rule proposal should be withdrawn until such time as all technical documentation is available to the public. In addition, the hydrologic and hydraulic methods provided in the new manual should be made consistent with the hydrology and hydraulics used by the Flood Hazard and Dam Safety Sections. (33)

RESPONSE: The Flood Hazard Area Technical Manual is intended to be a practical guide to assist applicants who are applying for an approval under this chapter. The manual includes various diagrams, examples, references and other aids in the design of projects. All substantive standards related to the design of an approvable project are contained within the Flood Hazard Area Control Act rules. With regard to hydrologic and hydraulic methodologies, the Department does intend to provide guidance on the use of such methodologies that is consistent with the Department’s Bureau of Dam Safety and Flood Control.

N.J.A.C. 7:13-3.2(c)2

306. COMMENT: Special Report 38 (SR-38) is a guide that has been used in the past to determine peak flows for FEMA studies, which is currently being updated by the United States
Geological Survey (USGS). Currently, the Department does not permit the use of SR-38 for delineating unstudied streams. While the new rules do not specify the methods to be used, the Department should specify acceptable hydrologic methods in the technical manual, which we recommend includes SR-38. We also offer the Department technical recommendations and assistance in drafting the manual. (27, 49)

RESPONSE: The Department acknowledges the commenters’ offer to assist in drafting the flood hazard area technical manual, which will include a discussion on acceptable hydrologic and hydraulic methodologies for application under this chapter. As indicated by the commenters, SR-38 is currently being updated by the USGS for New Jersey. Once these revisions have been completed, the Department will evaluate its use for compliance with the adopted new rules and, if appropriate, will incorporation these revisions into the technical manual.

N.J.A.C. 7:13-3.3 Flood hazard area and floodway based on a Department delineation (Method 1)

N.J.A.C. 7:13-3.3(b)1

307. COMMENT: N.J.A.C. 7:13-3.3(b)1 should be clarified to indicate that the limit of the flood hazard area can be established by applying the Department’s water surface profile to an applicant’s topographic mapping if the applicant's topographic mapping is of better resolution. (27, 49)

RESPONSE: The Department agrees that the extent of a flood hazard area on a given site is determined by applying the flood hazard area design flood elevation to the best topographic data available. The flood hazard area along a Department delineated water is therefore not equal to the extent of flooding shown on the Department’s flood mapping. Rather, as indicated at N.J.A.C. 7:13-3.1(b), the flood hazard area is “the land, and the space above that land, which lies below the flood hazard area design flood elevation.” The flood hazard area design flood elevation is shown on the Department’s flood profiles, and should be used to determine the
actual extent of flooding on a given property, as provided at N.J.A.C. 7:13-3.3(b)1. The extent of the flood hazard area shown on the Department’s mapping is, therefore, only an approximation of the flood hazard area based on the topography available to the Department when the mapping was promulgated. As such, for specific project applications, the flood hazard area design flood elevation should be applied to the submitted topographic information, as required under N.J.A.C. 7:13-6.1(c)5i.

308. COMMENT: Existing NJDEP Flood maps and models should be made available online. (33)

RESPONSE: The Department is currently in the process of placing digitized flood mapping on its website.

N.J.A.C. 7:13-3.4 Flood hazard area and floodway based on FEMA information (Methods 2 through 4)

N.J.A.C. 7:13-3.4

309. COMMENT: While the commenters support the expansion of the methods to determine the floodplain limits, there is concern that using 125 percent of the FEMA Flood Insurance Studies as prescribed in Method 4 is not sufficiently conservative for certain watersheds. Many of FEMA studies are antiquated and were based on Special Report 38, which is currently under revision by the United States Geological Survey. Land use in New Jersey has changed appreciably since many of these Studies were performed. If this method is used, we recommend a cutoff date be considered with respect to the date of the Flood Insurance Study. (27, 49)

RESPONSE: The Department recognizes that some earlier FEMA flood insurance studies may no longer be reliable indicators of the extent of the 100-year flood plain due to changes in methodology and development in the watershed. As such, N.J.A.C. 7:13-3.4(b)2ii does not allow the use of FEMA studies that predate January 31, 1980.
310. COMMENT: A margin of safety as included in the rule for increases in the 100 year flow is necessary. The proposed 25 percent increase in the 100 year flow should be sufficient in second-order streams or larger. First-order and smaller headwater streams could receive a proportionally larger increase in flood flows and a margin of safety of 50 percent or greater should be considered for headwater streams. (66)

RESPONSE: The Stormwater Management rules at N.J.A.C. 7:8 are designed to address downstream increases in peak flows from new major development and redevelopment. The 25 percent increase in the 100-year peak flow for the establishment of a flood hazard area provides an additional safety factor to address the impacts from developments that are not subject to the requirements of the Stormwater Management rules, as well as other hydrologic factors that may increase flood flows over time. The Department is not, however, aware of any studies that would suggest that a greater factor of safety is appropriate for smaller streams. Thus, the Department believes that the application of a 25 percent factor of safety to all hydrologic calculations under Method 4 at N.J.A.C. 7:13-3.4 and Method 6 at N.J.A.C. 7:13-3.6, respectively, is appropriate, regardless of the contributory drainage area of the watershed being analyzed.

N.J.A.C. 7:13-3.4(b)2ii

311. COMMENT: Please clarify what occurs if the original date of a FEMA flood insurance study is prior to January 31, 1980, but the "effective" date of the study, or the date of latest revision, is after Jan 31, 1980? (15, 57)

RESPONSE: N.J.A.C. 7:13-3.4(b)2 requires that any FEMA flood insurance study used under this chapter must be dated January 31, 1980, or later, and must be the most recent study published by FEMA for that municipality. Thus it is the most current date reflected on the study that determined whether it meets these requirements, not the original date of the flood insurance study.
N.J.A.C. 7:13-3.4(f)i

312. COMMENT: In order to accurately determine the flood hazard area design flood elevation along tidal waters, the starting water surface elevation for any flood calculations should be the maximum "stillwater" elevation as published by FEMA. (15, 57)

RESPONSE: The stillwater elevation of a tidal water is the maximum storm-induced water surface elevation during a given flood event, and is determined primarily from a combination of the normal astronomic tide and the storm surge for that event. Stillwater elevations for the open coast are usually determined through analysis of historical gauge data or by utilizing a storm surge model. In FEMA A-Zones, where wave heights are generally less than 3 feet, the flood hazard area design flood is equal to the FEMA 100-year flood elevation, which may have been based on a combination of stillwater elevations and wave action. However, in cases where the 100-year flood elevation must be calculated along tidal tributaries that are not mapped by FEMA, the Department agrees that flood calculations should be based on the downstream stillwater elevation reported by FEMA, and should not include wave setup or other factors, which could result in tidal flood elevations that are inaccurate along the tributary being studied.

N.J.A.C. 7:13-3.4(f)ii and 7:13-3.6(c)2

313. COMMENT: The proposed requirement that hydraulic analysis be performed to determine the “flood hazard area design flood elevation” using 125 percent of the 100-year flow rate is unnecessary and should not be required because the Department has addressed mitigation of potential flood impacts associated with a 100-year storm in its Stormwater Management rules at N.J.A.C. 7:8. Through the Department’s adoption of the Stormwater Management rules, and through its other regulatory programs such as the recently adopted Highlands regulations, the Department has significantly reduced development and development potential. In addition to the benefits that the Department expects of those rules, the proposal acknowledges that the proposed new rules will further reduce development potential in the State. Therefore, the proposed requirement to use 125 percent of the 100-year flow rate is excessive, unreasonable and
unwarranted. While the current regulations at N.J.A.C. 7:13-2.3(a) include an adjustment factor to account for the impacts of future development, it has not been enforced because of implementation of the Stormwater Management rules. If the Department chooses to adopt rules that incorporate an adjustment factor (despite its being arbitrary and unreasonable), it should be adopted as a conditional requirement, where an applicant would have the option of designing a project in accordance with either the zero percent net-fill rule at proposed N.J.A.C. 7:13-10.4 or, alternatively, designing a project in accordance with a flood hazard area design flood elevation using 125 percent of the 100-year flow rate in which case the 20 percent net-fill rule would apply. (7, 18, 33, 46, 53)

314. COMMENT: The Department has failed to provide any substantive justification for the proposed requirement for over-detention by determining the “flood hazard area design flood elevation” using 125 percent of the 100-year flow rate. Potential flooding impacts from existing developments should be controlled by retro-fitting existing conditions, not by squelching future development. This point was made in comments on the report of the Flood Mitigation Task Force, which the Department ignored in the proposal. (7, 18, 33, 46, 53)

315. COMMENT: If the watershed upstream of a proposed development has previously been developed or is precluded from development by regulation, there is no substantive basis for requiring determination of the “flood hazard area design flood” using 125 percent of the 100-year flow rate. The purported justification in support of the 125 percent proposal is to account for potential future upstream development. To the extent that this concern does not exist based on actual field conditions or existing regulatory controls, the requirements should not apply. (7, 18, 33, 46, 53)

316. COMMENT: The assumption that the addition of 25 percent to the 100-year flood is an accurate estimation of the flood hazard area design flood elevation is arbitrary, capricious and unreasonable where studies of actual field conditions demonstrate that the 25 percent factor does not represent projected upstream flows. An applicant should have the option of either using the
“simplified” proposed procedure of assuming the 25 percent factor or conducting a study of upstream flows based on actual field conditions. (7, 18, 33, 46, 53)

317. COMMENT: The Department has failed to reference any technical studies or reports that would support the calculation of the flood hazard area design flood elevation using 125 percent of the 100-year flow rate. Without such support, the adjustment factor is arbitrary and untenable. While the proposal asserts that the Department’s flood hazard area delineations were developed using this 25 percent adjustment factor, the Department has not referenced any technical study or report that would provide some substantive justification for use of this 25 percent adjustment factor. Having offered no technical basis for this adjustment factor, the Department should withdraw all provisions of the proposed new rules which rely upon or utilize it in any way. (7, 18, 33, 46, 53)

318. COMMENT: To the extent that the Department intends to rely on concerns about increases in flood elevation due to changes in upstream development in support of the limitation on the duration of verifications, then the requirement to determine the flood hazard area design flood elevation using 125 percent of the 100-year flow rate at proposed section at N.J.A.C. 7:13-3.6 should be eliminated. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 313 THROUGH 318: The reduction of development potential based on regulations does not necessarily prevent increases in runoff volume that may result in downstream increases in peak flow. While the Department’s Stormwater Management rules at N.J.A.C. 7:8 are designed to address mitigation of development impacts on downstream peak flows, increases in runoff volume from projects approved under the repealed flood hazard rules that are not yet constructed, as well as the many projects that are not subject to the Stormwater Management rules, necessitate a factor of safety to address downstream peak flow impacts. In fact, any number of changes in the hydrologic and hydraulic characteristics of a watershed can increase expected flood flows at a given location, as noted in the response to comments 178 and 179. Upstream development, removal or modification of upstream bridges and dams, channel improvements, sediment removal projects, changes in hydrologic conditions in portions of a
watershed and alterations in weather patterns may all contribute to exacerbate flooding. Due to the wide range of factors that can affect the hydrologic and hydraulic response of a given watershed, flood plain modeling of fluvial systems is necessarily based on many factors and assumptions that cannot always be precisely measured or accurately predicted.

For these reasons, when the Department has undertaken the delineation of flood hazard areas for its jurisdictional mapping, a flow rate of 25 percent greater than the 100-year flood has been historically utilized. The Department has maintained that this 25-percent factor of safety for flood modeling is appropriate given the need to preserve public safety in light of the inherent inability of riverine modeling to provide an exact prediction of future flood conditions. The State’s continued flooding problems, despite the historic application of this 25 percent factor of safety, clearly demonstrates that this safety margin is absolutely necessary. The Department believes that simply assuming the additional protections contained in these new rules to address the problems that exist, even with the use of the factor of safety, should be considered sufficient to protect public safety, health and general welfare without continuing to require the factor of safety would be inappropriate and could put public health and safety at risk. Furthermore, even in cases where little or no future development can occur in a given watershed, the 25 percent factor of safety is appropriate, since this safety margin is not solely intended to address future upstream development. Acceptance of modeling suggested by the commenters to eliminate the factor of safety would be inappropriate.

Given this approach to riverine modeling, which has been maintained throughout the entire history of the Department’s flood mapping efforts, it is reasonable to require the same assumptions and factors of safety in modeling performed by the public sector in the absence of State flood hazard area delineation. This added factor of safety is actually represented in a number of ways in the various modeling options available under subchapter 3. Furthermore, adding a factor of safety is not proposed as a method to reduce flooding from existing development as indicated by the commenter, but is simply a means of ensuring that flood hazard area delineations are sufficiently conservative to protect public safety. Additionally, the zero-percent flood storage displacement requirements at N.J.A.C. 7:13-10.4 are intended to preserve the existing flood storage in order to prevent increases in the frequency and intensity of flooding. Preserving flood storage through the adopted zero-percent net fill standard is not a substitute for
adding a factor of safety when calculating the depth of flooding. Whereas the added 25 percent safety margin ensures that flood depths are not underestimated due to possible increases in flow due to changes in the watershed, the zero-percent net fill standard ensures that development on a given site will not displace floodwaters and therefore cause flood elevations to rise.

N.J.A.C. 7:13-3.4(f)iii and 7:13-3.6(c)3

319. COMMENT: Restricting the floodway analysis to only Method 4 (equal conveyance) is too restrictive, and may not result in the correct, or best, floodway location. For instance, if a project's property extends to both sides of the river, the equal conveyance determination may not be the most appropriate to optimally locate a bridge or other structure. Similarly, widely differing land uses in the floodplain may artificially skew the floodway location if the analysis is restricted to Method 4. Floodway determination should be made by currently accepted methodology, and should not be further restricted by these rules. (3)

320. COMMENT: Floodway calculations should not be restricted to strictly Method 4 (equal conveyance) for all floodways. Method 4 computes the floodway and it allocates conveyance on both sides of the streams equally. Prior to the current rules, there was no restriction on which method to use to calculate the floodway limits. A policy evolved in the Department that if the floodway existed on more than the applicant's property, Method 4 was to be used because it would equitably allocate floodway on both the applicant’s and the applicant’s neighbor’s property. But if the floodway was on the applicant's property, the floodway could be wherever the math allowed it to be. With the current rules, a rather arcane reference to Method 4 (not in the floodway section) was entered as a parenthetical phrase, and it has now become a requirement that is passed on to the new rules where all floodways have to be defined by Method 4. The different methods are purely arithmetic. There is not one better way of calculating floodway limits, simply different ways of coming up with the same result. However, there seems to be an unfounded belief in the Department that Method 4 is better than others. The standard step backwater calculations purely modify the cross-section, recalculate the flow based on Bernoulli's equation, and compute a change in the water level. (59)
COMMENT: Method 4 is not the best method for defining the floodway for the following reasons: (1) Redevelopment of sites. Together with other constraints, Method 4 makes it hard to redevelop a site if the floodway is contained on the site and the developer is not allowed to put the floodway where it best suits the redevelopment. (2) Environmental impact. In Method 4, the lower the conveyance of that portion of a floodway, the more you are allowed to encroach upon it. If a floodplain is equal on both sides geometrically, and one side is more densely vegetated than the other, for example woods and a parking lot, Method 4 floodway is going to allow much more encroachment in the wooded area than in the parking area. There is no true or better floodway than another, and when the floodway is on more than one property, Method 4 is the equitable way. However, when the floodway is on only one property, you need to allow the flexibility to avoid unintended environmental impacts and to allow developers to have a better opportunity to redevelop that site. (59)

RESPONSE TO COMMENTS 319 THROUGH 321: The equal conveyance method described at N.J.A.C. 7:13-3.4(f)iii and 7:13-3.6(c)3 has historically been preferred by the Department, since this method calculates the floodway based on the equal conveyance of floodwaters on both sides of a channel. Thus, when a flood hazard area is divided between two property owners (which is common since streams often serve as property boundaries between two lots) the flood fringe is distributed onto both properties equally. However, the Department also recognizes that site conditions may not warrant such a flow distribution due to a number of physical characteristics or other site constraints. The Department is interested in attaining the most accurate and optimized flood hazard area modeling possible. Furthermore, it would not be in the best interests of public safety, health and general welfare to require engineers to use the equal conveyance method on a given site if, based upon best engineering judgment, this method is not optimal in establishing the floodway on that site. The Department also recognizes that the Army Corps of Engineers, who developed the hydraulic modeling referenced by the commenters, recommends that other floodway methods be used in conjunction with, and to supplement, the equal conveyance method in certain cases, and that this methodology is widely accepted throughout the county. Since it is in the best interest of public safety to have accurate and optimized floodway,
the language at N.J.A.C. 7:13-3.4(f1)iii and 7:13-3.6(c)3 has been modified to allow the applicant to demonstrate “(prior to the submission of an application for a flood hazard area verification to the Department) that due to the topography of the area, the proximity of structures to the channel and/or other physical characteristics of the watershed or flood hazard area, use of another method will optimally calculate the floodway limits at a given location.”

322. COMMENT: The proposed new rules require accuracy to a tenth of a foot precision for proposed increases in flood elevation. However, since many of the FEMA flood-boundary studies performed from 1980 through the 1990s had flood-elevation precisions of 1 to 2 feet, proposed encroachments within the flood hazard area should be required to include a minimum 1.5 feet margin of safety to delineate the flood hazard area boundary when using the older FEMA studies. In addition, the allowable increase in flood hazard area elevation should be defined as the total increase in the elevation for a specific reach length. (66)

RESPONSE: The Department assumes that the 0.1-foot accuracy to which the commenter refers concerns the calculation of floodway limits based on a 0.2-foot rise under N.J.A.C. 7:13-3.4(f)iii. The Department acknowledges that many assumptions are made in calculating the 100-year flood elevation, and that if hydrologic and topographic data is flawed then the resulting hydraulic calculations can be erroneous as well. However, since the calculation of the floodway limits compares the same 100-year flow rate under different hydraulic conditions along the same reach of stream, the Department believes that the 0.1-foot accuracy is reasonable and appropriate.

N.J.A.C. 7:13-3.6 Flood hazard area and floodway determined by calculation (Method 6)

N.J.A.C. 7:13-3.6(c)3

323. COMMENT: The proposed requirement to determine the “floodway limit” using the 100-year flow rate assuming a maximum rise of 0.2 feet in the 100-year flood elevation should negate the requirements of the proposed zero percent net-fill rule set forth at proposed N.J.A.C. 7:13-10.4. The design requirement of a limitation of the maximum rise in the 100-year flood elevation
of 0.2 feet is an extraordinarily, if not unduly, stringent design standard; it exceeds the Federal government standard of an allowable 1-foot rise. This standard will need to be met regardless of whether any fill occurs on site. Therefore, if a project is designed to meet this standard, then the proposed zero percent net-fill rule will be inconsequential and have no practical effect in controlling flooding impacts. (7, 18, 33, 46, 53)

RESPONSE: As noted in the response to comments 241 through 251, flooding in New Jersey has continued to worsen during the years since the implementation of the Flood Hazard Area Control Act despite the requirement that fill be located outside the floodway. The standards in the rules prior to this adoption at N.J.A.C. 7:13-2.4(b) established the floodway based on a maximum rise in the 100-year water surface elevation of 0.2 feet. To change this requirement to allow a 1-foot rise in water surface elevation would result in a less protective rule than existed prior to adoption of the new rule and would not be consistent with the Department’s goals to prevent increases in the frequency and intensity of flooding.

Furthermore, the Department’s standard for delineating floodway limits is not related to the volume of fill that a development activity can displace in the flood fringe without causing flood elevations to rise. The floodway is the portion of the flood hazard area that is expected to carry the majority of flow during a flood, while the flood fringe is the portion of the flood hazard area where floodwaters are temporarily stored. Displacing flood storage volume in the flood fringe forces the floodway to convey more floodwater, and thus causes flood elevations to rise. Permitting new developments to displace flood storage volume, as the commenters suggest, would therefore cause flood elevations to rise, which is not in the best interest of public safety, health and general welfare. The Department therefore believes that a floodway based on a 0.2-foot rise, in conjunction with the zero-percent flood storage displacement standards of N.J.A.C. 7:13-10.4, is necessary to ensure that future development will not exacerbate flooding in the State.

Subchapter 4. Determining the Riparian Zone

N.J.A.C. 7:13-4.1 The riparian zone
324. COMMENT: We support establishment of riparian areas to reduce flood damage. Development in riparian areas must be limited to reduce the costs of flood damages and to enable to floodplain to reduce flood peaks, volumes and velocities. (10, 67)

325. COMMENT: We strongly support the establishment of the riparian zones. (54, 60, 63)

RESPONSE TO COMMENTS 324 AND 325: The Department acknowledges these comments in support of the proposed riparian zones.

326. COMMENT: We support the creation of riparian zones to protect vegetation adjacent to watercourses. The existing Flood Hazard Area Control rules provide for the protection of vegetation within a 25 or 50-foot area adjacent to a waterway, depending upon the quality or sensitivity of the area. The proposed new rules better recognize the importance of these areas by designating them as "riparian zones," and expanding their protection to a width of 300 feet for Category One waters and their upstream tributaries; 150 feet for trout production waters and their upstream tributaries; and 50 feet for all other waters. By adopting identical riparian zone rules in both the Flood Hazard Area Control rules and the Coastal Zone Management rules, the Department is again ensuring consistency between the protections afforded waterways regulated by the two programs. (37)

RESPONSE: The Department acknowledges the comment in support of the rules. Expanded riparian zones of 50 to 300 feet are more reflective of the actual width such a zone must be to protect the water resources of the State. In addition, consistency among rules makes it easier for the regulated community to comply with such rules and also for Department staff to consistently apply and enforce such rules.

327. COMMENT: The rule acknowledges the importance of these vegetated buffers in holding water and filtering this water into our streams and waterways. (48)
RESPONSE: The Department acknowledges the comment in support of the rules regarding the importance of vegetated buffers for water retention and water filtration.

328. COMMENT: We support the 300-foot buffers that are provided around high quality Category 1 streams as well as trout maintenance streams. The 150-foot buffers that surround areas where threaten and endangered species habitat is found and the 50-foot buffers provided for all other streams in the State minus tidal coastal streams is also supported. Limiting the new construction in these vegetated areas will accomplish flood protection in this State by preventing increased incidents of flooding. (48)

RESPONSE: The Department acknowledges the comment in support of the rules. The riparian zones of 50 to 300 feet are more reflective of the actual size required for such a zone to be protective of the water resource, and also protective of the public.

329. COMMENT: The proposed new rules should be limited to protecting the public from the physical hazards of flooding by assuring that unnecessary activities do not occur within the flood hazard area (that is that area presently designated the flood plain). The Department should therefore limit its adoption to those aspects of the proposed regulations that deal with protecting the size and availability of the flood hazard area. All aspects of this proposal that pertain to the establishment and/or maintenance of a riparian zone are inappropriate in this context and should not be adopted. (42)

330. COMMENT: There is no statutory authority under the Flood Hazard Area Control Act for the establishment of a “riparian zone” as proposed by the Department. Unless it can be demonstrated that these buffers serve some flood control purpose, ulterior objectives (such as protection of threatened and endangered species or water quality preservation) should be addressed in other, more appropriate regulatory programs. Therefore, all sections of the proposed new rules concerning “riparian zones” should be eliminated. (7, 18, 33, 46, 53)
331. COMMENT: The proposed riparian zones are nothing more than a buffer, similar to those imposed by other statutory provisions. In this case, there is no statutory authorization for these riparian zones and therefore this portion of the regulations should be withdrawn. (7, 18, 33, 46, 53)

332. COMMENT: Riparian zones that reach beyond the floodplain do not provide any meaningful protection against flooding, which is the basic purpose of the Flood Hazard Area Control Act. The provisions for water quality buffers under the Stormwater Management Rules and transition areas under the Freshwater Wetland program should serve this water quality function. (12)

333. COMMENT: Pursuant to the Department’s comments on the proposed regulations, the purpose of the riparian zone is to preserve the function of riparian systems and to protect the State’s surface and groundwater resources. Protection of the riparian zone bears no direct correlation with preventing flood hazards. (40)

RESPONSE TO COMMENTS 329 THROUGH 333: The Department believes that the inclusion of a regulated riparian zone under the adopted rule is appropriate. As noted in the proposal summary, the Army Corps of Engineers documents that a riparian zone does help to control flooding by moderating flows to streams and providing areas for flood storage. This is corroborated by studies conducted by researchers such as Wenger, as described in detail the proposal summary at 38 N.J.R. 3971-3.

With respect to statutory authorization, the Flood Hazard Area Control Act at N.J.S.A. 58:16A-52(a) directs the Department to “…delineate as flood hazard areas such areas as, in the judgment of the department, the improper development and use of which would constitute a threat to the safety, health, and general welfare from flooding.” Since a riparian zone has been documented to be a nonstructural flood control measure, its designation as a component of a regulated water is appropriate. As such, the Department has the statutory authority to regulate development within this zone, including establishing standards for development that include preserving riparian zone vegetation. The Department notes that, in many cases, the riparian zone

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of a regulated water lies within the flood hazard area of that water. Therefore, even if the focus is entirely on flooding, it is appropriate that the adopted rule includes provisions to establish regulated riparian zones.

While the Flood Hazard Area Control Act is the primary enabling legislation for the Flood Hazard Area Control Act rules, the rules are also adopted under the authority of the Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.), the Highlands Water Protection and Planning Act (N.J.S.A. 13:20-1 et seq.), the Water Quality Planning Act (N.J.S.A. 58:11A-1 et seq.), N.J.S.A. 13:1D-33, and the Construction Permits Law (N.J.S.A. 13:1D-29 et seq.). These laws provide the authority to protect water quality through varying mechanisms including the protection of buffers for the preservation of vegetation. As indicated in the response to comment 129 above, the Department’s ability to protect the environment, including flora and fauna, as it implements the Flood Hazard Area Control Act rules, was affirmed by the Appellate Division Court in 1985. Society for E.E.D. v. New Jersey DEP, 208 N.J. Super. 1 (App. Div., 1985). In addition, the Department’s authority to use stream buffers to protect water quality was affirmed in, “In the Matter of Stormwater Management Rules, 384 NJ Super. 451, cert. denied 188 NJ 489 (2006).” The Department has chosen to implement some of these authorities in the new adopted rules, and had also done so in the former rules. For instance, authority for the new 50, 150 and 300-foot riparian zones is derived from the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.

Finally, a riparian zone that extends beyond the limit of the flood plain still aids in flood abatement, since flood plains are directly impacted by land cover alterations and discharges of runoff from areas outside of the flood plain. The buffers established under the Freshwater Wetlands Protection Act Rules and the Stormwater Management Rules do not include all areas contained within riparian zones in need of protection. Because of the need to provide protection of these areas, as stated above, it is appropriate to continue and to expand regulated riparian zones under the adopted rule.

334.COMMENT: The proposed riparian zones are not scientifically based. A “riparian zone” should therefore not be required as a buffer around every regulated water, particularly as that term is defined and used throughout the proposed new rules. The Department should set forth its
purported technical basis for the conclusion that all regulated waters require a riparian zone.
Engineering controls can achieve similar effects as a buffer zone without the socio-economic
consequences inherent in the Department’s proposed approach. (7, 18, 33, 46, 53)

335. COMMENT: The Department has failed to provide any historical or scientific
documentation to suggest that mandatory Statewide stream buffers are required to protect water
quality and that the existing water quality requirements mandated in the Stormwater
Management Rules at N.J.A.C. 7:8 are inadequate. (7, 16, 18, 46, 53)

336. COMMENT: Technical support has not been provided to justify many of the significant
requirements in the proposed regulations. We question the scientific basis for the increase in
buffers, now termed "riparian zones." A decision to expand such zones should be based on sound
science and something more substantial than "more is better." (46)

337. COMMENT: The riparian zone dimensions specified in proposed N.J.A.C. 7:13-4.1(c)1 and
2 (300 feet along both sides of any Category One water and 200 feet along both sides of waters
identified in N.J.A.C. 7:13-4.1(c)1) are unduly stringent and should be reduced to 200 feet and
100 feet, respectively, for the same classifications. This would be more compatible with the
studies the Department cites (none of which justify 300-foot/200-foot buffer areas) as well as
comparable buffer zone requirements in other states. (36)

338. COMMENT: Should the Department feel compelled to proceed with the adoption of a
riparian zone, it should at a minimum revise N.J.A.C. 7:13-4.1(c)1 and 2 to establish the riparian
zone as 200 feet along both sides of any Category One water and 100 feet along both sides of
waters identified in (c)1. In the Basis and Background document the Department cites a number
of studies by Wenger and others as well as standards imposed by other states as the justification
for establishing the 300-foot and 200 foot riparian zones respectively around the various water
types. Yet the document recognizes that none of those studies recommends such extensive
riparian zones as those proposed in these regulations, and that no other State has established such
stringent requirements (Massachusetts is identified as having established riparian zones ranging
from 25 to 200 feet, and Maryland’s model ordinance includes “no build” setbacks ranging from 50 to 100 feet from the top of bank). A review of the information presented in the Basis and Background document strongly supports maximum riparian zones of 200 feet around more sensitive waters, and 100 feet around less sensitive waters, while providing a more realistic and balanced control philosophy that affords environmental protection as well as reasonable use by the citizens of the State of their property. (42)

339. COMMENT: The required 300-foot, 150-foot and 50-foot areas for riparian zones are arbitrary. Every regulated water and the area surrounding it has unique topographic, hydrologic and geologic characteristics. Unlike the proposed methods for determining flood hazard areas which would take into consideration physical properties of the environment, the designated riparian areas as proposed would be fixed at 50, 150 or 300 feet regardless of the specific physical characteristics associated with each regulated water or the areas surrounding it. As a result, some riparian areas that may require additional protection are not afforded that additional protection under the proposed regulations. On the other hand, due to the physical properties along other regulated waterways, those areas may not require the high degree of protection afforded under the proposed regulations. Such areas will be over-regulated, thereby increasing the burden on landowners as well as the State’s administrative burden. The riparian zone scheme set forth in the regulation (50, 150 or 300-foot zones) does not address the variability of hydrologic conditions, topography, or soil type, and therefore lacks sufficient scientific basis to effectively serve its stated purpose. (40)

340. COMMENT: While the Department's Summary and Background discussion of riparian zones (38 N.J.R. 3951) provides a list of benefits, it does not shed light on any scientific evidence that, for example, a 150' buffer is as good as a 100', 140', or a 175' buffer, along trout maintenance waters. Absent such scientific data, and recognizing that not all streams and sites are created equal, the Department should consider amending the rule to include opportunities for design professionals to demonstrate that the goals of the Department (i.e., ensure no increase in flooding, protect public safety, and provide healthy riparian corridors) can be met, even if waivers from strict adherence to the buffers are sought. (47)
341.COMMENT: There is no need, scientific basis or otherwise, to impose riparian zones of up to 300-feet on stream corridors. It is completely possible in this regard that existing development has occurred closer than 300-foot or 150-foot to the stream channel, and the rule proposal does not address the instance where vegetation does not exist in this area. With distances as great as 300 feet or 150 feet, it is entirely probable that topographic breaks in grade exist, so that the outer limits of those distances drain in a completely different direction, making these great distances useless. (61)

RESPONSE TO COMMENTS 334 THROUGH 341: As noted in the proposal summary, the Department has determined that the near-stream buffers under repealed N.J.A.C. 7:13-1.3(a) did not adequately protect the surface waters of the State or the ecosystem associated with these waters. Therefore, wider riparian zones are warranted along regulated waters regardless of the size of the water’s contributory drainage area. Furthermore, the adopted riparian zones have a strong basis in science. Studies referenced by the Department document the numerous environmental benefits provided by riparian zones and support the proposed riparian zone widths. It has been shown that minimum widths are required to effectively realize various functions, including sediment removal, bank stabilization, pollutant removal and flood storage, as well as to provide suitable habitat. As noted in the proposal summary, studies have shown that sediment can travel through a vegetated area a distance as great as 300 feet. Other studies have shown that a minimum 300-foot wide riparian zone is needed to address in-water and near-water habitat considerations and flood attenuation. Riparian zones up to 300 feet have also been recognized for enhanced water quality, as discussed in the proposal summary at 38 N.J.R. 3971-3.

The Department acknowledges that engineering controls can sometimes be effective in mimicking natural environmental functions, if all appropriate variables are considered in the design and the selected engineering controls are properly maintained. However, since such controls seek to mimic natural systems, the preservation of natural systems is more effective in providing the desired environmental functions than obtaining suitable engineering solutions.
From a regulatory standpoint, establishing a variable riparian zone width along a given reach of a watercourse is impractical. The Department does not have sufficient scientific documentation upon which to rely in order to establish standards for a variable riparian zone width along small segments of stream corridor. In addition, the Department believes that clearly-defined riparian zone widths and uniform standards for riparian zone disturbance, as contained in the adopted new rules, will serve to reduce confusion among the regulated community and increase compliance with the requirements of this chapter.

Finally, it should be noted that the riparian zone standards of the adopted new rules apply to the preservation of existing riparian zone vegetation. Where development exists within a riparian zone, redevelopment is not precluded in areas devoid of vegetation.

The Department believes that the riparian zones established in the adopted new rules are necessary and appropriate to preserve the quality and integrity of the surface waters of the State.

342. COMMENT: The proposed requirement for a riparian zone around every regulated water is inconsistent with the Best Management Practices of the Department’s Stormwater Management rules. (7, 18, 33, 46, 53)

343. COMMENT: The proposed riparian zones should be eliminated as the Department has already established water quality buffers in its Stormwater Management rules. Furthermore, the regulation of development in flood hazard areas offers the necessary reductions in flooding hazards. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 342 AND 343: Establishing riparian zones around regulated waters is, in fact, consistent with the Best Management Practices of the Stormwater Management rules. The Stormwater Management rules require a low impact design element for all proposed major developments, as defined in the Department’s Stormwater Management rules at N.J.A.C. 7:8-1.2. The protection of water quality features is an example of such a low impact strategy. As the scientific literature cited in the proposal summary demonstrates, riparian zones do provide, among other things, important water quality functions. Therefore, the riparian zone preservation
directly correlates with the Department’s Stormwater Management rules, in that it is an example of a low impact design strategy.

Furthermore, the 300-foot Special Water Resource Protection Area under N.J.A.C. 7:8-5.5(h) only applies to Category One waters if a project is classified as a major development under N.J.A.C. 7:8-1.2. The Stormwater Management rules do not establish any other riparian buffers. Because the Department has determined that riparian zone preservation is essential to maintaining healthy watercourse ecosystems in the State, as well as providing important flood control functions as described in the response to comments 329 through 334, riparian zones have been established and preserved by the adopted new rules along all regulated waters and for all regulated activities, with certain exceptions at N.J.A.C. 7:13-2.3(a)2. This is necessary, since unchecked development within flood hazard areas and riparian zones can adversely impact flooding and degrade the health of surface waters. The establishment of appropriate riparian zones, along with the other stringent design and construction standards of the adopted new rules, will serve to best minimize these potential adverse impacts.

344.COMMENT: There should be opportunities to modify the width and/or shape of the riparian zone consistent with the transition area averaging and reduction standards of the Freshwater Wetland Protection Act rules. (11)

345.COMMENT: The Department should consider an alternative riparian zone width designation that focuses on taking into consideration the width of the waterway, the slope of the bank of the waterway and size of the upstream watershed. (12)

346.COMMENT: The various geological/topographic relief formations in the State (i.e., mountains, coastal plains, etc.) should also be recognized in the development of meaningful riparian zones for different situations/parts of the State. (12)

RESPONSE TO COMMENTS 344 THROUGH 346: In terms of protection of the receiving watercourse, studies by Rabeni and Smale (as cited in the proposal summary at 38 N.J.R. 3971-3) have shown that segmenting a riparian zone into areas of variable widths will negatively
impact the functionality of the riparian zone. This would, in turn, have an adverse impact on the receiving watercourse. Because of this, the Department determined that it would be inappropriate to modify the width of a given riparian zone on a site-by-site basis.

The Department has relied on existing research to establish the riparian zone width along a given watercourse. This research has also shown that riparian zones not only provide water quality benefits, but also aid in the attenuation of floods, the stability of stream banks and the provision of habitat, sustenance and corridors for wildlife, both within and adjacent to surface waters. All of these factors determine the value of a given surface water, and the riparian zone serves to aid in the protection of the value of that water. Finally, it is the Department’s experience that the physical dimensions of a surface water, such as channel width, bank slope and contributory drainage area, are not accurate or adequate indicators of the appropriate riparian zone width within which vegetation should be preserved in order to sufficiently protect the quality and integrity of a surface water.

347.**COMMENT:** The proposed rule requires a 25 to a 300-foot vegetated buffer be established from underground piped streams. Since a significant number of older municipalities were constructed by piping streams, maintaining or establishing a buffer would completely stop redevelopment in those areas. (16)

348. **COMMENT:** It is absurd that the Department is proposing to establish a riparian zone along all underground, previously-piped streams and that, at a minimum, a 25 foot vegetated buffer be established along such piped streams. Since many existing developments were constructed by piping streams, maintaining or establishing a new buffer along these piped streams would prevent redevelopment of many areas. (7, 18, 33, 46, 53)

**RESPONSE TO COMMENTS 347 AND 348:** The definition of “water” at N.J.A.C. 7:13-1.2 provides that “a water that is piped, relocated or otherwise modified remains a water” for the purposes of this chapter, and is therefore subject to the requirements of the adopted rules. However, disturbance to vegetation within the riparian zone of a piped water does not impact the functionality of watercourse ecosystem. It is therefore not the Department’s intention to apply a
riparian zone along the piped segments of an otherwise regulated water, provided such piping was not done in violation of this chapter.

349. COMMENT: The Department should adopt wider riparian zones and take a strict interpretation of the proposed new rules. (10, 67)

350. COMMENT: The definition of riparian zone should be expanded to address the impacts of global warming. The 50 minimum from the top of bank is insufficient and should be increased to 100, 300 or 500 feet. (56)

351. COMMENT: The widths of the riparian zones should be increased as follows: Stream stabilization, up to 50 meters; Flood attenuation, 150 meters and upwards; Wildlife habitat, 500 meters. (56)

352. COMMENT: The new rules will clarify and reorganize New Jersey's regulations to limit new development in flood plains. Current buffer zones of 25 to 50 feet will increase to 50, 150 or 300 feet depending on the category of the waterway. The U.S. Department of Agriculture and the U. S. Environmental Protection Agency have recommended a 75 foot to 200 foot buffer for flood control. (Chesapeake Bay Riparian Handbook, 1998). Also, West Amwell Township recently adopted a new Stream Corridor Ordinance with a minimum 75 foot buffer, as mandated by the Department. As such, the minimum buffer should be 75 feet in the proposed new rules. (51)

353. COMMENT: We support the riparian zone regulation and recommend wider widths than proposed with up to 600-foot buffers in some areas. At a minimum, the widths should not be less than those required in other State regulations for consistency. The Surface Water Quality Category One program does not recognize all the waters deserving Category One status, and many streams are under protected by the Surface Water Quality standards. These rules should not rely on the Surface Water Quality program to establish the widths of the riparian zone. (The commenters also submitted a fact sheet, entitled “Wide Riparian Zones Need to Be Regulated,” which presents scientific evidence supporting various widths of riparian zones necessary to
RESPONSE TO COMMENTS 349 THROUGH 353: As noted in the proposal summary, the Department has carefully researched the numerous functions of the riparian zone, and has established riparian zone widths appropriate for the continued functionality of these areas along surface waters of varying characteristics, for example C1 waters, and trout waters. The Department does not believe that the scientific research available at this time supports the establishment of wider riparian zones, as suggested by the commenters. The Department will continue to review research in this area. If the adopted new riparian zones are found to be insufficient to preserve the quality and integrity of the State’s surface waters, new riparian zones will be considered in future rule proposals, as appropriate.

With respect to the comment referencing global warming, the protection of the vegetation within the riparian zone will have a positive impact. Vegetation actively serves as a carbon dioxide sink, which moderates the concentration of this greenhouse gas in the atmosphere. Also, with respect to the referenced stream corridor ordinance, the Department has determined that a riparian zone width of 50 feet is acceptable as the minimum width at this time. However, local governments may elect to establish riparian zones of greater width than adopted in this chapter.

With respect to Category One watercourses, the adopted rule relies on the Surface Water Quality Standards at N.J.A.C. 7:9B for designation of such watercourses, pursuant to N.J.A.C. 7:13-1.2. The Flood Hazard Area Control Act rules do not themselves designate watercourses as Category One. However, amendments were recently proposed to the Surface Water Quality (see 39 N.J.R. 1845(a)). Included in these amendments are criteria for determining the circumstances under which a watercourse would be classified as Category One. Should more watercourses be designated as Category One as a result of this or future amendments, the riparian zones under the adopted Flood Hazard Area Control Act rules will automatically be increased to 300 feet along the incorporated watercourses, pursuant to N.J.A.C. 7:13-4.1(c)1.

354.COMMENT: Three hundred-foot buffers do not meet the safety requirements of absorbing water during normal high rain events and certainly not during flood events with the rate that
impermeable surfaces are being added in the western Burlington County area. Four hundred and fifty-foot buffers would not be sufficient; it might be necessary to provide at least 650-foot buffers, to protect against future flooding along the Delaware River for the following reasons.

The following streams empty into the Delaware River on the New Jersey side in the upper estuary area: Rancocas Creek, Assiscunk Creek, Bustleton Creek, Crafts Creek, Spring Hill Brook, Blacks Creek, Thornton Creek, and Crosswicks Creek. It is our experience, through 50 years of observation and countless sojourns for many recreational activities, that the combined flows of the above mentioned tributaries contribute an addition flow of water to the Delaware River that is of a considerable volume. Trenton is the approximate stopping point of the tidal influence of the Delaware’s Upper Estuary area. This area and its tributary flows contribute an enormous amount of water during any heavy rain event. The area from Rancocas Creek to Trenton has been referred to by a few of us as the “cork” part of the River. The reason for this reference is the tide reversal that causes the Delaware River to run backwards during incoming tides. The resulting tidal influence raises water levels in the Bordentown/Trenton area six to eight feet on any given normal tide. When there are floods, the incoming tides with flow from the afore-mentioned tributaries essentially dam up (“cork”) the Delaware River at Trenton.

More impermeable surfaces have been added each year into the afore-mentioned watersheds. Even with the new stormwater rules, little has helped; new basins designed to the stormwater standards do not work in this area. All the stormwater basins and ground water discharge wastewater plants I have observed fail to function as designed. This has a lot to do with high clay strata that allow limited retention in the soils.

We have heard that the lower estuary of the Delaware River is going to be dredged an additional five feet, thus resulting in an additional one foot to the tidal back up at Trenton. Delaware River tides in the 1800’s were approximately three feet or less at Trenton. The New Jersey Turnpike is slated to add six new lanes from exit 6 to 8a. This will entail 26 linear miles of asphalt 60 feet wide. Sixty feet of asphalt multiplied by 26 miles equals more than 8 million square feet of new impermeable surface in watershed area 20. Consequently, we are of the opinion that 650 feet may be necessary to protect against flooding, although with river dredging and turnpike widening and continued building in New Jersey we are already long past any balance or sanity. (62)
RESPONSE: As noted in the response to comments 349 through 353 above, the Department believes that the widths of the riparian zones adopted under these new rules are well supported by science and are therefore appropriate to protect the quality and integrity of surface waters as well as provide other benefits including attenuation of flooding.

The Department acknowledges concerns for flooding in the Delaware River watershed. This watershed has experienced three devastating floods in the past several years, and the Department is committed to implementing these adopted new rules stringently in order to ameliorate damages from flooding in this basin and throughout the State to the maximum extent possible.

In addition to addressing flood impacts in the Delaware River from New Jersey tributaries, the Department is working with neighboring states to control all contribution to flooding of this waterbody. With this intent, the Governors of the four states that comprise the basin assembled a team of experts to discuss regional flooding and to make recommendations on initiatives to help mitigate future flood damages along the Delaware and its tributaries. To this end, the Delaware River Basin Interstate Flood Mitigation Task Force released its final report in July 2006, which recommended a number of regulatory changes, many of which were modeled after draft versions of the Flood Hazard Area Control Act rules that are being adopted at this time.

With regard to impacts resulting from new impervious surface throughout the State, the Department adopted new Stormwater Management rules in 2004 at N.J.A.C. 7:8, which place stringent requirements on development in order to ensure that stormwater runoff will not contribute to flooding or degrade the quality of our surface waters. Any permit issued under the Flood Hazard Area Control Act rules, which involves the creation of more than one-quarter acre new impervious surface, must comply with the requirements at N.J.A.C. 7:8.

The Department believes that these new Flood Hazard Area Control Act rules, in combination with the Stormwater Management rules and the other State and Federal initiatives mentioned above, will greatly assist in the protection of the residents of New Jersey from the adverse impacts of flooding both from the Delaware River as well as all other waterbodies in the State.
355. COMMENT: Although we are opposed to the implementation of riparian zones under this proposal, should the Department adopt riparian zones as proposed, the proposed new rules should include a procedure to verify the location of such riparian zones to promote sound planning. (7, 18, 33, 46, 53)

RESPONSE: The proposed rule provides sufficient guidance to determine the location and width of the riparian zone. N.J.A.C. 7:13-4.1 explicitly defines where a riparian zone exists. Under N.J.A.C. 7:13-4.1(b), the portion of the riparian zone contained outside of the watercourse “…is measured landward from the top of bank.” When no discernible top of bank is present, the cited subsection establishes specific criteria with respect to where to begin the outward measurement of the riparian zone. Finally, N.J.A.C. 7:13-4.1(c) establishes the appropriate widths of the riparian zone.

It should also be noted that N.J.A.C. 7:13-6.1(c)5vii requires that drawings submitted to the Department under an application for a flood hazard area verification must also include “the limit of any riparian zone onsite as described at N.J.A.C. 7:13-4.1.” Thus a flood hazard area verification issued by the Department will also include a verification of the riparian zone.

356. COMMENT: Although we are opposed to the implementation of riparian zones under this proposal, should the Department adopt riparian zones as proposed, the riparian zone should not be applied to any waters that have a drainage area of less than 50 acres to promote uniformity and predictability. (7, 18, 33, 46, 53)

RESPONSE: The repealed rules established near-stream buffers along certain naturally-occurring waters with contributory drainage areas less than 50 acres, and the adopted new rules continue to require riparian zones along these waterbodies, pursuant to N.J.A.C. 7:13-2.2(a)3 and 2.3(a)2. The establishment of riparian zones along such watercourses with small contributory drainage areas is necessary to protect the continued functionality of the watercourse’s ecosystem. The protection afforded is therefore independent of the size of the contributory drainage area. The Department believes that the adopted new rules are appropriately uniform and predictable in this regard.
357. COMMENT: Although we are opposed to the implementation of riparian zones under this proposal, should the Department adopt riparian zones as proposed, the width of the riparian zone should not extend into developed areas, because this will prevent redevelopment of those areas. There are industrial areas in need of redevelopment where there is some limited pervious area that would preclude not only redevelopment, but also remediation of pollution that may currently impact nearby surface waters. (7, 18, 33, 46, 53)

RESPONSE: The width of the riparian zone at N.J.A.C. 7:13-4.1 has been established as a jurisdictional element and is independent of the type of land cover that exists. However, the Department does not intend to discourage redevelopment or remediation activities within flood hazard areas and riparian zones. The adopted new standards for construction in these areas are intended to ensure that development will not adversely impact flooding or the environment.

To this end, the adopted new rules establish allowable disturbance limits within the riparian zone in order to accommodate certain aspects of development. For example, the permit-by-rule at N.J.A.C. 7:13-7.2(a)2 allows construction in a disturbed riparian zone or at or below grade in a flood hazard area, which could, in some cases, accommodate the reconstruction or expansion of a parking area. Furthermore, the riparian zone requirements at N.J.A.C. 7:13-10.2 apply only to the preservation of existing riparian zone vegetation. Activities in the riparian zone, which do not remove vegetation, are not subject to the requirements at N.J.A.C. 7:13-10.2. Previously developed areas within the riparian zone, which are devoid of vegetation, can therefore be redeveloped.

Responsible redevelopment considers all factors, including the environment, in its design. When designed responsibly, redevelopment projects can be permitted under the adopted rules. Finally the adopted rules will not preclude projects which seek to remediate polluted areas, provided that the proposed remediation effort is sensitive to the needs of the environment.

358. COMMENT: When a riparian zone (or even jurisdictional limits) is defined by the mean high water, it would be beneficial if the State could provide that established limit, just as it does with its State Adopted Study floodplain/floodway mapping. The mean high water line is often
not readily available to an applicant, and at times this can present an undue hardship. To eliminate confusion in this regard, the State might be in a better position to identify the mean high water lines for waters of the State, perhaps in a GIS database. (9)

RESPONSE: Where mapping of the mean high water exists, the Department makes this information available to the public upon request to the Division of Land Use Regulation. Further information is provided in the Flood Hazard Area Technical Manual, which is available from the Department at the address listed at N.J.A.C. 7:13-1.1(g). In cases where such mapping does not exist, an applicant would be required to locate the mean high water by field investigation.

359. COMMENT: The proposed new requirement of a 100-foot "riparian zone" along manmade ditches or swales places an unreasonable burden on landowners with these features and is unnecessary to protect the natural characteristics of the water course. It will also be extremely restrictive to most development and property maintenance activities in the riparian zones. In adopting the Freshwater Wetland Protection Act, the legislature considered the need for buffers adjacent to ditches and swales and determined that they were not necessary to protect the ecosystem. Accordingly, the riparian zone should remain a maximum of 50 feet (25 feet on either side), include only those areas which are vegetated and in the drainage area of the water course. (11)

RESPONSE: The width of a riparian zone is established under N.J.A.C. 7:13-4.1(c) to be 50, 150 or 300 feet, on either side of a regulated water, depending on the type of surface water being protected. As noted in the response to comments 334 through 341, the Department has determined that the near-stream buffers under the repealed rules were inadequate in protecting both the receiving watercourse and its associated ecosystem. The Department has researched available literature to determine appropriate riparian zone widths that would provide an environmental benefit. This research, as well as the conclusions reached that led to this proposal, are summarized in more detail in the rule proposal summary (see 38 N.J.R. 3971-3). Since the available research suggests that riparian zones should protect all waters regardless of contributory drainage area, the adopted new rules establish a riparian zone along all regulated
waters, with the exception of certain manmade and tidal features at N.J.A.C. 7:7E-3.26(a), N.J.A.C. 7:13-2.3(a)1 and 4.1(a), for reasons addressed in the proposal summary at 38 N.J.R. 3955, 3966 and 3972, respectively.

With respect to the Freshwater Wetlands Protection Act rules, the emphasis of those regulations is to protect the freshwater wetland complexes of the State. The transition areas prescribed therein are not primarily targeted to protect a watercourse or its associated ecosystem, a function the Department has assigned to the adopted Flood Hazard Area Control Act rules. Thus, the Department does not believe that protection of freshwater wetlands transition areas is an appropriate substitute for the adopted new riparian zones.

Finally, the adopted rule does not forbid continued maintenance of lawfully existing development within riparian zones, which is permitted-by-rule at N.J.A.C. 7:13-7.2(b)1. Additionally, a number of other permits-by-rule have been adopted to facilitate homeowners undertaking minor construction activities that would not adversely impact flooding or the environment, such as the construction of a shed or other similar structure under N.J.A.C. 7:13-7.2(b)8, the construction of a swimming pool under either N.J.A.C. 7:13-7.2(b)11 and 12, and the construction of a deck under N.J.A.C. 7:13-7.2(b)13. The Department therefore does not agree that the adopted riparian zone widths place an unreasonable burden on landowners.

360.COMMENT: The widespread impacts to land and land values from a 300-foot riparian zone should be more thoroughly explored by the Department before implementing the proposed regulations. Since the Department has been very aggressive on categorizing many waters as Category One waters over the past several years, one can only assume that the proposed 300-foot riparian zones will be very common adjacent to regulated waters. One test-case the commenter performed using GIS on a 500-acre study area in southern New Jersey found an approximate 20 percent decrease in developable uplands when comparing a 50-foot riparian zone to a 300-foot riparian zone and that the riparian zone expanded far beyond any floodplain of the waterway, especially along small tributaries and waterways with adjacent steep slopes. The commenter’s test-case suggests that the Department should consider regulations that make the width of the
riparian zone more consistent with the width of the flood hazard areas (i.e., width and banks of the waterway). (12)

361. COMMENT: The Department must quantify the amount of land being “taken” by the buffers where the buffers extend beyond the Flood Hazard Area limits. These are beyond the scope of “Flood Hazard” regulation. (33)

RESPONSE TO COMMENTS 360 AND 361: It is not possible to foresee how many surface waters will be classified as Category One as a result of future rule amendments. While it is logical to infer that the adoption of wider riparian zones would reduce to some extent the area of land available for development within the State, the exact acreage of reduction is not easily calculable given that many Category One subject to this chapter already possess a 300-foot Special Water Resource Protection Area under the Stormwater Management rules at N.J.A.C. 7:8-5.5(h). Accordingly, those developments meeting the definition of major development (one-quarter acre or more new impervious surface or one acre or more disturbance) will already be subject to the restrictions on development within the 300-foot Special Water Resource Protection Area under the Stormwater Management rules. The Department also points out that other site conditions may exist, which further reduce the developable area of land within the newly adopted riparian zones, such as the presence of steep slopes, freshwater wetlands, transition areas, high groundwater and other site constraints. These facts make it impossible to simply calculate the area within 300 feet of a Category One water and to further assume that, without the riparian zone, this area would be entirely developable. The Department does not agree that the commenter’s test-case is necessarily representative of conditions Statewide, or that the adopted riparian zone widths are inappropriate, as suggested by the commenter.

362. COMMENT: There are currently numerous unregulated drainage paths that under the proposed regulations will now be regulated with a riparian corridor. These “buffers” could extend from 50 feet to 300 feet. Carneys Point Township’s Municipal Redevelopment Plan does not, nor could it, account for these extensive areas of land that would be lost to development. (16)
RESPONSE: It is unclear which waters the commenter is referring to as “numerous unregulated drainage paths” under the repealed rules, which would now be subject to the adopted new rules. With the exception of a number of tidal waters that were not regulated under the repealed rules and which are now subject to this chapter, the adopted new rules apply to substantially the same set of surface waters as the repealed rules. For example, N.J.A.C. 7:13-2.2(a)3 exempts from regulation certain features draining less than 50 acres, which was also provided at repealed N.J.A.C. 7:13-2.1(a) and (b) (see proposal summary at 38 N.J.R. 3965-6).

While the set of fluvial surface waters subject to the adopted new rules is not substantially increased from the repealed rules, the area of protection around regulated waters has increased from 25 or 50 feet (under repealed N.J.A.C. 7:13-1.3(a)2 and 3), to 50, 150 or 300 feet (under adopted new N.J.A.C. 7:13-4.1). As noted in the response to comments 334 through 341, as well as in the proposal summary at 38 N.J.R. 3971-3, the Department has determined that the near-stream buffers under repealed N.J.A.C. 7:13-1.3(a) did not adequately protect the surface waters of the State or the ecosystem associated with these waters, and that adoption of the new riparian zones was in the best interest of public safety, health, general welfare and the environment.

All development, including redevelopment, must be sensitive to the needs of the ecosystem. Redevelopment, when done responsibly, can successfully balance the needs of the environment with the economic needs of a community’s redevelopment plan. Furthermore, as noted in the response to comment 357, the riparian zone requirements of the adopted new rules apply only to the preservation of existing riparian zone vegetation. Activities in the riparian zone, which do not remove vegetation, are not subject to the requirements at N.J.A.C. 7:13-10.2. Previously developed areas within the riparian zone, which are devoid of vegetation, can therefore be redeveloped.

363.COMMENT: The Department should pick a consistent manner for measuring buffers. The rule proposal for establishing riparian zone buffers is different then the existing rule for measuring wetland buffers, and the existing stormwater management rule for measuring special water resource protection area buffers. This causes confusion in planning, and inconsistencies in review. All of the rules should be reviewed and modified for consistency. (61)
RESPONSE: The riparian zones and transition areas employed by different regulations serve different purposes, relative to the feature each regulation seeks to protect. The Department notes that the adopted new rules are consistent with the Stormwater Management Rules in terms of the width of the riparian zone for Category one watercourses, since both rules seek, in part, to protect watercourse health and water quality. Similarly, the riparian zone widths under this chapter are in many cases similar to transition area widths under the Freshwater Wetlands Protection Act rules. For example, both the riparian zone and the wetlands transition area along trout production waters (as modified on adoption at N.J.A.C. 7:7E-3.26(c)2i and N.J.A.C. 7:13-4.1(c)2i, pursuant to agency initiated change no. 4), as well as areas with threatened and endangered species, is 150 feet. Similarly, intermediate value freshwater wetlands and regulated waters that are not identified as having significant environmental resources, both receive a 50-foot buffer. Since the Freshwater Wetlands Protection Act rules seek to preserve freshwater wetlands, these transition areas are measured outward from freshwater wetlands. Similarly, since the Flood Hazard Area Control Act rules seek to protect the quality and integrity of surface waters, the adopted riparian zones are measured outward from the top of bank or edge of water of surface waters.

With regard to the adoption of riparian zone widths of different sizes, the adopted new rules detail all necessary criteria for determining the width of the riparian zone at N.J.A.C. 7:13-4.1. In this way, the adopted rules are predictable with respect to how wide a riparian zone is.

364. COMMENT: I purchased a building lot on the Maurice River in Cumberland County in 1988. At that time, I could build a home with a 25 foot setback from the wetlands. In 1990 that setback was increased to 50-foot. Then in 1996, the setback was increased once again to 150-foot from the wetlands. Now you are proposing to move the setback to 300 feet from the wetlands. This change would render my land unbuildable and virtually worthless. In considering comments on setback changes, please take into consideration people like me who have owned the land for many years, who have been good custodians of the wetlands, and who have always had the intentions of building a home myself or for a family member on the property. I am all for
preserving the wetlands but I feel a clause should but put in place for people like myself who had owned the land before all the setback changes. (35)

RESPONSE: The adopted new Flood Hazard Area Control Act rules do not establish buffers on freshwater wetlands. Development within or near freshwater wetlands is governed by the Department’s Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A. The riparian zones established in the adopted new rules apply to surface waters, and are measured outward from such waters, as described at N.J.A.C. 7:13-4.1(b) and (c).

Freshwater wetlands transition areas, near-stream buffers and other environmental setbacks are established to protect a recognized environmental resource. The width of these buffers do change over time as the Department adopts rules that reflect the most recent understanding of the functionality of these buffers, as provided by the best scientific research available to the Department. The width of freshwater wetlands transition areas and near-stream buffers has accordingly increased since 1988 because prior widths have proved to be insufficient to preserve the integrity of the environmental resource these areas are designed to protect.

It should also be noted that the Flood Hazard Area Control Act rules do not establish or identify waters as Category One, but rather, like the Department’s Stormwater Management rules at N.J.A.C. 7:8-5.5(h) establish 300-foot areas of protection around these waters. A limited number of waters in the State are considered Category One, and these waters are promulgated as such in the Department’s Surface Water Quality Standards at N.J.A.C. 7:9B. Proposed revisions to the N.J.A.C. 7:9B, published in the New Jersey Register dated May 21, 2007 (see 38 N.J.R. xx), would classify small segments of the Maurice River as Category One. Based on the information in the comment, it is unclear whether the commenter owns land along these segments of the Maurice River, or whether the property in question is located along a segment of the river that instead will possess a 50-foot or 150-foot riparian zone under the adopted new Flood Hazard Area Control Act rules. However, regardless of the width of the riparian zone on the site in question, the adopted new rules do not categorically preclude the construction of one private residence on a lot situated within the riparian zone. A private residence that meets the requirements of N.J.A.C. 7:13-10.2(m) would qualify for construction in a riparian zone, provided all other requirements of the chapter were met. Furthermore, in cases where the
construction of a private residence does not meet the requirements of the chapter, an applicant can request a hardship exception to strict application of the rules, under N.J.A.C. 7:13-9.8.

365. COMMENT: To further enforce the riparian protections, we strongly recommend that the Department also amends the Water Quality Management Rules and Stormwater Rules to reinforce the water quality value of riparian zones. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Department has recently proposed amendments to the Water Quality Management Planning Act rules at 39 N.J.R. 1870(a) which, among other changes, seek to adopt riparian zone protections under proposed N.J.A.C. 7:15-5.25(g)2, which are identical to the riparian zones under the adopted new Flood Hazard Area Control Act rules (as a result of modifications on adoption at N.J.A.C. 7:7E-3.26(c)2i and N.J.A.C. 7:13-4.1(c)2i, pursuant to agency initiated change no. 4). Furthermore, the adopted new riparian zones along Category One waters under N.J.A.C. 7:13-4.1(c)1 overlap and reinforce the Special Water Resource Protection Area along these waters established by the Stormwater Management rules at N.J.A.C. 7:8-5.5(h).

366. COMMENT: It appears that riparian corridor protections cannot be trumped by other provisions in the rules. For instance, a general or individual permit for an activity in the flood fringe would not override protections in the riparian corridor. Is this correct? (54, 60, 63)

RESPONSE: The commenter’s understanding that the standards in the adopted new rules are intended to be cumulative is correct. Any activity authorized under a permit-by-rule, general permit or individual permit, which is proposed within a riparian zone, must meet the riparian zone requirements appropriate for that activity, in addition to any other standards in the adopted new rules that may apply.

367. COMMENT: The rules should expand riparian corridors for areas above reservoirs or major water supply intakes. Under the rule, Category One streams and trout production streams get expanded corridors but not the drinking waters for the people of the State of New Jersey. (43, 54, 60, 63)
368. COMMENT: Buffers should be established where water supply intakes exist. A water supply intake on a Category 1 stream that has trout should not be afforded higher quality protection than an intake without trout. Therefore, buffers should be made the same for those two criteria. (48)

RESPONSE TO COMMENTS 367 AND 368: The Department’s Surface Water Quality Standards, at N.J.A.C. 7:9B, identify those waters designated as Category One. Among the criteria that can qualify a waterbody for Category One antidegradation designation is the waterbody’s status as an exceptional water supply resource. The new Flood Hazard Area Control Act rules provide, at N.J.A.C. 7:13-4.1(c)1, that all tributaries to designated Category One waterbodies located in the same HUC-14 watershed will receive a 300-foot riparian zone. Accordingly, should a waterbody be upgraded to Category One status pursuant to the Surface Water Quality Standards, a 300-foot wide riparian zone will apply to the waterbody and its upstream tributaries under the Flood Hazard Area Control Act rules. By combining a Category One designation for exceptional water supply resources with the application of a 300-foot wide riparian zone, the Department believes it is providing appropriate protection to riparian areas related to drinking water resources.

369. COMMENT: Changes to the width of the riparian zone will significantly impact future development at the commenter’s Kenilworth campus. The watercourse buffer of 25 feet which previously applied to the manmade ditch on site, would be increased to a 100-foot riparian zone (50 feet each side) and extend to the manmade ponds. (11)

RESPONSE: Manmade features, such as ditches and basins that have a contributory drainage area of less than 50 acres, are not regulated under this chapter, pursuant to N.J.A.C. 7:13-2.2(a)3, and would therefore not receive a riparian zone. If the ditch referenced by the commenter has a drainage area of 50 acres or more, the adopted new rules establish both a flood hazard area and riparian zone along the feature, pursuant to N.J.A.C. 7:13-2.3. The commenter should be aware, however, that the establishment of riparian zones along such features will not impede the current,
lawful use of the commenter’s Kenilworth campus, provided activities onsite do not result in the disturbance of riparian zone vegetation. Furthermore, a number of activities that result in minor riparian zone disturbance are permitted-by-rule under N.J.A.C. 7:13-7.2. In the event that activities are proposed onsite which result in riparian zone disturbance that is not permitted-by-rule, the facility can apply for a general permit or individual permit for the proposed work. Finally, it should be noted that the riparian zone standards of the adopted new rules apply to the preservation of existing riparian zone vegetation. Where development already exists within a riparian zone, redevelopment is not precluded in areas devoid of vegetation

370.COMMENT: While the goals of the riparian zones are understood and well documented, the requirement of up to 300 feet seems excessive. The stated benefits of reduction of sediment, nitrogen, organic matter etc. were also cited in the establishment of the Stormwater regulations. If a stormwater management plan with the required BMPs is part of a project, can the width of the riparian buffer be reduced? (4)

RESPONSE: The width of the riparian zone cannot be reduced under the adopted new rules. The Department has determined that riparian zone widths should remain consistent along a given reach of a watercourse in order to promote the maximum functionality of the riparian zone. The appropriateness of the 300-foot buffer has been documented in the available literature cited in the proposal summary (See 38 N.J.R. 3971-3).

371.COMMENT: Was any cost/benefit analysis considered in establishing these riparian widths? A moderate size property (5-10 acres) with a tributary running through it may be rendered unusable due to the buffers, constituting a ‘taking’ of the property. (4)

RESPONSE: The widths of the riparian zones were established after considering the available scientific research, the fact that the near-stream buffers under the repealed rules were inadequate to protect the in-water and near-water ecosystem, and the development needs of the State. The riparian zones serve to protect the receiving watercourse and the watercourse ecosystem. As such, these zones are in need of protection. In consideration of the development needs of the
State, the adopted rules do contain thresholds for allowable disturbance within riparian zones, which are contained at N.J.A.C. 7:13-10.2. These thresholds are a function of both the proposed use of the site and the width of the riparian zone. For example, up to 5,000 square feet of disturbance is allowable in a 150-foot wide riparian zone to accommodate the construction of a private residence. N.J.A.C. 7:13-10.2 also takes into account situations where all or a large portion of a lot falls within a riparian zone. For instance, N.J.A.C. 7:13-10.2(m) allows disturbance of the riparian zone for construction of a private residence regardless of lot size if there is no other reasonable use for the site, which would reduce or eliminate the impact to the riparian zone; there is no other feasible location onsite to construct a private residence, which would reduce or eliminate the impact to the riparian zone; and all disturbance within the riparian zone is located at least 25 feet from any top of bank or edge of water and as far from the regulated water as possible, unless the private residence is constructed adjacent to a man-made tidal waterway. Finally, a property owner who believes the riparian zone as applied in the review of a specific permit application creates a hardship can seek a hardship exception under N.J.A.C. 7:13-9.8.

372. COMMENT: Application of riparian areas will affect urban areas where re-development is encouraged. The Department should address how riparian zones will adversely affect municipal zoning because of impact on small tributaries and the economic cost of both potential losses of ratables and of significant revisions to master plans. (26)

RESPONSE: As indicated in the Economic Impact statement in the proposal (see 38 N.J.R. 4036), the proposed expansion of the width of riparian zones will likely reduce the level and type of development that will be possible adjacent to surface waters and is likely to further restrict development in many tidal areas. The adopted rules may also reduce the expected ratables that a municipality could otherwise have made on a given parcel under the repealed rules. Furthermore, the more stringent requirements of the proposed new rules may cause some development to relocate outside the flood hazard area altogether. This does not necessarily incur costs to the regulated community so much as it is likely to reduce the profit margin on potential development in flood hazard areas. Consequently, it is possible that the proposed new restrictions on
development in flood hazard areas and riparian zones will reduce the value of existing property in these areas, and as a consequence the ratables realized by the municipality, but property values outside these areas may rise as development is shifted away from restricted areas. However, the Department anticipates that implementing the new rules will result in increased public safety, minimization of property damage and reduced need for flood relief, which will outweigh the negative economic impacts that may be caused by the new more stringent construction standards contained in these new rules.

N.J.A.C. 7:13-4.1(b)1

373. COMMENT: The statement that “along a linear fluvial or tidal water, such as stream or swale, the riparian zone is measured landward from the feature’s centerline” is contradictory to the reference of riparian zones discussed N.J.A.C.7:7E-3.26(b)1, which states that the measurement is from the features centerline only if no bed and bank are present. (26)

RESPONSE: N.J.A.C. 7:13-4.1(b) specifies that the riparian zone will be measured starting landward from the top of bank. This subsection then specifies that the measurement shall only be made along the fluvial feature’s centerline should no discernible bank be present. In this way, the proposed rule is consistent with both N.J.A.C. 7:7E and N.J.A.C. 7:8.

374. COMMENT: It appears that the Department is attempting to add buffers to swales which are exempt from transition area requirements of the Freshwater Wetlands Protection Act. (N.J.A.C.7:7A-1.1 et seq.) The term “swale” should be stricken from this section. (26)

RESPONSE: As noted in the response to comment 221, the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4 provide that a swale “drains less than 50 acres” and “has no definite bed and banks.” Thus a swale is not regulated under the Flood Hazard Area Control Act rules. The definition of “water” at N.J.A.C. 7:13-1.2 has therefore been modified on adoption to omit the term “swale” from the list of examples of a “water” since, while a swale is a type of “water,” it is not a “regulated water” under this chapter. N.J.A.C. 7:7E-3.26(b)1 and N.J.A.C. 7:13-
4.1(b)1 have been similarly modified on adoption to omit the term “swale,” since the Department does not intend to regulate flood hazard areas and riparian zones along swales under this chapter.

N.J.A.C. 7:13-4.1(b)4

375. COMMENT: It is unclear how the centerline of a feature is determined if it is within a larger wetland complex. (26)

376. COMMENT: It is unclear how such an amorphously-shaped feature could have a centerline from which to measure the riparian zone. (66)

RESPONSE TO COMMENTS 375 AND 376: In cases where a feature contains a braided network of rivulets, wherein more than one thalweg (lowest point in the channel) can be identified, or in absence of any distinct linear path whatsoever within the overall feature, the riparian zone should be measured outward along a line that lies halfway between either side of the feature, and which connects the inflow point to the outflow point of the feature.

377. COMMENT: The term “amorphously-shaped” should be changed to “irregularly-shaped”, as “amorphous” is generally used to mean “without shape.”

RESPONSE: Recognizing the need for the protection of these features, the Department proposed to refer to such features as “amorphously-shaped” to describe features that lack discernible bed and banks. Since the term “amorphous” is generally used to mean “lacking definite form, having no regular or specific shape, formless,” the Department believes that the term is sufficiently clear and has, therefore, not modified the rule on adoption as suggested by the commenter.

N.J.A.C. 7:13-4.1(c)

378. COMMENT: The Department should indicate how proposed N.J.A.C. 7:13-4.1(c) is justified. (44)
RESPONSE: The Freshwater Wetlands Protection Act rules, the Stormwater Management rules and the Flood Hazard Area Control Act rules recognize the heightened sensitivity of certain environmental features and establish buffers around these features. In the new Flood Hazard Area Control Act rules, riparian zone widths of 50 feet, 150 feet and 300 feet were chosen after a review of available research. It has been the Department’s experience that the previous near-stream widths that constituted the riparian buffer were insufficient to protect a given resource. Along watercourses with no specific heightened environmental sensitivity, a 50-foot wide riparian zone has been adopted. This width has been documented to provide for more efficient flood attenuation and stream bank protection. Features with trout resources, threatened or endangered species habitat, or acid soils represent a heightened environmental sensitivity, and as such, they merit a 150-foot riparian zone. This has also been scientifically documented, as discussed in more detail in the proposal summary (see 38 N.J.R. 3971-3). Finally, features designated as Category One represent the most environmentally sensitive watercourses in the State. Therefore, they merit the widest riparian zone. To be consistent with the 300-foot wide Special Water Resource Protection Area established in the Department’s Stormwater Management rules, the adopted new Flood Hazard Area Control Act rules include a 300-foot riparian zone along Category One waters and tributaries in the same HUC-14 watershed.

N.J.A.C. 7:13-4.1(c)1

379.COMMENT: The proposed riparian zone definition for Category One streams in the proposed new rules should match the buffer defined in the Stormwater Rules (N.J.A.C. 7:8). While we support the function of riparian zones and buffers, confusion will be created with two different regulations. (27, 49)

RESPONSE: The Stormwater Management rules and Flood Hazard Area Control Act rules govern different surface waters, as described below, and therefore necessarily apply the 300-foot Category One buffer to a slightly different set of features.
Under both rules, the 300-foot buffer is established along Category One waters and all tributaries within the same HUC-14 watershed. The Special Water Resource Protection Area under N.J.A.C. 7:8-5.5(h) applies to Category One waters and tributaries that are mapped on USGS maps or county soil surveys. The 300-foot riparian zone under N.J.A.C. 7:13-4.1(c)1, however, applies to Category One waters and tributaries regulated under N.J.A.C. 7:13, except as noted at N.J.A.C. 7:13-4.1(a). Waters regulated under N.J.A.C. 7:13 are not dependent on USGS mapping or County soil surveys. Furthermore, the Special Water Resource Protection Area under N.J.A.C. 7:8-5.5(h) applies only when major developments are proposed, as defined at N.J.A.C. 7:8-1.2, whereas the 300-foot riparian zone under N.J.A.C. 7:13-4.1(c)1 applies to any project located within the riparian zone. The differences between these two regulatory areas is therefore a necessary consequence of the differing jurisdictions of these two rules.

380.COMMENT: There is currently no clear procedure that a municipality can rely upon to evaluate the possibility of current Category Two Waters being upgraded to Category One Waters. Should the watercourses within our municipality’s Redevelopment Area be upgraded to Category One Waters, the proposed restrictions within 300 feet of these waters would render our Redevelopment Plan moot. (16)

RESPONSE: The Flood Hazard Area Control Act rules do not establish criteria or timelines for designating watercourses as Category One. The Department’s Surface Water Quality Standards at N.J.A.C. 7:9B identify the watercourses in New Jersey that receive Category One designations. Should a watercourse within a redevelopment area be upgraded to Category One, then the corresponding redevelopment plan should be revised to address this change. While the State values redevelopment, sound redevelopment must be undertaken with sensitivity to the environment and in consideration of the ramifications of inappropriate development in environmentally sensitive areas.

381.COMMENT: The proposed 300-foot width of the riparian zone should be limited to those Category One waters and upstream tributaries that are shown on USGS Quadrangle Maps, in order to achieve consistency with the Department’s Stormwater Management rules at N.J.A.C.
7:8-5.5(h), and to provide a defined source for identifying tributaries. Furthermore, we have been advised that the updated Natural Resource Conservation Service (NRCS) official soil surveys, use the USGS maps to identify streams and tributaries. Therefore, any reference to soil surveys for the purpose of identifying streams with 300-foot riparian zones is inappropriate. Prior to adoption of these proposed new rules, the Department should adopt clear maps to delineate these Category One waters. (7, 18, 33, 46, 53)

RESPONSE: As noted in the response to comment 379, the Stormwater Management rules impose 300-foot buffers along all Category One watercourses and their tributaries which appear on either the USGS map or County soil survey, as long as these tributaries are located within the same HUC-14 watershed. Any proposed project that is a major development as defined in these rules is subject to the 300-foot buffer requirements. The Department recognizes a need for more comprehensive protection of Category One watercourses. Because the criteria for establishing a 300-foot wide riparian zone is clearly established by N.J.A.C. 7:13-4.1(c)1, there is no need to rely on mapping as suggested by the commenter. An applicant need only rely on the adopted Flood Hazard Area Control Act rules and the Surface Water Quality Standards.

N.J.A.C. 7:13-4.1(c)2

382. COMMENT: The proposed new rules need to clarify what is meant by “tributaries within one mile” in identifying upstream protection areas. Is this a straight line or a meandering line? (50)

383. COMMENT: It is not clear how the upstream tributaries within one mile should be measured. We urge you to clarify whether this means a square mile or a lineal mile upstream. (20, 38, 41, 54, 63, 69)

384. COMMENT: The term “one river mile” should be used to clarify what is meant by “tributaries within one mile” in identifying upstream protection areas. (66)
RESPONSE TO COMMENTS 382 THROUGH 384: The distance of one mile referenced at N.J.A.C. 7:13-4.1(c)2 has been clarified to indicate that it is to be measured as one mile along the regulated water, following the bends and meanders of the channel, and not as a straight line.

N.J.A.C. 7:13-4.1(c)2i

385. COMMENT: At N.J.A.C. 7:13-4.1(c)2i, the rules provide for uniform protection of all Category One waters and tributaries. The proposal explicitly applies to tributaries to “trout production” (TP) based on “Category One” (Category One) waters. It appears that the Department omitted the implicit applicability of the proposed rule to all “Category One” waters designated on the basis of other exceptional criteria. The Department should clarify on adoption that the rules shall apply to all tributaries to Category One waters designated on the basis of “exceptional water supply”, “exceptional ecological”, “exceptional recreational” and all other Category One designation criteria pursuant to the Surface Water Quality Standards (N.J.A.C. 7:9B-1 et seq.). The clarification on adoption clearly should state that all Category One tributaries shall be regulated by the proposed new rules, and shall receive 150-foot riparian zone protection under the Flood Hazard Area Control Act Rules. The Department may not provide differential protection to Category One waters. By regulating only the tributaries of trout production based Category One waters, the Department would not be providing an equivalent protection of other designated exceptional Category One waters. This under-protects these important Category One waters and is inconsistent with and in violation of applicable requirements. (69)

386. COMMENT: Why is the riparian zone only 150 feet for any upstream tributary to a trout production water. It should be 300 feet. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 385 AND 386: As noted by the commenter, the Department classifies waters as Category One for a number ecological reasons, including the presence of a reproducing trout population. In most cases, waters that are identified as trout production are also classified as Category One under N.J.A.C. 7:9B. Pursuant to N.J.A.C. 7:13-4.1(c)1, the riparian
zone is 300-feet wide along both sides of any Category One water, and all upstream tributaries situated within the same HUC-14 watershed. This is consistent with the 300-foot Special Water Resource Protection Area established along these waters under the Stormwater Management rules at N.J.A.C. 7:8-5.5(h). Additionally, N.J.A.C. 7:13-4.1(c)2i establishes a 150-foot riparian zone along both sides of all trout production waters and all upstream waters including tributaries. Therefore, in cases where a trout production water is also designated by the Department as a Category One water, the trout production water itself (and all upstream tributaries situated within the same HUC-14 watershed), would receive a 300-foot riparian zone, while all tributaries beyond the HUC-14 watershed boundary would receive a 150-foot riparian zone.

Consequently, while trout production waters generally receive a 300-foot riparian zone (since the majority of trout production waters are classified as Category One), for tributaries that are outside the HUC-14 boundary of the trout production designation (and thus far-removed from the actual trout production water itself), the Department has determined that a 150-foot wide riparian zone along these waters is sufficient to protect the downstream trout production resources. This is consistent with the transition area requirements of the Freshwater Wetlands Protection Act rules, which also place a 150-foot transition area around freshwater wetlands associated with trout production waters.

With regard to tributaries to Category One waters (that have been classified as Category One for reasons other than being trout production), the Department does not believe that it is necessary to place 150-foot riparian zones along all upstream tributaries that are outside the HUC-14 boundary of the Category One designation. Furthermore, given that several major bodies of water are designated as Category One, placing a 150-foot riparian zone along all upstream tributaries would cause a large number of waters in the State to have 150-foot riparian zones. For example, Delaware Bay is a Category One water under N.J.A.C. 7:9B. Establishing 150-foot riparian zones around all upstream tributaries to Delaware Bay would cause every regulated water within the entire Delaware River drainage basin to have a minimum 150-foot riparian zone. The Department does not believe that all such waters require this level of protection, and has therefore adopted the proposal without the amendments suggested by the commenters.
387. COMMENT: At N.J.A.C. 7:13-4.2(c)2i, the Department should specify the watershed area to which the section applies, for instance HUC-8, similar to the way it is specified in N.J.A.C. 7:13-4.2(c)1. (66)

RESPONSE: Since there is no N.J.A.C. 7:13-4.2(c)2i, the Department assumes the commenter is referring to N.J.A.C. 7:13-4.1(c)1 and also to N.J.A.C. 7:13-4.1(c)2i. N.J.A.C. 7:13-4.1(c)1 places a 300-foot riparian zone along both sides of any Category One water, and all upstream tributaries situated within the same HUC-14 watershed. N.J.A.C. 7:13-4.1(c)2i establishes a 150-foot riparian zone along both sides of all trout production waters (that are not Category One) and all upstream waters including tributaries. The term “all upstream tributaries” refers to any regulated water that eventually flows into the trout production water, irrespective of HUC boundaries. It is not appropriate, therefore, to limit the tributaries to a particular HUC designation.

N.J.A.C. 7:13-4.1(c)2ii

388. COMMENT: The proposed 150-foot riparian zone should not be extended to all upstream tributaries within one mile of any trout maintenance water, because this would apply to all upstream areas even if they are not hydrologically connected. For instance, upstream areas could be piped or flow into wetlands complexes. Furthermore, there is also no scientific basis presented for the proposed one-mile distance. (7, 18, 33, 46, 53)

RESPONSE: The Department has employed a one-mile distance under the repealed Flood Hazard Area Control Act rules regarding trout maintenance waters (at former N.J.A.C. 7:13-1.3(a)3, as defined at former N.J.A.C. 7:13-1.2), and has continued this standard in the adopted new rules. In addition, watercourses containing upstream piped sections or that flow through upstream wetland complexes are considered to be connected to the downstream watercourse. Wetlands and piped sections of watercourse serve as conveyance features which, by definition, provide hydrologic connections to downstream reaches of said watercourses. By definition, however, a water that is not hydrologically connected to a water cannot be a tributary to that...
water. The standard at N.J.A.C. 7:13-4.1(c)2ii does not apply a 150-foot riparian zone to any water that lies within one mile of a trout maintenance water. It applies a 150-foot riparian zone to any upstream tributary to a trout maintenance water, that is, any water that is connected to and flows into a trout maintenance water, provided the tributary lies within one mile of the trout maintenance designation.

N.J.A.C. 7:13-4.1(c)2iii

389. COMMENT: The proposed 150-foot riparian zone should not be extended to all upstream tributaries within one mile of any water flowing through an area that contains documented critical habitat for a threatened or endangered species. The proposed one-mile area may extend beyond what is recognized as “documented habitat” under the Landscape Project. There is no justification for applying a 150-foot buffer to an upstream property that is beyond the documented critical habitat of a threatened or endangered species and where no relationship to threatened and endangered species exists. Furthermore, there is no way to determine where this critical area exists and this will make it impossible to predict with any degree of certainty whether a development is feasible. (7, 18, 33, 46, 53)

390. COMMENT: The inclusion of all waters within one mile may extend beyond critical habitat identified by the Natural Heritage Program/Landscape Project or proven so by more accurate habitat evaluations conducted by competent professionals. (26)

391. COMMENT: The Department has failed to justify the necessity for a larger riparian zone up to one mile for upstream tributaries. No correlation is provided that demonstrates that imposing a riparian zone of this magnitude or distance from a documented species is necessary or appropriate. No scientific evidence is presented that suggests that wider buffers on very minor tributaries within one mile receiving runoff across a substantially wider riparian zone will provide added benefits to such species that would ensure its survival. (19)
RESPONSE TO COMMENTS 389 THROUGH 391: Research has shown that a riparian zone of 150 feet is the minimum necessary to protect endangered species habitat (see 38 N.J.R. 3971-3). Given the sensitivity of threatened or endangered species to pollutants within stream corridors, an enhanced level of environmental protection is appropriate for these tributaries. Since the 150-foot riparian zone is applicable to tributaries within one mile upstream of trout maintenance waters, the Department has determined that it is also appropriate to extend the same riparian zone along upstream tributaries within one mile of waters that support threatened or endangered species that are critically dependent on the regulated water to survive. However, the Department is limiting the waters that are provided this additional protection to those associated with threatened or endangered species that are dependent on the watercourse to survive because these are the species that will be impacted by disturbances to the riparian zone.

392. COMMENT: This section specifically states that the 150-foot riparian zone is to be associated with all waters flowing through documented habitat for threatened and endangered species that are critically dependent on the waters for survival. Not all species currently regulated under the Freshwater Wetlands Protection Act for purposes of determining resource value classifications are dependent on water, including but not limited to the Barred Owl (Strix varia), Red-shouldered Hawk (Buteo lineatus) and Bobolink (Dolichonyx oryzivorus). This section does not clarify whether, in the case of such species, an applicant will be able to argue that a 50-foot riparian zone is appropriate. (26)

393. COMMENT: What is meant by "waters flowing through areas that support certain threatened or endangered species"? In other words what are the "certain" threatened or endangered species? It's much too arbitrary, subjective, and vague. (21)

394. COMMENT: The Department must clarify the phrase “critically dependent on a water to survive” in regard to threatened and endangered species. This phrase is so overly broad that it does not appear to limit the application of the provision. (19)
395. COMMENT: How does the Department determine when threatened or endangered species are "critically dependent on a water to survive?" (44)

RESPONSE TO COMMENTS 392 THROUGH 395: The Flood Hazard Area Technical Manual, available on the Division of Land Use Regulation website at www.nj.gov/dep/landuse, includes a listing of flora and fauna species which are critically dependent on the regulated water to survive, so that applicants can determine whether the riparian zone at N.J.A.C. 7:13-4.1(c)2iii applies. Flora and fauna species selected to be "critically dependent on the regulated water for survival", are those determined by Department biologists to be critically dependent on the hydrologic regime (i.e. stream flow, water depth, water temperature) of the watercourse and/or quality of its water for their continued existence within the waterbody or floodplain. The 150-foot wide riparian zone will apply only to waters supporting species contained on such list, and all upstream waters within one mile. Therefore, if a water flows through an area that supports a threatened or endangered species that is not contained in this list, then the riparian zone would be 50 feet wide, provided the regulated water is not subject to the 300-foot or 150-foot riparian zone widths due to another reason under N.J.A.C. 7:13-4.1(c)1 or 2, respectively.

396. COMMENT: The plant list is not referenced in this section, and if necessary, it should be clarified that only those plant species dependent on water should be included. (26)

RESPONSE: The Flood Hazard Area Technical Manual, available on the Division of Land Use Regulation website at www.nj.gov/dep/landuse, includes a listing of the plant species which are critically dependent on the regulated water to survive, so that applicants can determine whether the riparian zone at N.J.A.C. 7:13-4.1(c)2iii applies. Plant species selected as "critically dependent on the regulated water for survival", are those determined by Department biologists to be critically dependent on the hydrologic regime (i.e. stream flow, water depth, water temperature) of the watercourse and/or quality of its water for their continued existence within the waterbody or floodplain. As indicated in the summary of this subparagraph in the proposal (38 N.J.R. 3973), the additional protection provided to the riparian zone of waters containing documented habitat for threatened and endangered species, whether flora or fauna, is applicable
only to the watercourse(s) associated with species dependent upon the watercourse for their survival. The Department believes that this limitation is adequately stated in N.J.A.C. 7:13-4.1(c)2iii.

397. COMMENT: It is unclear if and how documented habitat information will be made available to the public. (19)

398. COMMENT: How is the regulated community going to determine if any segment of water passes through a documented habitat for endangered or threatened species, upstream for one mile? How is that information going to be disseminated? (44)

RESPONSE TO COMMENTS 397 AND 398: The information is disseminated through the Landscape Project, and through information provided by the Department’s Natural Heritage Program. Web links to both are provided in the new adopted rule at N.J.A.C. 7:13-10.6(c). Relevant data from the Landscape Project is also available through iMap. Alternatively, any party contemplating development can request a listing of known sightings of threatened or endangered species from the Natural Heritage Program prior to designing the development. As has been the case in the past, to ascertain if a proposed project site contains endangered or threatened species habitat, some sites may require further investigation by a potential applicant’s qualified consultant.

399. COMMENT: The proposal requires a 150-foot wide riparian zone in tributaries one mile upstream of areas supporting threatened or endangered species without providing a list or mapping of said areas. This could result in a 150-foot buffer for a swale or ditch based on the proposed definition of “water.” The Department must clarify this requirement as the intent is not clear and the terminology is vague and not defined. (19)

400. COMMENT: The Department proposes a 150-foot wide riparian zone in tributaries one mile upstream of areas supporting threatened or endangered species without providing a list of said
areas. This could mean that a narrow swale could end up with a 150' buffer, although a habitat for these species may not be present in the site area. (44)

RESPONSE TO COMMENTS 399 AND 400: As noted in the response to comments 392 through 395, the Flood Hazard Area Technical Manual includes a listing of the species which are critically dependent on a regulated water to survive, so that applicants can determine whether the riparian zone at N.J.A.C. 7:13-4.1(c)2iii applies. With regard to swales, as noted in the response to comment 221, a swale is not regulated under the Flood Hazard Area Control Act rules. Swales, therefore, do not have either a flood hazard area or riparian zone under this chapter.

401. COMMENT: There is currently no way for a municipality to evaluate the possibility of any of its waters being classified, in the future, as Threatened or Endangered Species Habitat and therefore it can not be assured that 150-foot riparian buffers will not be imposed in our municipality’s Redevelopment Area. Such a restriction would render the municipality’s Redevelopment Plan moot. (16)

RESPONSE: The Department does not have a means of predicting where threatened or endangered species habitat may someday be located. The Department does, however, endeavor to provide the most recent data available to applicants, so that developments can be planned using the best available knowledge and resources. The Department notes that all development, including redevelopment, must be carefully designed to respect the sensitivity of the environment in order to be successful. To this end, the Department has published in the Flood Hazard Area Technical Manual a listing of all threatened and endangered species determined to be critically dependent upon a regulated water for survival. This is a tool to be used to aid in the design of any project, redevelopment or otherwise. Through the employment of qualified professionals, redevelopment projects that are sensitive to the needs of the environment can qualify for approval.

402. COMMENT: The proposed rule should be revised to provide an applicant with an opportunity to request that a documented habitat based on the Landscape Project Method not
result in the establishment of a 150-foot riparian zone pursuant to proposed N.J.A.C. 7:13-4.1(c)2.iii. The applicant can demonstrate, through site-specific species surveys and/or habitat assessment or studies, that no species exist on-site and/or that the site does not constitute viable habitat for the species of concern based on the loss of one or more habitat requirements. Such practice would be consistent with the Department’s Freshwater Wetlands Protection Act Rules set forth at N.J.A.C. 7:7A-2.4(c). (7, 18, 33, 46, 53)

RESPONSE: If it can be demonstrated through a site-specific analysis that a segment of regulated water, which has been identified by the Department as flowing through an area that contains documented habitat for a threatened or endangered species of plant or animal, which is critically dependent on the regulated water for survival, does not, in fact, contain such documented habitat, the Department will not apply a 150-foot riparian zone along that segment of regulated water (unless it lies within one mile upstream of another area that does support such species).

N.J.A.C. 7:13-4.1(c)2iv

403.COMMENT: The proposed rule should be revised to eliminate the requirement for a buffer from acid producing soils. There is no substantive basis for the requirement to establish a 150-foot riparian zone around segments of water flowing through an area that contains acid producing soils and, in fact, no justification is provided in the proposed new rules. Engineering mechanisms exist to mitigate against and prevent impacts from floodwater exposure to acid producing soils. There are also sites where the acid-producing soils will not be exposed to floodwaters. Clearly, any buffer should not apply in these situations. Additionally, the length of a buffer zone has no relationship to the harm that could be associated with floodwater impact from acid producing soils. These impacts can be prevented regardless of the existence of a buffer and, therefore, there is no technical justification for the proposed buffer. Additionally, to the extent that an applicant satisfies the proposed requirements for mitigation for acid producing soils at proposed N.J.A.C. 7:13-10.7, there is no substantive justification for implementation of a buffer from acid producing soils as no negative impact will occur even without the buffer.
Implementation of the requirements of the proposed new rules in the context of sites containing acid-producing soils will obviate the need for any riparian zone buffer. Therefore, this provision of the proposed regulations should not be adopted. (7, 18, 33, 46, 53)

404. COMMENT: There is no need to provide for riparian zones of 150 feet along streams with acid producing soils. This is because there are engineering standards already in place and working to mitigate the occurrence of exposure to, or disturbance of, these soil types. It is an entirely independent circumstance in dealing with acid producing soils as part of a project, which may still need to be dealt with independently of any riparian zone buffer. Therefore, increasing the buffer width to 150 feet in these project areas is useless. (61)

RESPONSE TO COMMENTS 403 AND 404: While the Department acknowledges that engineering solutions can be helpful, it is the Department’s experience that natural solutions are generally expected to perform more efficiently than standard engineering mechanisms, because the engineering mechanisms may only take a limited number of variables into consideration upon design. In part, this rationale is what drives the low impact requirements of the Stormwater Management rules at N.J.A.C. 7:8. In consideration of this, a vegetated riparian zone is most appropriate to combat the potentially harmful effects of exposed acid producing soils. The wider riparian zone affords a lesser amount of disturbance closer to the stream and also a greater opportunity for vegetation to intercept the flow of runoff over acid producing soils, thereby providing a greater level of protection to the receiving surface water. With respect to N.J.A.C. 7:13-10.7, this section is intended for use when acid producing soils must be exposed by proposed construction, and does not negate the utility of a 150-foot wide riparian zone. The Department believes it is not appropriate to use N.J.A.C. 7:13-10.7 as a substitute for the environmental benefits provided by a vegetated riparian zone.

405. COMMENT: Can the Department justify a 150-foot riparian zone in areas of acid producing deposits without definitive documentation that such acid producing deposits exist on a site? Would it not be simpler and fairer to land owners to have a standardized testing system in place to verify such deposits rather than subjecting landowners to hardship based on a vague map of
"Areas of New Jersey with Acid Producing Deposits?" Furthermore, if testing indicates the presence of such deposits, there are already measures in place through the Soil Conservation Districts, to have said deposits buried during the course of construction to negate their presence, and eliminate the need for excessive riparian zones. Also, does the requirement apply to areas where no excavation is proposed, or where the acid producing material will not be exposed? (19, 44)

RESPONSE: As noted in the proposal summary at 38 N.J.R. 3973, the Department believes that it is necessary to apply a 150-foot riparian zone along waters that flow through an area that contains acid producing soils under N.J.A.C. 7:13-4.1(c)2iv in order to prevent the degradation of water quality and the riparian zone due to exposure to acid. Acid producing soils produce sulfuric acid when exposed to oxygen which, if allowed to seep onto nearby land and surface waters, can destroy vegetation and aquatic life. Construction activities within areas that are likely to contain such deposits must therefore not be situated in close proximity to surface waters. If a project is situated on a site that is likely to contain acid producing soils, as evidenced by soil mapping or other data available to the Department, a 150-foot riparian zone will therefore apply to any regulated water on that site, unless the regulated water is also designated as Category One or an upstream tributary of a Category One water within the same HUC 14, which would instead receive a 300-foot riparian zone under N.J.A.C. 7:13-4.1(c)1. This standard applies regardless of whether the acid producing soils are proposed to be disturbed. This is appropriate since the Department believes that the width of the riparian zone should be determined by the presence or absence of the acid producing soils on a site and not whether a particular project will expose these soils. However, if an applicant demonstrates to the Department that, despite the indications of the available soil mapping, there is, in fact, no acid producing soils on the site in question, then the Department will not apply a 150-riparian zone under N.J.A.C. 7:13-4.1(c)2iv on that site.

In cases where acid producing soils are exposed by construction activities, the adopted new rules at N.J.A.C. 7:13-10.7(b) and (c) list, respectively, requirements to minimize the adverse effects of exposing acid producing soils, and steps that shall be taken if acid producing soils are unexpectedly exposed in a regulated area. Furthermore, N.J.A.C. 7:13-10.7(d) refers the reader
to the “The Flood Hazard Area Technical Manual”, which provides information on how to comply with requirements at N.J.A.C. 7:13-10.7(b) and (c) and includes references to the appropriate measures set forth by local Soil Conservation Districts. However, while mitigation standards address how to treat exposed areas, no such treatment is completely effective, and temporary impacts may be expected as a result. The most environmentally responsible solution, therefore, is to not expose acid producing soils wherever possible. Should such soil be exposed, then the greater distance from the watercourse afforded by the 150-foot riparian zone under N.J.A.C. 7:13-4.1(c)2iv will serve as an additional nonstructural measure to better protect the quality and integrity of the watercourse.

406. COMMENT: N.J.A.C. 7:13-4.1(c)2iv references an “area that contains acid producing soils”. The term “area” should be clarified as to whether it applies to a stream in acid waters or a riparian zone in acid producing soils. (26)

RESPONSE: If a project is situated on a site that is likely to contain acid producing soils, as evidenced by soil mapping or other data available to the Department, a 150-foot riparian zone will apply to any regulated water on that site, unless the regulated water is also designated as Category One or an upstream tributary, which would instead receive a 300-foot riparian zone under N.J.A.C. 7:13-4.1(c)1. However, if an applicant demonstrates to the Department that, despite the indications of the available soil mapping, there is, in fact, no acid producing soils on the site in question, then the Department will not apply a 150-riparian zone under N.J.A.C. 7:13-4.1(c)2iv on that site.

407. COMMENT: The greatest problem with acid producing soils is exposure due to stream scouring and erosion. This regulation would either preclude appropriate structural or bioengineering stabilization measures or remove an incentive for the applicant to implement such measures. (26)

RESPONSE: The Department acknowledges that exposure of acid producing soils due to stream scouring and erosion does present environmental problems. It is furthermore important to note
that environmental threats arising from acid soils exposure also arise from the indiscriminate removal of riparian zone vegetation along waters that flow through areas containing acid producing soils. The adopted rules do not preclude any stabilization measures along such surface waters, nor do they remove incentive to implement such measures. N.J.A.C. 7:13-10.2 allows for disturbance within the riparian zone to effect necessary stream stabilization measures.

N.J.A.C. 7:13-4.1(c)3

408. COMMENT: N.J.A.C. 7:13-4.1(c)3 establishes that a 50-foot wide riparian zone exists adjacent to all regulated waters other than Category One waters and trout production/maintenance waters. The Water Quality Management Planning Act rules currently require a 75-foot wide buffer zone for these same waters that fall under the jurisdiction of the Water Quality Planning Act, N.J.S.A. 58:11A-1. See, Riparian Buffer Zone Model Ordinance, www.state.nj.us/dep/watershedmgt/rules.htm, at page 4. The proposed rule also states that compliance with the riparian zone requirements of this chapter does not constitute compliance with the requirements imposed under any other Federal, State or local statute, regulation, or ordinance, and specifically mentions the different buffer requirements of the Highlands Water Protection and Planning Act rules and the Transition Area requirements of the Freshwater Wetlands Protection Act rules. Nevertheless, for consistency's sake, the Department should consider using the 75-foot wide riparian zone already established as being appropriate for these waters under the Water Quality Management Planning rules. (37)

409. COMMENT: The proposed riparian zone of 50 feet along Category 2 waters is inconsistent with the Department’s technical guidance, review practices, and model riparian buffer ordinance, as currently implemented under the Water Quality Management Rules (N.J.A.C. 7:15-1 et seq.), and Executive Order 109. Under WQMP policy, guidance and review practices, the riparian zone is 75 feet. The Flood Hazard Area Rules should be consistent by requiring 75 feet instead of the proposed 50 feet riparian zones. (69)
410. COMMENT: The proposed riparian zone of 50 feet is inconsistent with riparian buffers currently being required under the Water Quality Management Rules. Under the latter rule, the riparian zone requirement is 75 feet. The Flood Hazard Area Rules should be consistent and require 75-foot instead of 50-foot riparian zones. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 408 THROUGH 410: As noted in the response to comments 334 through 341, the Department has researched the functionality of differing widths of a riparian zone and has determined that a 50-foot wide riparian zone is an acceptable width to protect the watercourses not listed at N.J.A.C. 7:13-4.1(c)1 and 2. As such, the riparian zones set forth in the proposed Water Quality Management Planning Act rules at N.J.A.C. 7:15-5.25(g)2 are identical to the riparian zones in the adopted new Flood Hazard Area Control Act rules (see 39 N.J.R. 1870(a)).

N.J.A.C. 7:13-4.1(d)

411. COMMENT: The statements that the riparian zone is separate from and in addition to other similar zones or buffers with reference to the Stormwater Management rules at N.J.A.C. 7:8 establishing a 300-foot Special Water Resource Protection Area or Freshwater Wetlands Protection Act rules transition areas should be changed. There is a clear relationship between the proposed riparian zone with an adjacent 300-foot Special Water Resource Protection Area established due to Category One waters as well as transition areas established adjacent to a wetland containing a regulated water. To infer that there is no relationship between these various zones/buffers/areas next to a regulated water is not logical from a scientific perspective. (12)

412. COMMENT: In those situations where the Stormwater Management rules for a Major Development and/or Freshwater Wetland transition area rules apply, the riparian zone provisions of the Flood Hazard Area Control Act rules should not apply. The Department should be trying to simplify buffer provisions adjacent to waters to allow the regulated public the ability to have one buffer requirement for regulated waters on a specific project site, and not a complex matrix of potential buffers. (12)
RESPONSE TO COMMENTS 411 AND 412: The Department acknowledges that the buffers of the cited regulations are related, in that they each serve to protect an environmentally sensitive feature. However, the Department establishes environmental setbacks such as riparian zone and transition areas in order to serve different purposes, and address differing environmental concerns of separate regulations. Having one, overall buffer requirement for all regulations is unworkable since it would apply an overly simplistic solution to complex environmental and regulatory issues. The applicability of each buffer on a given site is clearly referenced by each set of regulations cited, and is not a complex matrix of potential buffers, as stated by the commenter.

Furthermore, N.J.A.C. 7:13-4.1(d) is simply intended to inform the regulated community that various environmental buffers and setbacks also exist under other regulations, and that compliance with the riparian zone requirements of the adopted new rules, do not constitute compliance with environmental setback requirements imposed under any other Federal, State or local statute, regulation or ordinance. Consequently, compliance with the Special Water Resource Protection Area requirements of the Stormwater Management rules at N.J.A.C. 7:8-5.5(h), the transition area requirements of the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A, or any other Federal, State or local rule, does not constitute compliance with riparian zone requirements of the adopted new rule. For example, although an applicant may lawfully perform work within a freshwater wetlands transition area under the Freshwater Wetlands Protection Act rules, this does not indicate in any way that the applicant is entitled to perform the same work within a riparian zone under N.J.A.C. 7:13.

413. COMMENT: N.J.A.C. 7:13-4.1(d) should be clarified to avoid the interpretation that the riparian zone/buffer is not additive, but that the higher standard applies. (27, 49)

RESPONSE: The Department believes the adopted language clearly states the Department’s intention that all other programs requiring similar protective zones, continue to be applicable as separate, distinct mandates.
Subchapter 5: Applicability Determinations

N.J.A.C. 7:13-5.1 General provisions for applicability determinations

N.J.A.C. 7:13-5.1(c)2

414. COMMENT: Please clarify the level of detail required for the drawings to be submitted for an applicability determination. (66)

RESPONSE: In general, the required drawings must provide a sufficient level of detail in order for the Department to determine if the proposed activity is located in a regulated area and whether the particular activity is regulated. Drawings should clearly depict the proposed limits of disturbance and all existing and proposed structures, including but not limited to buildings, utilities, roadways, driveways, parking areas, and other impervious and/or disturbed areas. If there is a water body located on or near the property, the top of bank of the water, as well as existing and proposed topography, including NGVD reference, must be provided. However, if the project site is located far enough away from a regulated water, it may be obvious that the proposed activity will not be located within the flood hazard area or the riparian zone. In these cases, the Department may determine that the topography and top of bank are not necessary to determine compliance with this chapter.

N.J.A.C. 7:13-5.1(e)

415. COMMENT: The term ‘workload permitting’ is not definable. It is unclear how an applicant will know when the Department can provide this service within the expected time limit, to allow the applicant to decide whether or not to move directly to a permit application. (66)

416. COMMENT: The 30 calendar day timeframe for making a decision on complete applications for applicability determinations should be binding and not discretionary based on
the workload of the Department’s staff member to whom the application is assigned. (7, 18, 33, 46, 53)

417. COMMENT: The reference to “workload permitting” should be deleted. Applicants should be certain of when applicability determinations will be acted upon by the Department. (12)

418. COMMENT: Applicability determinations can be an extremely useful tool not only for enabling applicants to fully understand if, or the degree to which, their proposed project is regulated, but also for assisting the Department in managing its workload by precluding applicants from filing applications for projects that do not need permit approval or assisting applicants in assuring they are filing for the appropriate type of permit (general or individual) for their project. However, this section will allow the Department to delay determinations that are absolutely essential for projects to commence and, potentially, receive financing. Additionally, maintaining a 30 day review period could be critical in assuring timely review by a municipality of any project where the municipality requires as a condition for approval that the applicant demonstrate a proposed activity meets a permit-by-rule. Accordingly, the “workload permitting” qualifier that precedes the requirement for the Department to make an applicability determination within 30 calendar days of receiving a complete application should be deleted. The Department needs to make a firm commitment to appropriately staff the section responsible for conducting the applicability determination reviews to assure that such reviews are completed within the 30 day time frame. (22)

419. COMMENT: Under proposed N.J.A.C. 7:13-5.1(e) a request for an applicability determination takes nominally 30 days, but is subject to the demands of “other workload.” The Department should provide a firm 30 days. Unlike a firm 30-day standard, the “workload permitting” contingency the Department proposes fails to provide the certainty that applicants need in determining the extent of state-imposed requirements that accompany a given project. The “workload permitting” standard also seems to lose sight of the fact that applicability determinations will be a “critical path” for other necessary approvals, such as local government
permit review, which will often be deferred pending the State’s determination of whether a proposed activity qualifies for a permit-by-rule. (36, 42)

RESPONSE TO COMMENTS 415 THROUGH 419: N.J.A.C. 7:13-5.1 continues repealed N.J.A.C. 7:13-1.3(g), which similarly provided a process for requesting written jurisdictional determinations. The repealed rules did not provide any time limit for the processing of the jurisdictional determinations, and N.J.A.C. 7:13-5.1(e) is simply intended to provide applicants with a time frame that they can reasonably expect their application for a applicability determination to be processed.

The Department intends to make every effort to review and respond to applicability determination requests within 30 days of receipt and to provide adequate staffing to satisfy this goal. However, the Department sometimes experiences unanticipated fluctuations in workload and staffing levels, and therefore finds it necessary to include the "workload permitting" language in the adopted provision.

Furthermore, making the 30-day review period binding would imply that an applicant would not be subject to this chapter simply because the Department did not respond within 30 days of the applicant’s receipt. Such a situation could lead applicants to falsely assume that their project does not need a flood hazard area permit, possibly subjecting them to fines and penalties, as well as creating adverse impacts on flooding and the environment.

Given the above, the Department has not adopted a binding time frame to process applicability determination applications. Nevertheless, the 30-day time limit does provide predictability to applicants that did not exist in the repealed rules. Furthermore, as indicated above, the Department does intend to make every effort to satisfy this time limit.

N.J.A.C. 7:13-5.1(f)

420. COMMENT: "Jurisdiction Determination" letters are valid for five years under the existing rules, and can only become null and void if the plan contains inaccuracies or the site changes. Will the new rules affect the validity of Jurisdictional Determination letters? (46)
RESPONSE: N.J.A.C. 7:13-5.1(f) sets forth the term of an applicability determination, which is five years, except as provided at N.J.A.C. 7:13-5.1(g). An applicability determination cannot be extended because site conditions can change. Whether an activity is subject to the adopted new rules may need to be reevaluated if the activity has not yet been undertaken or a permit not been applied for within five years. This has been the Department's longstanding practice for jurisdictional determinations, and it has been codified in the adopted new rules.

N.J.A.C. 7:13-5.1(g) provides for the situation in which the Department initially determines that this chapter does not apply to a proposed activity, but the chapter is subsequently amended to put in place stricter standards or conditions such that the proposed activity becomes regulated. N.J.A.C. 7:13-5.1(g) also addresses situations where the Department amends the flood hazard area or riparian zone on the site, such that the proposed activity now lies within one of these regulated areas. In such a case, the applicability determination will become void and the applicant must obtain a permit pursuant to N.J.A.C. 7:13-2.1 prior to commencing any regulated activities onsite. This is appropriate since the Department may, at any time during the life of an applicability determination, determine that more stringent standards need to be implemented under this chapter to adequately protect the public from the hazards of flooding and/or to prevent adverse impacts to the environment.

Furthermore, the Department may at any time be presented with new information that indicates a flood hazard area or riparian zone is inaccurate and in need of amendment on a given site. An applicability determination therefore reflects the status of a proposed activity under the conditions existing at the time the applicability determination is approved. Should the adopted new rules change, or should the Department subsequently find that a previously-determined flood hazard area or riparian zone is incorrect on a given site, a previously exempt activity may no longer be exempt, and a permit may be required to undertake the activity.

For example, an activity near a stream may lie outside the flood hazard area and riparian zone, as these areas are currently defined by this chapter. As such, the applicant can receive an applicability determination stating that no permit is needed to undertake this activity since it does not currently lie within a regulated area. However, the Department may subsequently determine that it is necessary to expand the flood hazard area or riparian zone along the stream in question. If the activity lies within the newly-expanded regulated area, the activity would become
regulated and require a permit. In such a case, the applicability determination would become void and the applicant must receive a permit under this chapter prior to undertaking the activity. Regarding jurisdictional determinations issued under the repealed rules, prior to (effective date of these new rules), some activities that were initially determine to not require a permit may now fall under the jurisdiction of the adopted new rules. In such a case, the newly regulated activity, if not grandfathered under N.J.A.C. 7:13-2.1(c)3, would require a permit under this chapter before commencing.

421.COMMENT: The last sentence of N.J.A.C. 7:13-5.1(f) should not be adopted. Applicability determinations, as well as all approvals issued under the proposed new rules, should transfer with title and run with the land. The validity of an applicability determination, and any permit issued by the Department, should not depend on the ownership of the property to which it applies. The factors that should govern whether an applicability determination is issued are the activity that is proposed and the location of the activity, not the owner of the property where the activity will occur. If an applicability determination is issued for a parcel because the parcel is located in a regulated area and the proposed activity is a regulated activity, the change in ownership of the parcel after the applicability determination is issued should have no bearing on whether the activity is a regulated activity that is proposed to occur in a regulated area. The Department acknowledges this point by specifying elsewhere that “the identity of the owner of the site generally has no bearing on whether an application is approved.” (38 N.J.R. at 4026). (7, 18, 33, 46, 53)

RESPONSE: N.J.A.C. 7:13-5.1(f) provides that a person can transfer an applicability determination to a new owner, pursuant to N.J.A.C. 7:13-14.1. Since transferring a document does not extend the term of the document, the Department anticipates that a new owner will often apply for a new applicability determination rather than transferring over an existing one. Nevertheless, the option to transfer an applicability determination to a new property owner is available. It is important to note that this is only an option and there is no requirement to transfer an applicability determination to a new owner. N.J.A.C. 7:13-14.1(c) only requires the transfer when it has approved a regulated activity under a permit. N.J.A.C. 7:13-5.1(a) notes that a flood
hazard area applicability determination is simply the Department's statement of whether an activity is regulated and, if regulated, the activity requires a permit under this chapter.

422. COMMENT: Applicability determinations are valid for five years. We question this provision. This is a determination that is not required, but which requires enough information that the Department can make a determination within 30 days of receipt. This provision adds more work to the Department workload and may result in inappropriate determinations because of review time constraints. The increased chance for inappropriate determinations means they should not be valid for five years. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: N.J.A.C. 7:13-5.1(f) sets forth the term of an applicability determination, which is five years, except as provided at N.J.A.C. 7:13-5.1(g). This provision requires that an applicability determination will become void if: (1) This chapter is amended to put in place stricter standards or conditions such that the proposed activity, although initially not regulated, becomes regulated; or (2) The Department amends the flood hazard area or riparian zone such that the proposed activity now lies within one of these regulated areas.

The Department acknowledges that the review of applicability determinations contributes to the Department workload. However, as noted in N.J.A.C. 7:13-5.1(b), the Department recommends that an applicability determination be obtained in order to avoid unintentionally undertaking unauthorized regulated activities and incurring potential liability. The Department believes that the five-year validity of an applicability determination is appropriate in order to provide an applicant sufficient time to obtain other approvals and undertake construction. Furthermore, if the Department shortened the five year validity, that would require applicants to obtain new applicability determinations more frequently, which would actually increase workload for the Department.

Regarding the 30-day review of applicability determination applications, as noted in the response to comments 415 through 419 above, this is simply an estimate of how long the Department anticipates it should take to review an application. This timeframe is not binding on the Department and therefore, will not result in default or automatic approval of the applicability
determination if the Department fails to render a decision within 30-days of the receipt of an application.

Subchapter 6. Verifications

N.J.A.C. 7:13-6.1 General provisions for verifications

423. COMMENT: As drafted, the proposed new rules are likely to have a significant adverse impact on economic activity in the State of New Jersey. This is because, while the Department has provided clear guidance and a procedure to get written verification of the extent of flood hazard areas (N.J.A.C. 7:13-3 and N.J.A.C. 7:13-6), there are no procedures whatsoever to get written verification of riparian zones (a new regulated area per N.J.A.C. 7:13-2.3), the latter with severe limitations on clearing, cutting or removing vegetation, per N.J.A.C. 7 13-10.2. Also, the guidance at N.J.A.C. 7 13-4.1 is woefully inadequate without the ability to clearly establish and secure written verification from the Department of both flood hazard areas and riparian zones. The regulated public will be unable to make informed decisions on planned development or redevelopment opportunities in the State of New Jersey. Further, without the ability to clearly establish and secure written verification from the Department of both flood hazard areas and riparian zones, the Department will not be able to meet one of its stated goals, which is to provide healthy riparian corridors. On this oversight or omission alone, the Department should withdraw this rule proposal. (47)

424. COMMENT: The verification process should specifically reference verification of the width of the regulatory riparian zone associated with the regulated water. (12)

RESPONSE TO COMMENTS 423 AND 424: N.J.A.C. 7:13-6.1(c)5vii requires that drawings submitted to the Department under an application for a flood hazard area verification must also include “the limit of any riparian zone onsite as described at N.J.A.C. 7:13-4.1.” It is the Department’s intention, therefore, to review and approve the limit of the riparian zone as part of a flood hazard area verification, since the flood hazard area, floodway and riparian zone limits
demarcate the jurisdictional boundaries of this chapter. As such, the following modified on adoption have been made:

1. The definition for “verification” at N.J.A.C. 7:13-1.2 has been modified on adoption to explain that, in addition to the flood hazard area design flood elevation, flood hazard area limit and/or floodway limit on a site, the limit of the riparian zone will also be verified by the Department under a verification.

2. N.J.A.C. 7:13-6.1 has been modified on adoption to clarify that a flood hazard area verification issued by the Department will also include a verification of the riparian zone, if a riparian zone exists on a site.

3. The term “flood hazard area verification” in N.J.A.C. 7:13-6.1(a) has been modified on adoption to refer to a “verification” since that is the name for the approval used throughout the chapter defined at N.J.A.C. 7:13-1.2.

4. A statement noting that the riparian zone limits on a site shall be determined in accordance with the procedures outlined in N.J.A.C. 7:13-4 has been added at N.J.A.C. 7:13-6.1(b) for consistency.

5. The requirement at N.J.A.C. 7:13-8.1(k) that a verification is of the “flood hazard area design flood elevation, flood hazard area and/or floodway limits” prior to the Department issuing authorizations under general permits 5, 6 and 7, has been modified on adoption to instead require a verification of the “flood hazard area design flood elevation, floodway limits and/or riparian zone limits,” in order to be consistent with the modifications at N.J.A.C. 7:13-6.1.

6. N.J.A.C. 7:13-13.1(a), (c) and (f), which apply to the revision of a verification, have been modified on adoption to reference the fact that a riparian zone limit, in addition to a flood hazard area design flood elevation, flood hazard area, floodway limit and/or other related feature, can be revised under the procedures set forth in that section.

425.COMMENT: We question if it would be more efficient to include verifications as a part of a permit application. The advantage would be a matching permit and verification time period validity. (20, 38, 41, 54, 60, 63, 69)
RESPONSE: The Department believes that it is helpful to separate the flood hazard area verification process from the flood hazard area permitting process. In some cases, an applicant may simply want to know the limits of the regulated areas onsite prior to, or independent of, submitting a permit application, and thus a prior verification is helpful. In other cases, an applicant may wish to concurrently submit applications for both a verification and a permit. However, the adopted new rules do not require that an applicant receive a verification prior to submitting a permit application. Applicants may therefore concurrently submit verification and permit applications, so that the Department may review and approve them at the same time, where possible.

In some situations, however, the Department must know the flood hazard area, floodway and/or riparian zone limit in order to determine whether a project satisfies the design and construction standards of the chapter. There are cases, therefore, when the Department can approve a permit application only if a verification is obtained concurrent with, or prior to, a permit. Cases where a general permit authorization requires a verification are described at N.J.A.C. 7:13-8.1(k). Cases where an individual permit requires a verification are described at N.J.A.C. 9.6.

N.J.A.C. 7:13-6.1(e)

426.COMMENT: There is no rational basis for placing a five year limitation on the validity of verifications where conditions that supported issuance of the verification have not changed. The Department’s explanation in support of the proposed rule that it is necessary and appropriate to place a five-year time limit on the validity of a verification because “a number of factors can change within a watershed and thus alter the flood hazard area and floodway limits along a regulated water” and that “land use changes within a watershed or new obstructions in the channel can raise flood elevations” is inconsistent with the proposed new rules which prohibit the placement of obstructions within the channel. Moreover, the rationale does not support the rule, because it fails to account for the fact that the proposed new rules require upstream development to be designed in accordance with a flood hazard area design flood elevation using 125 percent of the 100-year flow rate. Therefore, the stated concern that verifications should be
valid for no more than five years because of the potential for increase in flood elevations due to changes in the land use is unsubstantiated given the other requirements of the proposed new rules. (7, 18, 33, 46, 53)

RESPONSE: The time limit for verifications at N.J.A.C. 7:13-6.1(e) and (f) recognizes that factors can change within a watershed to alter the flood hazard area and floodway limits, such as changes in land use within the watershed or new obstructions in the channel. Although it is anticipated that there will generally be minimal changes that have not been addressed through the safety factor inherent in the establishment of the flood hazard area, changes may still occur that could impact the flood hazard area design elevation. For example, recent updates to the rainfall data resulted in increases in the 100-year 24-hour rainfall by greater than 20 percent in portions of the State. Therefore, the Department believes that it is both necessary and appropriate to place time limits on the valid period of a verification to evaluate whether changes within the watershed since the time of the original verification may have altered the flood hazard area design flood elevation or floodway limits.

427. COMMENT: There is no substantive basis for effectively terminating a verification or requiring its expiration because a person who proposes a regulated activity under the proposed new rules is required to determine the flood hazard area design flood elevation in accordance with one of the proposed methods, which will confirm whether or not the verification remains valid. To the extent that no regulated activities are proposed on a site, then there is no trigger for the examination of the verification and, therefore, no reason for it to expire. Therefore, since there is a mechanism for checking the validity of a verification upon an application for a regulated activity, there is no reason to impose an arbitrary five-year timeframe on the validity of verifications. (7, 18, 33, 46, 53)

RESPONSE: A verification is not only important in determining whether an activity within a flood hazard area meets the requirements of these adopted new rules, but also in determining whether an activity is located within the jurisdiction of this chapter. The commenter notes that if “no regulated activities are proposed on a site, then there is no trigger for the examination of the
verification and, therefore, no reason for it to expire.” The Department does not agree with this assessment, since an activity may be proposed immediately outside the limits of the flood hazard area. If the flood hazard area expands over time, the proposed activity may actually lie within the flood hazard area, even though it is not mapped as such on the verification. This subjects the activity to potential flood damages and safety risks. Therefore, the Department believes that it is both necessary and appropriate to place time limits on the valid period of a verification.

Additionally, under adopted new N.J.A.C. 7:13-6.1(e) and (f), a verification can be reissued automatically if, within five years of the original verification, a permit under the adopted new rules is issued.

N.J.A.C. 7:13-6.1(g)

428.COMMENT: Recording the information for a verification on the deed of a property, as required under the proposed new rules, will have the effect of causing the information to appear in the chain of title for the property in perpetuity. To the extent that verifications are limited to five years under proposed N.J.A.C. 7:13-6.1(e), then the requirement to record the verification information with the County Clerk should be eliminated because the information will remain on the deed after expiration of the verification and is likely to complicate, if not confound, due diligence inquiries. (7, 18, 33, 46, 53)

429.COMMENT: The requirement to file the verification on the deed of the property should be removed. If the verification is good for only five years as noted in N.J.A.C. 7:13-6.1(f), then placement of the verification on the deed makes no sense. This onerous requirement will lead most property owners to skip the verification process altogether. (12)

RESPONSE TO COMMENTS 428 AND 429: Adopted new N.J.A.C. 7:13-6.1(g)2 requires both the approval and expiration date of the verification to be incorporated in the deed and requires proof of such a recording to be submitted to the Department. Therefore, the expiration date of the verification will be available within the deed. Although flood hazard area limits onsite may
change over time, the Department believes that it is appropriate for future owners of a property to be aware that the State has determined that the site is subject to flooding.

430. 

COMMENT: The requirement that an applicant record verification information within 90 calendar days after the Department’s issuance of a verification places an undue burden on applicants who do not own the property for which the verification is issued. Contract-purchasers often submit applications to the Department for the parcel they are in contract to purchase. Contract-purchasers who obtain a verification from the Department will not have authority to record the verification information with the county clerk of the county where the property is located without the consent of the property owner. If the property owner refuses to provide consent, or delays in providing consent for longer than 90 calendar days after the Department issues the verification, the applicant will be subject to an enforcement action under N.J.A.C. 7:13-19 and the verification may be subject to termination. Either scenario would unfairly penalize applicants who have obtained a verification from the Department who do not own the property for which the verification was issued. To avoid this result, the requirement to record verification information within some predetermined period of time subsequent to its issuance by the Department should be eliminated. To the extent any recording is required, it should be required to be made prior to the undertaking of any regulated activity. (7, 18, 33, 46, 53)

RESPONSE: It is the Department’s experience that 90 days is sufficient to record the required information on the deed. The Department recognizes that obtaining approval from the owner, in the event that the applicant is not the owner, may delay the recording. However, the owner must sign the permit application forms, and/or grant permission to the applicant to request from the Department an approval for work on the owner’s property. Consent from the owner for the recording of the verification can be obtained at that time. A verification on a parcel allows the property owner to determine the regulated area prior to undertaking a regulated activity. Without the recorded verification, a property owner may inadvertently undertake a regulated activity within a regulated area without prior Department approval. In the event that the information required at N.J.A.C. 7:13-6.1(g) cannot feasibly be recorded within 90 days of the approval of a
verification, the applicant or owner should contact the Department prior to the 90 day timeframe, to discuss what alternatives, if any, may be available to them.

431. COMMENT: Flood hazard lines should be provided to the Department in a GIS format and (eventually) added to the NJDEP GIS system so that builders, home buyers, realtors, lawyers and other professionals who are involved in due diligence or land use can have access to this important information. (33)

RESPONSE: The Department agrees that the flood hazard area limits on a site should be adequately recorded so that builders, home buyers, realtors, lawyers and other professionals can determine where the flood hazard area limits extend on a given site. However, it is the Department’s experience that many applicants are currently unable to provide the flood hazard area limits or other data in GIS format. Therefore, applicants who receive a verification under N.J.A.C. 7:13-6.1 are required to record the metes and bounds description of any flood hazard area and floodway on a site, pursuant to N.J.A.C. 7:13-6.1(g)3.

Subchapter 7. Permits-By-Rule

N.J.A.C. 7:13-7.1 General provisions for permits-by-rule

432. COMMENT: We support the inclusion of previously non-regulated activities as permits-by-rule. However, some of the activities allowed under permits-by-rule should be individual permits or prohibited activities. In addition, we support the requirement for minimized vegetation disturbance and restoration. (10, 67)

RESPONSE: The Department acknowledges the comments in support of the inclusion of previously non-regulated activities as permits-by-rule, and the requirement for minimized vegetation disturbance and restoration. However, the Department is of the opinion that none of the activities allowed under by permits-by-rule should be individually-permitted or prohibited.
The Department has determined that if the regulated activities are undertaken as prescribed in the respective permits-by-rule, the impact on flooding and the environment will be *de minimis*.

433. **COMMENT:** There are not sufficient controls to prevent accumulation of negative impacts. It is unclear how the Department will use the notification at N.J.A.C. 7:13-7.1(d) to track the cumulative impacts of the permits-by-rule, or how impacts of cumulative activities within a watershed or HUC-14 will be assessed to prevent significant negative impacts of flooding and stream degradation. (10, 67)

434. **COMMENT:** One caution with permits-by-rule is that they often allow for self regulation, which could cause unintended environmental consequences. There should be case by case determinations whenever possible or appropriate due to the sensitive nature of the riparian and flood hazard areas. (45)

**RESPONSE TO COMMENTS 433 AND 434:** The notifications required under N.J.A.C. 7:13-7.1(d) will be sent to the Department’s Bureau of Coastal and Land Use Compliance and Enforcement, for compliance inspections. This should help to insure that the conditions of permits-by-rule are adhered to, and impacts to regulated areas are *de minimis*. As noted in the response to comment 432 above, the Department has determined that if regulated activities are undertaken as prescribed in the respective permits-by-rule, the impact on flooding and the environment, including stream degradation, will be *de minimis*. Furthermore, any cumulative impacts caused by these activities within a watershed or HUC-14 will also be *de minimis*, provided the requirements at N.J.A.C. 7:13-7.1(e) are met, where the total or cumulative impacts of activities that qualify for permits-by-rule must be taken into account. An example is provided at N.J.A.C. 7:13-7.1(e) regarding the permit-by-rule to place five cubic yards of fill under N.J.A.C. 7:13-7.2(b)3. The permit-by-rule allows the placement of no more than five cubic yards of fill, so multiple placements of fill that cumulatively do not exceed five cubic yards are also permitted-by-rule. For example, a person could place one cubic yard of fill per month for five months and be covered under this permit-by-rule. However, any additional fill placed after the limit is reached, no matter how small, is not permitted-by-rule and requires an individual permit.
or general permit authorization. N.J.A.C. 7:13-7.1(e) also explains that a project can be approved under multiple permits-by-rule and still be authorized under this section, provided no individual activity is undertaken that does not qualify for one of the proposed permits-by-rule. It is the Department’s experience in administering its flood hazard area permitting program, that, by their nature, *de minimis*, permits-by-rule will not have cumulative impacts that will exacerbate flooding or cause new flooding in areas not historically subject to flooding.

435. **COMMENT:** Regarding the Permit-by-Rule Summary Report, the report refers to N.J.A.C. 7:13-1.3(f), Non-regulated use in flood fringe. This rule does not appear in the Control Act Rules on page 465. (50)

RESPONSE: It is unclear which report the commenter is referencing. A table is provided in the proposal summary at 38 N.J.R. 3957-8, entitled “Table Of Existing and Proposed Citations”, which indicates that the “non-regulated uses” in the floodway and "non regulated uses" in the flood fringe at repealed N.J.A.C. 7:13-1.3(e) and (f) have been replaced by the permits-by-rule at N.J.A.C. 7:13-7.2. The term "non regulated uses in flood fringe" does not appear in the adopted new rules since all activities regulated under N.J.A.C. 7:13-2.4 must be covered under a permit-by-rule or another approval listed at N.J.A.C. 7:13-2.1. A table is also provided in the adopted new rules at N.J.A.C. 7:13-7.1(e), entitled “Summary of Permits-By-Rule” which briefly outlines the permits-by-rule promulgated under this chapter. Adopted new N.J.A.C. 7:13-1.3, which appears on page 465 of the electronic version of the rule proposal posted on the Department’s internet website, addresses types of permit approvals.

436. **COMMENT:** The rules should eliminate some of the 32 proposed permits-by-rule, which are loopholes to allow development within 25 feet from the stream for things like oil tanks, utility crossing, and five cubic yards of fill, and are given out by consultants who are working for the property owners. All these permits-by-rule lead to a death of a thousand cuts. (54, 60, 63)

437. **COMMENT:** Some of the proposed permits-by-rules should be eliminated, including the placement of oil tanks within 25 feet of stream banks, utility crossing and the five cubic yards of
fill. Review of compliance with these permits-by-rule will be done by consultants, not by the Department, and for those specific cases the Department is outsourcing important protection for our water bodies to private consultants. (48)

RESPONSE TO COMMENTS 436 AND 437: The Department selected certain activities, with limited and predictable impacts, to be permitted by way of a permit-by-rule. By establishing stringent requirements under which each permitted-by-rule activity must occur, the Department has ensured that any adverse impacts to flooding or the environment will be avoided. The activities selected for the adopted permits-by-rule also reflect common construction activities which would otherwise require a general permit or individual permit, but which, if undertaken as prescribed in each permit-by-rule, do not require application to the Department. The Department believes that by not requiring a general permit or individual permit for these activities, it will create an additional incentive for people to undertake activities as prescribed by each permit-by-rule.

For example, the Department believes it is necessary to permit aboveground fuel tanks of 2,000 gallons or less within or adjacent to existing buildings in a flood fringe because existing homes and businesses in the flood hazard area may need to replace or add new fuel tanks (see N.J.A.C. 7:13-7.2(b)15). Small aboveground fuel tanks will not obstruct flow if placed in a flood fringe, will displace little flood storage volume and will not adversely impact the environment if they are anchored and remain watertight during a flood. For the same reasons, the Department is permitting underground storage tanks. There must be some accommodation to locate such tanks, provided they are placed without adverse impacts to flooding or the environment. The Department has therefore established that they may not be placed within 25 feet of any top of bank or edge of water.

Regarding the commenter’s objection to the use of a permit-by-rule for utility crossings, the Department has identified several methods of by which utility lines can cross a regulated water without causing adverse impacts to flooding or the environment, and has codified these methods under six permits-by-rule at N.J.A.C. 7:13-7.2(c). The Department anticipates that these permits-by-rule will encourage utility companies to construction crossings under these permits-
by-rule, in order to avoid the need for a general permit or individual permit, and thereby reduce potential adverse impacts.

Finally regarding the commenter’s objection to a permit-by-rule for the placement of no more than five cubic yards of fill, N.J.A.C. 7:13-7.2(b)3 authorizes the placement of five cubic yards or less of fill in a flood fringe, because this amount of fill will have a *de minimis* impact to the flood storage capacity of a regulated water and allows the Department to focus the Department's time and resources on activities that have potential to more impact the flood hazard area and riparian zone. However, by placing conditions on the use of the permit-by-rule, the Department ensures that the fill will not affect the channel, restricts vegetation disturbance, and prohibits structures which could result in more than *de minimis* impacts. However, the permits-by-rule will allow small placements of fill, such as for landscaping or resulting from minor grading, which a landowner may want to undertake as part of normal property maintenance.

438. COMMENT: The Department should adopt a permit-by-rule for the investigation and/or removal of contamination or solid waste within the regulated area to facilitate the remediation of unsafe or unhealthy conditions. (7, 18, 33, 46, 53)

439. COMMENT: The Department should create a new permit-by-rule to allow remediation activities provided the remediation is being conducted under the oversight of the Department, USEPA, or some duly authorized county or local authority; and all vegetated areas temporarily disturbed within the riparian zone are replanted with indigenous, non-invasive species upon completion of the remediation, unless the disturbed area is to be covered in some other manner to serve as a remediation cap or to house a facility or structure to further the remediation. (42)

RESPONSE TO COMMENTS 438 AND 439: It is the Department’s experience that the investigation and/or removal of contaminated soils and/or solid waste in a flood hazard area or riparian zone can cause serious adverse impacts to flooding and the environment unless appropriate remediation standards are utilized. Due to the potential serious impact that such projects can cause if undertaken improperly in these areas, the Department believes that it is appropriate to perform a project-specific review of remediation activities under an individual
permit, pursuant to N.J.A.C. 7:13-9, 10 and 11. Therefore the Department has not adopted a permit-by-rule for this activity as recommended.

440. COMMENT: We agree with the proposed new rules for the new permits-by-rule, which will give property owners authorization to undertake specific regulated activities without the need to obtain prior written approval from the Department. (51)

RESPONSE: The Department acknowledges this comment in support of the adopted permits-by-rule.

441. COMMENT: The Department should create a new permit-by-rule to allow the conduct of periodic and routine vegetation management of existing rights-of-way used for utility lines, provided that all vegetation management activities are conducted in accordance with the best management practices of an overall integrated vegetation management program; all vegetation management activities are conducted in accordance with any vegetation management standards duly promulgated by any agency having jurisdiction over the electric utility industry, such as the New Jersey Board of Public Utilities; and within the riparian zone, the extent of vegetation clearing, cutting or removal will be the minimum necessary to maintain the utility line and assure electric system reliability on a vegetation management cycle that is consistent with any requirements of the New Jersey Board of Public Utilities and good industry practices. (42)

RESPONSE: The adopted new rules include a permit-by-rule at N.J.A.C. 7:13-7.2(b)1, which allows various vegetation management activities within existing rights-of-way. In cases where an applicant proposes to perform vegetation management activities that exceed the limitations of this permit-by-rule, the Department believes that it is appropriate to perform a project-specific review of such activities under an individual permit, pursuant to N.J.A.C. 7:13-9, 10 and 11, in order to determine if such riparian zone disturbance is warranted.

442. COMMENT: The Department should create a new section to allow emergency remediation activities as a permit-by-rule provided the remediation is a single phase remediation, undertaken
to address an emergency situation, such as a vehicular accident, a car-pole accident that involves the release of material from a transformer or other pad or pole-mounted electrical equipment; and all vegetated areas temporarily disturbed within the riparian zone are replanted with indigenous, non-invasive species upon completion of the remediation. (42)

443. COMMENT: We support the creation of a new permit-by-rule for certain remediation activities. Such a permit-by-rule should recognize that delaying a utility’s remedial response actions pending additional regulatory notifications under these regulations is unnecessary and counterproductive for the environment. When remediation is needed in riparian or flood fringe areas, such as the clean-up that is necessary following a chemical spill, the required work should proceed promptly to minimize adverse impacts. The benefits of a prompt remedial response in such situations are reinforced by the fact that the remediation will be conducted under the oversight of a regulatory agency representative who can be relied on to appropriately account for and coordinate the remediation tasks immediately at hand as well as the flood control objectives of the Flood Hazard Act. We also recommend the following language for this permit-by-rule, which should be codified at N.J.A.C. 7:13-7.2(g):

The permits-by-rule at (g) 1 through 2 below apply to site remediation activities.

1. Remediation activities at contaminated sites, provided:
   i. The remediation is being conducted under the oversight of the Department, USEPA, or some duly authorized county or local authority.
   ii. All vegetated areas temporarily disturbed within the riparian zone are replanted with indigenous, non-invasive species upon completion of the remediation, unless the disturbed area is to be covered in some other manner to serve as a remediation cap or to house a facility or structure to further the remediation.

2. Emergency remediation activities, provided:
   i. The remediation is undertaken to address a release or discharge of a hazardous substance; or as a result of an emergent situation, such as a vehicular accident, a car-pole accident that involves the release of material from a transformer or other pad or pole-mounted electrical equipment, etc.
ii. All vegetated areas temporarily disturbed within the riparian zone are replanted with indigenous, non-invasive species upon completion of the remediation. (22, 36, 42)

RESPONSE TO COMMENTS 442 AND 443: As noted in the response to comments 438 and 439 above, it is the Department’s experience that remediation activities can cause serious adverse impacts to flooding and the environment unless appropriate standards are utilized. Due to the potential serious impact that such projects can cause if undertaken improperly, the Department believes that it is appropriate to perform a project-specific review of remediation activities under an individual permit, pursuant to N.J.A.C. 7:13-9, 10 and 11. Therefore the Department has not adopted a permit-by-rule for this activity as recommended. However, in cases where emergency remediation activities are required, an applicant can request an emergency permit authorization from the Department under N.J.A.C. 7:13-12.1 to undertake activities that warrant immediate action to protect the environment and/or public safety, health and general welfare.

N.J.A.C. 7:13-7.1(c)

444. COMMENT: Contractor error and/or homeowner ignorance of these rules is probable given the limitations of the rule, which may result in widespread enforcement actions for minor “violations” which in fact have negligible impact on flooding. (26)

RESPONSE: By establishing a large number of permits-by-rule to accommodate minor construction activities that do not require a permit application, the Department believes it will facilitate responsible construction practices from homeowners and others in the regulated community, resulting in an increase in compliance with the adopted new rules. Therefore, the Department does not anticipate an increase in enforcement actions as a result of the adopted permits-by-rule.

445. COMMENT: The phrase “a person may wish to obtain an applicability determination in order to demonstrate to a local government that a proposed activity meets a permit-by-rule” should be eliminated. This would allow/encourage local governments to use this process to drag
out and delay an application/approval. This problem occurred with the so-called “Highlands exemptions” and forced many landowners to go through a costly, time-consuming and unnecessary process. This process inherently will add costs to housing. (33)

RESPONSE: N.J.A.C. 7:13-7.1(c) explains that no approval from the Department is required prior to undertaking a permitted-by-rule activity. However, if it is unclear if a particular activity is permitted-by-rule, or a municipality issuing a local building permit wants written proof that an activity does not require prior Department approval, the subsection cross-references and describes the ability to obtain an applicability determination under proposed N.J.A.C. 7:13-5.1. The adopted new rules do not require applicants to obtain an applicability determination from the Department for activities under a permit-by-rule. The Department has simply included this provision as a service to the regulated public, since it is the Department’s experience that homeowners, local official and other interested parties sometimes prefer to have written documentation from the Department that a project meets the requirements of this chapter prior to commencing construction.

N.J.A.C. 7:13-7.1(d)

446.COMMENT: Persons undertaking an activity pursuant to a permit-by-rule should not be required to provide advance written notification to the Department. Permits-by-rule include regulated activities that are so minor in nature that any impacts on flooding or the environment would be *de minimis*, and so no written approval is required from the Department. Since no prior written approval is required, likewise written notification should not have to be given to the Department. (7, 18, 33, 46, 53)

RESPONSE: To help safeguard against the potential adverse effects of exceeding the limits of these eight permits-by-rule, the Department is requiring a simple notification to of the intent to conduct activities under one of these permits-by-rule. Any activity conducted under a permit-by-rule, if not conformed to the limits established in the permit-by-rule, has the potential to adversely affect flooding, water quality, and wildlife or plant habitat at the site of the activity
and/or on nearby properties. Many of the proposed permits-by-rule authorize activities such as ongoing property maintenance or minor construction incidental to the use of private property or public roadways, utilities and recreational facilities. However, the Department is concerned that activities carried out under these eight permits-by-rule, if not performed in conformance with the limits of the respective permits-by-rule, could have cumulative or significant adverse impacts that manifest themselves quickly. The activities that present this concern are activities in the floodway or channel, and certain construction activities that are not incidental to the normal use of private or public property. Requiring prior notice of the intent to undertake such activities will therefore enable the Department to track the activities on a particular property and ensure that the permit-by-rule limits for that property are not exceeded in the first instance (for example, enlargement rather than reconstruction), and that they are not exceeded over time by the same or successive owners of the property.

447. COMMENT: The notifications requirements in the permits-by-rule vary. Since permits-by-rule allow wide latitude, they should be balanced by requiring adequate notification. (10, 67)

448. COMMENT: Only eight of the numerous permits-by-rule require notice to DEP before an activity can commence. We object to the lack of a requirement to require prior notice to DEP of all permits-by-rule. We object to the lack of a requirement to provide local public notice. Activities undertaken under permits-by-rule may be perceived as violations and may violate local ordinances. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 447 AND 448: As noted in the response to comment 446 above, due to the nature of the eight activities covered under the permits-by-rule at N.J.A.C. 7:13-7.2(a), the Department believes that it is appropriate to require notification to the Department prior to the commencement of these activities, so that the Department may monitor and inspect construction. The Department has similarly determined that the remaining permits-by-rule under N.J.A.C. 7:13-7.2(b) through (f) are of such a minor nature, and will furthermore pose no possible threat to flooding or the environment, that neither local public notice nor notification to the Department is warranted. An example of the latter is the permit-by-rule at N.J.A.C. 7:13-
7.2(b)1, which allows normal property maintenance for such things as pruning vegetation, or mowing an existing field, lawn or park. This permit-by-rule is very specific as to what it allows, and use of it would cause *de minimis* impacts on flooding and the environment. Furthermore, to require prior notification to the Department before undertaking activities such as mowing or pruning would create an unnecessary burden on the regulated community. Other permits-by-rule may actually have a positive environmental benefit, which the Department wants to encourage. For example, the permit-by-rule at N.J.A.C. 7:13-7.2(b)2 allows for the removal of lawfully existing structures within the flood fringe. Not only would this allow removal of a potential obstruction to flow during flood events, it would also require that vegetated areas within the riparian zone be replanted with indigenous, non-invasive species. This would serve to reduce local flooding and benefit the environment and, as such, the Department does not believe that prior notification would be beneficial.

Relative to the commenter's concern that the adopted permits-by-rule may be perceived as violations, it is unclear whether the commenter is referring to violations of this chapter or violations of local ordinances. With regard to the perception that activities undertaken via a permit-by-rule would violate the requirements of this chapter, the Department intends to provide adequate training of its staff and local officials in order to avoid misinterpretations of the provisions of this chapter. With regard to the possibility that activities undertaken via a permit-by-rule would violate local ordinances, the Department notes at N.J.A.C. 7:13-1.1(e) that activities regulated under this chapter may also be subject to other Federal, State and/or local rules, plans and ordinances, and that authorization to undertake a regulated activity under this chapter does not indicate that the activity also meets the requirements of any other rule, plan or ordinance. Therefore, it is the applicant's responsibility to obtain all necessary approvals for a proposed project.

N.J.A.C. 7:13-7.1(e) Table A

449.COMMENT: In Table A, the definition of “canal” should be changed to “canal transmission complex” which should be defined to mean “a linear transportation or water supply utility facility constructed for the purpose of transporting water or materials between points within a
manmade structure that includes embankments, the canal walls and bed, structures such as culverts and bridges over features such as streams, lakes and roads, and ancillary features such as access paths or walkways directly adjacent to the canal.” (66)

RESPONSE: As noted in the response to comment 162, the Department does not believe that a definition is required for the term “canal.”.

N.J.A.C. 7:13-7.2 Permits-by-rule

N.J.A.C. 7:13-7.2(a)1

450. COMMENT: Reconstruction of existing structures should not be allowed in the flood fringe or riparian zone. Structures should be removed from the flood fringe and riparian zones. Any exceptions should be required to provide 25 percent additional floodplain storage for any activity. (10, 67)

RESPONSE: New Jersey’s Fiscal Year 2004 Map Modernization Business Plan estimates that flood hazard areas encompass approximately 35 percent of the State (www.floods.org/pdf/sbp_nj_04.pdf). The Department does not believe that it is appropriate to prevent people from repairing or reconstructing lawfully existing structures within flood hazard areas, provided construction is undertaken responsibly, as prescribed by this chapter, so that adverse impacts to flooding and the environment will be avoided. Furthermore, the Flood Hazard Area Control Act at N.J.S.A. 58:16A-55.1 states that the Department shall not adopt any rule or regulation that would “prevent the repair or rebuilding within a flood hazard area of any lawful preexisting structure which was damaged by a flood or by any other means.” Thus the adopted permit-by-rule is appropriate.

451. COMMENT: N.J.A.C. 7:13-7.2(a)1 should be revised to provide clarity that activities that involve structures that are part of utility lines under N.J.A.C. 7:13-7.2(c) do not require prior written notice to the Department before being undertaken. (36, 42)
452. COMMENT: In order to clarify that activities which involve structures that are part of utility lines under N.J.A.C. 7:13-7.2(c) do not require prior written notice to the Department before being undertaken, we suggest the following revision: “The reconstruction of a lawfully existing structure (except structures that are part of an activity or activities associated with utilities as identified in (c) below) in a flood fringe, provided…” (22)

RESPONSE TO COMMENTS 451 AND 452: The 14-day prior notice required at N.J.A.C. 7:13-7.1(d) applies only to the eight activities permitted-by-rule at N.J.A.C. 7:13-7.2(a). Activities permitted-by-rule at N.J.A.C. 7:13-7.2(b) through (f), including the activities associated with utilities at N.J.A.C. 7:13-7.2(c), are not subject to 14-day prior notice to the Department to commence a permitted-by-rule activity.

N.J.A.C. 7:13-7.2(a)2

453. COMMENT: It is an unreasonable requirement to require a permit for such things as a playground/swing set and garden. It is specifically stated that “no vegetation” is to be disturbed. (26)

RESPONSE: Activities authorized under the permits-by-rule in this chapter do not require prior written approval from the Department. Therefore, a playground, swing set or garden that meets the permit-by-rule requirements at N.J.A.C. 7:13-7.2(a)2 does not require a general permit or individual permit under this chapter. With regard to the disturbance of vegetation allowed under this permit-by-rule, N.J.A.C. 7:13-7.2(a)2iv requires that, “No vegetation is cleared, cut or removed in a riparian zone, except where previous development or disturbance has occurred (such as an area maintained as a lawn or garden or an abandoned parking area that has partially revegetated).” Thus while vegetation in previously undeveloped or undisturbed portions of the riparian zone cannot be cleared, cut or removed under this permit-by-rule, the placement of a playground, swing set or garden, for example, within an area maintained as a lawn or garden or
an abandoned parking area that has partially revegetated is allowed, provided all other requirements of the permit-by-rule are satisfied.

454. COMMENT: We oppose construction of trails, driveways, outdoor recreation areas, parking lots, athletic fields, and roads in the flood fringe regardless of whether or not the construction is within 25 feet from the top of bank. All structures should be removed from the flood fringe and riparian zones. Any exceptions should be required to provide 25 percent additional floodplain storage for any activity. (10, 67)

RESPONSE: The Department is of the opinion that it is not appropriate to prevent all development within flood hazard areas and riparian zones in New Jersey, but rather to ensure, through proper regulation and oversight, that such development is undertaken responsibly so that it will not exacerbate flooding or contribute to the degradation of our surface waters. The adopted permit-by-rule at N.J.A.C. 7:13-7.2(a)2 is therefore designed to allow certain minor construction activities that will not adversely impact flooding or the environment.

455. COMMENT: N.J.A.C. 7:13-7.2(a)2 should be revised to provide clarity that activities that involve construction below grade that are part of utility lines under N.J.A.C. 7:13-7.2(c) do not require prior written notice to the Department before being undertaken. (42)

456. COMMENT: In order to clarify that activities that involve structures below grade that are part of utility lines under N.J.A.C. 7:13-7.2(c) do not require prior written notice to the Department before being undertaken, we suggest the following revision: “Any construction activity at or below grade…sidewalk or trail, except such construction activities associated with utilities as identified in (c) below), provided…”(22)

RESPONSE TO COMMENTS 455 AND 456: The Department believes that it is sufficiently clear that the standards for the permits by rule at N.J.A.C. 7:13-7.2(a) do not apply to the permits-by-rule for utilities at N.J.A.C. 7:13-7.2(c).
457. COMMENT: Subsections iv and v appear to contradict each other. Since the temporary clearing, cutting or removal of vegetation is allowed, the Department should revise the wording of item iv to include the word “permanently” before “cleared, cut or removed”. (22)

RESPONSE: N.J.A.C. 7:13-7.2(a)2iv requires that, “no vegetation is cleared, cut or removed in a riparian zone, except where previous development or disturbance has occurred (such as an area maintained as a lawn or garden or an abandoned parking area that has partially revegetated).” N.J.A.C. 7:13-7.2(a)2v requires that, for any riparian zone vegetation that is permitted to be disturbed under (a)2iv, “all vegetated areas temporarily disturbed within the riparian zone are replanted with indigenous, non-invasive species upon completion of the regulated activity.” Thus, N.J.A.C. 7:13-7.2(a)2iv establishes which vegetation can be disturbed overall, and (a)2v requires restoration of temporarily disturbed areas. The Department therefore does not believe that these provisions are in conflict.

N.J.A.C. 7:13-7.2(a)3

458. COMMENT: Structures should not remain in the flood fringe even if elevated. We recommend removal of structures from the flood fringe and riparian zones and the restoration of native vegetation. Any exceptions should be required to provide 25 percent additional floodplain storage for any activity. (10, 67)

RESPONSE: The Department does not believe that it is appropriate to prevent people from elevating lawfully existing structures within flood hazard areas, provided construction is undertaken responsibly, as prescribed by this chapter, so that adverse impacts to flooding and the environment will be avoided. Furthermore, the Flood Hazard Area Control Act at N.J.S.A. 58:16A-55.1 states that the Department shall not adopt any rule or regulation that would “prevent the repair or rebuilding within a flood hazard area of any lawful preexisting structure which was damaged by a flood or by any other means.” Thus the adopted permit-by-rule is appropriate.

N.J.A.C. 7:13-7.2(a)4
459. COMMENT: Additions to existing structures should not be allowed in the flood fringe regardless of size. This is currently not a regulated activity and we believe it should be regulated. (10, 67)

RESPONSE: The Department does not believe that it is appropriate to prevent people from adding small additions to lawfully existing structures within flood hazard areas, provided construction is undertaken responsibly, as prescribed by this chapter, so that adverse impacts to flooding and the environment will be avoided. Thus the Department believes that the adopted permit-by-rule is appropriate.

460. COMMENT: We object to allowing additions of up to 300 square feet of fill to a lawfully existing building if it is 25 feet from a channel or top of bank. The distance from the channel should be much greater. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: In some cases a lawfully existing building may lie near a channel. If an owner wishes to construct a small addition attached to this building, the addition would also be near the channel. The adopted permit-by-rule prevents work within 25 feet of a top of bank or edge of water, in order to preserve channel integrity, and also prevents work within a floodway, in order to ensure that floodwaters will not be obstructed. As noted in the response to comment 459, the Department does not believe that it is appropriate to prevent people from adding small additions to lawfully existing structures within flood hazard areas, provided construction is undertaken responsibly so that adverse impacts to flooding and the environment will be avoided. The adopted permit-by-rule contains conditions to assure these goals are achieved. Thus, the Department believes that the adopted permit-by-rule is appropriate.

461. COMMENT: The proposed rule that limits an addition within the 300-foot buffer to a single family house to 300 square feet should be amended to allow at least a 24 by 24 foot (576 square feet) addition, because that is the size of a two car garage. (58)
RESPONSE: It is the Department’s experience that the construction of a building addition of 300 square feet or less, in the manner prescribed by the adopted permit-by-rule, will cause a negligible impact on flooding and the environment. Since larger additions could cause potential adverse impacts, the Department believes that it is appropriate to perform a project-specific review of such additions under a permit application. However, a residential building or addition garage proposed within a tidal flood hazard area may qualify for General Permit 7 at N.J.A.C. 7:13-8.9, for residential construction in a tidal flood hazard area. Otherwise, for residential construction that does not qualify for a permit-by-rule or general permit would require an individual permit under this chapter.

N.J.A.C. 7:13-7.2(a)5

462. COMMENT: The 14-day notification requirement for "removal of a major obstruction from a regulated water" is unreasonable. The removal of obstructions is often necessary to prevent potential flood damage, and as such must be removed in a timely manner. The 14-day delay is a liability that we will not accept. It is also unclear what purpose the additional paperwork, time and expense would accomplish. This activity should be included under N.J.A.C. 7:13-7.2(b), which includes permits-by-rule that do not require prior notification to the Department. (3)

463. COMMENT: Under current N.J.A.C. 7:13-1.3(e)2iii, the use of machinery to remove a major obstruction from a regulated water that cannot be removed by hand, such as a fallen tree, abandoned vehicle, furniture and other large debris, is a non-regulated activity. To require a 14-day notification to the Department, as proposed in the new rule, is onerous relative to the current regulation. (29, 52)

RESPONSE TO COMMENTS 462 AND 463: It is not the Department’s intention, by adopting this permit-by-rule, to prevent public entities from performing emergency activities that are in the best interest of public safety, health and general welfare. It is the Department’s experience that, in many cases, the use of machinery to remove a major obstruction from a regulated water requires a period of planning and that the 14-day prior notification required at N.J.A.C. 7:13-
7.1(d) is neither onerous nor disruptive to this planning process. Should a person determine, however, that a major obstruction must be removed immediately in order to protect the public and/or preserve the environment, an emergency permit can be requested for the work pursuant to N.J.A.C. 7:13-12.1, through which the Department can verbally authorize appropriate activities to begin immediately.

464. COMMENT: N.J.A.C. 7:13-7.2(a)5 should be revised to provide clarity that using machinery to remove major obstructions during activities that are part of utility lines under N.J.A.C. 7:13-7.2(c), does not require prior written notice to the Department before the machinery is used. (42)

465. COMMENT: In order to clarify that using machinery to remove major obstructions during activities that are part of utility lines under N.J.A.C. 7:13-7.2(c) does not require prior written notice to the Department before machinery is used, we suggest the following revision: “The use of machinery (except that used in activities associated with utilities as identified in (c) below) to remove a major obstruction…” (22)

RESPONSE TO COMMENTS 464 AND 465: The Department believes that it is sufficiently clear that the standards for the permits by rule at N.J.A.C. 7:13-7.2(a) do not apply to the permits-by-rule for utilities at N.J.A.C. 7:13-7.2(c)

466. COMMENT: If a tree must be disturbed in the riparian zone to provide equipment access, the removal of an obstruction cannot be done under this permit-by-rule. Similarly, if the obstruction has caused sediment to accumulate a few feet upstream, the obstruction could be removed under this permit-by-rule but the sediment that continues to block the channel could not. The next permit option available would be general permit 1 for stream-cleaning. This permit would require certification by a municipal or county engineer, as well as certified drawings and plans, which are costly and onerous for the proposed activity. The Department should use the 14-day notification to allow some flexibility to the conditions stated in the proposed rule. If conditions stated in the proposed rule are met, a 14-day notification should not be imposed. Such
notification for removal of an obstruction should also be recognized by the Freshwater Wetlands program. (29)

RESPONSE: The Department has determined that requiring a 14-day prior notice for this work is appropriate and necessary in order to provide proper Department oversight, given the potential for adverse impacts to flooding and the environment if the activities under this permit-by-rule are improperly undertaken. As noted in the response to 436 and 437 above, the Department can grant emergency approvals for the removal of obstructions from a channel that warrant immediate attention. Also, as noted by the commenter, general permit 1 under N.J.A.C. 7:13-8.3 can be obtained for certain sediment removal and desnagging projects. It is not the Department’s intention to establish costly or onerous requirements for such activities. Consequently, all permits-by-rule and general permit 1 do not require application fees to the Department. The application requirements that are established for general permit and individual permits, however, have been determined to be necessary to allow the Department to satisfy its obligation to protect the public from increased flooding and adverse environmental impacts. Thus the Department believes that its permit-by-rule, general permit and individual permit standards regarding sediment and debris removal from channels are appropriate and necessary. With regard to the Freshwater Wetlands Protection Act rules, general permit 26 for minor channel or stream cleaning for local government Agencies at N.J.A.C. 7:7A-5.26 is equivalent to flood hazard area general permit 1 at N.J.A.C. 7:13-8.3.

467. COMMENT: Boat ramps should be regulated by individual permit since the installation of ramps require the disturbance of stream, stream bottom, streambanks, floodway and flood fringe. Vegetation must be removed and access from the shore to the ramp provided. Disturbance of 2000 square feet of the riparian zone will have significant impacts that need close regulation. (10, 67)

RESPONSE: It is the Department’s opinion that boat ramps, constructed in accordance with the requirements set forth in the permit-by-rule at N.J.A.C. 7:13-7.2(a)6, will not cause adverse
impacts to flooding, or the environment. This is due to the relatively small 2,000 square-foot, footprint and vegetation disturbance allowed, and the fact that the ramp must be at or below grade. This latter condition will ensure that flooding will not be exacerbated. In addition, timing restrictions will minimize impact to aquatic species. Finally, in accordance with N.J.A.C. 7:13-7.1(d), this permit-by-rule requires notification to the Department, which will assist the Department with compliance and enforcement inspections. Therefore, the Department believes that the adoption of the permit-by-rule is appropriate.

468. COMMENT: Can a facility be built in stages without an individual permit as long as the components do not exceed the limits of each permit-by-rule activity? How will the Department track such activities to ensure that the impacts to not exceed the permit-by-rule allowance over time? (10, 67)

RESPONSE: N.J.A.C. 7:13-7.1(e) provides that “a person may undertake a regulated activity under a permit-by-rule only up to any given limit specified by the permit-by-rule.” An activity under a permit-by-rule can be constructed in phases, provided the final project does not exceed the permitted limits. For example, the placement of no more than five cubic yards of fill under the permit-by-rule at N.J.A.C. 7:13-7.2(b)3 means either the one-time placement of five cubic yards of fill or multiple placements of fill over time that cumulatively do not exceed five cubic yards. Since most permits-by-rule are crafted to cover a particular project, such as a fence, swimming pool or dock, the Department does not believe that people will be able to easily combine them into a larger project that would otherwise be regulated under a general permit or individual permit. For instance, a person could elevate a building under N.J.A.C. 7:13-7.2(a)3, construct an addition to the building under N.J.A.C. 7:13-7.2(a)4, and build a fence around the building under N.J.A.C. 7:13-7.2(b)5, without requiring a general permit authorization or individual permit, provided each individual activity meets the descriptions of each applicable permit-by-rule. In this example, the Department views these three activities to be distinct and independent actions, each covered under a separate permit-by-rule. With regard to tracking, the permits-by-rule at N.J.A.C. 7:13-7.2(a)1-8 require prior notification to the Department. Hence,
this will assist the Department with compliance and enforcement inspections for these permits-by-rule.

N.J.A.C. 7:13-7.2(b)

469. COMMENT: The 18 activities allowed under permits-by-rule are untracked. These activities should require notification. (10, 67)

RESPONSE: Any activity conducted under a permit-by-rule, if not conformed to the limits established in the permit-by-rule, has the potential to adversely affect flooding, water quality, and wildlife or plant habitat at the site of the activity, and/or on nearby properties. Many of the adopted permits-by-rule authorize activities such as ongoing property maintenance, minor construction incidental to the use of private property, or public roadways, utilities and recreational facilities. The Department is of the opinion that these permits-by-rule have little potential to adversely affect the flooding or the aforementioned resources. However, the Department is concerned that activities carried out under the permits-by-rule at N.J.A.C. 7:13-7.2(a), if not performed in conformance with the limits of the respective permits-by-rule, could have cumulative or significant adverse impacts on flooding and/or the environment. The activities that present this concern are activities in the floodway or channel, and certain construction activities that are not incidental to the normal use of private or public property. Thus, prior notification pursuant to N.J.A.C. 7:13-7.1(d) is only required for permits-by-rule under N.J.A.C. 7:13-7.2(a). This will assist the Department with compliance and enforcement inspections for these permits-by-rule.

N.J.A.C. 7:13-7.2(b)1

470. COMMENT: This section refers to the rules’ proposal date of October 2, 2006. It should instead refer to the rule’s adoption date, so that lawns and gardens established after October 2, 2006 (that were authorized under the existing regulations prior to the adoption of the proposed new rules) may be lawfully maintained. (26)
RESPONSE: Given the stringent new standards adopted under this chapter regarding the preservation of riparian zone vegetation, the Department believes that it is appropriate to permit-by-rule the maintenance of lawns and gardens that were established prior to the rules’ proposal date of October 2, 2006, and not to permit-by-rule lawns and gardens established after this date. Once the Department’s intentions of restricting riparian zone disturbance were published on October 2, 2006, there was concern that people would purposely remove near-stream vegetation before the new riparian zones could be established. By doing so, people could potentially limit future regulation of the riparian zone on their site, since the vegetation would have already been removed or disturbed prior to the rules’ adoption. So as not to encourage people to remove near-stream vegetation between the proposal date and effective date of these new rules, the Department believes that it is appropriate to cite the rules’ proposal date in this permit-by-rule. The creation and maintenance of lawns and gardens in a riparian zone after October 2, 2006, are subject to the requirements of N.J.A.C. 7:13-10.2.

471.COMMENT: Incentives should be provided to use native vegetation instead of turf or non-native species in the riparian zone. Lawns should be replaced with native species. For more information, please refer to the attached fact sheet entitled “Protecting and Restoring Native Plant Communities and Forests.” (10, 67)

RESPONSE: The Department does not believe it appropriate to require people to remove existing lawns and gardens, lawfully established in the riparian zone prior to the rules’ proposal date of October 2, 2006. This permit-by-rule is provided to allow property owners to perform basic activities typical to the maintenance of a home, business, garden or lawn, while preventing an expansion of use that could exacerbate flooding or adversely impact the environment. As such, the Department believes that the adopted permit-by-rule is appropriate, and it has been adopted to allow mowing a field, lawn, park and/or easement that was lawfully established prior to October 2, 2006, and that has been periodically mowed since that date.
472. COMMENT: "Periodically" in the mowing frequency, should be defined either as a specific periodicity (for example, two years) or a specific method (for example, as recommended by a professional ecologist or biologist). (66)

RESPONSE: The permit-by-rule at N.J.A.C. 7:13-7.2(b)1i(4) was proposed to allow, as part of normal property maintenance, “mowing a field, lawn, park and/or easement that was lawfully established prior to October 2, 2006 and that has been periodically mowed since that date.” The term “periodically,” as used in this permit-by-rule, is not intended to be a precise period of time. Rather, it is simply intended to indicate that the subject field, lawn, park or easement has been maintained as a field, lawn, park or easement since October 2, 2006. The frequency at which mowing or other necessary maintenance is undertaken is not relevant, as long as the area has been maintained as a field, lawn, park or easement. The Department also recognizes that public utilities maintain rights-of-way according to prescribed maintenance plans, which include periodic mowing and vegetation removal necessary to facilitate the operation of utility lines. Thus, a utility easement may be properly maintained according to a maintenance plan, but not have been actually mowed since the rules’ proposal date of October 2, 2006. Furthermore, the requirements at N.J.A.C. 7:13-7.2(b)1ii ensure that maintenance activities under this permit-by-rule do not result in the placement of any structure, change in topography or other activity that could potentially adversely impact flooding or the environment. In recognition of this, the adopted permit-by-rule has been clarified to refer to the “maintenance” of such areas, since maintenance may not necessarily be limited to mowing.

473. COMMENT: This section creates a permit-by-rule for the disturbance of vegetation in a riparian zone for normal property maintenance. This permit provides for the normal maintenance of structures within the riparian zone. Normal maintenance would necessarily include the ability of utility companies to clear its electric and gas rights-of-ways of vegetation that would interfere with the safe and reliable transmission and distribution of its products to its customers. Similarly the following activities, although not inclusive, should also be authorized under this permit: (a) replacement of utility poles, towers and other support structures for overhead power lines, b) maintenance of access roads, and (c) repair and replacement of equipment at electric generating
stations, substations, switching stations and metering stations such as transformers, pumps, manholes, and pipelines and associated appurtenances. (22)

RESPONSE: The adopted permit-by-rule at N.J.A.C. 7:13-7.2(b)1 allows normal property maintenance in the riparian zone which, as discussed in the reponse to comment 445, has been modified on adoption to include “maintaining a field, lawn, park and/or easement that was lawfully established prior to October 2, 2006 and that has been maintained (such as through periodic mowing) since that date.” Therefore, this permit-by-rule does allow utility companies to clear existing easements of vegetation that would interfere with the safe and reliable transmission and distribution of its products to its customers, provided the requirements of the permit-by-rule are satisfied. However, this permit-by-rule does not allow the replacement or repair of structures, or the placement of fill or impervious areas, as described at N.J.A.C. 7:13-7.2(b)1ii(6). The placement (or replacement) of a utility pole or tower is permitted-by-rule in some cases at N.J.A.C. 7:13-7.2(c)1 and 2, respectively. Furthermore, the reconstruction of certain structures in a flood fringe is permitted-by-rule at N.J.A.C. 7:13-7.2(a)1, and the repair of certain structures is permitted-by-rule at N.J.A.C. 7:13-7.2(a)4. Finally, the maintenance of a lawfully existing access road is in some cases permitted-by-rule at either N.J.A.C. 7:13-7.2(a)2 or (b)1, depending on whether new impervious surface is proposed, or whether the ground elevation is being raised in a flood hazard area. Any maintenance or construction activity that is not permitted-by-rule under N.J.A.C. 7:13-7.2 requires a general permit authorization, individual permit, coastal permit or emergency permit, as described at N.J.A.C. 7:13-7.1(e).

474.COMMENT: This permit-by-rule directly conflicts with the recent enactment of vegetation management rules by the New Jersey Bureau of Public Utilities at N.J.A.C. 14:5-8.1 et seq. which require the clearing and removal of vegetation from transmission and distribution right-of-ways in order to maintain safety and reliability. PSE&G currently maintains over 800 miles of transmission right-of-way for vegetation on a 4-year annual cycle. This maintenance schedule invariably allows certain vegetation to begin re-growth. However, we must maintain the authorization to continue to clear these right-of-ways despite this re-growth. Furthermore, in connection with vegetation management, we use limited applications (subject to wetland permits
and other regulations) of herbicides in order to reduce costs to our ratepayers. Accordingly, the following language should be added to the end of the section “and except vegetation removed pursuant to the vegetation management rules promulgated at N.J.A.C. 14:5-81. et seq.” (22)

RESPONSE: It is not the Department’s intention to conflict with the requirements of N.J.A.C. 14:5-8.1. This section establishes a permit-by-rule to cover certain maintenance activities within riparian zones. Vegetation removal in excess of the limits established under this permit-by-rule is not prohibited, but rather requires a general permit authorization or individual permit and is subject to the requirements of N.J.A.C. 7:13-10.2. The Department believes that it is appropriate to perform a site-specific review of any activity that proposes to remove riparian zone vegetation in excess of the limits of this permit-by-rule.

N.J.A.C. 7:13-7.2(b)3

475.COMMENT: The limit of five cubic yards of fill is unreasonable and does not take into consideration large facilities. This restrictive amount is likely less than what some residences use to mulch gardens. (26)

476.COMMENT: The Department should not allow up to five cubic yards of fill in the flood fringe regardless of whether or not the construction is within 25 feet from the top of bank or vegetation is disturbed. This is a relaxation of the requirement. Tracking is difficult to ensure that the five cubic yard allowance is not exceeded over time. Adjacent property owners with five cubic yards of fill can have significant adverse impact to flooding and water quality. The Department should regulate all fill and have a means to analyze impacts on a watershed or HUC-14 basis. (10, 67)

477.COMMENT: We object to allowing the placement of no more than five cubic yards of fill in a flood fringe, placed 25 feet from any top of bank. During floods the fill can erode away and cause sedimentation and increased flooding downstream. (20, 38, 41, 54, 60, 63, 69)
RESPONSE TO COMMENTS 475 THROUGH 477: N.J.A.C. 7:13-7.2(b)3 authorizes the placement of five cubic yards or less of fill in a flood fringe, because the Department believes that this amount of fill will have a de minimis impact to the flood storage capacity of a regulated water. This permit-by-rule is intended for small placements of fill, such as for landscaping or resulting from minor grading, which a landowner may propose as part of the normal maintenance of a property. The placement of larger amounts of fill within the flood hazard area may result in adverse impacts to flooding or the environment, and must therefore be reviewed on a project-specific basis under a general permit authorization or individual permit. The Department therefore believes that that limiting fill under this permit-by-rule to five cubic yards or less is appropriate and necessary.

N.J.A.C. 7:13-7.2(b)5

478.COMMENT: This rule should be defined further to take into consideration the necessity for security fences along high volume roads, construction sites, industrial uses, prisons, airports, etc. (26)

RESPONSE: Security fences are allowed under this permit-by-rule, provided all the requirements of the N.J.A.C. 7:13-7.2(b)5 are satisfied. The construction of a fence that does not meet the requirements of this permit-by-rule may result in adverse impacts to flooding or the environment. An example is a fence not built in accordance with N.J.A.C. 7:13-7.2(b)5iv(2), such as a chain link fence that could catch debris during a flood and block the flow of floodwaters, causing property damage; or, N.J.A.C. 7:13-7.2(b)5iii, where temporary vegetation disturbance is not replanted with native vegetation, thereby possibly causing soil erosion, removing trees that shade surface water and degrading wildlife habitat. Any proposed fence not conforming to N.J.A.C. 7:13-7.2(b)5, must therefore be reviewed on a project-specific basis under a general permit authorization or individual permit.

N.J.A.C. 7:13-7.2(b)7
479. COMMENT: The Department should not have any authority to regulate/discuss second floor additions, particularly if it is above the designated flood elevation. (26)

RESPONSE: The requirements of N.J.A.C. 7:13-7.2(b)7 are necessary to ensure that the construction of an addition above a building will not adversely impact flooding or the environment. The Department acknowledges that construction activities wholly located above the flood hazard area design flood elevation in a flood fringe are not regulated under this chapter. However, the removal of riparian zone vegetation and other impacts on the ground within the flood hazard area, which would normally be associated with the construction of a second story addition to a building, are subject to the requirements of this chapter. The standards of this permit-by-rule ensure that the construction is undertaken properly and in compliance with the requirements of this chapter.

480. COMMENT: This proposed permit-by-rule authorizes the construction of an addition that increases the height of an existing building in a flood fringe, such as a second story addition, because such activity supposedly has no effect on flooding. However there is no discussion of the potential habitat destruction that may occur from the construction activities (such as walking in and through the sensitive vegetation, dropping construction materials, etc.). At a minimum, such unintentional damage should be remediated by the person or entity permitted for the construction activities. (45)

RESPONSE: The permit-by-rule requires that “no vegetation is cleared, cut or removed in a riparian zone, except for vegetation within 20 feet of the building if such disturbance is necessary to facilitate the construction of the addition.” The Department believes that allowing a small amount of temporary riparian zone disturbance around the building in order to access the addition during construction is appropriate. It is the Department’s experience that, in most cases, vegetation within 20 feet of a lawfully existing building situated in a riparian zone has historically been disturbed due to continual access to the building, periodic mowing of lawn areas, planting of gardens, pruning and other such disturbances typically associated with the use of a building. Furthermore, since “all vegetated areas temporarily disturbed within the riparian
zone are replanted with indigenous, non-invasive species upon completion of the regulated activity” under this permit-by-rule, the Department believes that there will be no lasting adverse impact to riparian zone vegetation beyond what the presence of the building in the riparian zone has already created.

N.J.A.C. 7:13-7.2(b)8

481. COMMENT: This rule should be revised to take into consideration agricultural buildings. This limit of 150 square feet is unreasonable for livestock shelter; pump station enclosures, equipment sheds and related agricultural buildings. (26)

RESPONSE: The construction of an agricultural building of no more than 1,000 square feet is permitted-by-rule at N.J.A.C. 7:13-7.2(f)4.

482. COMMENT: Construction of a non-habitable building in a flood fringe of no more than 150 square feet and only 25 feet of any top of bank should not be allowed. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: This permit-by-rule requires that such a building be situated outside a floodway, at least 25 feet from any top of bank and, if located in a riparian zone, only within areas where previous development or disturbance has occurred, such as an area maintained as a lawn or garden or an abandoned parking area that has partially revegetated. The Department believes that these restrictions will ensure that a building constructed under this permit-by-rule will not cause adverse impacts to flooding or the environment.

N.J.A.C. 7:13-7.2(b)8 through 12

483. COMMENT: A non-habitable building, an open structure, or a recreational structure should not be allowed to be constructed in the flood fringe, regardless of size or distance from the water or bank. (10, 67)
RESPONSE: Given that many existing communities are wholly or partially situated within flood hazard areas, the Department does not believe that it is appropriate to prevent the construction of small buildings or recreational structures ancillary to a private residence or other existing building, provided certain requirements are met to ensure that construction will not cause adverse impacts to flooding or the environment. It is not the Department’s intention to preclude the reasonable use of existing properties within flood hazard areas, but rather to ensure that such use is undertaken responsibly and without adverse consequences to flooding or the environment. The Department believes that the stringent requirements placed on the activities addressed under the permits-by-rule at N.J.A.C. 7:13-7.2(b)8 through 12 will ensure that these activities will not cause such adverse impacts. As such, the Department believes the adoption of these permits-by-rule is appropriate.

N.J.A.C. 7:13-7.2(b)9

484. COMMENT: The requirement that “no vegetation” be disturbed for building an open structure is unreasonable and should be eliminated from the rules. (26)

RESPONSE: The permit-by-rule at N.J.A.C. 7:13-7.2(b)9 does allow the disturbance of riparian zone vegetation for building an open structure, provided the disturbance occurs “where previous development or disturbance has occurred (such as an area maintained as a lawn or garden or an abandoned parking area that has partially revegetated).” The Department believes this requirement is necessary in order to preserve undisturbed riparian zone vegetation from unnecessary adverse impacts.

N.J.A.C. 7:13-7.2(b)11

485. COMMENT: We object to allowing construction of an aboveground swimming pool in a flood fringe provided no more than 100 cubic yards of flood storage volume is displaced and is located 25 feet from any top of bank. Any displacement of flood storage should comply with the no-net-fill requirement. (20, 38, 41, 54, 60, 63, 69)
RESPONSE: The construction of an aboveground swimming pool in a flood fringe that displaces no more than 100 cubic yards of flood storage volume is a non-regulated use under repealed N.J.A.C. 7:13-1.3(f)2ii, and has been continued under the permit-by-rule at N.J.A.C. 7:13-7.2(b)11. As noted in the response to comment 483, considering that many existing communities are wholly or partially situated within flood hazard areas, the Department does not believe that it is appropriate to prevent the construction of small buildings or recreational structures ancillary to a private residence or other existing building, provided certain requirements are met to ensure that construction will not cause adverse impacts to flooding or the environment. The Department believes that the requirements placed on the construction of a swimming pool under this permit-by-rule will ensure that no such adverse impacts will occur. With these limitations, the Department believes the adoption of this permit-by-rule is appropriate.

N.J.A.C. 7:13-7.2(b)12

486.COMMENT: This permit-by-rule should be revised to be more specific. Pool fences are required for security purposes and therefore cannot be “open as possible”. (26)

RESPONSE: The Department recognizes that there are a large number of types of fences, many of which include large open areas that allow floodwaters to pass freely. It is not the Department’s intention to specify a particular type of fence be used under this permit-by-rule, but rather to require the use of a fence that is “as open as possible to allow the passage of floodwaters” while also meeting any local construction and safety codes that may apply.

N.J.A.C. 7:13-7.2(b)14

487.COMMENT: What is the significance of the one-acre requirement under this permit-by-rule? The size of the lake or pond should have no bearing on the other requirements associated with the dock. (26)
RESPONSE: This permit-by-rule authorizes the construction of a dock in certain impounded waters, such as a lake, pond or reservoir. The construction of a dock will displace a certain volume of water. If the impounded water is large, the displacement caused by the dock is negligible. However, if the impounded water is small, the displacement caused by the dock may become significant and may cause adverse impacts to flooding, since the dock may obstruct the flow of water within the lake, pond or reservoir. As such, the Department has determined that an impounded water having a surface area of one acre or more will not be adversely affected by the construction of a dock, provided the other requirements of this permit-by-rule are satisfied.

N.J.A.C. 7:13-7.2(b)15 and 16

488. COMMENT: Above ground fuel tanks should not be allowed in the flood fringe. This is a relaxation of existing rules, and may cause significant water quality and safety impacts, such as fuel tanks and propane tanks carried by floodwaters into the Delaware River. A recent accidental spill from an oil tank at a residence allowed fuel oil to discharge into the Delaware and Raritan Canal. (10, 67)

489. COMMENT: An underground fuel storage tank should not be allowed within the flood fringe, regardless of area disturbed, safeguards taken and restoration efforts and advantages. This is a relaxation of the existing rules which are consistent with NJPDES pollution prevention strategies and wellhead water supply protections. Underground fuel tanks have resulted in contaminated groundwater, impacting both the receiving aquifer and the receiving stream. This section can be construed to allow commercial gas stations as well as residences to locate underground fuel tanks within 25 feet of the top of bank or the edge of water in the flood fringe. Gas stations are not adequately regulated in the State and leak prevention programs are notoriously under-funded.(10, 67)

490. COMMENT: The activities under the proposed permits-by-rule at N.J.A.C. 7:13-7.2(b)15 and 16 (placing an aboveground fuel tank of no more than 2000 gallons in a flood fringe, and placing an underground fuel tank, respectively) should not be permitted-by-rule. Neither of these
structures belong in a flood hazard area and the Department should do all that is necessary to prevent their occurrence. Requiring a general permit or an individual permit for these activities will allow the Department to be involved in both the better situating of these structures and/or an earnest analysis of alternatives. (37)

491. COMMENT: We oppose allowing construction of an underground fuel tank within or adjacent to the building it serves and if 25 feet from top of bank. Not only is there the danger of leaking fuel into the flood fringe, but the problem of erosion around the tank during flooding. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 488 THROUGH 491: While the repealed rules at N.J.A.C. 7:13-2.2(a)3 and (c)1 prohibit the storage of petroleum products in flood hazard areas, the Department recognizes that many homes and businesses are situated within flood hazard areas, and that these homes and business often need to replace or add fuel tanks. This is especially true in rural areas where natural gas service is unavailable, and homes and businesses require fuel oil or propane tanks to provide heat and/or hot water. If a lawfully existing building lies in a flood hazard area, and a fuel tank is required to serve this building, the placement (or replacement) of the fuel tank in the flood hazard area may be unavoidable. Furthermore, if a new home or business, which meets all requirements of this chapter, is constructed in a flood hazard area, the Department does not believe that it is reasonable to prevent the placement of a new fuel tank to serve the new home or business, provided the tank is constructed to preclude adverse impacts to flooding or the environment. Therefore, rather than prohibit tanks in such cases, the Department has instead adopted the permits-by-rule at N.J.A.C. 7:13-7.2(b)15 and 16 to ensure that such tanks are constructed properly and without such adverse impacts. The Department also recognizes that other State and local regulations are in place to ensure that new fuel tanks are constructed safely and properly. The Department believes that the requirements of these new permits-by-rule, in combination with other State rules and local ordinances, will ensure that such tanks will not cause adverse impacts to flooding or the environment, and as such review under a general permit or individual permit is not necessary.
Small aboveground fuel tanks constructed under the permit-by-rule at N.J.A.C. 7:13-7.2(b)15 will not obstruct flow, will displace little flood storage volume and will not adversely impact the environment since they must be anchored and remain watertight during a flood. A restriction on destruction of vegetation in the riparian zone is included, as well as a limit on the proximity to a channel in order to protect channel integrity. The riparian zone vegetation permanently lost is minimal and all temporarily disturbed riparian zone vegetation must be replanted with indigenous, non-invasive species upon completion of the tank placement. Since larger tanks, tanks in closer proximity to a channel, or tanks that result in larger amounts of riparian zone disturbance could present flooding or environmental hazards, such tanks are not authorized under this permit-by-rule.

Similar to N.J.A.C. 7:13-7.2(b)15, the permit-by-rule at N.J.A.C. 7:13-7.2(b)16 authorizes the construction of an underground fuel tank within or adjacent to the building it serves. A tank located underground and designed to remain watertight during a flood poses no flooding hazard. A restriction on destruction of vegetation in the riparian zone is included, as well as a limit on the proximity to a channel in order to protect channel integrity. The riparian zone vegetation permanently lost is minimal and all temporarily disturbed riparian zone vegetation must be replanted with indigenous, non-invasive species upon completion of the tank placement. As with tanks constructed under the permit-by-rule at N.J.A.C. 7:13-7.2(b)15, larger tanks, tanks in closer proximity to a channel, or tanks that result in larger amounts of riparian zone disturbance could all present flooding or environmental hazards. Therefore, such tanks are not authorized under this permit-by-rule.

492. COMMENT: Anchoring requirements should be included in these regulations regarding securing above-ground fuel tanks to protect against flotation, damage, or release of toxic chemicals and gases from being released into the waterways. (56)

RESPONSE: N.J.A.C. 7:13-7.1(b)2 requires that any structure authorized under a permit-by-rule in this chapter must be suitably anchored.

N.J.A.C. 7:13-7.2(b)18
493. COMMENT: The Delaware and Raritan Canal Water Supply Transmission Complex must be maintained as a water supply facility, including all maintenance, repair, structural replacement activities that affect only the canal, its embankments and the associated towpath/access roads. The rules appear to have this intent. However, it is not clear that where the canal structure is within the riparian zone, vegetation removal and other maintenance will be allowed under a permit-by-rule on the embankment and other parts of the canal, where the natural riparian zone areas would not be affected. (66)

RESPONSE: Manmade canals are not regulated under this chapter, pursuant to N.J.A.C. 7:13-2.2(a)1, and therefore do not posses their own flood hazard area or riparian zone. However, a canal can lies within the flood hazard area or riparian zone of another, regulated water, work within and along the canal is subject to the requirements of this chapter. The permit-by-rule at N.J.A.C. 7:13-7.2(b)18 has been established to facilitate normal maintenance activities associated within canals that lies within the regulated area of another water. In cases where a canal lies within the riparian zone of a regulated water, this permit-by-rule does allow the removal of riparian zone vegetation with certain restrictions. N.J.A.C. 7:13-7.2(b)18iii does therefore allow the removal of riparian zone vegetation for maintenance activities on the embankment and other parts of the canal, provided that “no trees are cleared, cut or removed.” N.J.A.C. 7:13-7.2(b)18iv furthermore requires that “all vegetated areas temporarily disturbed within the riparian zone” must be “indigenous, non-invasive species upon completion of the regulated activity.” In cases where the canal lies outside the riparian zone, there is no restriction on the clearing, cutting or removal of vegetation. Furthermore, in cases where the canal lies outside both the flood hazard area and riparian zone, activities within the canal are not subject to the requirements of this chapter, since the canal itself is exempt from regulation pursuant to N.J.A.C. 7:13-2.2(a)1 as noted above. The requirements of the adopted new rules apply to canals only in areas where the canal passes through the riparian zone or flood hazard area of a regulated water.
494. COMMENT: Regarding N.J.A.C. 7:13-7.2(b)18ii, please clarify whether temporary stockpile of material in the flood hazard area is permitted where that material is derived from, or is to be used for, a stream restoration project also in the flood hazard area. (66)

RESPONSE: Temporary stockpiling of unsecured material in the flood hazard area, which is necessary for a lawful construction activity, is permitted-by-rule at N.J.A.C. 7:13-7.2(e)1. Therefore, temporary stockpiling of soil is allowed.

495. COMMENT: Regarding N.J.A.C. 7:13-7.2(b)18iii, does this provision refer to temporary or permanent removal of vegetation? (66)

RESPONSE: N.J.A.C. 7:13-7.2(b)18iii requires that “no trees are cleared, cut or removed in a riparian zone.” This prohibits both temporary and permanent disturbance to trees. However, pruning and selective tree removal, as well as other maintenance activities within lawns, parks and easements, are permitted-by-rule in some cases at N.J.A.C. 7:13-7.2(b)1. The clearing, cutting or removal of riparian zone trees along a canal, which does not meet the permits-by-rule at N.J.A.C. 7:13-7.2(b)1 or 18, would require an individual permit from the Department.

496. COMMENT: Dredging of a channel or embankments of a stream should not be allowed under a permit-by-rule. Past history indicates that such activities have been expanded beyond what should be allowed as repair, and an individual permit should be required. (10, 67)

RESPONSE: The permit-by-rule at N.J.A.C. 7:13-7.2(b)18 does not permit the dredging of the channel or embankments of any stream. This permit-by-rule applies only to work within a canal, in areas where the canal passes through the riparian zone or flood hazard area of a regulated water. Dredging a stream channel requires authorization under a general permit or individual permit, as applicable.

N.J.A.C. 7:13-7.2(c)
497. COMMENT: We support the creation of a new permit-by-rule under N.J.A.C. 7:13-7.2(c) for vegetation management in rights-of-way. The proposed permit-by-rule should include the use of herbicides in right-of-way areas, consistent with the recognized Best Management Practices of Atlantic Electric’s Integrated Vegetation Management program. (36)

498. COMMENT: An additional permit-by-rule should be codified at N.J.A.C. 7:13-7.2(c) to read as follows: Conducting periodic and routine vegetation management of existing rights-of-way used for utility lines, provided:

i. All vegetation management activities are conducted in accordance with the best management practices of an overall integrated vegetation management program;

ii. All vegetation management activities are conducted in accordance with any vegetation management standards duly promulgated by any agency having jurisdiction over the electric utility industry, such as the New Jersey Board of Public Utilities.

iii. Within the riparian zone, the extent of vegetation clearing, cutting or removal will be the minimum necessary to maintain the utility line and assure electric system reliability on a vegetation management cycle that is consistent with any requirements of the New Jersey Board of Public Utilities and good industry practices.' (22)

RESPONSE TO COMMENTS 497 AND 498: The permit-by-rule at N.J.A.C. 7:13-7.2(b)1 allows various vegetation management activities within easements that pass through riparian zones, not including the application of herbicide. The Department does not believe that it is appropriate to allow herbicides to be administered in riparian zones without Department oversight. A utility company can, however, apply for an individual permit under N.J.A.C. 7:13-11.9(f) which would authorize for five years any maintenance, repair and replacement activities that are not covered under the adopted permits-by-rule.

499. COMMENT: The existing rules designate certain utility uses as “non-regulated uses,” which means they are not subject to the Flood Hazard Act. This reflects an appropriate recognition by the Department that certain utility activities in floodways and flood fringe areas have little if any
impact on the flood carrying capacity of the flood plain and that utilities have a public service
obligation under New Jersey law to serve all of their customers, wherever those customers are
located. (1)

RESPONSE: Many of the non-regulated uses under repealed N.J.A.C. 7:13-1.3(e) and (f) have
been adopted as permits-by-rule under new N.J.A.C. 7:13-7.2. For example, whereas repealed
N.J.A.C. 7:13-1.3(f)2iv exempted utility poles and towers located in a flood fringe, the adopted
new permits-by-rule at N.J.A.C. 7:13-7.2(c)1 and 2 permit these activities with certain
restrictions. The Department believes that it is appropriate to consider all construction activities
within flood hazard areas and riparian zones to be regulated under this chapter, and to then adopt
various permits-by-rule to cover those activities which the Department has determined will not
adversely impact flooding or the environment. The placement of utility poles and towers, which
conform to the permits-by-rule at N.J.A.C. 7:13-7.2(c)1 and 2, need no prior notification to, or
approval from, the Department.

500.COMMENT: Utility poles and underground utility lines should be located outside of the
flood fringe and riparian zone for safety and for the protection of the functions of the flood
hazard area and riparian zone. Underground utilities that must cross a stream should be required
to obtain an individual permit. (10, 67)

501.COMMENT: At 38 N.J.R. 3980, it is stated that "the Department intends to encourage
utility companies to avoid the impacts associated with cutting an open trench across a channel."
Why only encourage and not require avoidance of impacts associated with cutting an open trench
across a channel? (45)

RESPONSE TO COMMENTS 500 AND 501: It is the Department’s experience that while some
utility crossings of flood hazard areas, riparian zones and channels can be avoided, some cannot.
For example, an existing home located in a flood hazard area may require the placement (or
replacement) of electric cables, sewer lines, water mains and other utility lines in order to
continue to receive essential services. Furthermore, the Department also recognizes that, due to
the topography of a site, the accessibility of a channel to construction equipment and the proximity of a proposed utility line to existing structures, the placement of a new underground utility line sometimes necessitates the construction of an open trench across a channel. The Department does not, therefore, believe that it is reasonable to prohibit the placement of utility lines in these areas, or to prevent, in all cases, the construction of a trench.

However, the Department does believe that utility lines should be located outside these areas, where possible, and furthermore that utility lines, which must necessarily be located within these areas, should be constructed with minimal impact to flooding and the environment. For these reasons, the Department has adopted certain permits-by-rule under N.J.A.C. 7:13-7.2(c), which the Department believes will facilitate the placement of utility lines so as not to adversely impact flooding or the environment. For example, the permit-by-rule at N.J.A.C. 7:13-7.2(c)3 allows the jacking of a utility line beneath a channel. Under this permit-by-rule, the regulated water cannot be disturbed, no trees within the riparian zone can be cleared, cut or removed, and all disturbed areas within the flood hazard area and riparian zone must be restored to their original condition. Similarly, the permits-by-rule at N.J.A.C. 7:13-7.2(c)4, 5, and 6 allow for the placement of a utility line within a roadway, the attachment of a utility line to a bridge and the placement of an underground utility line outside a riparian zone, respectively. By adopting these permits-by-rule, which allow for the placement of utility lines in such a way as to cause no adverse impacts to flooding or the environment, the Department believes that utility companies will be encouraged to perform work under these permits-by-rule, and thereby avoid the need for a general or individual permit. Consequently, N.J.A.C. 7:13-11.9(b)1, 2 and 3, which apply to individual permits for utility lines, require that an applicant demonstrate that construction under the aforementioned permits-by-rule is not feasible, in order for the Department to consider an application to construct a utility line across or under a channel or regulated water.

502. COMMENT: Proposed amendments at N.J.A.C. 7:13-7.2(c)1iii, 2iv, 4ii, and 5ii are quite similar and in each instance would improperly prohibit or unduly restrict electric utilities in meeting their primary and longstanding responsibility to prevent right-of-way damage and power outages through the use of well-established and environmentally sound vegetation management practices. For those reasons, electric utilities have sophisticated BMP programs for vegetation
management. These factors, together with the fact that this matter is within the special competence of the Board of Public Utilities, see Boss v. Rockland Electric, 95 N.J. 33, obviate the need for further regulation under the Flood Hazard Act. (36)

RESPONSE: The requirements cited by the commenter place various restrictions on the disturbance of riparian zone vegetation associated with the placement of utility lines and appurtenant structures. The Department believes that it is appropriate to place such restrictions under these permits-by-rule in order to protect riparian zone vegetation from unwarranted and adverse impacts. As noted in the response to comment 441, the adopted new rules include a permit-by-rule at N.J.A.C. 7:13-7.2(b)1, which allows various vegetation management activities within existing rights-of-way. By adopting these new permits-by-rule, the Department is not preventing activities that exceed the limits contained within each permit-by-rule. Rather, in cases where an applicant proposes to perform vegetation management activities that exceed the limitations of a permit-by-rule, the Department believes that it is appropriate to perform a project-specific review of such activities under an individual permit, pursuant to N.J.A.C. 7:13-9, 10 and 11, in order to determine if such riparian zone disturbance is warranted. Also, as noted in the response to comments 497 and 498, a utility company can apply for an individual permit under N.J.A.C. 7:13-11.9(f) to cover any maintenance, repair and replacement activities within an entire utility network for a five-year period, which is not covered under the adopted permits-by-rule at N.J.A.C. 7.2(c)1-6.

503. COMMENT: This proposed section authorizes the placement of utility poles, towers, or lines in the flood hazard zone. Not only do such utility structures cause visual eyesores in these sensitive habitats, but they also cause degradation to the environment. Allowing utility structures to be built in the flood hazard zone simply because the floodway limits are often unknown is no excuse. There are plenty of places for utility structures, and the flood hazard zone should not be one of them. (45)

RESPONSE: Due to the location of homes and businesses within flood hazard areas and riparian zones throughout the State, the Department recognizes that it is sometimes necessary to place
utility poles and towers within or across these areas. Since the placement of these structures in regulated areas is sometimes unavoidable, the adopted new rules include several permits-by-rule designed to allow the placement of utility poles and towers in a manner that will not adversely impact flooding or the environment. The placement of poles and towers that do not meet the requirements of these permits-by-rule require an individual permit, so that the Department can assess whether the structure will cause adverse impacts.

Regarding construction in the floodway, open-frame towers cannot be placed in a floodway under the permit-by-rule at N.J.A.C. 7:13-7.2(c)2. Utility poles, however, are much smaller than towers, and cause little or no obstruction to the flow of floodwaters if placed in a floodway. Therefore the permit-by-rule at N.J.A.C. 7:13-7.2(c)1 allows utility poles in a floodway provided the pole is situated at least 25 feet from any top of bank or edge of water.

N.J.A.C. 7:13-7.2(c)1

504.COMMENT: This section discusses specific utility activities. As proposed, this section may seriously impact safety and reliability of electric service. Specifically, this section appears to apply to new installations of utility poles since the replacement of a broken or damaged pole would be considered ‘normal maintenance”. However, utility companies do not always choose the location of new poles. As part of a linear development, poles are often located in the most effective location for distributing the essential service to the public. The inability to clear trees for new utility lines will not permit the utility to safely locate facilities within this area, and will not permit the utility to properly maintain these facilities. Accordingly, we propose the following revisions: “The placement of one or more utility poles (which are not covered under “normal maintenance” at (b)1 above or open frame-towers as described in (c)2 below) for utility, provided”. We also suggest revising subsection (iii) as follows: “iii. No trees are cleared, cut or removed in a riparian zone, unless reasonably necessary for the safety and reliability of the utility line or unless required by other State or Federal regulations.” (22)

505.COMMENT: Proposed N.J.A.C. 7:13-7.2(c)1iii should be deleted and replaced with “Clearing, cutting or removing vegetation in a riparian zone shall be limited to the minimum area
necessary to allow for placement, maintenance and safe and reliable operation of one or more utility poles.” (36, 42)

RESPONSE TO COMMENTS 504 AND 505: The permit-by-rule at N.J.A.C. 7:13-7.2(c)1 allows the placement of utility poles, provided “no trees are cleared, cut or removed in a riparian zone.” Nevertheless, the Department recognizes that there are situations which warrant the removal of trees in order to accommodate the installation or replacement of utility poles. In such a case, the adopted permit-by-rule would not cover the activity, and an individual permit would instead be required to accommodate the tree removal. Tree removal is not prohibited under this chapter. The Department has simply determined that tree removal associated with the placement of utility poles should not be permitted-by-rule and should rather be reviewed under an application for an individual permit. Furthermore, as noted in the response to comments 497 and 498, a utility company can apply for an individual permit under N.J.A.C. 7:13-11.9(f) to cover any maintenance, repair and replacement activities within an entire utility network for a five-year period, which is not covered under the adopted permits-by-rule at N.J.A.C. 7.2(c)1-6.

506. COMMENT: Regarding N.J.A.C. 7:13-7.2(c)1iii, if it is a requirement to avoid all trees, it will therefore be necessary to construct more poles, towers etc. Further, “tree” is not specifically defined; does this include whips, saplings, seedlings, shrubs? (26)

RESPONSE: As noted in the response to comment 504, the Department recognizes that there are situations that warrant the removal of trees in order to accommodate the installation or replacement of utility poles. In such a case, the permit-by-rule at N.J.A.C. 7:13-7.2(c)1 would not cover the activity, and an individual permit would be required to accommodate the tree removal. With regard to the term “tree,” a definition has been adopted at N.J.A.C. 7:13-1.2, which reflects the Department’s longstanding usage of the word and is identical to the definition under the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4.

N.J.A.C. 7:13-7.2(c)2
507. COMMENT: As proposed this section will significantly impact and possibly eliminate the location of electric transmission lines in riparian zones. This section is directly in conflict with the New Jersey Board of Public Utilities’ vegetation management regulations, which completely require removal of vegetation on new transmission lines, N.J.A.C. 14:5-8.1 et seq. Similarly, this proposed rule is in direct conflict with the Pennsylvania-Jersey-Maryland Regional Transmission Organization’s design standards for new transmission facilities and the National Electric Safety Code, which require transmission right-of-ways to be cleared of trees to provide for the safety of the transmission lines and the proper area of maintenance of these facilities. PSE&G is required to meet these safety standards when constructing new transmission lines. We therefore recommend deleting this section in its entirety, and exempting transmission facilities from regulation. However, should the Department decide to not exempt transmission facilities from these regulations, we suggest the following:

1. Replace N.J.A.C. 7:13-7.2(c)2i with the following: “Each tower’s footing is constructed such that no more than 16 square feet of footing per leg of tower extends above grade. At the utility’s discretion, the footings may extend one foot or more above the flood hazard area design flood elevation.”

2. Replace N.J.A.C. 7:13-7.2(c)2iv with the following: “Clearing, cutting or removing vegetation in a riparian zone shall be limited to the minimum area necessary to allow for the placement of one or more open-frame towers.” (22)

508. COMMENT: Proposed N.J.A.C. 7:13-7.2(c)2iv should be deleted and replaced with “Clearing, cutting or removing vegetation in a riparian zone shall be limited to the minimum area necessary to allow for placement, maintenance and safe and reliable operation of one or more open-frame towers.” An integral part of the installation and maintenance of any electric utility right-of-way is to conduct proper vegetation management to remove, trim or control those trees that could contact the wires and thereby cause damage and/or power outages. All electric utilities have integrated and sophisticated best management programs to properly establish utility line rights-of-way and to maintain those ROWs, including vegetation management. (36, 42)
509.COMMENT: Contrary to the implication of proposed N.J.A.C. 7:13-7.2(c)2i, it is often infeasible to construct an open-frame electric power transmission tower’s footing at or below grade. That is because, among things, the linear nature of such towers requires construction within flood fringe areas, and protecting various metal components that comprise a given tower’s support structure from corrosion requires footing elevations above the design flood elevation. Put another way, an electric utility constructs its towers to appropriate construction and engineering standards and these standards protect against corrosion of the tower materials and provide necessary structural integrity. In short, exposing a steel pole or tower to flood water causes accelerated corrosion and, for that reason, standard design practice is to place the top of the steel structure’s foundation above flood level. Thus, the restrictions in this permit-by-rule are counterproductive – they would result in more, rather than less, environmental impact due to more frequent tower maintenance, repair and replacement – and should be eliminated in any final amended FHA regulations. Instead, the rule should be revised to require each tower’s footing to be constructed to appropriate construction and engineering standards and, as necessary to protect the footing and the tower metal latticework, the footings may extend above the flood hazard area design flood elevation. (36, 42)

RESPONSE TO COMMENTS 507 THROUGH 509: Tree removal is not prohibited under this chapter. However, due to the significant amounts of riparian zone vegetation that need to be removed to accommodate a new transmission lines, the Department has determined that this activity should not be permitted-by-rule and should rather be reviewed under an application for an individual permit. Similarly, regarding the construction of transmission towers that have footings that extend above grade, such construction is not prohibited under this chapter. However, given the potential for such structures to obstruct flood flows and/or displace flood storage volume, the Department has determined that this activity should not be permitted-by-rule and should rather be reviewed under an application for an individual permit.

Finally, with regard to the maintenance of existing transmission lines, the permit-by-rule at N.J.A.C. 7:13-7.2(b)1 allows various activities within existing easements, which should accommodate many necessary maintenance activities required by other State and Federal
statutes. In cases where maintenance of existing lines exceeds the requirements of this permit-by-rule, a utility company can apply for an individual permit under N.J.A.C. 7:13-11.9(f) to cover any maintenance, repair and replacement activities within an entire utility network for a five-year period.

N.J.A.C. 7:13-7.2(c)3

510. **COMMENT:** Contrary to the assumptions that appear to underlie N.J.A.C. 7:13-7.2(c)3, use of directional drilling to construct underground lines is frequently not a viable alternative to overhead transmission facilities. In fact, such underground lines can be difficult and very time consuming to repair, placing the electric consumer at greater risk. Moreover, certain components of underground lines must be placed aboveground. In addition, underground lines, just like their overhead counterparts, require a clear and accessible right-of-way. Furthermore, using directional drilling to construct underground lines can cause ground fractures which, in turn, result in unintended directional drilling fluid returns to the surface and associated filling or other damage to wetlands and waterways. (36, 42)

511. **COMMENT:** Delete proposed language at N.J.A.C. 7:13-7.2(c)3ii and replace it with language providing that clearing, cutting or removing trees in a riparian zone shall be limited to the minimum area necessary to safely locate and operate the directional drilling equipment. Situations may be encountered, where in order to utilize this technology, areas on either side of the channel must be cleared of vegetation, particularly trees, to enable the safe set up and operation of the equipment. Therefore a prohibition on tree clearing, cutting or removal could preclude the use of this permit-by-rule because the utility could not comply with its requirements. Additionally, after installation of the underground line is complete, the area cleared would be re-vegetated per condition 3iii. Therefore this condition is not only counterproductive but unnecessary. (42)

512. **COMMENT:** Directional drilling of utility lines is often the method of least impact for gas and electric line installation. However, situations may be encountered where in order to utilize
this technology, areas on either side of the channel must be cleared of vegetation, particularly trees, to enable the set up and operation of the equipment. Therefore a prohibition on tree clearing, cutting or removal could have the unwanted effect of precluding the use of this technology and forcing the utility to use another alternative, with potentially greater impact. Additionally, after installation of the underground line is complete, the area cleared normally would be re-vegetated. Therefore this condition is not only counterproductive, but also unnecessary. Accordingly, we propose the deletion of this section completely and replace it with the following: “Clearing, cutting or removing trees in a riparian zone shall be limited to the minimum area necessary to safely locate and operate the directional drilling equipment.”

RESPONSE TO COMMENTS 510 THROUGH 512: The Department acknowledges that directional drilling may not always be a viable alternative for the placement of electric transmission facilities across a channel. In cases where directional drilling is viable, the adopted permit-by-rule at N.J.A.C. 7:13-7.2(c)3, which sets forth standards to ensure that directional drilling will not adversely impact flooding or the environment, is available to applicants. Furthermore, this permit-by-rule does not force utility companies to use directional drilling in cases where a utility line must cross a channel, but rather establishes a means by which directional drilling can be performed without a general permit or individual permit.

Regarding the requirement at N.J.A.C. 7:13-7.2(c)3ii that “no trees are cleared, cut or removed in a riparian zone,” the Department believes that this requirement is necessary to protect riparian zone vegetation from adverse impacts. In cases where the removal of trees from the riparian zone is warranted to accommodate directional drilling, a utility company can apply for an individual permit pursuant to N.J.A.C. 7:13-11.9.

513.COMMENT: Revise N.J.A.C. 7:13-7.2(c)3vi to insert the word “nominally” before “horizontal. It would then read: “…If the line is jacked… and remains nominally horizontal….” While directional drilling of a utility line is possible, the placement of that line as accurately as DEP proposes is often not possible within current technological constraints. Directional drilling often shifts direction over distance and will not remain in a strictly horizontal position. (42)
514. COMMENT: The section addresses the placement of a utility line beneath a regulated water through directional drilling or “jacking”. While directional drilling of a utility line is possible, the placement of that line with the accuracy proposed by the Department in this section is often not possible within current technological constraints. Directional drilling often shifts direction over distance and will not remain in a strictly horizontal position. We therefore propose that the Department include the word “nominally” before “horizontal” at N.J.A.C. 7:13-7.2(c)3vi. (22)

RESPONSE TO COMMENTS 513 AND 514: The Department recognizes that, considering the construction methodologies currently available, it is not reasonable or necessary to require a utility line to be placed perfectly horizontal beneath a channel. The requirement that a utility remain horizontal is intended to ensure that the utility line, once placed beneath a channel, will not become exposed over time due to erosion or channel migration. A slight deviation from horizontal is not significant in this regard. Therefore, the adopted language has been revised in this permit-by-rule, and also at N.J.A.C. 7:13-11.9(b)9, which sets forth standards for utility lines under an individual permit, to require that the utility line remain “nominally horizontal” beneath the channel.

N.J.A.C. 7:13-7.2(c)4

515. COMMENT: How does the presence of a manhole affect flooding, specifically if it is flush to the ground? Notwithstanding the Department’s explanation to the former question, the reference to manholes that are “situated within a paved roadway” should be revised to include other impervious surfaces such as parking areas. (26)

RESPONSE: A manhole that is not flush with the ground can obstruct flows in a floodway and can displace flood storage volume in a flood fringe. Therefore, manholes under this permit-by-rule must be constructed flush with the ground. Regarding the placement of manholes within a paved roadway, the purpose of this requirement is to ensure that manholes constructed in close proximity to a channel will not become undermined due to erosion or channel migration over time. Thus, a requirement is included that no manhole is can be “constructed within 10 feet of
any top of bank or edge of water (unless situated within a paved roadway),” since the presence of pavement will protect the manhole from such damages. The intent of this provision is to ensure that the manhole is surrounded by pavement if constructed in close proximity to a channel, and not whether the pavement results from a roadway, parking lot or other paved area. Consequently, the adopted new rules have been clarified to reflect the Department’s intention to allow such manholes to be constructed in any paved surface.

516. COMMENT: Proposed N.J.A.C. 7:13-7.2(c)4ii should be deleted and replaced with the following: “Clearing, cutting or removing vegetation in a riparian zone shall be limited to the minimum area necessary to allow for placement, maintenance and safe and reliable operation of the underground utility and all vegetated areas temporarily disturbed within the riparian zone shall be replanted with indigenous, non-invasive species upon completion of the regulated activity.” (36, 42)

517. COMMENT: We suggest deletion of the presently proposed language of N.J.A.C. 7:13-7.2(c)4ii and replace it with the following: “Clearing, cutting or removing vegetation in a riparian zone shall be limited to the minimum area necessary to allow for placement of the underground utility; and all vegetated areas temporarily disturbed within the riparian zone are replanted with indigenous, non-invasive species upon completion of the regulated activity;” (22)

RESPONSE TO COMMENTS 516 AND 517: The permit-by-rule at N.J.A.C. 7:13-7.2(c)4 allows the placement of an underground utility line beneath existing pavement within a regulated area, such as under an existing parking lot in the flood hazard area or under an existing roadway that crosses a regulated water. It is the Department’s experience that the placement of an underground utility line within existing pavement should not require any disturbance outside the paved area. Thus, since the disturbance of riparian zone vegetation is not generally warranted for this activity, the permit-by-rule appropriately requires that “no vegetation is cleared, cut or removed in a riparian zone.” In cases where a utility company can demonstrate that such riparian zone disturbance is necessary, an applicant can request an individual permit under N.J.A.C. 7:13-11.9.
N.J.A.C. 7:13-7.2(c)5

518. COMMENT: The section applies to the attachment of a utility line to a roadway. These regulations will significantly impact utility service to the residents of New Jersey. Therefore this entire section should be deleted. Absent complete deletion, we believe that item “ii” is unnecessary in this proposal. The clearing, cutting or removal of vegetation in an existing ROW that is periodically mowed is part of “normal maintenance”. (22)

519. COMMENT: Proposed N.J.A.C. 7:13-7.2(c)5ii should be deleted and replaced with “Clearing, cutting or removing vegetation in a riparian zone shall be limited to the minimum area necessary to allow for attachment of the utility line to the existing roadway, and safe and reliable operation and maintenance thereof.” (36, 42)

RESPONSE TO COMMENTS 518 AND 519: The permit-by-rule at N.J.A.C. 7:13-7.2(c)5 allows the attachment of a utility line to a lawfully existing roadway that crosses a regulated water. In cases where attaching a utility line to a roadway is viable, the adopted permit-by-rule, which sets forth standards to ensure that such projects will not adversely impact flooding or the environment, is available to applicants. Furthermore, this permit-by-rule does not force utility companies to attach utility lines to roadways in cases where a utility line must cross a channel, but rather establishes a means by which attaching can be performed without a general permit or individual permit.

N.J.A.C. 7:13-7.2(c)6

520. COMMENT: An underground utility line outside of the riparian zone should not be regulated at all, as there is no impact from such improvements on flooding, especially due to the fact that all lines are generally sealed to prevent loss of product. (26)
RESPONSE: The Department agrees that an underground utility line outside of the riparian zone but within the flood hazard area will not cause adverse impacts to flooding or the environment, provided the utility line is constructed as established under the permit-by-rule at N.J.A.C. 7:13-7.2(c)6. The improper construction of such a utility line can result in obstructions to flood flows, flood storage displacement, leakages and other adverse impacts. Therefore, the Department believes that the adopted permit-by-rule is appropriate.

N.J.A.C. 7:13-7.2(d)

521. COMMENT: Roadways and parking areas should be relocated outside of flood hazard areas and riparian zones wherever possible. Repaving, resurfacing, repair, associated guardrails, all should only be allowed if no other alternative is possible due to historic development patterns. Any exceptions should be required to provide 25 percent additional floodplain storage for any activity through best management practices that improve the functions of the flood hazard area and riparian zone. (10, 67)

RESPONSE: Due to the large number of New Jersey’s residents that pass through, live or work within flood hazard areas, the Department does not believes that it is reasonable to prevent roadways and parking areas from being constructed or maintained in flood hazard areas and riparian zones. Rather, the Department believes that by establishing the permits-by-rule at N.J.A.C. 7:13-7.2 for the necessary maintenance of roadways and parking areas, adverse impacts to flooding or the environment can be avoided for many projects. In cases where an activity exceeds the limitations of a permit-by-rule under this section, the activity is subject to the individual permit requirements of N.J.A.C. 7:13-10 and 11, which further ensure that flood flows are not obstructed, flood storage displacement is limited and/or eliminated, and environmental resources are preserved.

N.J.A.C. 7:13-7.2(d)
522. COMMENT: This section allows for a permit-by-rule for certain activities associated with paving and parking areas, which may be too restrictive as to limit its import. Specifically, repaving and resurfacing of lawfully existing paved roadways or paved parking areas in the flood fringe area are permitted by rule as long as the surface is not raised by more than three inches. See Proposed Section N.J.A.C. 7:13-7.2(d)1i. We question why such limitation is necessary particularly given that, as the Department admits, “resurfacing is often necessary for the traveling public and thus should not be limited or restricted to flood storage displacement limitations” (38 N.J.R. 3980). While the Department summarily states that the addition of more than 3 inches of pavement as well as resurfacing in a floodway requires an analysis of the potential impacts on flooding, the Department offers no justification for such an analysis. We request that N.J.A.C. 7:13-7.2(d)1i be deleted and that the phrase “in a flood fringe area” be deleted from N.J.A.C. 7:13-7.2(d)1. (22)

523. COMMENT: Resurfacing of a roadway in a flood fringe is allowed under a permit-by-rule. What about resurfacing a roadway crossing over a regulated water? (15, 57)

524. COMMENT: While the permit-by-rule section provides for repaving in the “flood fringe,” it is unclear what type of permit, if any, would be required to resurface existing impervious surfaces such as parking lots or roadways that are within the floodway and flood hazard area. (19)

525. COMMENT: Will the Department issue an individual permit to resurface an existing parking lot or roadways that are within the floodway and flood hazard area? (44)

RESPONSE TO COMMENTS 522 THROUGH 525: The permit-by-rule at N.J.A.C. 7:13-7.2(d)1 authorizes the repaving and/or resurfacing of a lawfully existing paved roadway or paved parking area within a flood fringe, provided the existing grade is not raised by more than three inches. It is the Department's experience that the amount of flood storage volume displaced by raising an existing roadway in a flood fringe by no more than three inches is negligible. However, the addition of more than three inches of pavement, either in one application or
cumulatively, as well as resurfacing a roadway that is located within a floodway, would require an individual permit because the Department must evaluate the potential impacts on flooding in such cases. Raising pavement within a flood fringe by more than three inches can result in a large amount of fill, which should be subject to the flood storage displacement limitations of N.J.A.C. 7:13-10.4, unless the applicant can demonstrate compliance with the exemption at N.J.A.C. 7:13-10.4(d). Furthermore, a roadway crossing of a regulated water would necessarily cross through the floodway of that water. Raising a roadway in a floodway to any extent can cause flood elevations to rise unacceptably, and would be in conflict with the requirements at N.J.A.C. 7:13-11.1(f) and (g). As such, resurfacing a roadway that crosses a regulated water would not be allowed under this permit-by-rule, in cases where the roadway lies within a floodway. The Department therefore believes that it is appropriate to require an individual permit for repaving and/or resurfacing projects that do not meet the requirements of the permit-by-rule at 7:13-7.2(d)1.

526. COMMENT: Repaving is not currently subject to a Stream Encroachment Permit, and as such should not be included in the proposed regulations. In some cases more than 3 inches is required to rectify drainage and road geometry problems that pose a public safety hazard. Requiring review of such minor construction elements will increase cost and delay implementation of such needed measures and jeopardize public safety. (26)

RESPONSE: Repaving did in fact require a stream encroachment permit under the prior rules. The adopted new permit-by-rule will facilitate those repaving projects that the Department has determined will not adversely impact flooding or the environment. Repaving projects that do not meet the requirements of the permit-by-rule at 7:13-7.2(d)1 will require an individual permit from the Department.

N.J.A.C. 7:13-7.2(d)2
COMMENT: Why are guardrails only on a public road by a public entity referenced? Would this impugn safety on private residential roads, corporate access roads, industrial interior roads, private/non-profit recreation areas etc? (26)

RESPONSE: The Department believes that it is appropriate to limit this permit-by-rule to public roadways. Guardrail construction along public roadways is governed by local, State and Federal requirements, which ensure the proper sizing, location and placement of guardrails, requirements that would limit adverse impacts to flooding or the environment. Guardrails constructed along driveways and other private roadways may not be subject to such requirements, and therefore may be constructed in such a way as to exacerbated flooding and/or result in unwarranted riparian zone disturbance. In such a case, the Department believes that it is appropriate to require an individual permit for the placement of guardrails that do not meet the standards of this permit-by-rule, so that all potential impacts to flooding and the environment can be evaluated. The Department does agree, however, that it is not necessary that the guardrail actually be installed by a public entity, provided the public entity has approved the placement of the guardrail. As such, the permit-by-rule has been modified on adoption to allow the construction of a guardrail along a public roadway, provided it has been approved by a public entity.

COMMENT: The requirement of not removing trees under this permit-by-rule is overly restrictive. It appears that the permit-by-rule allows placement of guardrail, but does not allow for the removal of any trees associated with that placement. Guardrail placement is dictated by the roadway configuration and other factors, resulting in no effective alternative placement location. As such, the removal of a tree or other vegetation is necessary in order to meet the determined safety considerations. In addition, "tree" must be defined, such as a specified diameter at breast height. (3)

RESPONSE: The Department has limited the adopted permit-by-rule to address only those cases where it is evident that the placement of a guardrail will not adversely impact flooding or the environment. The Department does recognize that there are instances where tree removal is appropriate and necessary to accommodate the placement of a guardrail. Situations that would
require tree removal can be addressed under an individual permit application. Also, as noted in the response to comment 506 a definition for “tree” has been adopted at N.J.A.C. 7:13-1.2.

N.J.A.C. 7:13-7.2(d)3

529. COMMENT: The requirements of this section are overly restrictive. Removal of sediment and debris at a bridge often requires the use of a backhoe or other similar equipment, and the work is often done on an emergency basis to alleviate flooding, or to prevent potential flooding. The restriction of not using machinery such as a backhoe (section "i") and the timing restriction (section "vii") is unreasonable. It is unclear what purpose the additional paperwork and expense of applying for a general permit for this routine maintenance work would accomplish. Also, the provisions N.J.A.C. 7:13-7.2(d)3v should be clarified to define what is meant by "vegetation outside the regulated water". (3)

RESPONSE: The Department has limited the adopted permit-by-rule to address only those cases where it is evident that sediment removal will not adversely impact flooding or the environment. The Department does recognize that there are instances where sediment removal beyond the limitations of this permit-by-rule is appropriate and necessary. In such cases, applicants are afforded various options to apply for a general permit or individual permit, depending on the amount of disturbance that is necessary to accomplish the project. With regard to N.J.A.C. 7:13-7.2(d)3v, which requires that “vegetation outside the regulated water is not disturbed,” the Department believes that it is appropriate under this permit-by-rule to allow disturbance only within the channel of the regulated water from which sediment is being removed. If sediment removal activities extend outside the channel, such that riparian zone vegetation along the banks or beyond is disturbed, the Department does not believe that such activities should be permitted-by-rule and instead must be subject to review under either a general permit or an individual permit.

530. COMMENT: Limiting the removal of accumulated sediment and/or debris from a regulated water only on public property will cause more danger of flooding. Problems on private lands will
not be addressed as quickly. The expense and anticipated regulatory delays to private applicants will dissuade them from doing critical maintenance activities. (26)

RESPONSE: Normal property maintenance, such as the removal of trash, debris and dead vegetation by hand and selective tree cutting, is permitted-by-rule at N.J.A.C. 7:13-7.2(b)1. Furthermore, the use of machinery to remove a major obstruction from a regulated water that cannot be removed by hand, such as a fallen tree, abandoned vehicle, furniture and other large debris, is permitted-by-rule at N.J.A.C. 7:13-7.2(a)5. The Department believes that these permits-by-rule will cover many such situations that arise on private property. The Department does recognize that there are instances where sediment removal beyond the limitations of these permits-by-rule is appropriate and necessary. In such cases, applicants are afforded various options to apply for a general permit or individual permit, depending on the amount of disturbance that is necessary to accomplish the project.

N.J.A.C. 7:13-7.2(e)

531.COMMENT: Junkyards, gravel pits, hazardous waste and solid waste facilities should be relocated outside the flood hazard area and riparian zone to avoid pollution to the waterway. (10, 67)

RESPONSE: The Department does not believe it would be appropriate to force lawfully existing junkyards, gravel pits, hazardous waste and solid waste facilities to relocate outside flood hazard areas and riparian zones. Rather, the Department believes that by establishing the permits-by-rule at N.J.A.C. 7:13-7.2(e) to cover a range of activities that are necessary for the operation of a lawfully existing home or business, the regulated community will be encouraged to meet the permit-by-rule requirements so as to avoid the need for a general permit or individual permit for their activities. Furthermore, the Department has adopted these permits-by-rule because it has determined that activities conducted as prescribed therein will not adversely impact flooding or the environment. In cases where an activity exceeds the limitations of a permit-by-rule under this section, the activity is subject to the individual permit requirements of N.J.A.C. 7:13-10 and 11,
which further ensure that flood flows are not obstructed, flood storage displacement is limited and/or eliminated, and environmental resources are preserved.

532. COMMENT: It is our understanding that the activities identified as permits-by-rule are classified under the existing rules as “non-regulated uses” and no permit or prior notice to the Department is currently required before a person could engage in such activities. The current system was based on the supposition that the activities were carried out in a certain way and under certain conditions. Under the new permit-by-rule section, precisely because the activities must be carried out in a certain way and under certain conditions, they are now considered to be regulated activities and the specific manner in which the activities are allowed to be carried out is spelled out in the proposed new rules. In addition, although most of them do not require prior notice to, or approval by, the Department as long as the conditions and criteria are met, eight specific activities always require 14-day prior notice to the Department so that periodic on-site inspections can be carried out. We object to the inclusion of certain activities in the permit-by-rule activities that require neither prior notice to the Department nor the Department's approval and believe instead that both notice and approval for such activities should be required at all times. Specifically, we are referring to all six activities at N.J.A.C. 7:13-7.2(e) which are the “activities associated with the storage of unsecured materials.” The proposed new rules state that these activities can only be carried out under the permit-by-rule provisions if no hazardous substances are stored, or, if the storage of hazardous substances is essential to the business, and the "hazardous substances are isolated from potential contact with flood waters where possible." We believe that the Department should determine and/or confirm whether the stored substances are hazardous, essential to the business and properly isolated from potential contact with flood waters. Accordingly, the above-listed activities should not be allowed without prior notice to and approval of the Department and are therefore, better suited for inclusion in the proposed general permits section at N.J.A.C. 7:13-8.1. At the very least, the Department should include these in the list of activities for which 14-day prior notice is required, and require at the same time the submission of a manifest listing all substances stored, so the Department has the opportunity to inspect and/or confirm the information provided. (37)
RESPONSE: The repealed rules contain provisions regarding "non-regulated uses" in the floodway at N.J.A.C. 7:13-1.3(e) and "non-regulated uses" in the flood fringe at N.J.A.C. 7:13-1.3(f). The activities described therein were “non-regulated” because they were understood to have a *de minimis* impact on flooding and the environment, provided certain conditions are satisfied. Under the adopted new rules, these are the activities that are subject to permits-by-rule under proposed N.J.A.C. 7:13-7.1 and 7.2. Since these activities meet the description of regulated activity at N.J.A.C. 7:13-2.4, it is more accurate to refer to them as being permitted-by-rule rather than being non-regulated. A non-regulated (that is, exempt) activity is one that is not described at proposed N.J.A.C. 7:13-2.4, or which is not undertaken within the areas regulated under this chapter as set forth at proposed N.J.A.C. 7:13-2.3. Therefore the Department believes that it is appropriate to establish various permits-by-rule for regulated activities that the Department has determined will not adversely impact flooding or the environment.

Regarding advance notice of permits-by-rule, as noted in the response to comment 446 above, due to the nature of the eight activities covered under the permits-by-rule at N.J.A.C. 7:13-7.2(a), the Department believes that it is appropriate to require notification to the Department prior to the commencement of these particular activities, so that the Department may monitor and inspect construction. Conversely, the Department has determined that the remaining permits-by-rule under N.J.A.C. 7:13-7.2(b) through (f) are of such a minor nature that prior notification to the Department is not warranted. This must be also be understood in light of the enormous number of activities that are expected to occur under the various permits-by-rule, such as normal property maintenance under N.J.A.C. 7:13-7.2(b)1. The Department would not be able to review or respond to even a small fraction of the requests to operate under these permits-by-rule if prior notice to the Department were required.

With regard to the permits-by-rule at N.J.A.C. 7:13-7.2(e), the Department has adopted these permits-by-rule because it has determined that activities conducted as prescribed therein will not adversely impact flooding or the environment. As noted in the response to comment 531, the Department believes that by establishing permits-by-rule at N.J.A.C. 7:13-7.2(e) to cover a range of activities that are necessary for the operation of a lawfully existing home or business, the regulated community will be encouraged to meet the permit-by-rule requirements so as to avoid the need for a general permit or individual permit. Furthermore, these permits-by-rule
cover only the continuation of ongoing, lawful activities. No expansion of activities or facilities is permitted-by-rule under this subsection. In cases where an activity exceeds the limitations of a permit-by-rule, the activity is subject to the individual permit requirements of N.J.A.C. 7:13-10 and 11, which further ensure that flood flows are not obstructed, flood storage displacement is limited and/or eliminated, and environmental resources are preserved.

N.J.A.C. 7:13-7.2(e)2

533.COMMENT: It is unclear what is meant by the term “inordinate number of vehicles and machinery”. If a family has four kids and grandparents living in the same home, are seven cars “inordinate”? What about classic car collectors, landscape contractors with home offices, agricultural properties etc.? (26)

RESPONSE: The permit-by-rule at N.J.A.C. 7:13-7.2(e)2 is not intended to inconvenience home and business owners situated in flood hazard areas, but simply to limit storage to an amount that is usual and customary and that will not result in a public hazard. For example, the Department recognizes that typical storage at a residence may include several cars, wood piles, toys, patio furniture, shelters for animals and any number of other objects that could become buoyant or be transported offsite during a flood. The Department does not intend to cause homeowners to remove such objects from the flood hazard area. However, it has been the Department's experience that some homeowners store dozens of junked cars or used tires, piles of debris and other materials which serve no use to the residence whatsoever and simply present an increased public hazard if a flood should wash this material downstream. The provisions of these permits-by-rule, therefore, are designed to allow the normal storage of unsecured material in various circumstances while enabling the Department to prevent obvious abuses that could present a public hazard.

N.J.A.C. 7:13-7.2(e)4
534. COMMENT: This proposed section authorizes the storage of unsecured material necessary for the normal operation of certain existing businesses or nonresidential facilities whose primary function is to store and distribute material. The proposed rule is too lenient, and should require that such businesses or nonresidential facilities cover the unsecured material so that it does not flow into the riparian and flood hazard zones. (45)

RESPONSE: The permit-by-rule at N.J.A.C. 7:13-7.2(e)4 authorizes the storage of unsecured material necessary for the normal operation of certain existing businesses or non-residential facilities, whose primary function is to store and distribute material. Lumber yards, gravel pits, vehicle dealerships and other similar businesses depend on the constant import and export of unsecured material. New facilities of this type are regulated under N.J.A.C. 7:13-11.16. However, this permit-by-rule authorizes a lawfully existing business or similar facility to continue operating in a flood hazard area, provided the facility is not expanded and provided the activities meet certain other conditions that ensure there will be no adverse impacts on flooding or the environment. The Department does not believe that it is appropriate to prevent the storage of unsecured material necessary for the normal operation of certain existing businesses or nonresidential facilities, which was lawfully undertaken prior to the adoption of these new rules. Thus, lawfully existing uses that predate the adopted new rules can continue, provided certain standards are met. With regard to requiring that unsecured material be covered, it is the Department’s experience that such covering does little to secure the material during a flood and the cover itself can become an obstruction to flow if it becomes dislodged and is carried downstream. As such, the individual permit requirements at N.J.A.C. 7:13-11.16(d)4 state that any new unsecured material placed in a flood hazard area must be isolated from floodwaters by berms, or situated in a specially designed containment area onsite, so that, in the event of a flood, the stored material will not be transported off the site by floodwaters.

535. COMMENT: The term "where possible" should be stricken from proposed N.J.A.C. 7:13-7.2(e)4i(2), so that it reads in its entirety, "The hazardous substances are isolated from potential contact with flood waters." (37)
RESPONSE: This permit-by-rule authorizes an existing business or similar facility to continue operating in a flood hazard area, provided the facility is not expanded and provided the activities meet certain other conditions that ensure there will be no adverse impacts on flooding or the environment. As proposed, the storage of hazardous materials can occur under this permit-by-rule only if three conditions are met. First, at N.J.A.C. 7:13-7.2(e)4i(1), the storage of the hazardous substances must be essential to the operation of the business or facility. Second, at N.J.A.C. 7:13-7.2(e)4i(2), the hazardous substances must be isolated from potential contact with floodwaters where possible. Third, at N.J.A.C. 7:13-7.2(e)4i(3), the hazardous substances must be stored in accordance with all Federal, State and local laws.

However, the Department acknowledges that allowing hazardous materials to come into contact with floodwaters can create a serious potential risk to public safety, health, general welfare and the environment. Therefore, the Department agrees with the commenter that, in cases where hazardous materials cannot be isolated from potential contact with flood waters, the storage of the hazardous material should not qualify for a permit-by-rule under this chapter, and should rather be subjected to a site-specific review under an individual permit. Thus, N.J.A.C. 7:13-7.2(e)4i(2), as well as the parallel provision at N.J.A.C. 7:13-7.2(e)3i(2), have been modified on adoption to require that, under these permits-by-rule, hazardous substances must be isolated from potential contact with flood waters in all cases. In cases where hazardous materials cannot possibly be isolated from the flood hazard area, an individual permit would be required for the storage of hazardous materials.

536.COMMENT: Regarding “business or facility established prior to October 2, 2006”, it is unclear what is the status of businesses or facilities which received Department approval between October 2, 2006 and the date the rules are published. Is the Department simply not going to issue permits between October 2, 2006 and whatever date the rules are implemented, or will the permit issued be worthless and subject to enforcement action? Is the Department intending on implementing the new rules in reviewing projects even though the final form of those rules has not been (or should not have been) established? (26)
RESPONSE: A facility that has received a stream encroachment permit prior to the adoption of these new rules can rely on that permit for the entirety of the permit’s five-year duration, unless the Department find grounds to terminate or suspend the permit under N.J.A.C. 7:13-14.2 or 14.3, respectively. Furthermore, any stream encroachment permit issued by the Department prior to the adoption of these new rules was reviewed under the standards of this chapter as it existed at the time of application to the Department.

N.J.A.C. 7:13-7.2(e)6

537. COMMENT: This proposed section allows lawfully existing solid waste facilities to continue operation, so long as they are not expanded. Such facilities in riparian and flood hazard zones have the potential to contaminate any water they come into contact with, and should have further regulations than a permit-by-rule would require. (45)

RESPONSE: This permit-by-rule authorizes an existing solid waste facility to continue operating in a flood hazard area, provided the facility is not expanded and provided the activities meet certain other conditions that ensure there will be no adverse impacts on flooding or the environment. The Department does not believe that it is appropriate to force lawfully existing solid waste facilities within flood hazard areas or riparian zones to abandon operations. The expansion of such a facility with a regulated area, however, is subject to the individual permit requirements of N.J.A.C. 7:13-11.18.

N.J.A.C. 7:13-7.2(f)

538. COMMENT: Agricultural practices that perennially disturb soil or that compact soil, cause erosion or runoff, discharge non-point source pollution or point source pollution, should be relocated outside of the flood hazard zone and the riparian zone. While this section requires that no new vegetative disturbance occur, it allows for continuing existing activities. New Jersey’s Ambient Biomonitoring Network and the list of impaired waters set forth in Section 303(d) of the Clean Water Act demonstrate that existing agricultural practices do contribute to water
quality problems in the State. Native vegetation and forests are the most protective of floodplain and riparian functions and should be sought in all circumstances where possible. For more information, please refer to the attached fact sheet entitled “Protecting and Restoring Native Plant Communities and Forests. (10, 67)

RESPONSE: The permits-by-rule at N.J.A.C. 7:13-7.2(f) are designed to allow lawfully existing agricultural activities in regulated areas to continue, or to expand in certain limited cases, provided a number of standards are met to ensure that flooding is not exacerbated and to protect the environmental resources under the jurisdiction of this chapter from degradation. The Department does not believe it would be appropriate to force lawfully existing farms to relocate outside flood hazard areas and riparian zones. Furthermore, it is not the Department’s intent to prevent lawfully existing agricultural practices from continuing or expanding in regulated areas, provided proper controls are established to meet the goals of this chapter. By preventing the placement of fill in flood hazard areas, limiting the proximity of the work to surface waters and preventing the expansion of activities into previously undeveloped riparian zones, the Department believes that the adopted new permits-by-rule in this subsection will prevent adverse impacts to flooding or the environment, which could result from agricultural practices in regulated areas.

539. COMMENT: Regarding “forestry under an approved forest management plan”, such a plan is not required for appurtenant or accessory forest harvest under the Farmland Assessment Act. This will place undue burden and cost on farmers. (26)

RESPONSE: The activities allowed under the permits-by-rule at N.J.A.C. 7:13-7.2(f) are designed to allow lawfully existing agricultural activities in regulated areas to continue, or to expand in certain limited cases, provided a number of standards are met to ensure that flooding is not exacerbated and to protect the environmental resources under the jurisdiction of this chapter from degradation. It has been the Department’s experience that forestry activities executed under an approved forestry management plan, which does not allow clear cutting, best reflects the Department’s goals under this chapter to preserve healthy riparian zone vegetation. As such, the
permits-by-rule under this section are available to such forestry activities, provided the additional requirements of each permit-by-rule are satisfied. Forestry activities that are not approved under by a forestry management plan, or which exceed the limitations of the permits-by-rule in this subsection, are not prohibited by this chapter, but must rather obtain an individual permit under this chapter.

540. COMMENT: We appreciate the creation of separate permits-by-rule and general permits for agricultural activities. However, many agricultural practices or activities are not addressed by either the permit-by-rule or the general permit and would therefore require an agricultural operation to obtain an individual permit. (55)

RESPONSE: The Department believes that many ongoing agricultural activities will be adequately covered in the four adopted new permits-by-rule at N.J.A.C. 7:13-7.2(f) and the seven adopted new general permits at N.J.A.C. 7:13-8.4, all of which are designed specifically for agricultural sites. For example, the permit-by-rule at N.J.A.C. 7:13-7.2(f)1 authorizes the continuation of existing, ongoing agricultural activities in many situations. Furthermore, N.J.A.C. 7:13-7.2(f)2 authorizes new agricultural activities that do not result in the placement of fill or an aboveground structure. Vegetation in the riparian zone can be disturbed to accommodate new agricultural activities where previous development or disturbance has occurred. The permit-by-rule at N.J.A.C. 7:13-7.2(f)3 authorizes certain soil conservation and agricultural activities, and the permit-by-rule at N.J.A.C. 7:13-7.2(f)4 authorizes the construction of an agricultural building without a foundation. The Department has also adopted seven general permits at N.J.A.C. 7:13-8.4 which facilitate common agricultural projects, with NRCS oversight, under an expedited permitting process. The Department believes that these provisions will ensure that ongoing agricultural practices will not be hindered, and that the adopted new rules will not decrease the value of farmland in New Jersey. In cases where agricultural activities exceed the permit-by-rule or general permit limitations, the Department believes that a site-specific review of the activity is appropriate in order to ensure that it will not adversely impact flooding or the environment.
541. COMMENT: The stipulation that all disturbed riparian zone land must be stabilized with native non-invasive species is problematic as existing agricultural activities may be occurring in the riparian zone. (55)

RESPONSE: The requirement that all disturbed riparian zone land must be stabilized with native non-invasive species (at N.J.A.C. 7:13-7.2(f)3v and (f)4vi) does not apply to ongoing agricultural activities, which are instead permitted-by-rule at N.J.A.C. 7:13-7.2(f)1. N.J.A.C. 7:13-7.2(f)3 allows the continuation or commencement of soil conservation practices, and N.J.A.C. 7:13-7.2(f)4 allows the construction of an agricultural building with no foundation. The Department recognizes that under both of these permits-by-rule, some riparian zone vegetation will be permanently disturbed. As such, this requirement applies only to those areas that are temporarily disturbed, such as the temporary removal of riparian zone to access the building being erected under N.J.A.C. 7:13-7.2(f)4 by construction workers and machinery.

N.J.A.C. 7:13-7.2(f)1

542. COMMENT: This proposed section authorizes the continuation of existing, ongoing agricultural activities. There is nothing in the proposed rule having to do with the use of pesticides, which should be highly regulated, especially for agricultural lands hydrologically connected to riparian and/or flood habitat zones. (45)

RESPONSE: The use of pesticides on agricultural lands in New Jersey is regulated by the Department under the Pesticide Control Code, N.J.A.C. 7:30 and does not fall under the purview of this chapter.

543. COMMENT: Please clarify what is meant by “flood storage volume related disturbance” as it applies to agricultural activities. N.J.A.C. 7:13-7.2(f)1i provides that existing agricultural activities may continue, provided they do not result in displacement of flood storage volume. Does this mean that existing agricultural activities that may currently be considered to “displace flood storage volume” must be removed? (55)
RESPONSE: This permit-by-rule has been adopted to allow lawfully existing agricultural activities to continue, provided no flood storage displacement occurs and no aboveground structure is erected. In some cases, grading a site can cause the ground elevation in the flood hazard area to rise, thus displacing flood storage volume. Erecting a structure above the ground in a flood hazard area will also displace flood storage volume. Since this can have adverse effects on local flooding conditions, the Department has limited this permit-by-rule to only those activities that will not result in such flood storage displacement. Existing fill and buildings, however, do not need to be removed from flood hazard areas, provided the fill or buildings are lawfully existing. Furthermore, agricultural activities that will result in the placement of fill or the erection of structures (that do not meet another permit-by-rule under N.J.A.C. 7:13-7.2) may qualify for an individual permit under N.J.A.C. 7:13-10 and 11.

N.J.A.C. 7:13-7.2(f)2

544.COMMENT: The commencement of new agricultural activities should comply with the riparian zones established in this rule. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: Under the permit-by-rule at N.J.A.C. 7:13-7.2(f)2, new agricultural activities may commence only if no vegetation is cleared, cut or removed in a riparian zone, except where previous development or disturbance has occurred (such as an area maintained as a lawn or garden or an abandoned parking area that has partially revegetated). Agricultural activities cannot expand into previously undisturbed riparian zones without meeting the stringent new individual permit requirements for riparian zones at N.J.A.C. 7:13-10.2.

545.COMMENT: Limitation on new agriculture will severely limit expansion of agriculture such that needed new lands necessary to be profitable will not be available. This will cause more farmers to be forced to sell their property to developers. The rules will be antithesis of the “smart growth” that has been championed by the Department in recent years. (26)
RESPONSE: The limitations placed on new agricultural activities within flood hazard areas and riparian zones under the permits-by-rule of this subsection are necessary to ensure that flooding is not exacerbated and to protect the environmental resources under the jurisdiction of this chapter from degradation. Agricultural activities that exceed the limitations of these permits-by-rule are not prohibited, but rather require that an applicant applies for an individual permit under this chapter.

546. COMMENT: Regarding “no vegetation is cleared”. What about fallow lands? Grazing is cited as approved “new agriculture”, however no “aboveground structures” are allowed. Fencing is an aboveground structure that will require secure posts (structures). (26)

RESPONSE: The permits-by-rule at N.J.A.C. 7:13-7.2(f) accommodate certain agricultural practices on lands that are “actively farmed,” as defined at N.J.A.C. 7:13-1.2. Under this definition, an area that lies fallow as part of a conventional rotational cycle that does not exceed five years is considered to be actively farmed. However, farms that have been abandoned for more than five years are not actively farmed. Therefore, riparian zone vegetation disturbed within actively farmed areas is permitted-by-rule under N.J.A.C. 7:13-7.2(f)1. However, clearing, cutting or removing riparian zone vegetation on lands that are not actively farmed do not qualify for the permits-by-rule and require that an applicant apply for a general permit or an individual permit subject to the requirements of this chapter.

With regard to aboveground structures, as referenced under N.J.A.C. 7:13-7.2(f), the erection of fences and other such structures on agricultural lands is not authorized under this permit-by-rule. Fences can, however, be erected under the permit-by-rule at N.J.A.C. 7:13-7.2(b)5 in some cases, as well as under general permit 2F under N.J.A.C. 7:13-8.4(c)6, which is specifically designed to accommodate fences on agricultural lands.

N.J.A.C. 7:13-7.2(f)3
547. COMMENT: We strongly recommend that commencement of soil conservation practices in a flood fringe should comply with the riparian zones established in this rule. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: Under the permit-by-rule at N.J.A.C. 7:13-7.2(f)3, soil conservation practices may commence or continue in a flood fringe, provided no vegetation is cleared, cut or removed in a riparian zone, except where previous development or disturbance has occurred (such as an area maintained as a lawn or garden or an abandoned parking area that has partially revegetated). Soil conservation practices cannot expand within previously undisturbed riparian zones without meeting the stringent new individual permit requirements for riparian zones at N.J.A.C. 7:13-10.2.

N.J.A.C. 7:13-7.2(f)4

548. COMMENT: The construction of a building with no foundation in a flood fringe should comply with the riparian zones established in this rule. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The permit-by-rule at N.J.A.C. 7:13-7.2(f)4 authorizes the construction of an agricultural building without a foundation, provided no vegetation is cleared, cut or removed in a riparian zone, except where previous development or disturbance has occurred (such as an area maintained as a lawn or garden or an abandoned parking area that has partially revegetated). Such a building cannot be constructed within previously undisturbed riparian zones without meeting the stringent new individual permit requirements for riparian zones at N.J.A.C. 7:13-10.2.

549. COMMENT: The 1,000-square foot limitation on structures is severely limiting, to nursery/flora industries in particular where hoop houses and the like are commonly utilized. (26)

RESPONSE: The permit-by-rule at N.J.A.C. 7:13-7.2(f)4 is designed to accommodate the erection of small agricultural buildings with no foundation, which will have no adverse impacts.
to flooding or the environment. Larger buildings constructed within flood hazard areas can exacerbate flooding due to displacement of flood storage. Furthermore, improperly built structures can dislodge during a flood and cause adverse impacts to other property owners. Therefore, while construction of a larger agricultural building in a regulated area is not prohibited, the Department believes that it is appropriate to perform a site-specific review of such buildings under an individual permit application in order to ensure that all standards of this chapter are met.

550. COMMENT: The citation at N.J.A.C. 7:13-7.2(f)4iii implies that agricultural structures, including barns, are permitted within the flood fringe under a permit-by-rule. It would be clearer if the Department stated that the permit-by-rule does not apply to structures that would increase the flood elevation or to structures that have the potential to introduce bulk material or significant contaminants to the stream. The regulations should support the Water Pollution Control Act goals regarding sediment, fill, and pollutant loadings to streams. (66)

RESPONSE: The permit-by-rule at N.J.A.C. 7:13-7.2(f)4 is designed to facilitate the erection of small agricultural buildings with no foundation on actively farmed lands. The limitations placed on this permit-by-rule will ensure that flooding is not exacerbated and that the environmental resources under the jurisdiction of this chapter are adequately protected. It is the Department’s experience that small agricultural buildings without foundations, constructed outside a floodway and not in close proximity to any surface water, will not adversely impact flooding or the environment. Thus the Department believes that the adopted permit-by-rule meets the goals of this chapter’s enabling statutes, including the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

551. COMMENT: N.J.A.C. 7:13-7.2(f) 4 provides that construction of a building is permitted on land that has been actively farmed provided that (i) the building is not located on land that has been actively farmed since October 2, 2006. This subsection appears to have multiple conflicting requirements that need to be clarified. (55)
RESPONSE: A typographical error in the proposal at N.J.A.C. 7:13-7.2(f)4i requires that “the building is not located on land that has been actively farmed since October 2, 2006.” As is the case with all permits-by-rule under this subsection, and as noted in the proposal summary at 38 N.J.R. 3981, it is the Department’s intention to allow the construction of such a building on land that was actively farmed since prior to the October 2, 2006, proposal date of these new rules. However, the typographical error would prevent such a building form being located on agricultural land. As such, N.J.A.C. 7:13-7.2(f)4i has been modified on adoption to omit the word “not.”

Subchapter 8: General permits

N.J.A.C. 7:13-8.1 Standards applicable to all general permits

552. COMMENT: The Department should expand the scope of the general permits to facilitate permitting of commonly performed activities within existing developed flood hazard areas. For example, a general permit should be provided for remedial work required in flood hazard areas and riparian zones when overseen and approved by other the Department programs. A general permit should be provided for work in flood hazard areas and riparian zones within existing developed industrial complexes and along linear developments (that is, highways and pipeline rights-of-way). (12)

553. COMMENT: General permits equivalent to those at N.J.A.C. 7:38-14 (Highlands general permits 1 and 2) should be provided for bank stabilization and habitat creation and enhancement projects. Environmental improvement practices should be fostered through general permits limited to the categories of practices and practitioners specified in the Highlands general permits. (66)

RESPONSE TO COMMENTS 552 AND 553: This is the first time that the Department’s Flood Hazard Area rules have been structured to include permits-by-rule and general permits. In selecting activities that are appropriate for these types of permitting, the Department considered
common activities that, when proposed in the flood hazard area or riparian zone, have the potential for impacts but which may be conducted safely within certain parameters and with a limited degree of oversight. With regard to the commenters’ suggestions to create additional general permits for these activities, the Department has determined that such activities are more appropriately reviewed under an individual permit application. Remedial work in flood hazard areas and riparian zones, while often ultimately environmentally beneficial, can cause unintended adverse impacts to flooding or the environment if undertaken improperly. Similarly, work in flood hazard areas or riparian zones within existing developed industrial complexes and along linear developments, can result in unacceptable flood storage displacements or loss of riparian zone vegetation. Certain bank stabilization activities on agricultural land are authorized under general permit 2A at N.J.A.C. 7:13-8.4(c)1, and aquatic habitat enhancement devices are permitted-by-rule at N.J.A.C. 7:13-7.2(a)7. The Department believes that applicants seeking to undertake activities that do not meet these general permit or permit-by-rule requirements should apply for an individual permit so that the Department can ascertain whether the activity will adversely impact flooding or the environment.

554. COMMENT: There should not be any exemption from public notice requirements for general permits. Public input is critical to permit decisions. (56)

RESPONSE: The Department selected activities to permit by way of general permits based upon the level of impact that could result from performing the activity. Consequently, the general permits represent activities that will have minimal impacts on flooding and the environment and that therefore require less scrutiny by the Department and by the public. In addition, many of the general permit activities also require review and approval by another entity, in addition to the Department. For example, general permit 1 can only be performed by a public entity; general permits 2A through 2G for agricultural activities all require approval and supervision by the Natural Resource Conservation Service; general permits 3 and 4 for bridge or culvert scour protection, and stormwater maintenance, respectively, will have to be approved and supervised by a public entity; and general permits 8 (utility line crossing), 9 (roadway or footbridge) and 10 (stormwater outfall structures) are limited to activities that also require a freshwater wetlands
general permit from the Department. Consequently, the Department believes that, due to the potential for limited impacts and the oversight that is afforded both by the Department and other agencies, there is no need to require direct public notice. Furthermore, the Department does provide notice of all applications it receives in the DEP Bulletin, so the public will be aware of received and pending flood hazard area general permits, and therefore have an opportunity to comment on these applications to the Department. Any comments or information received will be considered by the Department in its review of the general permit application.

555. COMMENT: More effective requirements should be included for some of the regulated activities covered by general permits. Generally, there needs to be greater oversight, data collection (as in the case of endangered and threatened species) and enforcement of regulations for general permits for the activities listed in 1 through 10. Additionally, any building that is allowed to remain needs to provide benefit. We support the requirements that low flow passage for fish not be disturbed; that fishery resources be protected; that threatened and endangered species habitat be protected; that erosion and sedimentation controls and regulations be followed as per N.J.A.C. 2:90 (at a minimum); and that acid-producing soils be carefully handled. (10, 67)

RESPONSE: It is unclear what the commenters’ mean by “greater oversight.” All of the adopted general permits require a complete application to the Department so that the Department can ensure that all activities satisfy the general permit criteria before they are conducted. In addition, all permits will be subject to the compliance and enforcement provisions of the rules. Regarding data collection for threatened and endangered species, the Department’s Division of Fish and Wildlife and Natural Heritage Programs already collect such information and include it in the database used by all Department programs. Additional information that may result from the implementation of the Flood Hazard Area rules will be added to those existing databases.

Regarding buildings remaining in the flood hazard area, existing buildings are not affected by the rules unless the owner proposes to conduct regulated activities, as described at N.J.A.C. 7:13-2.4 in regulated areas, described in N.J.A.C. 7:13-2.3.

Finally, the Department acknowledges the commenters’ support of certain provisions of the rules.
556. COMMENT: Although categorizing certain activities under general permits is an understandable action by the Department, we do not agree with all the activities placed under this category. In general, these permits should only be granted for activities that are similar in kind and have very little impact, if any, on the environment. Most of the 16 activities listed should have little or no environmental impact. However, a few are somewhat problematic. Additionally, the Department must take into account sequencing and the cumulative impacts that these general permits may have. (45)

RESPONSE: The Department agrees that only certain activities, with minimal impacts on flooding and the environment, should be permitted by way of general permits. The Department used that criteria to select the activities for which general permits are provided and believes that all of the activities for which general permits are available will have minimal impacts. Further, because of the limited scope of the activities that would qualify for a general permit, the Department does not anticipate any cumulative impacts. It is unclear what the applicant means by “sequencing.” The Department’s rules allow for applications to be submitted in any order, at any time, and are only concerned with confirming that proposed activities are conducted in accordance with all adopted standards.

557. COMMENT: Under the proposed new rules, the Department has 20 working days from receipt of the application for a general permit to either determine that the application is complete for review or, determine that the application is deficient and advise the applicant of the deficiencies in writing. If the Department does not take either of these actions within 20 working days, the general permit application is automatically deemed complete for review. Once the permit application is deemed complete for review, the Department then has 45 calendar days to either approve or deny the general permit application in writing. If the Department fails to take either written action within the 45 days, the general permit application shall be deemed to have been automatically approved. Although we appreciate the Department's interest in ensuring that applicants receive a speedy review, we vehemently object to the automatic completeness and automatic approval that will occur if the Department fails to meet these ambitious objectives.
These provisions leave no room for error or for the myriad of situations that could arise to prevent the initial review of an application in 20 business days and the review of a complete application in 45 calendar days, such as emergencies requiring the redirection of staff resources, unforeseen staff shortages and an unusually large submission of applications. The potential result - mandatory review of incomplete applications and the approval of inappropriate projects that do not meet the requirements of the rules defeats the very objectives that the Department is hoping to achieve through the adoption of the proposed new rules. This potential result is exacerbated by the fact that, as currently written, the proposed new rules require no public notice of general permit applications. In short, these provisions are overly ambitious and go above and beyond the requirements of the "90 day rule" and should be omitted from the proposed new rules. Instead, the Department should incorporate the review procedures set forth in the proposed individual permits section at N.J.A.C. 7:13-9.3(e), which require the Department to either deny or approve the permit application "within 90 calendar days following the receipt of a complete application."

RESPONSE: As stated in response to comment 556, the Department selected the activities for which general permits are provided based upon the potential for impacts and believes that all of the activities for which general permits are available will have minimal impacts on flooding and the environment. In addition, all general permit applications must be accompanied by a completed certification signed and sealed by an engineer, which addresses each of the general permit criteria and how it is being satisfied. Based upon these factors, the Department believes that the time frames it has established are adequate to determine whether or not a proposed application satisfies all requirements for approval.

558.COMMENT: The entire layout of the general permit chapter is poorly organized. The general permit number should coincide with the citation/rule reference. For example, general permit 1 should be N.J.A.C. 7:13-9.1, general permit 2 should be N.J.A.C. 7:13-9.2 etc.

RESPONSE: The Department does not agree that the layout of the general permit chapter is poorly organized. The Department believes that it is more appropriate to have all of the general
permit requirements together in one subchapter. Accordingly N.J.A.C. 7:13-8.1 and 8.2 are utilized to address the standards applicable to all general permits and general permit conditions, respectively, while the requirements for specific general permits start at N.J.A.C. 7:13-8.3 with General permit 1 for channel cleaning under the Stream Cleaning Act.

N.J.A.C. 7:13-8.1(b)1

559. COMMENT: How is the fish passage compliance satisfied under N.J.A.C. 7:13-8.1(b)1? Does this fall under authority of the Division of Fish and Wildlife? (44)

RESPONSE: Fish passage for projects authorized under a general permit is addressed under N.J.A.C. 7:13-8.1(b)2 which provides that a regulated activity shall not adversely affect low-flow aquatic passage within any regulated water. Compliance with the section will be confirmed by the Department as part of the review of the general permit application. The Division of Land Use Regulation may choose to consult the Division of Fish and Wildlife on low flow aquatic passage. However, the authority to determine compliance with this requirement rests with the Division of Land Use Regulation.

N.J.A.C. 7:13-8.1(b)3

560. COMMENT: Since the plant list is included in the threatened and endangered species definition, but habitat for same is not included on the Landscape Project mapping, will surveys be regularly required? Will the New Jersey Natural Heritage Program provide detailed location information on documented occurrences of plant species as to facilitate the habitat evaluations and surveys? (26)

RESPONSE: The list of endangered plant species is promulgated under the Endangered Plant Species List Act and is based upon research, investigations and scientific data maintained in the Department's Natural Heritage Database. The Natural Heritage Program maintains the Natural Heritage Program database containing the locations of documented species sitings and Natural
Heritage Priority sites for the State of New Jersey. While a survey is not required, a letter from the Natural Heritage Program can be obtained and provides the property owner or applicant with the results of a site-specific query of the Natural Heritage Program Database of documented species sitings and Natural Heritage Priority sites for a specific property so that this information can be included with an application. The process, which is referred to as a Data Request, is described at http://www.nj.gov/dep/parksandforests/natural/heritage/#datarequest and requires that an applicant submit the following information: Name and address of user or organization; the type of data needed; a copy of USGS quadrangle with exact boundaries; and an explanation of how the information will be used. The average processing time for these requests is two weeks and the fee is a minimum of $20.00. Charges for searches exceeding one hour are charged in half-hour increments at $20.00 per hour. A fee estimate can be obtained prior to initiating a search. The submission of a data request does not require the hiring of an expert since all of the information needed to request the search can be gathered by a layperson.

561 COMMENT: The phrases “adversely affect” and “documented” are overly vague and need to be better defined to avoid disagreements. (33)

RESPONSE: N.J.A.C. 7:13-8.1(b)3 requires that any regulated activity authorized under a general permit shall “not adversely affect a threatened or endangered species, or a documented habitat for a threatened or endangered species.” The term “documented habitat for threatened or endangered species” is defined at N.J.A.C. 7:13-1.2. The Department believes that the term “adversely effect” is sufficiently clear and does not need to be defined.

N.J.A.C. 7:13-8.1(b)7

562 COMMENT: We support that projects that meet the definition of major development should not fall under a general permit. However, project impacts should be judged and not based on the definition of major development. Some impacts from projects that did not meet the major development threshold should be been regulated as an individual permit. To protect from
increased flooding due to stormwater runoff, projects should not be allowed to disturb soil or impose new impervious surface in the flood hazard area or the riparian zone. (10, 67)

563. COMMENT: We support the general conditions for general permits under N.J.A.C. 7:13-8.1(b) with the exception of N.J.A.C. 7:13-8.1(b)7i. We oppose reliance on the Stormwater Rule’s definition of major development, the threshold for stormwater regulation. That threshold is 0.25 of an acre of impervious or one acre of disturbance. In many cases this threshold creates serious negative impacts not only to water quality, but to the riparian zone. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 562 AND 563: The specific general permits included in adopted N.J.A.C. 7:13-8 were chosen based on the limited complexity of the projects and their overall limited impacts on the environment and the public safety, health and general welfare. The exclusion of major projects, as defined at N.J.A.C. 7:8, from general permit eligibility (unless the project has already been approved by the Department under a coastal or freshwater wetlands permit) is just one factor that determines if a project qualifies for general permit processing. Because the Department agrees that smaller projects can have significant impacts depending on what is done and how the activity is conducted, the application must also satisfy all other requirements contained in N.J.A.C. 7:13-8.1(b) before a project is considered for any of the general permits. These additional requirements assure that the activities that satisfy the size requirement do not have impacts to fishery resources and threatened or endangered species and their habitat. In addition to the general safeguards provided in N.J.A.C. 7:13-8.1(b), to receive a general permit, the activity must additionally satisfy the requirements applicable to the general permit. The Department believes that these requirements, taken as a whole, assure that only those projects which will have minimal impacts to public health, safety and welfare, as well as the environment will qualify for general permits.

N.J.A.C. 7:13-8.1(d)3
564. COMMENT: We object to this section that provides that if the Department doesn’t make a completeness declaration within 20 days, the application is automatically deemed complete. The volume of applications could render a number of them inappropriately complete. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: N.J.A.C. 7:13-8.1(d) sets forth the Department’s procedures for initial completeness review of general permit applications. This procedure is identical to the completeness review for stream encroachment permits under repealed N.J.A.C. 7:13-4.7(a), as well as the completeness review for individual permits at N.J.A.C. 7:13-9.3(b). The subsection provides that the Department must determine whether all necessary information required for a complete general permit application has been provided, and accept as complete or reject the application accordingly. The subsection further provides that if the Department takes no action within 20 working days following the receipt of an application, the application is automatically deemed complete for review. However, this automatic acceptance does not preclude the Department from requesting additional information during the subsequent review of the application in order to render the application approvable. In addition the completeness determination does not in any way indicate that the application will ultimately be approved.

N.J.A.C. 7:13-8.1(e)

565. COMMENT: The Department should revise the language to clarify which of the following is the appropriate interpretation. N.J.A.C. 7:13-8.1(e) can be interpreted to mean the 45 calendar day review period starts at the time the Department issues its determination that the application is complete (such completeness determination being required to be made within 20 working days of the Department’s receiving the application) or that, unless an application is ultimately determined by the Department to not be complete, the 45 calendar day review period for that application started on the day it was received by the Department. In the former interpretation, the completeness review period (20 working days) and the approval/rejection review period (45 calendar days) run sequentially, while in the latter interpretation they run concurrently. (42)
566. COMMENT: This section could be interpreted to mean that the 45 calendar day review period starts at the time the Department issues its determination that the application is complete (such completeness determination being required to be made within 20 working days of the Department receiving the application) or that, unless an application is ultimately determined by the Department to not be complete, the 45 calendar day review period for that application started on the day it was received by the Department. In the former interpretation, the completeness review period (20 working days) and the approval/rejection review period (45 calendar days) run sequentially, while in the latter interpretation they run concurrently. The Department should revise the language of this section to clarify which is the appropriate interpretation. (22)

RESPONSE TO COMMENTS 565 AND 566: Adopted N.J.A.C. 7:13-8.1(e) provides that the Department must take one of two actions within 45 days after receiving a complete application, determine that the application meets the requirements of this chapter and approve general permit authorization in writing; or determine that the applications does not meet the requirements of this chapter and deny the general permit authorization in writing. This language clearly provides that the Department takes one of these two actions “within 45 days after receiving a complete application” not “within 45 days after the Department determines completeness of an application”. Therefore, if the Department receives a complete application, the 45 day review period will start on the day the application was received and not the day the Department determined that the application was complete.

N.J.A.C. 7:13-8.1(f)

567. COMMENT: This section of the rule gives the Department an excuse to take enforcement action, effectively negating the 45 day clock. This is misleading to the public by, in effect, claiming permit review periods that the public may not rely on. (26)

RESPONSE: This section of the rules does not give the Department an excuse to take enforcement action or negate the default approval. Adopted N.J.A.C. 7:13-8.1(f) provides that this default approval is subject to any applicable conditions set forth in this chapter for the
activities covered by the application for the general permit. The inclusion of the enforcement language in this section is intended to preserve the Departments rights to take enforcement actions pursuant to N.J.A.C. 7:13-19 for any activity undertaken in violation of this chapter including but not limited to non-compliance with the conditions set forth for in this chapter for the activities covered by the application for general permit authorization. If an applicant submits a general permit application which is subsequently approved by default and the applicant constructs their project in accordance with the conditions set forth for that general permit, there would be no need for the Department to take enforcement action against the applicant. However, a general permit obtained under this provision does not relieve the permittee from complying with conditions applicable to any other general permit issued in a non-default situation.

N.J.A.C. 7:13-8.1(j)

568. COMMENT: In cases where the Department revokes or amends a general permit under this chapter, the Department should grandfather any development project for which a general permit authorization has been issued prior to the date of any such revocation or amendment. If general permit authorizations issued by the Department cannot be relied upon for a set time period, property owners, developers and others will be reluctant to pursue allowable opportunities to build the places to live and work that our residents need. Inadequate grandfathering is inconsistent with principals of equity and corrosive of private sector confidence in public policy and planning. (7, 18, 33, 46, 53)

569. COMMENT: The proposed mandate that a person who has received a general permit authorization and started work must immediately cease the authorized work if the Department adopts rule changes that impose stricter standards or conditions under a general permit provision or repeals a general permit provision is bad public policy, and has the potential to result in unintended public safety, health and general welfare hazards. Where site construction has commenced, an immediate cessation of work may result in unsafe conditions. Additionally, projects that cannot physically or economically satisfy stricter standards imposed as a result of
the Department’s actions may be abandoned, resulting in unfavorable or unsafe conditions from a public health, safety, welfare and environmental perspective. (7, 18, 33, 46, 53)

570. COMMENT: This rule section will lead to abandoned projects due to the Department authored bankruptcy, and soil erosion and sediment control measures will fall into disrepair causing more problems. If an applicant/property owner is in possession of a valid permit, they should be able to complete the approved project. (26)

571. COMMENT: There is language stating the Department has the ability to drop a particular general permit authorization when it chooses to. We would recommend that this only be done through the due process of a regulation change and not when the Department chooses to do so. This is especially critical for pending applications. (44)

RESPONSE TO COMMENTS 568 THROUGH 571: General permits only exist to the extent that the rule upon which they are based remains valid. If the underlying rule expires or is repealed, there is no longer a legal basis upon which to rely for conducting regulated activities. The Department does not repeal or amend its general permits unless they become obsolete or the Department determines that it is in the best interest of public safety, health, general welfare and the environment to do so. New science or requirements of other Department rules may also necessitate such amendments. In all cases, rule amendments and repeals occur only through the public rulemaking process, during which the Department publishes a proposal, take public comment and then publicly adopt its rules with response to comments. This is the standard process for amending or repealing all rules, including those containing general permits.

The Department does not believe that it is appropriate to grandfather all approvals that are based upon obsolete rules since, when the Department determines to amend or appeal its rules, it does so for important health and safety reasons. Furthermore, since the process to amend or repeal a rule usually takes between six and twelve months, permittees will have adequate notice regarding the need to complete activities approved to be undertaken with general permits that are proposed for repeal or amendment.
The Department is aware that certain applicants may no longer be able to satisfy the Department’s requirements on a particular site. However, the Department does not undertake significant amendments to its rules without extensive research and contemplation. Consequently, if the requirements have undergone amendments that are significant enough to invalidate a project, the Department believes that the new rules are important enough for the protection of health and safety to require that all projects comply and projects that cannot comply must be redesigned to meet the new, more protective standards.

572. COMMENT: Because of the draconian nature of the proposed new rules and the severe negative effect of the proposal on permittees and property owners, the Department should be required to identify and provide written notice to all permittees and property owners who have received a general permit authorization under a general permit that is either repealed by the Department or amended to establish stricter standards or conditions. Additionally, it should be the Department’s burden to determine whether an activity for which a general permit has been issued would satisfy amended, stricter standards or conditions adopted by the Department. (7, 18, 33, 46, 53)

RESPONSE: As stated in response to comments 568 through 571 above, the Department only repeals or amends its general permits through the public rule making process. That process includes publication of the proposed amendments in the New Jersey Register, posting of the proposal on the Department’s website, notice to the public in newspapers throughout the State (when a rule is applied Statewide), press releases to news venues Statewide, a public comment period (generally 60 days), a public hearing, and then a public response to comments with the adopted rules. The entire process generally takes between six months and one year to complete. Consequently, the Department believes that this is sufficient time and notice to permittees regarding the status of the rules upon which a general permit approval is based.

Further, all of the public notice mechanisms described above contain a clear description of the proposed changes to the rules in question. Consequently, a permittee is provided with adequate resources to determine what may be changing in a general permit and the significance of such change to the project being undertaken.
N.J.A.C. 7:13-8.2 General permit conditions

573. COMMENT: We support the regulation of activities that have previously never been regulated because they were considered to have *de minimis* impacts. The proposed general conditions for general permits do apply certain additional responsibilities and requirements (such as required use of BMPs, oversight, site maintenance, and reporting) to the person who undertakes regulated activities and this is an improvement to the rule. We urge the Department to use the provision that allows for specific conditions to a general permit liberally so as not allow activities to fall between the regulated cracks, causing negative impacts. Structures should not be permitted in the flood hazard area and riparian zone. These areas should be naturally vegetated and free of fill and obstructions. (10, 67)

RESPONSE: The Department acknowledges this comment in support of the rules. In developing the general permits the Department endeavored to anticipate all issues of common concern to minimize flooding and environmental impact. Accordingly, the Department anticipates that it will only have to add site specific conditions on general permit approvals. With reference to the presence of structures in the flood hazard area and riparian zone, as noted previously, approximately 35 percent of the State lies within flood hazard areas. The Department does not believe it would be appropriate to attempt to eliminate lawfully existing structures from these areas or to entirely prohibit appropriately sited and constructed development in these areas. Instead, the rules seek to assure that public health, safety and general welfare are protected as well as the environment.

N.J.A.C. 7:13-8.2(b)2

574. COMMENT: The unavailability of extensions to the five-year term of a general permit will delay general permit re-authorization. Furthermore, different Department personnel applying rules in different ways will lead to sites remaining unsecured longer or being abandoned. This
will cause more harm than good. This rule should be revised to allow extensions for completion as long as construction is underway and continues. (26)

RESPONSE: Flooding conditions have been changing so rapidly in New Jersey that the Department does not believe it is prudent to allow general permits to be approved beyond five years. It is unclear why the commenter believes that five years is insufficient since the Department's land use permits all carry a five-year expiration date with no guarantee of extension even in those cases where extensions are available. Further, the Department routinely shifts personnel to accommodate work load so providing a permit extension is also no guarantee that the same person will review the permit each time. However, in the past, and similar to individual permits at N.J.A.C. 7:13-9.4, upon expiration of a permit, the Department will examine the extent of completed regulated activities when determining if a new permit is required.

N.J.A.C. 7:13-8.2(b)3 and N.J.A.C. 7:13-8.2(b)4

575. COMMENT: This section is not only confusing but is essentially stripping the Department of any need to perform a responsible and reasonable review. It is essentially stating that conditions set by the Department are irrelevant, that the applicant must police themselves, must be sufficiently knowledgeable to recognize and understand science and engineering behind the Department permit conditions, and must in some way perform environmental monitoring through such procedures that are not specified. This gives the Department the chance to prosecute people under a liberal policy. (26)

576. COMMENT: General permits should set conditions based on anticipated environmental impact and its minimization. Compliance with those conditions by the applicant should be sufficient to avoid enforcement action. Should the Department find that standard conditions are not affording environmental protections, they can propose a rule amendment. This rule effectively makes the applicant a criminal even if they strictly follow the rules and relieves the Department of all responsibility for setting appropriate and effective permit conditions. (26)
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577. COMMENT: If the Department sets permit conditions in an appropriate and effective manner, adverse impacts should be prevented and minimized. The responsibility of the Department is being avoided and the applicant is forced to be responsible even if the permit condition set by the Department was initially problematic. (26)

RESPONSE TO COMMENTS 575 THROUGH 577: The provisions to halt or reduce activities in order to maintain compliance with a permit and to minimize environmental impacts make the permittee responsible for his or her actions on the ground regardless of what may have been approved by the Department in good faith on paper. For example, if the Department approves an activity with the belief that all was properly designed to avoid offsite impacts but during construction offsite impacts occur and show no sign of abating upon construction completion, the permittee cannot ignore those impacts because he or she has an approved permit. The permittee has the responsibility to stop the activity until such time that the unanticipated impacts are discussed with the Department and a mutual change to the approved permit and plans is obtained. This does not negate the need for appropriate permit requirements or conditions or attempt to place blame for failed projects. Rather, this condition recognizes the fact that even the best plans are not always successful and that the most critical factor for successful project construction is that what occurs on the ground does not result in unanticipated negative impacts to the flood hazard area or environment.

N.J.A.C. 7:13-8.2(b)5

578. COMMENT: “Adequate funding” should be struck from the rules at N.J.A.C. 7:13-8.2(b)5. What if there is a turndown in the economy or bankruptcy occurs? The Department should not be able to prosecute for the lack of a balance of “x” in a bank account. (26)

RESPONSE: The condition requiring proper operation and maintenance, including adequate funding of all facilities does not mean that the Department will examine a permittee's bank account. Rather, it means that if a certain type of construction is required and approved as part of
a permit, the applicant is obligated to provide the funding necessary to conduct the construction as approved. If there is a down economy or bankruptcy, presumably the project will not be constructed and there will be no conflict with an approved permit.

N.J.A.C. 7:13-8.2(b)6

579. COMMENT: When the applicant (the agent's client) does not authorize the agent preparing the permit to perform oversight work, the oversight condition is a concern. Language should be added placing the burden on the applicant to obtain proper oversight for such work in order for an engineer (agent) to make a certification. (44)

RESPONSE: The applicant/permittee is ultimately responsible for ensuring that the activity is conducted in full compliance with the permit. N.J.A.C. 7:13-8.2(b)6 requires the permittee to ensure that all approved activities are undertaken using the best management practices available under the supervision and direction of an engineer. Consequently, an applicant/permittee who chooses not to retain an engineer to conduct oversight is not in compliance with this requirement.

580. COMMENT: Does ‘supervision and direction’ refer to day-to-day project/construction supervision, or overall project management which may include periodic site visits? The routine presence of a professional engineer on site is not necessary or cost effective for all projects, and other technical personnel can provide day-to-day oversight. (66)

581. COMMENT: Delete the phrase “under the supervision and direction of an engineer.” The language as presently proposed could be interpreted to mean that an engineer, by definition a professional engineer licensed in the State of New Jersey, must be on-site at all times to provide direction and supervision for all aspects of the job, for example tree trimming. It is unreasonable to require a professional engineer to be on-site to provide direction and supervision at all times during every work activity that must be accomplished to comply with the terms and conditions of a permit. By definition, “best management practices” will be developed in reliance on the expertise of the appropriate professionals, which will vary based on the circumstances. (42)
582. COMMENT: As presently proposed, this section could be interpreted to mean that a licensed professional engineer in the State of New Jersey must be on-site at all times to provide direction and supervision for the job. It is unreasonable to require a professional engineer to be on-site to provide direction and supervision at all times during every work activity that must be accomplished to comply with the terms and conditions of a permit. Instead, any work should be performed under the supervision of an authorized representative of the permittee. Accordingly, the following language should be inserted in this section: “Proper Oversight: The permittee shall ensure that all approved activities are undertaken using the best management practices available under the direction of an authorized representative of the permittee.” (22)

RESPONSE TO COMMENTS 580 THROUGH 582: The Department recognizes that proper oversight will vary from project to project. Depending on the activities being performed, proper oversight may require day-to-day project/construction supervision, or overall project management which may include periodic site visits. Oversight is proper if all aspects of the project are undertaken in compliance with the approved permit and all its conditions. It is at the discretion of the applicant and his professional to determine on a case by case basis, if or how frequently the licensed profession engineer must be onsite. The objective is to have the appropriate professional available at the appropriate time. The Department believes this flexibility is already inherent in the condition as written.

The Department agrees that best management practices may vary depending upon the circumstances since the goal of this condition is to ensure that the project is constructed without any impacts to the flood hazard area or environment that were not approved as part of the permit. The does not intend to require that a licensed professional engineer be present onsite during all phases of construction. Therefore, in order to clarify the Department’s intent with regard to this provision, N.J.A.C. 7:13-8.2(b)6 has been modified on adoption to require that permittee shall ensure that all approved activities are undertaken using the best management practices available under the supervision and direction of an engineer “at all points necessary to ensure compliance with all permit conditions.”
N.J.A.C. 7:13-8.2(b)7

583. COMMENT: It appears that a planned diversion of a stream is allowable under this section, such as during culvert replacements and stream restoration projects. (66)

RESPONSE: Yes. If the Department determines, during the review of the general permit, that the creation of a temporary diversionary channel would serve to protect the environment and reduce the likelihood of adverse impacts to flooding during construction, the planned diversion of a stream would be permitted.

N.J.A.C. 7:13-8.2(b)12

584. COMMENT: The Department needs to clarify on what ground(s) the Department would deny a transfer as implied at N.J.A.C. 7:13-8.2(b)12ii. (26)

RESPONSE: The rules at N.J.A.C. 7:13-8.2(b)12ii refer to transfers of permits that must be conducted in accordance with the terms and conditions at N.J.A.C. 7:13-14.1, transfer of an approval. At N.J.A.C. 7:13-14.1 the Department lists four criteria for the transfer of an approval. They are: the approval must be valid; the approval cannot be transferred if it is for an emergency permit or an individual permit obtained based upon a hardship exception; the transfer must be to a person who currently owns or is under contract to purchase the site that is the subject of the approval; and the transfer cannot alter a basic condition upon which the approval was granted or circumvent a requirement of the chapter. Consequently, the Department will deny a transfer if the permit is an emergency approval, an individual permit based upon a hardship exception, or if the Department determines that the transfer would alter a basic condition of the original approval or circumvent a requirement of the chapter. For example, the Department may have approved a road crossing over a channel because the applicant had no other feasible means of gaining access to a developable portion of a site. If, subsequently, the owner sells the property to an adjacent owner who already had access to that portion of the site, the Department may deny the transfer since, had the parcels been combined to begin with, there would have been no justification for
the crossing. Consequently, the transfer would allow the applicant to circumvent a requirement of the chapter and would be denied.

585. COMMENT: Noncompliance under N.J.A.C. 7:13-8.2(b)12iii is equivalent to a violation. Requiring that the applicant self-police and take responsibility but then tell them that by doing so they may be subject to enforcement action entirely defeats the purpose of the rules. This may lead to cover-ups rather than responsible reporting. (26)

RESPONSE: The Department’s enforcement provisions in Subchapter 19 establish penalties based upon several factors, including the knowledge of the violator and the length of time a violation continues before being corrected. Consequently, it behooves the permittee to tell the Department as quickly as possible when they become aware that a violation has occurred since each day that it is not reported will constitute a separate violation with a separate and additional penalty assessment. The self reporting requirement is a relatively standard requirement throughout the Department, for example, in the air permitting and New Jersey Pollutant Discharge Elimination System (NJPDES) programs.

N.J.A.C. 7:13-8.3 General permit 1 for channel cleaning under the Stream Cleaning Act

586. COMMENT: Stream cleaning needs to be better regulated or it may result in environmental and stream degradation and flooding. Contractors performing the task need better training in stream morphology and restoration. A certification program should be developed and required for those performing these activities. (10, 67)

RESPONSE: The Department acknowledges the commenter’s concerns regarding stream cleaning. The Department believes that conditions at N.J.A.C. 7:13-8.3(d) particular to channel cleaning under the Stream Cleaning Act, provide ample protection for a watercourse from unintended negative effects of any project, as do conditions at N.J.A.C. 7:13-8.1(b). Because of these numerous conditions, the Department believes that a certification program is not necessary, and the rule is adopted as proposed. Furthermore, professional education courses, such as offered
through Rutgers University, help to train contractors in various construction and regulatory issues. The Department encourages those involved in conducting these projects to take advantage of the availability of these courses.

587. COMMENT: The Department needs to clarify and define "channel-cleaning" activities (desnagging and/or removal of accumulated sediment, debris and garbage). The Department should develop guidelines, best management practices (BMPs) and categories of activities (general maintenance, pre-flood, emergency and post-flood) with associated permit triggers. The permit triggers should be based upon the level of effort and extent of the channel clearing and should define which activities are allowed under each type of permit (that is, emergency, permit-by-rule, general or individual permit). For example, *de minimis* “desnagging” near a bridge or culvert to prevent damage to the structure or to avoid a reduction in conveyance capacity would not need a permit; however, desnagging with greater disturbance to the stream may need a permit. (66)

588. COMMENT: The Department should develop a professional certification and education program for stream channel restoration and channel cleaning BMPs and consider requiring oversight by such certified professionals for all types of work in the stream. (66)

RESPONSE TO COMMENTS 587 AND 588: The Department believes that a BMP manual for these activities is not necessary, since the conditions of General Permit 1 adequately address and guide the applicant as to what is allowed under the permit. For instance, the permit allows removal of accumulated silt, sediment, debris and/or garbage from a channel with a natural bed, but does not allow removal of material below the natural bottom of the channel. Furthermore, to minimize impact, if the project involves sediment removal from a channel with a natural bed, the channel reach must be less than 500 feet in length; cannot exceed 15 feet in average width; the channel must have a documented history of severe flooding that has resulted or can result in property damage; the channel cannot be classified as a Pinelands water or Category One water under the Department's Surface Water Quality Standards at N.J.A.C. 7:9B; and, the channel cannot be a documented habitat for threatened or endangered species. Finally, the Department
believes that having categories of activities and permit triggers is not necessary, as the new adopted rules cover these scenarios via permits by rule, and general and individual permits.

The Department also believes that general and specific conditions throughout the new adopted rules provide ample protection from unintended negative consequences for stream channel restoration, and channel cleaning projects. Therefore, the Department believes that a certification program is not necessary, and that oversight by certified professionals would add an unnecessary layer, and expense, to project review.

589. COMMENT: Restoration of near-stream areas damaged by “channel cleaning” and maintenance of the hydraulic capacities of bridges and culverts should be required. (66)

RESPONSE: N.J.A.C. 7:13-8.3(d)4 requires that any channel cleaning project cannot disturb the channel bank or the riparian zone, unless such disturbance is unavoidable, necessary to gain access to the channel and is minimized. Furthermore, when possible, the project must be conducted from only one bank, the use of heavy equipment in the channel must be avoided, and vegetation and tree canopy on the more southerly or westerly bank must be preserved in order to shade the channel. Also, N.J.A.C. 7:13-8.1(b) requires that the regulated activity be performed in accordance with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90, which will help to restore near stream areas disturbed by any stream cleaning. As such, the Department believes that disturbances to near stream areas will be both minimized and appropriate restoration will occur.

590. COMMENT: We recommend an individual permit for stream cleaning and oppose stream cleaning under a general permit. We support the activity being carried out by a county, municipality, or designated agency rather than by an individual. Expertise may not exist at government or agency levels to determine when a stream needs to be cleaned. Inappropriate and ill-informed removal of debris destroys critical food, habitat, stream ecology and protection from erosive forces to both the stream and aquatic life. (10, 67)
RESPONSE: In 1998, the Flood Hazard Area Control Act at N.J.S.A. 58:16A-67 was amended to allow a local government to clean, clear or desnag a stream under certain conditions without applying for a 90-day stream encroachment permit. The amendments require the applicant to notify the Department of the proposed stream cleaning project, and the Department has either 15 or 60 calendar days to respond, depending on the particular activities proposed. If the Department does not respond within the allotted time, the project is automatically approved. Since the enactment of the amendments, the Department has been complying with this mandate, and has been following this procedure for projects that comply with the conditions in the legislation. N.J.A.C. 7:13-8.3 has been adopted to codify the procedure required under the amendments to the Act and to add necessary clarification and detail. The provisions and limitations of this general permit are therefore statutory, and the Department cannot require an individual permit for activities that meet the requirements of N.J.S.A. 58:16A-67.

591. COMMENT: This section describes what must be submitted to the Department for stream cleaning projects proposed under this general permit. As written, these requirements would apply to removal of trash and debris and general desnagging, as well as projects involving sediment removal. Requiring signed and sealed drawings, and certification by a municipal and county engineer, are too onerous for projects to remove trash and debris by hand. (29)

592. COMMENT: Before the Stream Cleaning Act, removal of trash and debris and general desnagging by hand did not require any permits. Under the proposed new rules and current Freshwater Wetland Protection Act rules, permits are needed and can only be obtained by local government. Technically, private groups such as the boy scouts or water watch groups can not conduct litter clean-ups along and within streams. (29)

RESPONSE TO COMMENTS 591 AND 592: At N.J.A.C. 7:13-7.2(d)3, the Department has provided a permit-by-rule for the removal of accumulated sediment and/or debris from a regulated water along a public roadway and/or on public property, provided all work is performed by hand and not with heavy machinery. This work must be conducted under the supervision of a public entity with responsibility for the public roadway or property, and does not
require an application to the Department with signed and sealed plans. The Department has also provided a permit-by-rule at N.J.A.C. 7:13-7.2(b)1 for the removal of trash, debris and dead vegetation by hand. The permit-by-rule is not limited to local governments, nor is an application to and approval by the Department necessary. Consequently, litter clean-ups can be conducted in and along waterways as they were previously as long as the conditions of the applicable permit by rule are satisfied.

593. COMMENT: Many of the natural streams that require cleaning for mosquito control would meet the physical criteria described in N.J.A.C. 7:13-8.3. Please clarify if mosquito control agencies can apply for this permit. If yes, would certification by a professional engineer substitute for the municipal or county engineer? (29)

RESPONSE: Local mosquito control agencies, such as County Mosquito Control Commissions, can apply for general permit 1 under N.J.A.C. 7:13-8.3. Any engineer who can sign and seal plans (so, is licensed), can sign and seal plans for this general permit.

594. COMMENT: The Freshwater Wetlands program has allowed a GP-26 application to cover multiple 500 foot segments, one per tributary, for stream systems greatly impaired by sediment and neglected for years. Will these rules also allow this? (29)

RESPONSE: If the purpose, scope and method proposed to clean each segment meets all of the standards and criteria contained at N.J.A.C. 7:13-8.3, the Department will allow multiple segments to be cleaned with the general permit. Furthermore, N.J.A.C. 7:13-8.3(b) provides that the receipt of a freshwater wetlands general permit 26 authorization under N.J.A.C. 7:7A-5.26 will automatically satisfy the requirement for a flood hazard area general permit 1. Thus applicants who receive a freshwater wetlands general permit 26 will not have to apply for a flood hazard area general permit 1.

595. COMMENT: The proposed regulations state that an agency that has obtained freshwater wetlands general permit 26 does not have to obtain a flood hazard area general permit 1
authorization. Therefore, receiving authorization under flood hazard area general permit 1 does not automatically provide authorization under freshwater wetlands general permit 26. Very rarely could a stream be cleaned with only a flood hazard area permit. It seems redundant to require two permits, where in the past only one was required. (52)

RESPONSE: As noted in the response to comment 594, applicants who receive a freshwater wetlands general permit 26 will not have to apply for a flood hazard area general permit 1. However, the Freshwater Wetlands Protection Act rules have notice requirements that must be satisfied pursuant to N.J.A.C. 7:7A-10, which are not satisfied by general permit 1 requirements in Flood Hazard Area Control Act rules. As such, while the receipt of a freshwater wetlands general permit 26 automatically satisfies the requires of flood hazard area general permit 1, receipt of a flood hazard area general permit 1 does not satisfy all necessary requirements for receiving a freshwater wetlands general permit 26. To the extent the proposed project requires a freshwater wetlands general permit 26 and a Flood Hazard Area Control Act general permit 1, the applicant may choose to proceed with the freshwater wetlands permit application and will not have to proceed with two permit applications because of the allowance provided by this section.

596.COMMENT: The wording of N.J.A.C. 7:13-8.3(d)9iii is misleading. It appears to read that there must be a documented history of flood damage to property before sediment can be removed from a stream channel. Sediment removal may also be necessary to prevent future property damage where there is currently no documented history of flood damage. The wording should be clarified. (3)

RESPONSE: The Flood Hazard Area Control Act at N.J.S.A. 58:16A-67 requires that, “For any project that includes sediment removal… the applicant shall provide a statement from the engineer that the stream floods and that such flooding results or can result in property damage necessitating the proposed cleaning, clearing, or desnagging.” If there is not a documented history of flood damage from a watercourse, then it is assumed that the watercourse and its flood hazard area are capable of handling large storms, and cleaning of such watercourse is not necessary. The wording of this section is meant to allow stream cleaning only for streams where
there is known severe flooding and is adopted as such. Stream cleaning projects that do not meet the criteria of general permit 1 can be authorized under an individual permit pursuant to N.J.A.C. 7:13-11.15.

597. COMMENT: Under N.J.A.C. 7:13-8.3(i), if the Department fails to take written action within 15 calendar days of receipt of application, or permit authorization within 60 days, the application is deemed approved. We oppose this provision, even understanding it is caused by the 90-day rule. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The timeframes set forth for the review of channel cleaning projects under general permit 1 are established in the Flood Hazard Area Control Act at N.J.S.A. 58:16A-67. Since these timeframes are statutory, they cannot be amended by the Department under this general permit authorization. However, the Department anticipates that applications under this general permit will not be automatically approved since, in light of the adverse environmental impacts that misuse of this general permit could effect, the Department is committed to carefully tracking these applications and providing adequate resources so that the statutory timeframes are met.

598. COMMENT: There is no technical or legal basis to differentiate between private and public entities for stream cleaning activities. This general permit should be revised to include private entities. Furthermore, there is no technical basis to limit stream cleaning projects to 500 ft and less than 15 ft in width. These criteria should be deleted. (33)

RESPONSE: In 1998, the Flood Hazard Area Control Act at N.J.S.A. 58:16A-67 was amended to allow a local government to clean, clear or desnag a stream under certain conditions without applying for a 90-day permit. Adopted new general permit 1 implements the provisions of the Flood Hazard Area Control Act, which limits the scope of this approval to certain public entities, as well as to stream cleaning activities of a certain size. The Department has, however, provided a permit-by-rule at N.J.A.C. 7:13-7.2(b)1 for the removal of trash, debris and dead vegetation from a stream by hand. The permit-by-rule is not limited to local governments or to a particular size project, nor is an application to or written approval from the Department necessary. For
projects that exceed the scope of this permit-by-rule or general permit 1, any person can apply for an individual permit to remove sediment from a channel pursuant to the requirements of N.J.A.C. 7:13-11.15. For stream cleaning activities that do not meet the permit-by-rule or general permit requirements, the Department believes that it is necessary to provide for site specific review of the proposed activities through an application for an individual permit, in order to properly assess any potential adverse impacts to flooding or the environment.

N.J.A.C. 7:13-8.4 General permits 2A through 2G for agricultural activities designed by the NRCS

599. COMMENT: Pursuant to this general permit, the Natural Resource Conservation Service (NRCS) and Soil Conservation District (SCD) manpower and resources will define what farmers can and cannot do. If the NRCS and/or SCD fail to act, the farmer will be adversely affected. This is contradictory of the history of the agricultural exemptions that were clearly initially the legislative intent. The Department should specify what steps have been taken to coordinate with the NRCS to establish that this Federal agency can and will assume the regulatory responsibility assigned to them under these rules, and whether they have the manpower to assume these responsibilities. (26)

RESPONSE: The NRCS is the agency that will participate in the review of the agricultural activities under the adopted general permits at N.J.A.C. 7:13-8.4. Prior to the proposal of these general permits, the Department met with the NRCS to discuss and develop each. Additionally, many of the identified general permit activities are already activities for which the NRCS provides farmers with plans and technical assistance. Consequently, the Department is confident that the general permitting process for the agricultural activities will occur efficiently and without negative repercussions to agriculture.

600. COMMENT: These general permits will further erode the ability of the farmer to make a profit and maintain value the of lands for their heirs. Adding so many layers of rules and regulation will make farming more difficult, dissuading individuals from continuing or entering
into agricultural practices, making it more attractive for small farmers to sell to developers. This is anti-“smart growth.” (26)

RESPONSE: The Department disagrees that the general permits for agricultural activities will impede farming in any way. The NRCS has routinely provided technical expertise and advice for conducting agricultural activities in and adjacent to waterways, at no cost to the farmers. Further, farmers who obtain farm conservation plans and use best management practices can obtain Federal funding for restoring riparian zones, to install pumps, fences and fords to limit both human and animal intrusion into stream corridors. Thus, the Department believes the general permits supplement and complement existing NRCS programs.

601. COMMENT: I oppose the agriculture general permits and the oversight of these projects by the USDA Natural Resources Conservation Service (NRCS). The NRCS is biased toward agriculture and will approve inappropriate projects. An independent agency should perform these functions instead. (56)

RESPONSE: The State of New Jersey is spending millions of dollars via the Farmland Preservation Program to assist in the preservation of agriculture statewide. In response, the Department of Environmental Protection recognizes agriculture’s importance to the State when adopting land use rules. The adoption of the agricultural general permits is the mechanism under the Flood Hazard Area rules to allow activities necessary for the conduct of agriculture, while ensuring protection of the flood hazard area and environment. The Department does not agree that an independent agency should review the activities for which the Department is providing general permits for agricultural activities. The NRCS is expert in agricultural practices and entirely knowledgeable about the need to protect the stream environment from poorly planned or executed agricultural activities. The protection of existing waterways through implementation of best management practices, and the restoration of previously disturbed waterways and wetlands are all responsibilities of the NRCS under Federal agricultural laws and funding programs. Consequently, the NRCS is very qualified to perform these reviews in concert with the Department’s permitting program. Finally, if agricultural activities do not comply with the
adopted, new rules, the Department can seek compliance and enforcement via N.J.A.C. 7:13-19. This will help to ensure protection of critical flood plain areas.

N.J.A.C. 7:13-8.4(a)1

602. COMMENT: To be consistent with the definition section of the rules, the word “active” should be deleted from N.J.A.C. 7:13-8.4(a)1, which apply to general permits 2A through 2G, in order to avoid confusion where agricultural land may be fallow. Fallow agricultural lands enrolled in conservation programs, which may be in place longer than 5 years, should not be precluded from future agricultural use. (55)

RESPONSE: As noted in the response to comments 156 and 157, the definition of “actively farmed” was adopted in these rules in order to maintain consistency with the use of the term in the Department’s Freshwater Wetlands Protection Act Rules, and references land areas that are currently and continually in use for cultivation, grazing or any other agricultural purposes that are recognized as “agricultural” by the USDA. The definition is necessary to identify those farms that are under active agricultural use from those that have been abandoned and should not benefit from the proposed permits-by-rule and general permits. The five-year limit on fallow areas is taken from the definition of "established, ongoing farming, ranching or silviculture operation" from the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4. The adopted definition is broader than the USDA definition in that it applies to land areas on which any agricultural activity, recognized as such by USDA, is undertaken. The term “actively farmed” applies only to the four permits-by-rule at N.J.A.C. 7:13-7.2(f) and the seven general permits at N.J.A.C. 7:13-8.4, which have been adopted to facilitate ongoing agricultural activities. Agricultural activities that do not meet the definition of “actively farmed” are not precluded under these rules. However, like any other activity that does not qualify for a permit-by-rule or general permit, an individual permit would be required for agricultural activities that do meet the definition of actively farmed.

N.J.A.C. 7:13-8.4(a)3
603. COMMENT: We support that the agricultural work is required to be carried out under the supervision of NRCS. Any work in a stream needs special expertise and training. (10, 67)

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

604. COMMENT: The Department should define the term “supervision” in the context of N.J.A.C. 7:13-8.4(a)3. (26)

RESPONSE: In the process of establishing plans for farms, the NRCS makes onsite visits and works with the farmer to ensure that the plan is feasible and reasonable. They may also visit the site during and after construction. That is the extent of the supervision intended under N.J.A.C. 7:13-8.4(a)3. Finally, since the supervision for the general permits at N.J.A.C. 7:13-8.4 will be performed by NRCS, it is inappropriate for the Department to include a definition for such in the adopted, new rules.

605. COMMENT: The Natural Resource Conservation Service (NRCS) does not approve agricultural activities. The local soil conservation district officially “approves” conservation plans designed by NRCS. (55).

RESPONSE: The Department recognizes that the jurisdiction and responsibilities of the NRCS and local soil conservation district are coordinated at the local level in order to facilitate ongoing agricultural activities. It is not the Department’s intention under this general permit to require unnecessary involvement by either the NRCS or local soil conservation district. The intention of N.J.A.C. 7:13-8.4(a)3 is to ensure the appropriate approvals and levels of oversight are provided for activities authorized under this general permit. Therefore, in order to clarify the Department’s intention, N.J.A.C. 7:13-8.4(a)3 has been modified on adoption to require that the agricultural activities be approved by and performed under the supervision of the USDA Natural Resource Conservation Service “and/or local soil conservation district, as appropriate.”
N.J.A.C. 7:13-8.4(c)1

606. COMMENT: Regarding N.J.A.C. 7:13-8.4(c)1i, the Department should clarify whether the 2,000 square feet of removed trees refers to permanent or temporary removal. In addition, the reference to “trees” should be changed to “vegetation.” In addition to the area, is there a linear foot limit associated with this general permit? (66)

RESPONSE: N.J.A.C. 7:13-8.4(c)1i authorizes soil erosion control, bank stabilization and bank restoration projects. In order to protect the biota of the stream, all work must be accomplished by regrading the eroded areas to a stable slope and replanting the disturbed areas with suitable vegetation, unless site conditions and steep slope grades make this technique unfeasible. Where this technique alone is not sufficient to stabilize erosion, or if more than 2,000 square feet of trees would be removed, soil-bioengineering must be used. Since the Department seeks to encourage bank stabilization, it has limited the wording for vegetation removal to trees. This is expected to give farmers more flexibility to successfully complete bank stabilization projects. The requirement to use soil bioengineering applies to both temporary and permanent removal. Furthermore, there is no linear foot limit associated with this general permit. However, the amount of vegetation removed in a riparian zone must be minimized, and replanting in the riparian zone is required for all temporary disturbances, pursuant to N.J.A.C. 7:13-8.4(c)1ii, and N.J.A.C. 7:13-8.4(c)1v, respectively. Projects that exceed the limitations of this general permit may be eligible to receive an individual permit under N.J.A.C. 7:13-11.14.

607. COMMENT: Regarding N.J.A.C. 7:13-8.4(c)1iii, the Department should define ‘significantly’ as it applies to a change in the cross-sectional area of the channel. (66)

RESPONSE: In order to preserve the flood-carrying capacity of the channel, and thereby ensure that the project will not exacerbate flooding, N.J.A.C. 7:13-8.4(c)1iii requires that “the cross-sectional area of the channel” not be “significantly altered.” Since the extent of erosion and channel characteristics are different for each project, flexibility is required to determine whether
the proposed cross-sectional area of the channel will be significantly altered. In this context, however, a significant alteration of the cross-sectional area is an alteration that the Department believes will adversely affect the hydraulic capacity of the channel such that flooding could increase and/or the integrity of the channel could be compromised as a result. “Significantly altered” can be determined in a pre-application with the Department, or during the application review process.

608.COLL: The stipulation that soil bioengineering “shall be used” when re-sloping and re-vegetating, does not address situations where structural armoring of the embankments would be necessary due to site limitations and/or public safety. The “Standards for Soil Erosion and Sediment Control in New Jersey”: Standard for Soil Bioengineering, 28-1 and the NRCS Engineering Field Handbook (EFH) provide methods for properly analyzing and designing such stabilization measures. (55)

RESPONSE: General permit 2A authorizes soil erosion control, bank stabilization or bank restoration project on land that is actively farmed. N.J.A.C. 7:13-8.4(c)1i requires that “the project is accomplished by re-sloping the eroded bank and planting vegetation where possible. Where these techniques alone will not stabilize erosion, or where more than 2,000 square feet of trees would be removed using such methods, soil bioengineering, shall be used.” This general permit does not, therefore, authorize the placement of structural armoring. In cases where soil bioengineering is not sufficient to stabilize an eroded bank or restore an eroded channel, armoring can be permitted under the individual permit requirements pursuant to N.J.A.C. 7:13-11.14. Finally, all activities authorized under a general permit or individual permit must conform to the New Jersey Standards for Soil Erosion and Sediment Control at N.J.A.C. 2:90, pursuant to N.J.A.C. 7:13-8.1(b)5 and 11.1(e), respectively. Therefore, the Standard for Soil Bioengineering, 28-1, are incorporated by reference.
609. COMMENT: Removal of garbage or other debris from a stream without NRCS/SCD approval would not qualify for proposed general permit 2A and therefore require an individual permit. It is unclear whether these Federal agencies were contacted by the Department to determine the applicability of this type of approval under Federal standards. This requirement will make farmers criminals for removing garbage from their streams and likely dissuade them from doing so due to the cost and time. (26)

RESPONSE: It is true that the removal of garbage or other debris from a regulated water without NRCS/SCD approval would not qualify for proposed general permit 2B. However, such activity would not necessarily require an individual permit. N.J.A.C. 7:13-7.2(b)1i(5) provides that the removal of trash, debris and dead vegetation by hand is allowed as a permit by rule, with no requirement to notify the Department in writing prior to undertaking the activity. Furthermore, N.J.A.C. 7:13-7.2(a)5 provides that the use of machinery to remove a major obstruction from a regulated water that cannot be removed by hand, such as a fallen tree, abandoned vehicle, furniture or other large debris, is allowed as a permit by rule subject to certain conditions including, but not limited to, prior written notice to the Department. Lastly, if farmers cannot qualify for either of these permits-by-rule, they still have the option of applying for general permit 2B, which would require NRCS approval. In view of the above, the Flood Hazard Area Control Act Rules provide options for farmers to clear garbage or other debris from a regulated water, both with and without NRCS approval, and without the need for an individual permit.

N.J.A.C. 7:13-8.4(c)3

610. COMMENT: Roadways should not be allowed across regulated waters under proposed general permit 2C. We have seen crossing abuses on farms and the proposed general conditions are not sufficiently protective. (10, 67)

RESPONSE: The construction of a roadway across a regulated water would have needed a stream encroachment permit under the repealed Flood Hazard Area Control Rules. This general permit makes it easier to obtain approval of such crossing, but includes limits to minimize
impacts and requires that the activities are performed under NRCS oversight. Furthermore, all general permits require that an application is submitted to the Department for review. Therefore, the Department believes that roadways for agricultural activities should be allowed by general permit 2C and that the provisions and conditions for this general permit are sufficiently protective of the environment and public safety, health and general welfare.

611. COMMENT: The permit authorization for farming activities seems to invite developers to use a general permit authorization for a road crossing that they would have to do as an IP if doing a development. In other words, can a road authorized under a GP be later used for a road through a development? (44)

RESPONSE: There is no specific provision in the Flood Hazard Area Control Act Rules that would prevent a road authorized under a general permit from later being used for a road through a development. However, N.J.A.C. 7:13-8.4(a) requires all general permits for agricultural activities to occur on land that is actively farmed, be solely intended for agricultural purposes, and be approved by and performed under the supervision of the USDA Natural Resource Conservation Service. These provisions would make it impossible for a developer to apply directly for this general permit.

Proposed N.J.A.C. 7:13-8.4(c)3v requires that the perpendicular path of disturbance through the riparian zone, to construct an agricultural roadway crossing, is no more that 25 feet in width (including all fill and other disturbance related to the placement of the road). This limit on disturbance would necessarily result in an even narrower roadway, which would not be sufficient to accommodate most proposed residential or commercial developments. Furthermore, if it became apparent during the review of the general permit application, that the roadway was actually intended for future development, rather than solely agricultural purposes, the application would not be approved by the Department.

612. COMMENT: It is unclear whether N.J.A.C. 7:13-8.4(c)3 permits construction of a ford; if so, fords should not be permitted in certain waters under a general permit, such as trout production and Category One. (66)
RESPONSE: Whereas general permit 2E at N.J.A.C. 7:13-8.4(c)5 authorizes the placement of a ford across a channel for livestock, general permit 2C at N.J.A.C. 7:13-8.4(c)3 is intended for road crossings associated with vehicular use. General permit 2C does not specifically permit, nor preclude, the construction of a ford for a roadway associated with agricultural activities. However, N.J.A.C. 7:13-8.4(c)3i does require that construction in the channel is minimized. Furthermore, N.J.A.C. 7:13-8.1(b)1 requires that work under any general permit is not undertaken in the channel or riparian zone of a regulated water with fishery resources during a restricted time period as described at N.J.A.C. 7:13-10.5(d), unless otherwise approved by the Department's Division of Fish and Wildlife. Additionally, N.J.A.C. 7:13-8.1(b)2 requires that work under any general permit cannot adversely affect low-flow aquatic passage within any regulated water. It is the Department's opinion that these provisions would provide the Department enough flexibility to issue a general permit for a ford, while at the same time being protective of the environment and floodplain areas. These same provisions could also be used to prevent fords in areas where adverse impacts to fishery, or other, resources were a concern. Department decisions would be made based on the specific circumstances associated with the project, and compliance with permit requirements. Finally, the Department is of the opinion that a ford, or other activities allowed by N.J.A.C. 7:13-8.4(c)3, can be built in trout production or Category One waters, since conditions associated with this section of the adopted new rules are protective of such resources.

N.J.A.C. 7:13-8.4(c)4

613. COMMENT: The filling of "manmade regulated water" for wetlands restoration, should not be permitted under proposed general permit 2D. The section is unclear and opportunity for abuse is too great to allow this activity under a general permit. (10, 67)

614. COMMENT: This proposed section authorizes the filling of a manmade channel for the purpose of freshwater wetlands restoration. It is unclear how this general permit would encourage restoration, as stated at 38 N.J.R. 3984. Additionally, there is no mention of how this
activity will be monitored, or if the desired effect of wetland restoration will be accomplished through the filling of manmade channels. (45)

615.COMMENT: N.J.A.C. 7:13-8.4(c)4 allows the filling of a manmade regulated water for the purpose of freshwater wetlands restoration. As this description is unclear, DEP should define manmade regulated water. It would appear that a manmade regulated water is not a wetland, so restoration is not applicable. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 613 THROUGH 615: N.J.A.C. 7:13-8.4(c)4 authorizes the filling of a manmade channel for the purpose of freshwater wetlands restoration. The Department has adopted this general permit because it is of the opinion that it will encourage freshwater wetlands restoration, identified as an important Department environmental goal. The general permit is limited to regulated waters that originate onsite, and requires that the filling of the regulated water will not adversely affect overland drainage on adjoining properties, and as such is restricted to limited situations. In many cases, manmade channels on existing agricultural fields have had negative affects on wetland complexes, by draining away groundwater that would naturally provide the hydrology to maintain freshwater wetlands. In such cases, filling these manmade channels would replenish the drained wetlands with hydrology necessary for a functioning wetland complex. The Department disagrees that the section is unclear and believes that the limitations on this general permit will adequately protect the environment, as well as the public safety, health and general welfare.

N.J.A.C. 7:13-8.4(c)5

616.COMMENT: This proposed section authorizes the construction of a ford across a channel for livestock. A description of a ford is provided, but in order to minimize the effects to water quality, placing a bridge over the channel would be more advantageous, preventing any livestock or vehicle contact with the water. (45)
617. COMMENT: Fords should not be allowed under a general permit for agriculture, since fords are not allowed for activities that contribute less pollution than agricultural stream crossings. At a minimum, agricultural fords should have gates on either end to prohibit animals from remaining in the stream corridor. (66)

RESPONSE TO COMMENTS 616 AND 617: Proposed general permit 2E authorizes the construction of a ford across a channel for livestock. A ford is a shallow area along the bed of a stream where the channel can be crossed by walking or driving a vehicle. The construction of a ford involves locating a shallow place in a channel and stabilizing the crossing with hard material such as concrete in order to provide livestock with stable footing and to prevent channel erosion. The Department believes that creating a general permit for this activity will have a substantial benefit to water quality and flood prevention. When large numbers of livestock access and/or cross a stream with a natural bed, the repetitive trampling causes erosion, sediment discharge, destruction of stabilizing vegetation and deterioration of channel integrity. Livestock are sometimes permitted to cross streams anywhere on site and thus large portions of channel are continually damaged. By permitting a small amount of short term disturbance required to construct a stable ford, and thereby concentrating access and crossings at one stable location, the proposed general permit will prevent larger disturbances with far greater long term impacts.

The Department agrees that a bridge over a channel may be more advantageous to water quality in some cases. However, this provision is intended to provide farmers with a low cost alternative to the construction of a bridge, in cases where livestock is already crossing a stream, and therefore may encourage more farmers to resolve the erosion problems caused by livestock crossing regulated waters. The Department therefore believes that the construction of a ford for livestock to cross a water will result in an improvement in water quality over existing conditions in which livestock cross without any protection to the channel. Furthermore, the Department believes that gates should not be required on either side of the ford as such gates would impede livestock from crossing the water channel without a person to open and close the gates, and that the having such gates should be left to the farmer's discretion.

N.J.A.C. 7:13-8.5 General permit 3 for bridge or culvert scour protection by a public entity.
618. COMMENT: Scour protection should be made a permit-by-rule, not a general permit. This type of work occurs below the bottom of the stream and inherently will not affect flooding. (33)

RESPONSE: It is the Department's experience that scour protection activities, if improperly undertaken, can result in adverse impacts to flooding and the environment. The Department therefore believes that scour protection activities warrant a project-specific review, under either a general permit or an individual permit, in order to ensure that such activities will not threaten public safety, health, general welfare and the environment. General permit 3 has been adopted to cover minor scour protection activities that conform to prescribed standards, which will enable the Department to perform an expedited review. Scour protection activities that do not meet the requirements of general permit 3 therefore require an individual permit review. Given the potential for adverse impacts to flooding or the environment, the Department does not believe that scour protection activities should be authorized under a permit-by-rule.

N.J.A.C. 7:13-8.5(b)3 and 4

619. COMMENT: Please specify a linear foot limit for the amount of rip-rap allowed under this general permit. (66)

RESPONSE: Adopted N.J.A.C. 7:13-8.5(b)3 and 4 provide that a scour protection activity is eligible for authorization under general permit 3 only if the stabilizing material placed in the channel is the same location as the material that has eroded away since the bridge or culvert was originally constructed and the amount of the stabilizing material placed in the channel is not greater than necessary to replace the material that has eroded away since the bridge or culvert was originally constructed. The amount of material, rip-rap or otherwise, allowed under this permit will vary from project to project depending on the amount and location of the material eroded away. Therefore, the Department believes that it would not be appropriate to specify a linear foot limit for the amount of rip-rap or other stabilization material allowed under this permit.
COMMENT: The need to provide scour protection for bridges is urgent as evidenced by the hundreds of New Jersey bridges identified as "scour critical" and bridge collapses that have occurred in 2005 and 2006. Scour countermeasure designs should be based on Federal Highway Administration (FHWA) procedures described in HEC-18, HEC-20, and HEC-23 to withstand scour conditions during a 100-year or 500-year event and not on existing scour holes. Existing scour holes are not predictive of what will occur during a large flood event because scour holes develop during the initial stages of a flood and then largely fill back in as the flood flows diminish. In addition, many bridges have not experienced a 100-year or 500-year flood event. Previous discussions with the Department have resulted in agreement that scour protections that meet certain criteria can be considered "minor", and will not require hydraulic analysis to verify that the flood profile will be affected. The general permit for scour protection should be limited to what is necessary to protect the bridge structure in accordance with the FHWA standards and what is demonstrated not to affect stream hydraulics. The general permit should also limit the scour protection to what is necessary to protect the bridge structure in accordance with the FHWA standards. If the Department will not approve meaningful scour protection measures under a general permit, then this general permit should be removed from the rules rather than mislead the public about the efficacy of merely filling in visible scour holes, which protects neither the environment nor the public. In that case, an individual permit needs to be made available for bridge scour protection measures. (15, 57)

RESPONSE: The Department has developed this general permit to allow public entities to perform minor scour protection activities in order to facilitate maintenance of existing bridges and culverts. The Department believes that the limits and conditions of this general permit are necessary to ensure that scour protection activities do not adversely affect flooding or the environment. However, the Department acknowledges that there are situations where scour protection activities must necessarily exceed the limits of this general permit. Such projects, while often justifiable, may lead to adverse impacts to flooding or the environment if performed improperly. As such, the Department believes that scour protection activities in excess of the limitations of this general permit warrant a review under an individual permit application. It is
not the Department’s intention under this general permit to mislead the public, or prevent public entities from undertaking more comprehensive scour protection activities where warranted. Rather, the adopted general permit sets forth scour protection activities which, if undertaken as prescribed, will not adversely impact flooding or the environment, and thus qualify for an expedited review by the Department.

The Department also recognizes, in light of the commenter’s concerns, that the general permit language unintentionally implies that stabilization material can only be located where material has been washed away and not subsequently replaced with other material. The Department acknowledges that during flood events, stable streambed material can erode away, only to be replaced with silt, sediment and other unconsolidated material at the end of the flood event. Thus, the Department agrees that a scour hole does not always consist of an open gap in the streambed but may also consist of a space that was created during a flood event, which has been refilled with unconsolidated material that can easily wash away during a subsequent flood event, and which therefore provides little or no protection against future scouring. The Department has therefore clarified in the adopted general permit that unconsolidated material in the channel, deposited as a result of scouring during a flood event, can be replaced with rip-rap or stabilization material, provided all requirements of the general permit are met.

N.J.A.C. 7:13-8.5(b)5

621. COMMENT: This section should be revised to read "The scour protection material shall be designed to protect the structure. Consideration should be given to utilizing indigenous material where possible." In addition, the word "indigenous" should be defined. (3)

RESPONSE: N.J.A.C. 7:13-8.5(a) establishes a general permit that authorizes a public entity to place rip-rap and other stabilization material within or along a regulated water to replace material that has eroded away, in order to prevent the scouring of an existing bridge or culvert along a public roadway. The Department believes that the adopted language is sufficiently clear that stabilization is intended to protect a bridge or culvert from scour. Therefore, the Department believes it would be redundant to further clarify at N.J.A.C. 7:13-8.5(b)5 that the scour protection material shall be designed to protect such a structure.
Furthermore, the Department does agree that if the language in adopted N.J.A.C. 7:13-8.5(b)5 were revised to replace "indigenous substrate" with "indigenous material" it may be necessary to define indigenous. However, the Department believes that when “indigenous” is used with regard to “substrate”, it is clear that indigenous substrate means material from the channel of the water in question. Therefore, the Department does not find it necessary to change "substrate" to "material" or to define “indigenous” for the purposes of this general permit.

N.J.A.C. 7:13-8.5 and 8.6

622. COMMENT: The general permits for bridge/culvert scour protection and stormwater maintenance should be for all permittees, not just for a public entity. These types of activities and related minimal environmental impacts associated with these general permits have nothing to do with whether a public or private entity performs the work. (12)

623. COMMENT: Limiting these general permits to public entities and excluding homeowners associations, commercial and industrial owners etc. will result in higher costs due to unnecessary need for individual permits to do maintenance activities. This will dissuade those entities from doing so, then resulting in greater instances of un-maintained structures, which is detrimental to the environment and the very goals that the rules intended on achieving. (26)

624. COMMENT: With respect to proposed general permit 4 for stormwater maintenance by public entities, this permit should be modified to allow for stormwater maintenance to also be conducted by private entities responsible for stormwater maintenance in mixed use or office/industrial parks. (46)

625. COMMENT: This general permit applies only to public entities. Why are homeowner associations treated differently in regard to maintenance of stormwater management measures? (15, 57)
626. COMMENT: N.J.A.C. 7:13-8.6(a) authorizes the maintenance, repair and replacement of stormwater management structures and conveyance features by a public entity. Many such structures are owned by private entities and should be maintained, repaired, and replaced by these private entities. As written, the rule by default puts the responsibility and cost of maintenance on a public entity. N.J.A.C. 7:13-8.6(b)1 implies that the Department wants a public entity to oversee such maintenance, repair or replacement but not necessarily perform the work. This would be consistent with the NJPDES municipal stormwater permitting program that requires municipalities to certify such stormwater structures are operating and maintained as designed. The Department, however, should make the permit to perform the work available to both private and public entities. (29)

627. COMMENT: There is no technical or legal basis to differentiate between a public and private entity for maintenance and repair of stormwater facilities under general permit 4. This general permit should therefore be revised to include private entities. (33)

628. COMMENT: Agricultural operations do not appear to have the ability to maintain or repair stormwater management structures under a general permit, where general permit 4, allows public entities to do maintenance and repair. (55)

629. COMMENT: Stormwater maintenance responsibilities do not always fall under the jurisdiction of a public entity. Many stormwater facilities are privately owned or maintained by a homeowner’s association or other private entity. Routine maintenance should be encouraged, not dissuaded by requiring a permit. If a permit is going to be required it should be available for private entities as well as public entities. (52)

RESPONSE TO COMMENTS 622 THROUGH 629: The general permits established at N.J.A.C. 7:13-8.5 and 8.6 are intended to allow public entities to perform certain minor scour protection and stormwater maintenance activities, respectively, which the Department has determined are necessary and appropriate to preserve public safety, health and general welfare,
and also which, if undertaken as prescribed by these general permits, will not adversely impact flooding or the environment.

It is not the Department’s intention to assign the responsibility or cost of scour protection or stormwater maintenance activities on public entities, or to qualify whether it should be a private entity or a public entity that is legally responsible for undertaking such activities at a given location. These general permits have been limited to apply to public entities because the Department believes that it is appropriate to require proper oversight of these activities by a public entity, such as a county or municipal government, given the expedited Department review of these general permits. The Department also does not intend to imply that private entities cannot, or should not, undertake scour protection and stormwater maintenance activities. However, since these general permits apply only to public entities, private entities must receive an individual permit to perform such activities.

N.J.A.C. 7-13-8.6 General permit 4 for stormwater maintenance by a public entity

630.COMMENT: General permit 4 should be deleted and changed to a permit-by-rule. (33)

RESPONSE: The permits-by-rule adopted under this chapter do not require prior review by the Department or any written approval. It is the Department's experience that stormwater maintenance activities, if improperly undertaken, can result in adverse impacts to flooding and the environment. The Department therefore believes that stormwater maintenance activities warrant a project-specific review, in order to ensure that such activities will not threaten public safety, health, general welfare and the environment.

631.COMMENT: Proposed general permit 4 should be eliminated, and included under the permit-by-rule. Requiring a general permit for routine maintenance and repair of existing stormwater management structures and facilities is absolutely unnecessary and unreasonable. It is unclear what purpose the additional paperwork and expense of applying for a general permit for this routine maintenance work would accomplish. Also note that the requirements of this
general permit will discourage public entities from performing routine maintenance work, which in turn will have a negative impact on water quality. (3)

RESPONSE: General permit 4 has been adopted in order to facilitate certain stormwater maintenance activities by a public entity, for those cases where such maintenance activities fall under the jurisdiction of this chapter.

The Department acknowledges that in many cases, the routine maintenance of lawfully existing stormwater management structures is not regulated under this chapter. For instance, N.J.A.C. 7:13-2.2(a)3ii exempts from regulation under this chapter any feature that drains less than 50 acres, provided the feature is “confined within a lawfully existing, manmade conveyance structure or drainage feature, such as a pipe, culvert, ditch, channel or basin (not including any water that historically possessed a naturally-occurring, discernible channel which has been piped, culverted, ditched or similarly modified.” Since many stormwater management structures and features throughout New Jersey would meet this description, the maintenance of such structures and features is not regulated under this chapter, and would not therefore require any flood hazard area approval from the Department.

The Department further acknowledges that, in cases where a stormwater maintenance activity does fall under the jurisdiction of this chapter, the activity may be allowed under a number of permits-by-rule at N.J.A.C. 7:13-7.2. For example, N.J.A.C. 7:13-7.2(a)1 permits the reconstruction or replacement of certain structures outside a floodway, N.J.A.C. 7:13-7.2(b)1 permits various property maintenance activities, N.J.A.C. 7:13-7.2(b)4 permits the repair of many structures, and N.J.A.C. 7:13-7.2(d)3 permits hand removal of sediment and debris from within and adjacent to culverts and bridges.

Adopted general permit 4 is therefore not intended to expand the Department’s authority, or to create additional or unnecessary paperwork, but rather to establish a set of activities which, if undertaken as prescribed, will not cause adverse impacts to flooding or the environment, and are thus appropriate for expedited review by the Department. In order to clarify the scope of this general permit, N.J.A.C. 7:13-8.6(a) has been modified on adoption to provide that this general permit applies “in cases where such activities are regulated under this chapter.”
632. COMMENT: Stormwater structures should be removed from flood hazard areas and riparian zones, not maintained at those locations. (10, 67)

RESPONSE: Adopted N.J.A.C. 7:13-8.6 authorizes the maintenance, repair and replacement of lawfully existing stormwater management structures and conveyance features by a public entity. This general permit does not authorize any new stormwater discharges or the expansion of an existing stormwater management or collection system. The Department believes it is unreasonable to not allow a public entity to maintain their lawfully constructed stormwater structures, whether they are in the flood hazard area or not. Maintenance of such structures is necessary in order to ensure that the structures operate properly so that the structures will provide the stormwater quantity, recharge and water quality benefits that they were designed for.

633. COMMENT: The Department should allow one permit to cover all structures and conveyances under the jurisdiction of the applicant to facilitate on-going maintenance and repair rather than have such activities done in a piecemeal fashion. The Department could issue a jurisdiction-wide permit with a notification process incorporated for each specific structure or facility. (29)

634. COMMENT: The Department should consider allowing one permit to cover all structures and conveyances under the jurisdiction of the applicant to facilitate on-going maintenance and repair. (52)

RESPONSE TO COMMENTS 633 AND 634: General permit 4 for stormwater maintenance by a public entity, under N.J.A.C. 7:13-8.6, does not establish a limit on the number of structures and conveyances that may be included in the general permit application. One general permit authorization could therefore be issued to cover all structures and conveyances under the jurisdiction of the applicant.

N.J.A.C. 7:13-8.7 General permit 5 for the relocation of a building to reduce flood damage
N.J.A.C. 7:13-8.8 General permit 6 for the reconstruction of a damaged or destroyed residence
N.J.A.C. 7:13-8.9 General permit 7 for residential construction in a tidal flood hazard area

635.COMMENT: The requirement that the flood hazard area be verified for proposed general permits 5, 6 and 7 will effectively eliminate the usefulness of these general permits for all but a very few applicants, since the cost of performing the required verification will be too high. (7, 18, 33, 46, 53)

RESPONSE: N.J.A.C. 7:13-8.1(k) provides that an applicant does not need to obtain a verification prior to obtaining a general permit authorization, except for certain cases under general permits 5, 6 and 7, as discussed below. In some cases, the flood hazard area design flood elevation, flood hazard area limit and/or floodway limit must be known onsite in order to determine whether a proposed regulated activity complies with the requirements of this chapter. For instance, the adopted new rules often require that a building constructed in a flood hazard area must be elevated so that the lowest habitable floor lies one foot above the flood hazard area design flood elevation. The Department cannot determine whether this requirement is met unless the flood hazard area design flood elevation is first known. The mechanism in the adopted new rules for determining and verifying the depth and extent of flooding is known as a verification, which is set forth at N.J.A.C. 7:13-6.

These general permits authorize the relocation and/or construction of a habitable building in a flood hazard area, and require that the lowest floor of the building be elevated one foot above the flood hazard area design flood elevation. Therefore, in order to determine compliance with these general permits, the flood hazard area design flood elevation must be known. General permits 5 and 6 further require that the building not be located in a floodway, and so the floodway limits must also be known for these general permits.

In cases where a Department delineation or FEMA flood insurance study is available for a site, the flood hazard area design flood elevation and floodway limits can often be easily determined (see Methods 1, 2 and 3 at N.J.A.C. 7:13-3.3, 3.4(d) and 3.4(e), respectively). In order to facilitate the processing of these general permits, the Department will accept a statement from the submitting engineer regarding the flood hazard area design flood elevation and floodway limits rather than require a formal verification under N.J.A.C. 7:13-6.
appropriate since the engineer is certifying the accuracy of the information and the Department can easily verify whether the proper flood data has been utilized.

However, if no Department delineation or FEMA flood insurance study is available for a site, Methods 4, 5 or 6 must then be used to determine the flood hazard area design flood elevation and/or floodway limits (at N.J.A.C. 7:13-3.4(f), 3.5 and 3.6, respectively). Methods 4 and 6 involve detailed hydrologic and/or hydraulic calculations and Method 5 utilizes the approximate method to estimate flooding, which is described in detail at Appendix 1. Due to the complexity of these methods, it is appropriate for the Department to review their use and require a verification when these methods are employed when obtaining authorization under general permits 5, 6 and 7. However, the application fee for a verification based on Method 5 will be waived if submitted with these general permit applications, as noted at the fee schedule at N.J.A.C. 7:13-17.1.

General permits 5, 6 and 7 can be utilized by many applicants without the need to obtain a verification. However, some applicants will need to apply for a verification to ensure that their buildings are properly elevated and that the buildings are not located in the floodway. In view of the above, the Department believes that many applicants will be able to utilize these general permits independent of the need for a verification, and therefore the Department does not agree that the requirement that the flood hazard area be verified for general permits 5, 6 and 7 will effectively eliminate the usefulness of these general permits for all but a very few applicants. Finally, the Department anticipates that the regulated community will prefer, in many cases, to conform to a 45-day general permit where possible, rather than apply for an individual permit, which is more costly to obtain, and which has a 90-day review period.

N.J.A.C. 7:13-8.8 General permit 6 for the reconstruction of a damaged or destroyed residence

636.COMMENT: General permit 6 should be deleted and changed to a permit-by-rule. (33)

RESPONSE: The permits-by-rule adopted under this chapter do not require prior review by the Department or any written approval. It is the Department's experience that the reconstruction of a
damaged or destroyed residence, if improperly undertaken, can result in adverse impacts to flooding and the environment, as well as subjecting the occupants to unsafe conditions. The Department therefore believes that the reconstruction of a damaged or destroyed residence warrants a project-specific review, in order to ensure that the residence is constructed in accordance with all requirements of this chapter.

637. COMMENT: N.J.A.C. 7:13-8.8 proposes a general permit that authorizes the reconstruction of a private residence that has been damaged or destroyed by fire, flood or other natural disaster. The Department must not allow applications for such construction to be reviewed under the proposed general permit process and should instead include it in the proposed individual permit section at N.J.A.C. 7:13-9.1. It seems as if this would be the prime example of when a reevaluation of the entire situation would be in order. In working with the applicant, it may be determined that the flood fringe and the floodway were previously misidentified or that they were never previously identified at all and that the likelihood of a reoccurrence is high. Perhaps, in working with the applicant, a better, less vulnerable location for the reconstruction on the property can be identified and agreed upon.

In December 2006, it was reported that the city of Wayne, New Jersey, is buying and tearing down 41 residential properties that regularly flood when the Pompton River overflows its banks. Earlier in December, Allstate Insurance Company announced that, due to the risk associated with flooding and coastal storms, it will no longer write policies for homeowners in New Jersey. This is clearly not the time to make it easier for homeowners to rebuild in flood hazard areas when their homes are damaged or destroyed by flooding. (37)

638. COMMENT: There should be no general permit for reconstruction of a residence. Exceptions to this rule need to be handled under an individual permit. (10, 67)

RESPONSE TO COMMENTS 637 AND 638: The Flood Hazard Area Control Act at N.J.S.A. 58:16A-55.1 provides that “No rule or regulation . . . shall prevent the repair or rebuilding within a flood hazard area of any lawful preexisting structure which was damaged by a flood or by any other means.” As such, the Department does not have the statutory authority to prevent the
reconstruction of a lawfully existing private residence, or any other structure, in a flood hazard area. The Department has, however, adopted provisions in these new rules, which require that such reconstruction is undertaken responsibly and with minimal adverse impacts to flooding, or the environment. Adopted N.J.A.C. 7:13-8.8(a) therefore provides for a general permit that authorizes the reconstruction of a lawfully existing private residence that has been damaged or destroyed by fire, flood or other natural disaster, provided the reconstruction is performed in accordance with specific limitations at N.J.A.C. 7:13-8.8(b), to minimize the chance of adverse impacts.

It has been the Department's experience that private homeowners often find the permitting process difficult to negotiate after the loss or severe damage of a home. In order to facilitate the expeditious reconstruction of a home that is destroyed or damaged due to fire, flooding or other natural disaster, the Department has adopted general permit 6, which will allow reconstruction to occur provided a number of conditions are met to reduce future flood damage potential. In order to encourage homeowners to take advantage of this general permit, the Department is proposing to require no application fee. General permit 6 is also available only for the reconstruction of a lawfully existing private residence. Reconstruction of a building other than a private residence, as well as a private residence that was erected in violation of local, State or Federal law, must receive an individual permit under this chapter.

The reconstruction of a private residence is eligible for authorization under this general permit only if it satisfies all conditions at N.J.A.C. 7:13-8.7(b). The project must first be eligible for a general permit authorization as described at N.J.A.C. 7:13-8.1(b). The residence must also have been damaged or destroyed by fire, flood or other natural disaster within the past 12 months. The general permit is designed to facilitate reconstruction by homeowners who have been suddenly displaced due to the destruction or severe damage of their home, and allow them to quickly rebuild and reoccupy their residence. Homes that have been destroyed or damaged and subsequently abandoned for more than 12 months must therefore receive an individual permit under this chapter.

The reconstructed residence must furthermore be situated within the footprint of the original residence or else moved further from the regulated water to higher ground onsite in order to reduce future flood damage potential. The building cannot be enlarged or located in a floodway.
under this general permit. The enlargement of buildings is permitted-by-rule in some cases under N.J.A.C. 7:13-7.2(a) or (b) and otherwise requires an individual permit under this chapter.

Additionally, and of critical importance to help alleviate flooding and flood damage, in order to further reduce flood damage potential, the lowest finished floor of the building must be raised to at least one foot above the flood elevation. The area below the lowest finished floor also cannot be used for habitation and must remain open to floodwaters in accordance with the standards at N.J.A.C. 7:13-11.5(l). Finally, a 20-foot perimeter of vegetation within the riparian zone can be removed around the home in order to facilitate its reconstruction, provided all temporarily disturbed areas are replanted with indigenous, non-invasive vegetation upon completion of the project, including the area vacated by the relocation of the residence if it is moved elsewhere on site.

As outlined above, adopted general permit 6 will make the process of obtaining a permit easier and more expeditious for homeowners who have suddenly been displaced from their home due to an unforeseen disaster. However, even though the general permit will make the permitting process easier, the technical requirements to reduce flood damage potential are not relaxed over what is required in an individual permit application.

With regard to the proper location of the flood hazard area and/or floodway onsite, N.J.A.C. 7:13-8.8(c) provides that a verification of the flood hazard area design flood elevation and floodway limits must be obtained prior to, or concurrent with, obtaining authorization under this general permit. An exception is made if the flood hazard area design flood elevation and floodway limits are determined using Method 1, which relies on a Department delineation, or Methods 2 and 3, which rely on FEMA flood insurance studies for flood data. If an applicant uses the State delineation or the FEMA flood insurance study, they are using the best available information and the Department believes that it is generally not appropriate to require an applicant reevaluate these studies to make sure that the flood fringe and floodway are correct. However, applicants not relying on these studies are required to obtain a verification. The Department will therefore ensure that the flood fringe and floodway are established correctly as part of the verification process.
639. COMMENT: We support the Department's consideration of displaced residents during a flood and the waiver of permit fees; however, the Department must ensure that a substantial damage evaluation has been performed for the building before issuing a general permit. The requirements of the National Flood Insurance Program must be met during the Department's permit review. (27, 49)

RESPONSE: The Department acknowledges the commenters’ support of general permit 6. The Department also notes that all applications under this general permit must satisfy the requirements at N.J.A.C. 7:13-8.8, which are equal to or more stringent than the requirements of the National Flood Insurance Program. Therefore, a substantial damage evaluation would not be helpful to the Department during its review of an activity under this general permit. The Department also believes that determining compliance with the National Flood Insurance Program is best addressed by municipalities, and that it is not necessary for the Department to require such a determination as part of its review under this general permit.

N.J.A.C. 7:13-8.8(b)5

640. COMMENT: Reconstruction of a damaged or destroyed residence is allowed if the lowest finished floor elevation is one foot above flood hazard area design flood elevation. Since an addition to the residence is allowed under a permit-by-rule, this section seems incompatible with the no-net-fill requirement. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The permit-by-rule at N.J.A.C. 7:13-7.2(a)4 authorizes the construction of an addition of up to 300 square feet to a lawfully existing building in the flood fringe. This was a non-regulated use under the repealed N.J.A.C. 7:13-1.3(f)2i, which was limited to single-family homes. The adopted new rules expand the authorization to allow additions of 300 square feet to any existing building in a flood fringe, because the flooding impact of an addition is not related to the use of the building. The Department acknowledges that such additions may result in some net fill in the flood hazard area. However, the Department believes that the impacts of this fill on flooding would be de minimis and that it is appropriate to allow the owners of lawfully existing
building to have the flexibility to construct a small addition, without the need to obtain a general permit or individual permit.

If an applicant applies for a General Permit 6 for the reconstruction of a damaged or destroyed residence in accordance with adopted N.J.A.C. 7:13-8.8, and the residence is enlarged, the addition must meet the requirements of the permit-by-rule at N.J.A.C. 7:13-7.2(a)4, or must be approved under an individual permit. Furthermore, in such a case, the lowest finished floor of the new residence, including the addition, would have to be constructed at least one foot above the flood hazard area design flood elevation and the area below the lowest floor of the new residence would be required to remain open for floodwaters. These requirements would mean that fill associated with the addition would likely be less than that which is allowed by the above referenced permit-by-rule.

Given the above, the Department does acknowledge that both adopted N.J.A.C. 7:13-7.2(a)4 and N.J.A.C. 7:13-8.8 do allow for some flood storage displacement in the flood hazard area. However, as noted above, the Department believes that it is appropriate to allow this small amount of fill in cases that clearly pose minimal risk to the public safety, health, and general welfare.

N.J.A.C. 7:13-8.9 General permit 7 for residential construction in a tidal flood hazard area

641 COMMENT: We believe that no new residential construction should be allowed in flood hazard areas. At the very least, the Department must not allow applications for such construction to be reviewed under the proposed general permit process and, should instead, include it in the proposed individual permit section at N.J.A.C. 7:13-9.1.

Six months ago, the Department released the New Jersey Coastal Management Program Assessment and Enhancement Strategy ("the Assessment") in which it characterized the risk to New Jersey citizens and properties from storm surges, flooding, shoreline erosion and sea level rise as being "high." In addition, the document predicted that these threats are only going to increase as a result of increases in sea level rise, which it is estimated could be as much as 0.71 meters by 2100, more than twice the rise that occurred in the last century. Further, the document included the following telling statement not once, but twice: "Reconstruction of residential
development and the conversion of single family dwellings into multi-unit dwellings continues in hazardous areas."

The amendments to the Flood Hazard Area rule and the Flood Hazard Control Act rules are identified in the Coastal Hazards section of the Assessment as one of the means by which the Department intends to meet the following Section 309 Programmatic Objectives: (1) direct future public and private development and redevelopment away from hazardous areas; (2) preserve and restore the protective functions of natural shoreline features; and (3) prevent or minimize threats to existing populations and property from both episodic and chronic coastal hazards.

In direct contrast to these stated issues and objectives, through the proposed new rules, the Department is proposing a general permit, a permit for which no public notice is required and for which the review process is recklessly streamlined to allow for the construction of new residential housing in flood hazard areas. (37)

RESPONSE: Under this general permit, one new private residence can be constructed, provided it is not being constructed as part of a larger residential subdivision, as well as an addition and/or an appurtenant structure such as a garage, barn or shed. As a result of the changes to the Coastal Zone Management rules at N.J.A.C. 7:7E-3.25, and the removal of the list of exempted waters at repealed N.J.A.C. 7:13-1.3(b)1ii, a number of tidal flood hazard areas in New Jersey which were not previously subject to this chapter are now regulated. In order to facilitate the safe construction of a new residential structure that is not part of a larger development in these areas, the Department has adopted general permit 7, which will authorize such construction provided a number of stringent standards are satisfied.

Construction in tidal flood hazard areas is not subject to many of the requirements of this chapter, such as net fill restrictions. This is due to the fact that tidal flood hazard areas are controlled by the Atlantic Ocean, the elevation of which is unaffected by development. As such, construction in a tidal flood fringe will not exacerbate offsite flooding as construction potentially could in fluvial areas. As a result, the primary focus of this chapter regarding individual residential structures in tidal areas is the safety of the building itself, as opposed to the flooding impact the building could cause to other nearby properties. Accordingly, the Department believes that the construction of one private residence (or appurtenant structure) in a tidal flood hazard
area, which satisfies specific requirements, appropriately lends itself to general permit review.
Construction in tidal flood hazard areas which does not comply with the specified limitations of
this general permit, as well as all new construction in fluvial flood hazard areas, will be subject
to the individual permit requirements of this chapter. Furthermore, the design and construction
standards for a building under this general permit are equivalent to the individual permit
standards. This general permit has been created as an administratively simplified process for
homeowners. In order for the construction of a residential building to be eligible for this general
permit, it must satisfy all specified conditions of N.J.A.C. 7:13-8.9. The building must be located
in a tidal flood hazard area and not require a CAFRA or waterfront development permit under
N.J.A.C. 7:7 and 7:7E. If a coastal permit is required, the requirements of this chapter will be
applied as part of the coastal permit review, and a separate permit under this chapter will not be
required in accordance with N.J.A.C. 7:13-2.1(b)5. The building must also meet the requirements
for disturbance in the riparian zone at N.J.A.C. 7:13-10.2, including any justification that may be
required for the activity and any limitations on the area of vegetation that can be cleared, cut or
removed in the riparian zone. The building is additionally required to satisfy the applicable
requirements for a building at proposed N.J.A.C. 7:13-11.5. These standards ensure that the
proposed residential building will not adversely affect the environment or exacerbate flooding.

By providing a general permit for these activities, which entails a simplified application
package, expedited review time and reduced application fee, the Department intends to provide
an incentive for homeowners to meet the standards of the section and thereby simultaneously
reduce flood damage potential. The Department therefore believes that the adopted general
permit is appropriate and meets the statutory intent of the Flood Hazard Area Control Act.

N.J.A.C. 7:13-8.9(c)

642. COMMENT: Although the permit conditions in N.J.A.C. 7:13-8.9(c) are good, we question
this provision given expected rises in sea level. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Department acknowledges that sea levels may rise in the future. However,
there is no agreement in the scientific community regarding how quickly or by how much sea
levels will rise. The requirements for new buildings to be set back from the top of bank and to have a lowest floor at least one foot above the flood hazard area design flood elevation will provide some protection against a sea level rise for these structures. In absence of conclusive data on which to base substantive standards, the Department believes that general permit 7 will adequately provide for the protection of the environment and the public safety, health and general welfare. If sea levels do indeed rise in the future, this will have the effect of raising the flood hazard area design flood elevation for future construction.

N.J.A.C. 7:13-8.10 General permit 8 for a utility line across or along a water with a drainage area of less than 50 acres

643. COMMENT: Proposed N.J.A.C. 7:13-8.10 provides a general permit for utility lines that, among other things, cross or parallel waterways with drainage areas of less than 50 acres and which are authorized under freshwater wetlands general permit 2. Despite the Department’s good intentions, there are very few waterways, particularly outside the most remote areas (and the latter would have the least need for such a general permit) that have drainage areas of less than 50 acres. In addition, the difficulty of accurately measuring the 49.99-acre limit, as well as the fact that freshwater wetlands general permit 2 only applies to underground lines, will further reduce the otherwise minimal value of proposed general permit 8. In short, this proposed general permit is too narrow and will serve essentially no purpose as a consequence of the 49.99-acre drainage area limit, which is made even narrower by the requirement (eligibility prerequisite) for a freshwater wetlands general permit 2. (36, 42)

644. COMMENT: This section states that a applicant is only eligible for a general permit 8 under these regulations if it is also eligible for a general permit 2 under the wetlands regulations (N.J.A.C. 7:7A-5.2). However, the general permit 2 under the wetlands regulations is specifically for an underground utility line. Utilities will have lines going across or along a waterway that are not underground lines. To the extent projects involving overhead or underground lines meet the other requirements of this section all of those projects, regardless of whether they are overhead or underground, should be eligible for this general permit 8. This subsection be deleted. (22)
RESPONSE TO COMMENTS 643 AND 644: The Department does not agree with the commenter’s assertion that there are so few waterways that drain less than 50 acres in New Jersey, which are being crossed by utility lines, as to render adoption of this general permit of minimal value. It is the Department’s experience that public utilities, local governments and private developers often propose to construct utility lines across or along waters that drain less than 50 acres.

As with all general permits adopted under N.J.A.C. 7:13-8, it is not the Department’s intention to prevent parties from undertaking activities which they deem necessary or in the public interest. These general permits have been established to set forth various construction activities which the Department has determined will not cause adverse impacts to flooding or the environment if performed as prescribed in each general permit. General permit 8 is not being adopted to force people to construct utility lines in a certain manner. It is merely being established to provide an expedited review for a certain class of projects that the Department intends to encourage. If a proposed utility crossing cannot be accomplished under this general permit, then the utility line simply needs an individual permit under this chapter instead of a general permit.

With regard to the requirement at N.J.A.C. 7:13-8.10(b)3 that the utility line be authorized under a valid freshwater wetlands general permit in order to qualify for flood hazard area general permit 8, the Department believes that this requirement is appropriate. First, it is the Department's experience that the majority of activities that fall under flood hazard area general permit 8 would also require a freshwater wetlands general permit. Second, by requiring that the freshwater wetlands general permit be obtained prior to (or concurrent with) the issuance of a flood hazard area general permit 8, the Department can be assured that many of the environmental issues related to the placement of utility line in environmentally sensitive areas have already been reviewed by the Department.

Regarding the specific requirement that a freshwater wetlands general permit 2 (for underground utility lines) be obtained, flood hazard area general permit 8 is intended to permit both aboveground utility lines and below ground utility lines, provided the requirements of the general permit are met. This intention can be seen in the fact that flood hazard area general
permit 8 authorizes “a utility line across or along a water”, which can be above or below ground. However, the Department acknowledges that in addition to referencing freshwater wetlands general permit 2 for underground utility lines (at N.J.A.C. 7:7A-5.2), freshwater wetlands general permit 21 for aboveground utility lines (at N.J.A.C. 7:7A-5.21) should be referenced in the rule. To correct this, N.J.A.C. 7:13-8.10(b)3 has been modified on adoption to require that the activity be “authorized under a valid freshwater wetlands general permit 2 or 21, pursuant to N.J.A.C. 7:7A-5.2 or 5.21, respectively,” which accurately reflects the Department’s original intention for this general permit.

645. COMMENT: Utility crossings are regulated under the Freshwater Wetlands Protection Act Rules (N.J.A.C.7:7A-5.2). Therefore it is not necessary to regulate them under these rules. (26)

RESPONSE: The Department acknowledges that underground and above ground utility crossings of freshwater wetlands, transition areas and open waters are regulated, respectively, under freshwater wetlands general permit 2 at N.J.A.C. 7:7A-5.2, and under freshwater wetlands general permit 21 at N.J.A.C. 7:7A-5.21. During review of freshwater wetland permit applications, the Department will review many of the environmental impacts associated with the project. However, the environmental standards of the Freshwater Wetlands Protection Act rules are designed to preserve freshwater wetlands, transition areas and open waters from unwarranted and adverse impacts. A utility crossing under the Flood Hazard Area Control Act rules is subject to additional environmental constraints that are designed to preserve the quality and integrity of surface waters. For example, a utility crossing must satisfy the standards for disturbance in the riparian zone at N.J.A.C. 7:13-10.2, as well as specific standards related to the construction of utility lines under proposed N.J.A.C. 7:13-11.9. These standards are not addressed by the Freshwater Wetlands Protection Act rules. Therefore, in order to adequately protect the environment and the public safety, health and general welfare, the Department believes that it is appropriate and necessary to adopt this general permit with the requirements outlined at N.J.A.C. 7:13-8.10.
646. COMMENT: The rules should not permit the placement of utility lines along a regulated water that has a drainage area of less than 50 acres since these waterbodies are especially vulnerable to degradation. Riparian areas should be left natural and unobstructed. (10, 67)

647. COMMENT: We oppose this general permit that allows a utility line to be placed along a regulated water that has a drainage area of less than 50 acres. This drainage area is usually in the headwaters area that is most vulnerable to negative impacts resulting from utility line installation. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 646 AND 647: Adopted general permit 8, for a utility line across a water with a drainage area of less than 50 acres, can only be approved if it is also authorized under freshwater wetlands general permits 2 or 21, pursuant to N.J.A.C. 7:7A-5.2 or 5.21. During the review of these freshwater wetland permits, the Department will review many of the environmental impacts associated with the project. In order to ensure that environmental impacts are minimized, these freshwater wetlands permits must therefore be issued in advance of, or concurrent with, an authorization under this flood hazard general permit. The standards for disturbance in the riparian zone at N.J.A.C. 7:13-10.2 must also be satisfied, as well as specific standards related to the construction of utility lines under N.J.A.C. 7:13-11.9. If all these standards are satisfied, the utility line is eligible for authorization under flood hazard area general permit 8. The Department believes that all of the adopted requirements will adequately protect the environment and the public safety, health and general welfare along waters that drain less than 50 acres. The Department therefore believes that adopting this general permit is appropriate.

N.J.A.C. 7:13-8.10 General permit 8 for a utility line across or along a water with a drainage area of less than 50 acres
N.J.A.C. 7:13-8.11 General permit 9 for a roadway or footbridge across a water with a drainage area of less than 50 acres
N.J.A.C. 7:13-8.12 General permit 10 for stormwater outfall along a water with a drainage area of less than 50 acres
COMMENT: A portion of the Department’s stated justification in support of the proposed general permits is that issues related to flooding are not regulated along waters that drain less than 50 acres under the existing rules (38 N.J.R. at 3987). To the extent that the Department is distinguishing between regulated waters with a drainage area of less than 50 acres and regulated waters with a drainage area of 50 or more acres from a flood potential perspective, then the general permit provisions applicable to regulated waters with a drainage area of less than 50 acres should not be limited solely to utility line crossings, roadways or footbridge crossings and stormwater outfalls, but should be expanded to include all regulated activities. (7, 18, 33, 46, 53)

RESPONSE: The Department does not agree that all regulated activities along waters with a drainage area of less than 50 acres should be allowed under a flood hazard area general permit. The three general permits cited by the commenters were selected by the Department for several reasons. First, the Department’s review associated with these particular activities is limited in nature. Pursuant to N.J.A.C. 7:13-2.3(a)1, flood hazard areas do not exist along such waters, and therefore issues related to flooding, such as flood storage displacement, floodway obstructions, and access during a flood are not relevant. Second, in creating these flood hazard area general permits, the Department focused on activities that were commonly proposed within the jurisdiction of this chapter, and which would also require a freshwater wetlands general permit. Since the activities under these three general permits often require a freshwater wetlands approval pursuant to N.J.A.C. 7:7A, the Department would already be addressing many of the same environmental issues as under N.J.A.C. 7:13, minimizing additional review under this Subchapter. It is the Department’s experience that utility lines, roadways, and stormwater outfalls are the most common activities that meet these requirements, and so the Department created three flood hazard area general permits to accommodate these activities. The Department may propose additional general permits under this chapter in future rule amendments, should the Department determine that other activities are equally as well suited for inclusion.

COMMENT: Proposed general permits 8, 9 and 10 should be available in any regulated waterway and not limited to those waters with a drainage area of less than 50 acres, because the activity itself will have a minimum impact regardless of the drainage area. (7, 18, 33, 46, 53)
650.COMMENT: Proposed general permit numbers 8, 9 and 10 are limited to activities along regulated waters with a drainage area that is less than 50 acres; and activities that are not located in the flood hazard area or riparian zone of another regulated water that is greater than 50 acres. There are few, if any, drainage areas in New Jersey that will meet both of these criteria. As a result, we believe that these general permits are overly restrictive and do not offer substantial benefits over the use of individual permits. Accordingly, the Department should revise each of these general permits in this subchapter and remove all references to the 50-acre drainage area limit. Since the Department is also requiring that these activities be authorized under a valid freshwater wetlands general permit, this change would allow the regulated community to conduct operations in an efficient and effective manner. (22)

RESPONSE TO COMMENTS 649 AND 650: As noted in the response to comment 648, flood hazard area do not exist along waters that drain less than 50 acres, pursuant to N.J.A.C. 7:13-2.3(a)1. As such, issues related to flooding, such as flood storage displacement, floodway obstructions and access during a flood, are not relevant along these waters. The Department’s review of activities proposed along such waters is therefore limited to environmental considerations, such as riparian zone disturbance, impacts to fishery resources, water quality, and threatened and endangered species. Many of these concerns are addressed during the review of freshwater wetlands general permits. Thus, the Department has selected for adoption the three activities under general permits 8, 9 and 10 because of the limited review the Department would need to perform in order to determine that these activities would satisfy the requirements of this chapter.

Along regulated waters that drain 50 acres or more, the Department is required to review a number of additional factors related to flooding. This includes, but is not limited to, review of hydrologic and hydraulic calculations, access requirements, and flood storage displacement calculations. Such detailed review is not appropriate under the expedited review format of general permits in this Subchapter. Therefore, the Department does not believe that it is appropriate to expand the scope of these general permits to cover activities along regulated waters that drain 50 acres or more.
COMMENT: The proposed new rules are unclear as to whether the thresholds for disturbance under the proposed general permits are on a per occurrence basis or whether impacts onsite are cumulative. For example, if three stormwater outfalls are authorized under proposed general permit 10, does the proposed general permit limit each outfall to a maximum permanent vegetation disturbance of 1,000 square feet (as per Table B under proposed N.J.A.C. 7:13-10.2), or must all three outfalls cumulatively disturb a total of less than 1,000 square feet in the riparian zone? This question was raised at a public presentation of the proposal, during which a Department representative verbally responded that limitations on disturbance in the riparian zone authorized under the proposed general permits are to be calculated on a per-occurrence basis and are not cumulative. Please clarify this point in the adoption of these proposed new rules. (7, 18, 33, 46, 53)

RESPONSE: Disturbance is calculated differently under general permits than under individual permits. Activities under individual permits are evaluated on a per-occurrence basis. So, to cite the commenters’ example, if an applicant proposes to construct three stormwater outfall structures on a site under an individual permit, each separate outfall would be allowed a maximum permanent vegetation disturbance of 1,000 square feet, pursuant to N.J.A.C. 7:13-10.2, provided all other requirements are met for each outfall.

However, N.J.A.C. 7:13-8.1(h), which applies to general permits, provides that, "Multiple or repeated activities proposed to be undertaken on a site that would individually qualify for authorization under a general permit shall require an individual permit if the cumulative impacts exceed any limit contained in the applicable general permit." Therefore, all activities under a given general permit that are proposed onsite are viewed cumulatively, and must collectively meet any general permit threshold that may apply.

For example, to again cite the commenters’ example, flood hazard area general permit 10 allows the construction of one stormwater outfall structure, provided the standards of that general permit are met. If three outfalls are proposed on one site, each outfall would require a separate general permit 10, since general permit 10 authorizes the construction of only one outfall. Furthermore, the combined riparian zone disturbance of those three outfalls must be less than the
threshold at N.J.A.C. 7:13-10.2. Therefore, all three outfalls are collectively permitted a maximum permanent vegetation disturbance onsite of 1,000 square feet. If these three outfalls require a larger amount of riparian zone disturbance, an individual permit would be required for their construction.

The Department believes that it is appropriate to limit impacts under general permits in this way. Flood hazard area general permits have been adopted for activities that have been identified as causing no adverse impacts to flooding or the environment, if undertaken as prescribed by each general permit. Repeated activities on the same site, even if undertaken via a general permit authorization, can cumulatively have large impacts, which are more appropriately reviewed under an individual permit application.

652. COMMENT: The requirement that the activity authorized under a general permit also receive a valid freshwater wetlands permit should be deleted. It should only say that a permit may be necessary. The language makes the presumption that a permit is necessary. If a freshwater wetland permit is always needed, then why not make these activities authorized under a permit-by-rule and stop making applicants get multiple permits. This would also reduce the number of applications the Department has to review for projects with minimal environmental impacts. (12)

RESPONSE: Activities are eligible for adopted general permits 8, 9 and 10 only if they satisfy the requirements applicable to all general permits at N.J.A.C. 7:13-8.1(b), and the activity is authorized under a valid freshwater wetlands general permit 2 or 21; 10A or 10B; or 11, respectively. During review of the respective freshwater wetland permit, the Department will review many of the environmental impacts associated with the project, minimizing additional Department review under this subchapter. In order to ensure that environmental impacts are minimized, the freshwater wetland permits must therefore be issued in advance of, or concurrent with, an authorization under the flood hazard general permits.

However, not all of the environmental issues relevant to N.J.A.C. 7:13 are addressed under the freshwater wetlands permit review. For example, N.J.A.C. 7:13 includes additional requirements designed to preserve riparian zone vegetation, and to ensure the quality and
integrity of surface waters. The Department acknowledges that a freshwater wetlands general permit may not always be necessary for activities addressed by general permits 8, 9 and 10. In such cases, the activity would not be eligible under these flood hazard area general permits because previous review under freshwater general permit applications would not have taken place, and all appropriate environmental concerns would not have been addressed. As such, all appropriate review is outside the purview of the adopted, new general permits 8, 9 and 10.

Finally, the Department also does not agree that these activities should be permitted-by-rule. The activities under these flood hazard area general permits can cause adverse impacts to flooding, or the environment, if improperly constructed, and so Department oversight is warranted.

N.J.A.C. 7:13-8.11 General permit 9 for a roadway or footbridge across a water with a drainage area of less than 50 acres

COMMENT: The Department should clarify if N.J.A.C. 7:13-8.11(b)3 means that the freshwater wetlands general permit must be approved prior to submittal of the flood hazard area permit application. Since there is no review time limit for freshwater wetland general permits, if submitted simultaneously does the review stop for the Flood Hazard general permit or will the Freshwater Wetland general permit adhere to the Flood Hazard Area Protection Act Rules? Will both the Flood Hazard Area and Freshwater Wetland staff review both GP’s, which would clearly be duplicative? (26)

RESPONSE: N.J.A.C. 7:13-8.11(b)3 provides that, in addition to satisfying the requirements applicable to all general permits at N.J.A.C. 7:13-8.1(b), a roadway or footbridge is eligible for authorization under general permit 9 only if it is authorized under a valid freshwater wetlands general permit 10A or 10B, pursuant to N.J.A.C. 7:13 7:7A-5.10A or 5.10B, respectively. In order to satisfy this requirement, the freshwater wetlands permit must be issued in advance of or concurrent with, an authorization under this flood hazard general permit. However, since there is no time review limit for freshwater wetland general permits, if the freshwater wetlands general permit cannot be reviewed by the Department within the review time limit established for Flood
Hazards general permits, then the Department would not be able to approve the roadway or footbridge under general permit 9. For this reason, the Department recommends that the applicant obtain approval of the freshwater wetlands general permit in advance of submitted general permit 9. With regard to which Department staff will review these general permit applications, the Department will assign appropriate staff to review these applications at the time the applications are submitted.

N.J.A.C. 7:13-8.12 General permit 10 for stormwater outfall along a water with a drainage area of less than 50 acres

654. COMMENT: The placement of stormwater structures along a regulated water that has a drainage area of less than 50 acres should not be permitted since these waterbodies are especially vulnerable to degradation. In addition, stormwater structures under present guidelines should attempt to provide infiltration into groundwater. Riparian areas should be left natural and unobstructed. (10, 67)

655. COMMENT: We oppose general permit 10 that allows a stormwater structure along a regulated water with a drainage area of less than 50 acres. This activity should require an individual permit. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 654 AND 655: N.J.A.C. 7:13-8.12(b) explains that a stormwater outfall structure is eligible for authorization under this general permit only if it satisfies the conditions applicable to all general permits as described at N.J.A.C. 7:13-8.1(b). Additionally, the regulated water must have a drainage area of less than 50 acres, and the project cannot be located in the flood hazard area or riparian zone of another larger water, since the flood hazard area of the larger water would govern. The discharge must also have been previously authorized, or concurrently authorized, under a valid freshwater wetlands general permit 11, pursuant to N.J.A.C. 7:7A-5.11. This freshwater wetlands review helps to ensure that environmental impacts have been addressed, and are minimized.
Furthermore, if the stormwater outfall drains an area that is considered a major development, as defined in Stormwater Management rules at N.J.A.C. 7:8-1.2, the application for the freshwater wetlands general permit 11 will have to satisfy all applicable requirements of N.J.A.C. 7:8 including, but not limited to, erosion control, groundwater recharge and runoff quantity, and quality standards. The standards for disturbance in the riparian zone at N.J.A.C. 7:13-10.2 must also be satisfied, as well as the standards for construction of a stormwater outfall structure at N.J.A.C. 7:13-11.10. Only after all of these standards are satisfied, is the discharge eligible for authorization under this general permit. In view of the above review elements (conditions applicable to all general permits under this subchapter, freshwater wetlands approval, stormwater review, riparian zone), the Department is of the opinion that it is appropriate to permit stormwater outfalls under flood hazard area general permit 10, since issuance of the same will not cause adverse impacts to flooding or the environment.

Subchapter 9: Individual permits

N.J.A.C. 7:13-9.2 Application requirements for an individual permit

N.J.A.C. 7:13-9.2(a)

656.COMMENT: The proposed new rules provide that the Department “shall, upon request, provide an applicant with guidance regarding the appropriate level of detail for a particular application.” Any such guidance should be binding on the Department to the extent that an applicant submits the information identified by the Department in the guidance document, and such applicants should not be required to submit additional information in support of an application in order for the application to be deemed complete. The Department’s practice of having different individual staff members perform application intake and substantive review of an application often results in multiple requests for information, which inflates costs and delays processing. This places an unfair burden on the applicant. This practice should not be permitted where there has been reasonable reliance on the Department’s guidance that identifies the appropriate level of detail for an application. (7, 18, 33, 46, 53)
RESPONSE: The Department strives to provide applicants with accurate and complete guidance on application requirements. This guidance may take place at a pre-application meeting, by telephone, e-mail or a formal letter. There are many reasons why the Department may request additional information, not identified in the initial guidance provided to the applicant. The information presented to the Department at a pre-application meeting or otherwise may be preliminary or otherwise lack the details that are part of a formal application. The amount of time available to the Department for review of such information is also limited compared to the much longer time frames necessary to review a formal application for administrative and technical requirements. Furthermore, the guidance presented to an applicant is generally limited to the specific issues discussed with the Department and could never be as exhaustive as the detailed administrative and technical requirements that are set forth in the Flood Hazard Area Control Act rules. In addition, it is possible that the Department staff may inadvertently provide inaccurate guidance at a pre-application meeting or otherwise, and that error is later caught by a supervisor or management. All of these situations may require that the Department request additional information that was not addressed in initial guidance provided by the Department to the applicant. The Department’s mandate under the Flood Hazard Area Control Act, and the other statutes which these rules implement, is to protect the public health, safety and general welfare, and the environment. While the Department will continue to attempt to provide as complete and thorough guidance as possible at all stages of the permit process, it cannot agree to make decisions based upon incomplete information, merely because all information necessary to make a fully informed decision was not identified in the initial stages of the permitting process.

657. COMMENT: Proposed N.J.A.C. 7:13-9.2(a) states that the level of detail for an individual application “shall correspond to the size and likely impact of the proposed project,” and adds that, upon request, the Department will provide guidance on the appropriate level of detail required. In order to be meaningful, such guidance must be timely, and this regulation should be modified to include a two-week (or 10-workday) period for the Department to respond to a written request for guidance from an applicant. (36, 42)
658. COMMENT: At N.J.A.C. 7:13-9.2(a), the Department should commit to providing requested guidance within 14 calendar days (two weeks) of receiving a request for guidance regarding the appropriate level of detail for a particular application. This section should be amended to read as follows: “…The Department shall, upon request, provide an applicant with guidance regarding the appropriate level of detail for a particular application. Such guidance shall be provided within 14 calendar days of the Department’s receipt of a request. Such guidance may take the form of a written response to the request or a meeting with the applicant to review the request and the applicant’s specific questions in detail. If the appropriate venue is determined to be a meeting, the Department shall provide the applicant with a written guidance document within 14 calendar days of the meeting.” For planning purposes it is imperative that an applicant receive guidance from the Department within some reasonable time frame from the date such guidance is requested. (42)

659. COMMENT: For planning purposes it is imperative that an applicant receive guidance from the Department within some reasonable time frame from the date such guidance is requested. The Department should commit to providing guidance within 30 calendar days of receiving a request regarding the appropriate level of detail for a particular application. Accordingly, this section should be amended to read as follows: “…The Department shall, upon request, provide an applicant with guidance regarding the appropriate level of detail for a particular application. Such guidance shall be provided within 30 calendar days of the Department’s receipt of a request. Such guidance may take the form of a written response to the request, or a meeting with the applicant to review the request and the applicant’s specific questions in detail. If the appropriate venue is determined to be a meeting, the Department shall provide the applicant with a written guidance document within two (2) weeks of the meeting.” (22)

RESPONSE TO COMMENTS 657 THROUGH 659: The adopted new rules contain numerous deadlines that are designed to assure applicants’ a timely review. Examples include the 20 working days completeness review period for general permits at N.J.A.C. 7:13-8.1(d), and individual permits at N.J.A.C. 7:13-9.3(b); the 45 calendar days formal review period for general permits at N.J.A.C. 7:13-8.1(e); and, the 90 calendar days formal review period for verifications
and individual permits at N.J.A.C. 7:13-9.3(e). These various time frames are provided to ensure applicants will receive a predictable, and timely, processing of verification and permit applications. However, these time frames place significant demands on the Department staff. The Department is therefore unable to agree to the commenters’ requests that application guidance be provided within specific timeframes. To do so would make it much more difficult to meet the regulatory and statutory time frames that are already set forth.

Furthermore, it is sometimes not possible to provide meaningful or specific guidance to applicants in such a short timeframe given the lack of detail provided to the Department in many applications. While the Department acknowledges that some projects warrant elevated input from Department staff during project design, the Department believes that the application requirements of the adopted new rules are sufficiently clear for most situations as to not necessitate extensive input from Department staff.

N.J.A.C. 7:13-9.2(b)

660. COMMENT: We object to exempting applicants for construction of one private residence from submission of an environmental report under N.J.A.C. 7:13-9.2(b)4. The size and location of a single residence can create very substantial adverse impacts. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: Under N.J.A.C. 7:13-9.2(b)4 an applicant for an individual permit for the construction of one private residence, which is not part of a larger residential subdivision, or an appurtenant structure, does not need to submit an environmental report. The Department has adopted this requirement in order to relieve this particular type of applicant from the additional burden and costs associated with the preparation of an environmental report. It is the Department’s experience that any potential impacts associated with such construction are obvious upon review of the site plan. Consequently, information contained in an environmental report is not generally helpful to the Department when making decisions on permit applications for the construction of one private residence or appurtenant structure. For example, the environmental report requires “an analysis of any potential adverse impacts” to channels, riparian zones, fishery resources, threatened or endangered species, and regulated waters, and “a
detailed description of how potential adverse impacts shall be minimized.” Requiring the builder of one private residence or appurtenant structure to prepare such a report, when the report is not generally helpful to the Department, is not appropriate.

Notwithstanding the fact that applications for such projects do not require an environmental report, applications for these activities will be reviewed against all applicable provisions of the adopted new rules to ensure that the proposed project will not adversely impact flooding or the environment. Furthermore, if during the review of the project the Department determines that the project could have adverse environmental consequences, the Department will fully explore all aspects of the project and, if necessary, request additional environmental information so that the Department can render a fully-informed decision on the application.

661. COMMENT: N.J.A.C. 7:13-9.2(b)7iii should be amended to clarify that the applicant may use any written guidance obtained under section N.J.A.C. 7:13-9.2(a) as documentation that topography is not necessary to determine compliance with this chapter. If the Department has previously determined that topographic information is not needed, submission of any written confirmation from the Department on that issue is sufficient justification for not including that information in the application. The applicant should not need to be concerned that the application reviewer will determine the application to be incomplete for lack of this information when provided with a previously obtained written determination on this issue from the Department. (42)

662. COMMENT: This section should be revised to read as follows: “… unless the Department determines that topography is not necessary to determine compliance with this chapter. With respect to the need to provide topographic information with an application, the applicant may use a written guidance document provided by the Department in response to any request for guidance on this requirement filed under section N.J.A.C. 7:13-9.2(a), or any written determination resulting from any pre-application meeting, as verification that the Department has determined that topographic information is not needed to support the application.…” (22)
RESPONSE TO COMMENTS 661 AND 662: The Department agrees that an applicant may use any written guidance obtained under N.J.A.C. 7:13-9.2(a) as documentation that topography is not necessary to determine compliance with this chapter. However, the Department finds it unnecessary to change N.J.A.C. 7:13-9.2(a) to reflect the same, since an applicant can simply include the written documentation from the Department with their application. It should be noted that, as discussed in the response to comment 656, should the Department subsequently determine that the guidance provided under N.J.A.C. 7:13-9.2(a) was based on incomplete or incorrect information from the applicant, the Department reserves the right to request a further demonstration that topography is not necessary.

663. COMMENT: To avoid potential duplication and conflicts with the Soil Erosion and Sediment Control Act 4:24-1 et seq., we suggest that language be added to read: “coordinated and in compliance with and not duplicative of soil conservation district requirements for control of soil erosion and sedimentation.” (55)

664. COMMENT: N.J.A.C. 7:13-9.2(b)7v and vii should be deleted. New Jersey has an entire program, administered by the County Soil Conservation District Offices, to assure that proper soil erosion and sediment control measures are employed on projects and activities. This program requires an applicant to obtain a Certification of their erosion control plan from the appropriate District Office on projects that disturb as little as 5,000 square feet of area. The Department’s proposal that an applicant submit these details in an application for a Flood Hazard Area permit is therefore duplicative and unnecessary. Since securing approval from a County Soil Conservation District Office almost invariably is less time consuming than securing any approval from the Department, those applications are generally filed later than applications to the Department. Therefore, the applicant may not have all of the details identified for the proposed soil erosion and sediment control measures at the time of the Flood Hazard Control Permit application. Additionally, the County Soil Conservation District Office, which has primary authority over these kinds of issues, may during their review require changes or additions to the proposed control details. This would leave the applicant in the tenuous position of having to file with the Department either a revised application, or a permit modification, to conform the details
depicted in the Department application/permit with those ultimately required by the County Soil Conservation District Office. To not do so could leave the permittee with two approvals, one from the Department and one from the County Soil Conservation District Office that require different, and possibly conflicting, soil erosion and sediment control measures. The Department can address this issue by conditioning any permit it issues on the permittee implementing the appropriate controls as found in the New Jersey Standards for Soil Erosion and Sediment Control and obtaining a Soil Erosion and Sediment Control Plan Certification from the appropriate Soil Conservation District Office for projects of sufficient size to require such Certification prior to initiating any construction activities. (42, 22)

RESPONSE TO COMMENTS 663 AND 664: Although the Soil Conservation Districts are responsible for ensuring that adequate soil erosion and sediment control measures are included for certain construction projects, the Department is responsible for protecting the integrity and health of all waterways and their environment. Consequently, it is critical to the Department’s permitting process to know and require that soil erosion and sediment control measures have been designed and are adequate to protect a waterway against secondary impacts resulting from an approved flood hazard area permit. Furthermore, the Department’s rules require the inclusion of such measures in all applications, not just those that exceed 5,000 square feet of disturbance. The Department does not agree that this requirement could result in conflict with the review by the Soil Conservation Districts, since this requirement has been contained in the Department’s rules since at least 1995.

665.COMMENT: Regarding the requirements at N.J.A.C. 7:13-9.2(b)7vi(1), it is not reasonable, necessary, or even possible to require an applicant to identify every detail regarding methods of construction in order to obtain permit approvals. On large public works projects, Federal requirements and long-standing industry contract practices provide contractors significant flexibility in regard to construction methods, and contractors can often reduce both costs and environmental impacts by using innovative solutions. The rules should be revised to allow for such flexibility by clarifying that only those details affecting the extent, nature, and timing of environmental impacts are required to be submitted. (15, 57)
666. COMMENT: Please clarify the level of detail required at N.J.A.C. 7:13-9.2(b)vi(1). The ‘exact method’ referenced in (1) and details referenced in (3) could have ramifications for State bidding procedures. Construction bids are often precluded from specifying “exact methods,” especially where these require a proprietary technology, or unique equipment. While private developers may not face such constraints, public agencies will. The term “exact method” should be defined in a way that does not prevent compliance with State procurement requirements. (66)

RESPONSE TO COMMENTS 665 AND 666: It has been the Department's experience that applicants rarely provide methods for construction within stream channels on their drawings and, as a result, applicants and their contractors are left to use whatever methods they choose which may lead to unanticipated adverse impacts to the stream in question. The use of the word "exact" in proposed N.J.A.C. 7:13-9.2(b)vi(1) is not intended to require an applicant to specify every minute detail of the method of construction, but rather to require the applicant to provide enough information so that the Department can determine if the construction method has the potential to cause unanticipated adverse impacts to the water. The Department is not opposed to an applicant providing optional methods for construction on drawings in order to provide some flexibility for contractors. However, each method described would need to have sufficient detail for the Department to determine if it is likely to cause adverse impacts to the water. If an applicant finds it necessary to change the method of construction after a permit is approved, the applicant still has the option to apply for a revision to the permit as specified N.J.A.C. 7:13-13. However, in response to the commenters’ request for clarity, and consistent with the Department’s intent and needs as described above, N.J.A.C. 7:13-9.2(b)vi(1) has been amended to require “A thorough explanation of the proposed method of construction.”

667. COMMENT: N.J.A.C. 7:13-9.2(b)vii should be deleted. The drawings required in this section, similar to the requirement proposed in item N.J.A.C. 7:13-9.2(b)v above, are already required by the District Office during their review of applications for soil erosion and sediment control plan certifications. Therefore, requiring this level of detail and information in a flood hazard area permit application is duplicative and unnecessary, and only serves to create the same
type of potential approval conflicts between a flood hazard area permit and a Soil Erosion and Sediment Control Plan Certification referenced in comments regarding N.J.A.C. 7:13-9.2(b)7v.

(22)

RESPONSE: As stated in response to comments 665 and 666, the Department is responsible for ensuring that the waterway and its environment is protected during and after the conduct of a regulated activity. Because the Department is providing protection for the riparian zone, it is of critical importance to know what vegetation is proposed for removal as part of the permit application, and how that vegetation will be replaced, when appropriate, after project completion. This requirement goes beyond erosion control concerns, and is intended to ensure not only that replanting occurs, but that the replanting proposed will sufficiently restore the values and functions of the riparian zone.

N.J.A.C. 7:13-9.2(d)

668. COMMENT: The requirement to purchase fill credits before submittal of the permit application is unreasonable. The possibility of having the permit denied results in an undue financial burden on the applicant. Fill credit purchases should be a condition of the permit, not a condition of the application. (3)

RESPONSE: Prior to the mid-1980s, the Department did condition permits to require permittees to obtain fill credits from within the Central Passaic Basin prior to construction. However, the Department found that, while there were many applications being approved to place fill in the Central Passaic Basin, few applications were being proposed to create flood storage in compensation. Upon further investigation, the Department determined that the conditions in the permit were being ignored by applicants resulting in a reduction in the flood storage in the Central Passaic Basin, which increased the flood damage potential in the flood hazard area of the basin.

To address this problem, the Department instituted a policy in the mid-1980s to require applicants to demonstrate that flood storage in the Central Passaic Basin had already been created to offset any proposed fill, prior to submitting a permit application for that fill. The
repealed Flood Hazard Area Control Act rules at N.J.A.C. 7:13-2.15(a)6 stated "In order for the Department to approve any application proposing a net increase of fill in the Central Passaic Basin, a Stream Encroachment Permit for the corresponding excavation of material must have already been issued or, applied for and approved concurrently with the application made under this chapter." Proposed N.J.A.C. 7:13-9.2(d) provides similar language that requires "An application that proposes the use of fill credits to balance fill on a site in the Central Passaic Basin, as described at N.J.A.C. 7:13-10.4(s) and (t), shall include documentation that the fill credits have been purchased by the applicant prior to the submittal of the application."

Given the above, and in light of the serious flooding historically experienced in the Central Passaic Basin, the Department believes that it is not unreasonable to require an applicant to purchase fill credits before submittal of the permit application. Careful planning and adherence to this subchapter by the applicant, in addition to guidance provided by the Department per N.J.A.C. 7:13-9.2(a), should minimize purchase of fill credits for applications that may be denied by the Department.

N.J.A.C. 7:13-9.2(f)

669. COMMENT: The assumption that off-site “adverse impacts” will occur is inherently flawed, since the purpose and intent of the proposed new rules is to mitigate against and prevent negative flooding impacts to off-site properties. A regulated activity that is designed in accordance with the proposed new rules should not have an adverse off-site impact. Therefore, this proposed provision should be eliminated. (7, 18, 33, 46, 53)

670. COMMENT: Allowing adverse impacts is objectionable despite ownership. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 669 AND 670: It is the Department's experience that applicants sometimes submit applications for projects that will cause adverse impacts on property not owned by the applicant. The Department does not assume that all applications will have adverse impacts on other properties. Whether a particular proposed activity would have adverse impacts
on other properties is a determination made by the Department during the review of an application. N.J.A.C. 7:13-9.2(f) is intended to protect property not owned by the applicant from such adverse impacts. In view of the above, the Department cannot agree to the request to eliminate this provision. Since this provision is intended to protect property rights, the Department believes that it is reasonable to alert any impacted property owners of the possible risk, so they can decide whether the adverse impacts are objectionable.

671. COMMENT: We strongly oppose this provision which allows adverse impact if the applicant has merely entered into a contract to purchase the property that will be adversely impacted. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The adverse impacts referred to in this section relate to increases in flooding that may be caused by a project, as described at N.J.A.C. 7:13-11.1(f). The Department will not approve any project that will cause such adverse impacts offsite, unless all affected parties agree to the potential impacts. Furthermore, if the affected property is purchased by the applicant, than any adverse impacts to flooding would be wholly contained on the applicant’s own property. The Department notes, however, that even in such a case, the Department will not allow such impacts to affect new roads and buildings, which must be constructed in accordance with N.J.A.C. 7:13-11.5 and 11.6, and which must be properly elevated wherever possible. The Department does not intend to approve unsafe construction that could put the applicant and others at risk, even if the applicant is willing to take such risks. The Department therefore believes that it is appropriate to allow certain adverse impacts to a property not owned by the applicant, provided that the applicant has entered into a contract to purchase the affected property. Finally, if the Department issues a permit in such a case, the permit will be conditioned upon the applicant purchasing the property prior to the commencement of any activities onsite. Therefore, in the event that the intended purchase does not occur, the approved activities cannot be undertaken.

N.J.A.C. 7:13-9.2(g)
672. COMMENT: The Department should not adopt proposed N.J.A.C. 7:13-9.2(g). The Department has publicly acknowledged the inadequacies of its existing water quality management planning program implemented under the Water Quality Management Planning Act, N.J.S.A. 58:11A-1, et seq., and the regulations adopted pursuant thereto at N.J.A.C. 7:15. The Department has publicly stated that it is in the process of redesigning its Water Quality Management Planning rules to address the failures of this program. The impacts of any redesigned Water Quality Management Planning (WQMP) regulations on implementation of the proposed Flood Hazard Area Control Act rules must be considered to avoid conflicts between the two programs. (7, 18, 33, 46, 53)

673. COMMENT: The Department’s jurisdiction under the proposed new rules is limited to “regulated activities.” The Department must explain how “regulated activities” will be relevant in the WQMP context. Until it does so, the blanket restriction against acceptance of applications for individual permits except where a consistency determination under the WQMP rules has been made is premature and unjustified. Even where regulated activities are pertinent to the WQMP regulatory program, the Department should have the flexibility to review and issue individual permits for regulated activity subject to a condition that the project for which the regulated activity is approved be consistent with the applicable Water Quality Management Plan. Depending upon the revised WQMP framework, which is unknown to this commentator, the potential for flexibility could provide the same level of environmental protection while eliminating unnecessary permitting delays that might occur if the proposed rule is adopted as written. (7, 18, 33, 46, 53)

674. COMMENT: To the extent that the Department takes action on subsection N.J.A.C. 7:13-9.2(g) of the proposed new rules, the requirement that a proposed regulated activity must be found to be consistent with the applicable Water Quality Management Plan prior to acceptance of an application for an individual permit for review by the Department is unduly burdensome and serves no valid purpose. Since the Department has announced its intention to propose substantially revised WQMP rules, but will do so only after the close of the comment period on the instant proposal, commentators are unable to meaningfully address this requirement. It
should be withheld until such time as the Department concludes its WQMP rulemaking. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 672 THROUGH 674: Before approving any project or activity affecting water quality, and pursuant to the Water Quality Planning Act at N.J.S.A. 58:11A-1 et seq., the Department is required to determine whether a proposed project or activity is consistent with an adopted areawide Water Quality Management Plan (WQMP). Despite the Department’s desire and intent to revise the Water Quality Management Plan rules, N.J.A.C. 7:15, the existing rules in place must govern. Consequently, the Department would be in violation of the Water Quality Planning Act if it did not require a determination of consistency until such time the Department completes the process of amending the Water Quality Management Plan rules. N.J.A.C. 7:13-9.2(g) reflects this statutory mandate, which is unaffected by the Department’s proposal to improve the Water Quality Management Planning Rules.

N.J.A.C. 7:13-9.2(h)

675.COMMENT: The sequential approach in proposed N.J.A.C. 7:13-9.2(h), which applies to projects within the jurisdiction of the Pinelands Commission, will cause unnecessary delay in proceeding with construction of essential – indeed, critical – linear development infrastructure for New Jersey. See “Memorandum of Agreement Between The New Jersey Pinelands Commission And The New Jersey Board Of Public Utilities”, September 13, 2004, at 1, 4 (describing “critical” need for additional electric power transmission facilities in the southern New Jersey region). For that reason, the Department should replace N.J.A.C. 7:13-9.2(h)’s sequential permit review regimen with simultaneous (or concurrent) review and a requirement for the applicant’s written acknowledgement of the Pinelands Commission approval prerequisites that apply to the affected project. Alternatively, concurrent review can be implemented using the “Certificate of Filing” mechanism in the Pinelands Commission regulations, N.J.A.C. 7:50-4.82(b). That regulation provides as follows: If the [Pinelands Commission] Executive Director determines that any proceedings to be conducted by the State agency in question should be conducted prior to or simultaneously with any Commission review provided for in this Plan, the
Executive Director shall within 30 days issue to the applicant a Certificate of Filing evidencing the fact that the applicant has complied with the provisions of N.J.A.C. 7:50-4.81 and authorizing the filing of the application with the State agency. Such Certificate of Filing shall indicate that any permit, approval or authorization granted by the State agency shall be conditioned upon the issuance of any Commission approval provided for by this Plan. (36, 42)

676.COMMENT: For an activity located in an area under the jurisdiction of the Pinelands Commission, this section should be revised to require that an applicant need only acknowledge in an application that it must secure the appropriate approval from the Pinelands Commission for the proposed activity. To require that multiple permits or approvals for a project only be secured in a sequential manner, and not be pursued in parallel, imposes unnecessary constraints on an applicant’s ability to plan and schedule activities. This revision can be accomplished by deleting in its entirety the first sentence of paragraph (h) and replacing it with the following: “(h) An application for an individual permit for an activity located in an area under the jurisdiction of the Pinelands Commission, as defined at N.J.S.A. 13:18A-11, must contain a statement that the applicant acknowledges that the applicant must obtain a Certificate of Filing, a Certificate of Compliance or a Resolution of Approval from the Pinelands Commission for the proposed activity, as appropriate before the activity may be conducted.” (22)

RESPONSE TO COMMENTS 675 AND 676: The Pinelands Protection Act rules at N.J.A.C. 7:50-4.81(b) state that, “no State department, board, bureau, official or other agency shall deem an application complete unless it is accompanied by a Certificate of Filing, a Notice of Filing, a Certificate of Completeness or a resolution of the Pinelands Commission approving an application for public development.” The Department has mirrored this language at N.J.A.C. 7:13-9.2(h). Consequently, an applicant may concurrently submit a Certificate of Filing with an application for a Flood Hazard Area permit, under the rules as adopted. Furthermore, in order to make the Flood Hazard Area Control Act rules consistent with the requirements of N.J.A.C. 7:50-4.81(b), N.J.A.C. 7:13-9.2(h) has been modified on adoption to include a “Notice of Filing” as an action that would satisfy this requirement.
N.J.A.C. 7:13-9.3 Application review procedures for a verification or individual permit

N.J.A.C. 7:13-9.3(e)

677. COMMENT: We are concerned that projects may be accepted as complete or approved due to State personnel shortages. (10, 67)

RESPONSE: It is the Department’s intention to take all actions necessary and within its power, including requesting additional staff and redistributing permit workload, to ensure that applications under this chapter will not be unduly accepted as complete or approved due to personnel shortages.

N.J.A.C. 7:13-9.3(f)

678. COMMENT: In regard to requesting more than a 30 day extension of the review period, this is sometimes necessary when comments from Department staff are not received until the 88th day. If revised plans are quickly resubmitted in 15 days, this does not leave much time for a final Department review and any professional back and forth with the Department staff. This issue goes to the question of staffing. If the workload is such that reviewers cannot get to applications until after the 80th day now, how will the additional work load be handled? (4)

RESPONSE: The Construction Permits Law, N.J.S.A. 13:1D-29 et seq., allows one 30-day extension of the 90-day review period with the mutual consent of the Department and applicant. The Department does not now, and will not in the future, allow 30-day extensions for applications that are so grossly deficient or inconsistent with the rules that the Department’s review of additional material cannot reasonably occur within the 30-day extension period. The 30-day extension is only made available for applications needing minor changes or for which changes have been agreed upon verbally, but which need to be incorporated into final plans for approval. Consequently, this provision will not result in any change to the Department’s workload.
N.J.A.C. 7:13-9.3(h)

679. COMMENT: The provision at N.J.A.C. 7:13-9.3(h) for automatic approval should be deleted on adoption. It could result in approval of permits that conflict with or violate applicable State and Federal laws. For example, it is our understanding that Federal entities such as NOAA have raised written objections, and identified deficiencies in the implementation of automatic permit approvals by the Department for State permits that may involve Federal jurisdiction, or Federally delegated programs such as the Coastal Zone Management Act. Automatic approval is a “fast track” policy that sacrifices environmental protection solely for the expediency and economic interests of the development community. In addition to raising serious potential conflicts with Federal and State requirements, and Federally delegated programs, it is poor public policy. (69)

RESPONSE: Although the Department appreciates the commenter’s concern regarding the potential for environmental impacts if a decision is not made within 90 days on a flood hazard area approval, approvals under this chapter are governed by the review and approval procedures contained within the Construction Permits Law (N.J.S.A. 13:1D-29 et seq.). That law provides that in the event that the Department fails to take action on an application for a construction permit within the 90-day period specified, then the application shall be deemed to have been approved (see N.J.S.A. 13:1D-32). Because the Flood Hazard Area Control Act does not have a Federal equivalent and is not Federally delegated, there is no Federal mechanism available that would supersede the Construction Permits Law requirement.

N.J.A.C. 7:13-9.3(i)

680. COMMENT: The Department should not have the discretion to refuse the request of an applicant to withdraw an application. Conditions may change with respect to an applicant or a proposed regulated activity that warrant withdrawal of the application. To the extent that an applicant no longer intends to pursue the regulated activity as evidenced by a request to
withdraw the application, there is no valid basis for the Department to render a permitting
decision. If there is no regulated activity proposed because an applicant does not intend to pursue
it as evidenced by the notice of withdrawal, then any action by the Department regarding the
withdrawn application is superfluous and unnecessary. (7, 18, 33, 46, 53)

RESPONSE: There are situations where an application is in significant non-compliance with the
requirements of the Flood Hazard Area Control Act rules and the Department may choose to
issue a formal denial of the application noting the deficiencies in the application. There are also
situations where the Department has already invested significant time and effort in the
preparation of a denial document and therefore the Department may choose not to agree to the
applicant's request to withdraw an application. However, in most cases, the Department does
agree to an applicant's request to withdraw an application. Furthermore, it is very unlikely that
the Department would not agree to the applicant's withdrawal of an application if the applicant
no longer intends to pursue the regulated activity.

N.J.A.C. 7:13-9.3(k)

681.COMMENT: The word “complete” should not be adopted at proposed N.J.A.C. 7:13-9.3(k).
The Department should publish notice of all submitted applications in the DEP Bulletin, not just
those applications that are declared or deemed complete for review. (7, 18, 33, 46, 53)

RESPONSE: A significant amount of applications submitted to the Department are determined
to be incomplete and are returned to the applicant. To publish notice of these incomplete
applications would be burdensome to the Department. Furthermore, the public may misconstrue
these publications, assuming that the Department is actively reviewing an application that has
been returned to the applicant. Accordingly, the requested change has not been made.

N.J.A.C. 7:13-9.3(l)
682. COMMENT: The proposed new rules are vague and ambiguous in that they fail to identify what would constitute “a significant degree of public interest” in an application. This provision should not be adopted. (7, 18, 33, 46, 53)

RESPONSE: N.J.A.C. 7:13-9.3(l) provides that the Department shall hold a public hearing if there is a significant degree of public interest in the application, as manifested by written requests for a hearing from at least 10 persons at different addresses. In considering the degree of public interest, the Department shall take into account whether the issues raised in the hearing request are relevant to the application's review. It is the Department's opinion that a hearing request from at least 10 persons at different addresses would represent a significant degree of public interest provided the issues raised are determined by the Department to be relevant to the application's review. Due to the complexity of the Flood Hazard Area Control Act rules and the wide range of issues that may concern the public, it is impossible for the Department to specify exactly which issues would be relevant to the review of an application in advance. However, it is the Department's intention to review hearing requests on a case by case basis and determine whether the issues raised are relevant to requirements of the Flood Hazard Area Control Act rules. This provision is not vague and ambiguous and has been adopted as proposed.

683. COMMENT: The written requests for a hearing from at least 10 persons at different addresses should also specifically exclude “form letters.” (33)

RESPONSE: N.J.A.C. 7:13-9.3(l) provides that the Department shall hold a public hearing if there is a significant degree of public interest in the application, as manifested by written requests for a hearing from at least 10 persons at different addresses. The intention of this provision is to help the Department identify those projects which have generated sufficient public interest to warrant a public hearing. Whether or not the letters received by the Department are reproduced “form letters” does not alter the fact that interested parties have contacted the Department, which would require the Department to respond accordingly.

N.J.A.C. 7:13-9.4 Duration of an individual permit
N.J.A.C. 7:13-9.4(a)

684. COMMENT: Five years is too long for an individual permit considering the ravages of flooding that changed conditions dramatically in the State over the past three years. (10, 67)

RESPONSE: The Flood Hazard Area Control rules adopted in 1984 provided that permits would generally be effective for a period of two years but could be extended beyond the two-year period for a maximum of five years, granted in one-year increments. It was the Department's experience that the two-year duration of permits was too short for applicants to complete their activities, and that many applicants were forced to request extensions of time. Processing the extension requests was burdensome to the Department and to applicants and created undue delay and uncertainty.

To address this situation, the repealed Flood Hazard Area Control rules at N.J.A.C. 7:13-4.7(f), adopted in 1995, provided that permits under the jurisdiction of this chapter are valid for five years. The Department believes that the five-year validity of an individual permit, as adopted at N.J.A.C. 7:13-9.4(a), provides an applicant sufficient time to obtain other approvals and undertake construction. Furthermore, the adopted Flood Hazard Area Control Act rules have adequate provisions to ensure that future construction does not increase flooding or otherwise threaten the public safety, health and general welfare.

685. COMMENT: Once construction activities associated with a permitted regulated activity have commenced, an individual permit should remain valid and should not expire. There is no substantive justification for expiration of a permit for a regulated activity that has commenced, but not been completed, within five years of the date of issuance of the permit. For instance, the Department’s coastal permits provide that permits do not expire so long as construction is initiated and there is no cessation of construction for a period of more than one year. The expiration of permits for regulated activities undertaken, but not completed, could lead to circumstances where incomplete projects (such as those delayed by cyclic economic conditions)
are not resumed because of the costs and uncertainties of the permitting process. (7, 18, 33, 46, 53)

686.COMMENT: This section limits the validity of an individual permit to five years from the date of issuance. The Department does not allow for circumstances where permits could expire while projects are only partially complete. This section should be changed to read as follows; “Except as provided in (b)1 or 2 below….”; subsection (b) should be renumbered to (b)1 and a new subsection (b)2 added, which states “An individual permit issued for a project that is 75 or more percent complete can be extended for up to two years without change to its requirements.” (22)

RESPONSE TO COMMENTS 685 AND 686: Flooding conditions have been changing so rapidly in New Jersey that the Department does not believe it is prudent to allow permits to be extended beyond five years, except for certain public roadway, railroad or flood control projects that cannot be completed within five years, pursuant to N.J.A.C. 7:13-9.4(b). It is unclear why the commenters believes that five years is insufficient since the Department’s land use permits carry a five-year expiration date with no guarantee of extension even in those cases where extensions are available. While CAFRA and waterfront development permits do allow the continuation of construction activities beyond the five-year term of the permit in some cases, the Department believes that, due to the unique and dynamic nature of flooding, which can substantially change within a given watershed over a five-year period, it is appropriate to limit flood hazard area approvals to five years. Further, the rule at N.J.A.C. 7:13-9.4(c)2 clearly addresses the circumstance where a permit expires but projects are partially complete. It states that, if work has already begun under the permit at the time of expiration, the project must be modified to the extent feasible to conform with the rules in effect at the time of application for the new permit. Further, in determining the feasibility of compliance with the current requirements, the Department will consider the amount of construction that was completed onsite prior to the permit expiration, as well as whether continuing construction as originally approved would constitute an adverse impact on flooding or the environment. The Department believes
this provision is sufficiently broad to address all circumstances and degrees of project completeness.

687.COMMENT: Proposed N.J.A.C. 7:13-9.4(a) limits the permit term for public utility infrastructure projects to five years, although such projects are analogous to the other types of public infrastructure for which proposed N.J.A.C. 7:13-9.4(b) authorizes ten-year permits. Accordingly, we recommend modifying N.J.A.C. 7:13-9.4(a) to allow for a five-year extension of the initial five-year permit term. (36, 42)

RESPONSE: In the Department’s experience, the scope of utility projects is not such that they would result in extensive impacts to flood hazard areas or riparian zones requiring more than five years for completion. Most of the projects that the Department reviews include impacts confined to a limited, concise area, and consequently the Department has provided several permits-by-rule to accommodate these activities at N.J.A.C. 7:13-7.2(c).

While the Department believes that many utility maintenance activities are permitted-by-rule at N.J.A.C. 7:13-7.2, those maintenance activities which require an individual permit under this chapter are eligible to receive a network-wide permit under N.J.A.C. 7:13-11.9(f), which can allow any necessary maintenance, repair or replacement activities over a five-year period. In such a case, the Department believes that it is appropriate to review such permits every five years to determine whether compliance has been achieved and also to ascertain whether improvements in technology or rule amendments warrant revision of permitting requirements. Consequently, the Department believes it is not appropriate to include public utilities in the list of entities for which ten-year permits may be approved. If for some reason the public utility anticipates a much larger project that could exceed five years, the Department would advise the utility to separate the project into more discrete projects that can be reasonably completed within the five-year term of the permit approval.

N.J.A.C. 7:13-9.4(b)
688. COMMENT: There is no basis for the distinction between public projects and private projects for purposes of establishing a ten-year or five-year duration of an individual permit. Private development projects are often as large and/or as complicated, and can take as long to complete, as public projects. The determining factor of whether a project warrants a permit with a ten-year duration rather than a five-year duration should not be the identity of the applicant, but the nature of the regulated activity and the project. Like public projects, it may be “difficult or even impossible” to change a private project after five years if the approved project has been partially completed and, therefore, “a longer permit term will prevent unnecessary delay and paperwork for those projects that clearly need more than five years for completion.” (7, 18, 33, 46, 53)

RESPONSE: While the scope of a project may dictate the amount of time necessary to complete regulated activities to be conducted by a flood hazard area permit, the Department believes it is appropriate to distinguish between public and other projects by providing a longer period of time for project completion in those circumstances where the public applicant can demonstrate that the size and scope of the project is likely to prevent completion of all regulated activities in five years. Public projects are conducted with taxpayer funding and overseen by public entities accountable to the public. Often, large public projects may have been funded and developed only after public referenda with government approval. Consequently, the Department feels it is appropriate to accommodate such projects if provided that they satisfy all rules. Furthermore, if for some reason a private entity anticipates a much larger project that could exceed five years, the Department would advise the applicant to separate the project into more discrete projects that can be reasonably completed within the five-year term of the permit approval.

689. COMMENT: The duration of flood hazard verifications is limited to five years. For larger public agency projects which qualify for the ten-year permit, the flood hazard verification time limit should be extended to ten years. (57)

RESPONSE: N.J.A.C. 7:13-6.1(f) provides that, “If the Department issues a verification for a site, and within five years issues a general permit authorization or an individual permit for a
regulated activity that references or relies upon the verification at that site, the Department shall automatically reissue the verification upon approval of the permit or authorization so that the verification and permit or authorization have the same expiration date.” Consequently, if the Department issues a verification and within five years issues a ten-year permit under N.J.A.C. 7:13-9.4(b), the verification will automatically be reissued for a ten-year period so that the permit and verification expire together.

However, as proposed, N.J.A.C. 7:13-6.1(e) explained that a verification is valid for five years and cannot be extended. Therefore, under the proposed language, if a verification was issued at the same time as a ten-year permit, the verification would be valid for only five years in accordance with N.J.A.C. 7:13-6.1(e). However, if the verification was issued at any point before the ten-year permit, the verification would be reissued for a ten-year period under N.J.A.C. 7:13-6.1(f). Therefore, in order to clarify the Department’s intention that the permit and verification expire together, N.J.A.C. 7:13-6.1(e) has been modified on adoption to provide that, “A verification is valid for five years from its issuance date, unless the verification is issued concurrently with a ten-year individual permit under N.J.A.C. 7:13-9.4(b), in which case the verification is valid for ten years from its issuance date.”

690.COMMENT: We question this provision that allows duration of a permit for ten years for a public roadway, railroad or flood control project if the applicant is a public entity. An applicant should be required to renew a five-year permit. This provision would provide for changes to the floodplain or floodway that happen over time. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: Although the Department agrees that it is important to assess the flood hazard area environment after five years, the Department is trying to balance this goal with the goal of protecting infrastructure serving, and funded by, the public. Consequently, the Department has concluded that it is appropriate in the limited circumstances provided for public roadways, railroads or flood control projects to provide for a ten-year permit in certain cases. The Department notes that this ten-year permit is not automatic for all public projects and that the applicant must demonstrate that the size and scope of the project will require more than five
years to complete. As such, the Department does not anticipate issuing many ten-year permits under the adopted new rules.

N.J.A.C. 7:13-9.4(c)

691. COMMENT: To the extent that the rules are adopted with limitation on the duration of individual permits at proposed N.J.A.C. 7:13-9.4(a) and (b), then proposed N.J.A.C. 7:13-9.4(c)2 should be modified to provide for the automatic extension or reissuance of a permit if the rules applicable to the regulated activity have not changed. If the rules applicable to the regulated activity have changed, then the permit should be extended upon demonstration that the regulated activity complies with the modified rules. To the extent that rule changes have occurred and the permittee cannot demonstrate compliance, then the permittee should be afforded an opportunity to submit a feasibility analysis demonstrating that it is not practicable to comply with the new rules. If this is demonstrated, the work should be allowed to be completed. (7, 18, 33, 46, 53)

RESPONSE: As stated in response to comments 685 and 686, flooding conditions have been changing so rapidly in New Jersey that the Department does not believe it is prudent to allow permits to be extended beyond five years. Consequently, the degree of change between adopted rules and future rules, while a consideration when evaluating a project that is partially completed at the time that a permit expires, is not the Department’s main consideration for requiring applicants to obtain a new approval after five years. Rather, the Department also needs the opportunity to review the flood hazard area limits to make sure that nothing has changed significantly since the previous permit approval.

692. COMMENT: N.J.A.C. 7:13-9.4(c)2 should be deleted or revised. The lack of extensions could cause significant redesign and review costs even for partially completed projects. There should be individual permit extensions, at least one extension equal to the ten years available to public entities. Furthermore, the Department must clarify who determines “where feasible” and on what criteria the determination is based. Finally, the term “consider the amount” is very vague and it is unclear if money expended to date, the efficacy of continuance of contracts to avoid
unemployment of laborers, and significant investment into materials, equipment rentals etc. will be considered. (26)

RESPONSE: As previously stated, flooding conditions have been changing so rapidly in New Jersey that the Department does not believe it is prudent to allow permits to be extended beyond five years. The Department has provided N.J.A.C. 7:13-9.4(c)2 to strike the appropriate balance between protecting an individual’s investment in a partially completed project, while protecting the public by ensuring that the flood hazard environment is protected. The Department shall only approve a new individual permit if the project is revised where feasible to comply with the rules in effect when the new application is submitted. If the Department believes that compliance with the new rules can be affected by a change to the individual permit project, the applicant will have to demonstrate why it is not feasible to incorporate such a change. While all factors will be considered and evaluated, the Department’s determination regarding the feasibility of compliance will focus on whether the amount of completed construction at the expiration of the permit is so significant that it is no longer feasible to make revisions to the project and also on whether continuing the construction as originally approved would constitute an adverse impact on flooding and the environment.

N.J.A.C. 7:13-9.5 Individual permit conditions

693.COMMENT: We support the proposed oversight, operation and maintenance and site condition care requirements for individual permits. (10, 67)

RESPONSE: The Department acknowledges this comment in support of the oversight, operation and maintenance and site condition care requirements for individual permits.

N.J.A.C. 7:13-9.5(b)2

694.COMMENT: The proposed language suggests that a new permit would be required to continue the operation of a fully constructed regulated structure after the expiration date of the
permit. The proposed rule should be clarified to confirm that a new permit is not required for the continued operation of a fully constructed facility after the expiration date of a permit. (7, 18, 33, 46, 53)

RESPONSE: Generally an activity covered by a permit, such as the proposed construction of a regulated structure, is not ongoing in nature and therefore, once the construction associated with the construction is completed, the activity has been completed. The occupation or continued operation of a fully constructed regulated structure before or after the expiration date of the permit is not considered to be a regulated activity and therefore a new permit is not required in that case. In some limited cases, however, regulated activities are ongoing, such as the continued maintenance of a utility line under N.J.A.C. 7:13-11.9(f). In such a case, a new individual permit must be received from the Department in order to continue work once a permit has expired.

N.J.A.C. 7:13-9.5(b)4

695.COMMENT: Proposed N.J.A.C. 7:13-9.5 provides certain conditions on all individual permits to ensure project compliance. In addition to these extensive conditions, there is a proposed requirement at N.J.A.C. 7:13-9.5(b)4 that permittees shall “take all reasonable steps to prevent, minimize or correct any adverse impact on the environment resulting from activities conducted pursuant to the permit, or from noncompliance with the permit.” As drafted, N.J.A.C. 7:13-9.5(b)4 would impose unspecified additional requirements on permittees. This provision should be eliminated from the proposed regulations. The proposed regulations for individual permits should contain sufficient conditions to ensure that each regulated activity is protective of the environment and otherwise meets the Department’s flood mitigation objectives. Compliance with those conditions of individual permits should be sufficient to ensure that no adverse environmental impacts will occur and that the flood mitigation objectives of the regulation are achieved. Because proposed N.J.A.C. 7:13-9.5(b)4 would require permittees to exceed all of these other extensive environmental protection for flood mitigation conditions, this requirement would be redundant and do nothing but provide the Department with an additional provision under which the Department can find violations and seek penalties. (40)
RESPONSE: As stated in response to comments 575 through 577 to comments on a similar condition in the context of general permits at N.J.A.C. 7:13-8.2(b)4, the provisions to halt or reduce activities in order to maintain compliance with a permit and to minimize environmental impacts make the permittee responsible for his or her actions on the ground regardless of what may have been approved by the Department in good faith on paper. For example, if the Department approves an activity with the belief that all was properly designed to avoid offsite impacts but during construction offsite impacts occur and show no sign of abating upon construction completion, the permittee cannot ignore those impacts because he or she has an approved permit. The permittee has the responsibility to stop the activity until such time that the unanticipated impacts are discussed with the Department and a mutual change to the approved permit and plans is obtained. This does not negate the need for appropriate permit requirements or conditions or attempt to place blame for failed projects. Rather, this condition recognizes the fact that even the best plans are not always successful and that the most critical factor for successful project construction is that what occurs on the ground does not result in unanticipated negative impacts to the flood hazard area or environment.

696. COMMENT: This proposed section discusses the duty to minimize environmental impacts for individual permits. However, there does not appear to be any guidance as to how this is done. Will this be specified in every individual permit based on the proposed activity? (45)

RESPONSE: As set forth in the response to comment 695, the provisions of this section are intended to remind a permittee of their responsibility to prevent, minimize or correct adverse impacts on the environment resulting from activities conducted pursuant to the permit, or from noncompliance with the permit. Since the Department has no way to anticipate, in advance, what, if any, adverse impacts may result form the construction of a project, the Department cannot specify how to avoid such impacts in every individual permit.

N.J.A.C. 7:13-9.5(b)6
697. COMMENT: Please clarify whether the ‘supervision and direction’ refers to day-to-day project/construction supervision, or overall project management which may include periodic site visits. The routine presence of a professional engineer on site is not necessary or cost effective for all projects, and other technical personnel can provide day-to-day oversight. (66)

698. COMMENT: Delete the phrase “under the supervision and direction of an engineer.” The language as presently proposed could be interpreted to mean that an engineer, by definition a professional engineer licensed in the state of New Jersey, must be on-site at all times to provide direction and supervision for all aspects of the job, for example tree trimming. It is unreasonable to require a professional engineer to be on-site to provide direction and supervision at all times during every work activity that must be accomplished to comply with the terms and conditions of a permit. By definition, “best management practices” will be developed in reliance on the expertise of the appropriate professionals, which will vary based on the circumstances. (42)

699. COMMENT: Proposed N.J.A.C. 7:13-9.5(b)6 requires all approved activities to be “undertaken using the best management practices available under the supervision and direction of an engineer.” This requirement is unnecessary and counterproductive. By definition, “best management practices” will be developed in reliance on the expertise of the appropriate professionals, which will vary based on the circumstances. Thus, for some matters the necessary expertise will be that of a professional engineer; in other instances the required expertise may be an arborist or forestry management professional. N.J.A.C. 7:13-9.5(b)6 should be modified by deleting the phrase “under the supervision and direction of an engineer.” 36

700. COMMENT: As presently proposed, it is unclear whether a licensed professional engineer in the State of New Jersey must be on-site at all times to provide direction and supervision for the job. It is unreasonable to require a professional engineer to be on-site to provide direction and supervision at all times during every work activity that must be accomplished to comply with the terms and conditions of a Permit. We propose the deletion of the requirement that the work must be done under the “supervision and direction” of an engineer, but need be done under the supervision of authorized representative of the permittee. The section would then read as
follows: “The permittee shall ensure that all approved activities are undertaken using the best management practices available under the direction of an authorized representative of the permittee.” (22)

RESPONSE TO COMMENTS 697 THROUGH 700: As stated in response to comments 580 through 582, the Department recognizes that proper oversight will vary from project to project. Depending on the activities being performed, proper oversight may require day-to-day project/construction supervision, or overall project management which may include periodic site visits. Oversight is proper if all aspects of the project are undertaken in compliance with the approved permit and all its conditions. It is at the discretion of the applicant and his professional to determine on a case by case basis, if or how frequently the licensed profession engineer must be onsite. The objective is to have the appropriate professional available at the appropriate time. The Department believes this flexibility is already inherent in the condition as written.

The Department agrees that best management practices may vary depending upon the circumstances since the goal of this condition is to ensure that the project is constructed without any impacts to the flood hazard area or environment that were not approved as part of the permit. The does not intend to require that a licensed professional engineer be present onsite during all phases of construction. Therefore, in order to clarify the Department’s intent with regard to this provision, N.J.A.C. 7:13-9.5(b)6 has been modified on adoption to require that permittee shall ensure that all approved activities are undertaken using the best management practices available under the supervision and direction of an engineer “at all points necessary to ensure compliance with all permit conditions.”

N.J.A.C. 7:13-9.5(b)7

701. COMMENT: Please clarify whether a planned, temporary diversion of a stream is allowable under this paragraph, such as during culvert replacements and stream restoration projects. (66)

RESPONSE: As stated in response to comment 583, regarding to a similar comments on a parallel provision for general permits at N.J.A.C. 7:13-8.2(b)7, if the Department determines,
during the review of the general permit, that the creation of a temporary diversionary channel
would serve to protect the environment and reduce the likelihood of adverse impacts to flooding
during construction, the planned diversion of a stream would be permitted.

N.J.A.C. 7:13-9.6 Cases where a verification is required prior to obtaining an individual permit

702. COMMENT: Verification should be required for all activities prior to commencement. (10, 67)

RESPONSE: N.J.A.C. 7:13-9.6 (b) and (c) provide exceptions where a verification is not
required prior to obtaining an individual permit. These exceptions are allowed because, in some
cases, the flood hazard area design flood elevation and floodway location are not necessary to
determine if the excepted activities satisfy the requirements of the Flood Hazard Area Control
Act rules. For example, in some cases a stormwater outfall structure is the only construction
proposed anywhere near the regulated water, and all other proposed construction onsite is
situated at ground that is so far away and above the elevation of the regulated water that it is
obvious from a visual inspection of the submitted drawings that the construction activities are not
proposed within the flood hazard area or riparian zone. In such a case, as long as the outfall is
constructed at or below existing grade, the location of the floodway and elevation of the flood
hazard design flood elevation are not necessary to process the permit application. Because of
situations like these the Department believes that it is not appropriate to require a verification for
all activities prior to commencement.

703. COMMENT: N.J.A.C. 7:13-9.6(b)2iii should be rewritten as "it is clear to the Department
from a visual inspection of submitted drawings that the proposed fill and/or structure is either
located outside a floodway or will not obstruct flow in a floodway, nor cause habitat
degradation." (45)

RESPONSE: The purpose of this subsection is to describe the conditions that must be present for
an activity to be permitted without the need for a verification under N.J.A.C. 7:13-6.1. This
subparagraph provides that, where fill is proposed, it is unnecessary to precisely establish the
limits of the floodway through a verification if it is clear that the floodway will not be impacted. A verification provides information on the location of areas regulated under this chapter, including the floodway. It does not provide habitat information. It is also unclear how the Department would be able to determine from a visual inspection of submitted drawings whether habitat would be impacted. Accordingly, the Department does not believe that it is necessary to modify proposed N.J.A.C. 7:13-9.6(b)2(iii) to require a verification due to habitat concerns. Nevertheless, please note that the Department cannot issue an individual permit for a project that would adversely impact threatened and endangered habitat, pursuant to N.J.A.C. 7:13-10.6.

N.J.A.C. 7:13-9.7 Cases where an individual permit can be issued in an approximated flood hazard area

704.COMMENT: N.J.A.C. 7:13-9.7(a)2 allows the Department to issue a permit for a regulated activity in a flood hazard area if a habitable dwelling is not in the floodway and any fill is outside of the floodway or meets the no net-fill provisions at N.J.A.C. 7:13-10.4. We oppose this provision unless an applicant can meet strict hardship conditions. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Department believes that it is reasonable to allow the construction of buildings in flood hazard areas, provided all standards of these adopted new rules are met, to ensure that the building will not adversely impact flooding or the environment. In terms of public safety or potential impacts to the flooding and the environment, construction in an approximated flood hazard area, pursuant to Method 5 at N.J.A.C. 7:13-3.5, is no different than construction in a flood hazard area determined through another method provided at N.J.A.C. 7:13-3. Furthermore, the approximation of the flood hazard area under Method 5 is designed to be conservative and therefore it is reasonable to allow this method to be used to establish floor elevations for a habitable dwelling and/or appropriate elevations for a driveway, private roadway or parking area proposed to serve the habitable dwelling. N.J.A.C. 7:13-9.7(a)2 requires that: (1) it is clear to the Department from a visual inspection of submitted drawings that the habitable dwelling is outside the floodway; (2) any fill or other structures are either located outside the floodway or will not obstruct flow in a floodway; and (3) the flood storage displacement requirements of N.J.A.C.
7:13-10.4 are satisfied. These requirements, which are in addition to all other requirements for an activity under an individual permit in N.J.A.C. 7:13-9 through 11, will ensure that the proposed activity will not adversely impact flooding or the environment. In view of the above, the Department believes that proposed N.J.A.C. 7:13-9.7(a) is appropriate and that it is not necessary to require an applicant to meet the strict hardship exception conditions in order to utilize the provisions of this section.

N.J.A.C. 7:13-9.8 Hardship Exception for an individual permit

705.COMMENT: Hardship exceptions should not be allowed. (10, 67)

RESPONSE: N.J.A.C. 7:13-9.8, which provides for the issuance of an individual permit based on a hardship exception, is continued from repealed N.J.A.C. 7:13-4.8. The Department recognizes that situations do exist when strict compliance with the requirements of this chapter would create an undue hardship on an applicant. For example, a person may propose to construct an additional room on his or her home in order to provide long-term care for a disabled family member. The construction of an addition of 300 square feet or more is not permitted-by-rule at N.J.A.C. 7:13-7.2, and therefore must be elevated above the flood hazard area design flood elevation, pursuant to N.J.A.C. 7:13-11.5(g). However, if the floor of the existing home is several feet below the flood hazard area design flood elevation, it may not be feasible to construct an addition at the required elevation. The applicant may furthermore be able to make a compelling case that the disabled family member would be unable to access the elevated addition without elevators or other expensive mechanisms that the family cannot afford to provide. The Department may or may not approve a hardship exception in this case, since the decision would depend on the justification submitted by the applicant and the impacts of the project of flooding and public safety. However, the Department believes that, due to situations as described above, it is appropriate to include this section in order to allow for those unanticipated, special and/or unique situations that arise. In view of the above, the Department does not agree that hardship exceptions should not be allowed.
706.**COMMENT:** The Department should openly disclose the degree of flexibility it intends to use in imposing the new riparian zone widths and new no net-fill regulations rather than deferring to the rules on hardship exceptions, to provide relief from strict adherence with the rules. Hardship exceptions require expensive and time consuming applications, and in the past were infrequently approved. What is the expected policy towards the new hardship exceptions? Does the applicant have a reasonable chance of successfully obtaining a hardship exception, without a very expensive investment to support such an application? (44)

**RESPONSE:** The Department has adopted rules that are necessary to protect the public from flooding and to preserve the quality of surface waters and the wildlife and vegetation that exist within and depend upon such areas for sustenance and habitat. However, in order to be able to address unanticipated situations or circumstances of the applicant or site condition, the Department has included a provision for hardship exceptions. All applicants who can design a project to comply with any of the myriad situations addressed specifically by the rules, will be required to do so because the Department believes that full compliance with the rules is the best mechanism available to control flooding and protect the environment. It remains to be seen how many projects may fall outside the prescribed rule standards thereby requiring a hardship exception. It is important to note that the Department’s hardship exception criteria all require protection of public safety, health and general welfare, and the environment. Consequently, if the proposed activity fails to adequately protect public safety, health and general welfare, and the environment, it will not be approved regardless of whether the applicant contends that a hardship exists. Those who submit applications that will provide equal or better protection to public safety, health and general welfare, and the environment, which fully demonstrate the need for a hardship exception to complete the activities will continue to qualify for this exception.

707.**COMMENT:** N.J.A.C. 7:13-9.8 allows the Department to issue an individual permit for an activity that does not comply with one or more of the requirements of the proposed new rules providing certain requirements are met, including a determination that the cost of compliance is "unreasonably high" in relation to the environmental benefits that would be achieved by compliance; or that due to an "extraordinary situation" compliance would result in an
"exceptional and/or undue hardship" for the applicant. We find these requirements, and the terms upon which they are based, to be too subjective and open to a wide range of interpretations. This section should be amended to incorporate specific standards or formulas to enable applicants to prepare a cost benefit analysis or render a true demonstration of economic hardship. (37)

708. COMMENT: The Department must define the terms “feasible and prudent” as well as “unreasonably high”(33)

RESPONSE TO COMMENTS 707 AND 708: Incorporating specific standards or formulas into the Department’s hardship exception provisions would defeat the purpose of the provision. As stated in response to comment 706, in adopting these new rules, the Department has anticipated as many situations and circumstances as possible. In order to be able to address unanticipated situations or circumstances, the Department has included a provision for hardship exceptions. All applicants who can design a project to comply with any of the myriad situations addressed specifically by the rules, will be required to do so because the Department believes that full compliance with the rules is the best mechanism available to control flooding and protect the environment. Since the Department does not know in advance the nature of the situations which may result in requests for hardship exceptions, it cannot more specifically provide standards for review of these situations. The Department is not asking for a cost benefit analysis. It is important to note that there is a strong focus in the hardship exception on the potential effects of the proposed activity on public safety, health and general welfare, and the environment. Consequently, if the proposed activity fails to protect public safety, health and general welfare, and the environment it will not be approved regardless of whether the applicant contends that a hardship exists.

709. COMMENT: The cost benefit test hardship waiver is inconsistent with, not authorized by, and therefore violates applicable Federal and State requirements. The Department must repeal the proposed hardship waiver provisions related to the cost benefit test. The proposed cost benefit test conflicts with Federal Clean Water Act and New Jersey Stormwater Quality Standards (SWQS) regulations, which have no such hardship waiver. Not only do Federal and
State rules not have a hardship waiver, such a waiver is inconsistent with those rules, and would allow applicants to avoid compliance with water quality requirements solely on the basis of economic hardship.

Federal and State SWQS and antidegradation requirements apply for two basic reasons: a) first, the Department’s own proposed new rules are based on the antidegradation designations of streams, i.e. The proposed buffer widths and other technical requirements vary based solely on whether a stream is designated Category One or Category 2. Those stream designations are made pursuant to the authority of SWQS definitions, such definitions being linked to implementation of the antidegradation policies. The Department may not selectively pick and choose to apply the designation of a stream for the purposes of stream encroachment permit requirements, without recognizing all the protections afforded the Category One or Category 2 designation; and b) second, the SWQS and antidegradation policies apply directly to all waters of the State, even in the absence of the proposed rule. Even if the proposal did not base Flood Hazard Area Control Act permits, and environmental and water quality protections on the antidegradation designations of a waterbody, those SWQS and policies would still apply to activities regulated by the Flood Hazard Area Control Act rules. Equally, the SWQS and antidegradation policies apply to actions by the Department that may impact water quality, including proposal and adoption of regulations – so the Department’s rulemaking activity is regulated by these SWQS rules.

According to USEPA SWQS Economic Guidance: (link: http://www.epa.gov/waterscience/econ/) “Pursuant to the Water Quality Standards Regulation (40 CFR 131), States must define Statewide water quality goals by: 1) designating water uses and 2) adopting water quality criteria that protect the designated uses. When designating uses, States must consider the use and value of the waterbody for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. The designated use may or may not coincide with the existing use, but it cannot reflect lower water quality than the existing use. As described in the Water Quality Standards Handbook, if the designated use of a water body is also an existing use, the designated use cannot be downgraded to one that requires less stringent water quality criteria. If, however, the designated use is not an existing use the States may, under certain
circumstances, remove the designated use, create new subcategories of the use, or grant a water quality standard.

States are also required to adopt an antidegradation policy to protect existing uses, high-quality waters, and water quality in waters that are considered to be outstanding national resources. The antidegradation policy allows States to lower water quality in higher-quality waters only if it is necessary to accommodate important economic or social development. The use of the term "important" communicates a general sense of the level of economic and social development. This provision is intended to permit degradation of high-quality water bodies in only a few extraordinary cases where the benefits of the economic or social development unquestionably outweigh the costs of lowering water quality. Under no circumstances, however, may water quality fall below that required to protect existing or designated uses.”

The proposal fails to comply with these Federal requirements. The proposed hardship waiver is inconsistent with these requirements, in that it would allow a lowering of water quality without any public demonstration of justification, as required by Federal rules that require that:

“The antidegradation policy allows States to lower water quality in higher-quality waters only if it is necessary to accommodate important economic or social development”

The proposal does not require any public demonstration of justification for lowering water quality as necessary to accommodate important economic or social development. (69)

710.COMMENT: The waiver for hardship is too broad and represents an unnecessary loophole without any real standards for doing a cost benefit analysis or claiming an economic hardship. The State should adopt a rule for hardship that is similar to the burdens of proof in the EPA guidance. (48, 54, 60, 63)

RESPONSE TO COMMENTS 709 AND 710: Because the Flood Hazard Area rules are not governed by any additional Federal standards, they are not required to be consistent with criteria that may be contained elsewhere in Federal standards or guidance. Furthermore, the EPA has no criteria for establishing “burden of proof” as suggested by the commenter. The Federal cost/benefit guidance to which the commenter refers is used to compare the cost of upgrading water pollution control equipment versus the water quality benefits that would result. The
Department does not agree that such comparison is comparable with the desire of a public or private entity to construct a structure within the flood hazard area.

Additionally, the Department does not agree that the hardship criteria are too broad or create a loophole. The Department will not approve a permit based upon hardship unless the Department determines: that there is no feasible and prudent alternative to the proposed project, including not pursuing the project, which would avoid or substantially reduce the anticipated adverse effects of the project, and that granting the hardship exception would not compromise the reasonable requirements of public safety, health and general welfare, or the environment; that the cost of compliance with the requirements is unreasonably high in relation to the environmental benefits that would be achieved by compliance; and/or the Department and applicant agree to one or more alternative requirements that, in the judgment of the Department, provide equal or better protection to public safety, health and general welfare and the environment. In addition, the applicant has to demonstrate that due to an extraordinary situation of the applicant or site condition, compliance would result in an exceptional and/or undue hardship; the proposed activities will not adversely affect the use of contiguous or nearby property; the proposed activities will not pose a threat to the environment, or to public safety, health and general welfare; and the hardship was not created by any action or inaction of the applicant or its agents. Consequently, if the proposed activity fails to protect public safety, health and general welfare, and the environment it will not be approved regardless of whether the applicant contends that a hardship exists. The Department believes that taken as a whole, these requirements will ensure that hardship exceptions will not be granted without extensive review and consideration, and that the grant of the exception will not result in negative environmental impacts.

711. COMMENT: I am concerned with the frequency that hardship waivers are given by the Department and recommend that public notice be required for each hardship proposed. (56)

RESPONSE: N.J.A.C. 7:13-16.3 requires public notice for all individual permit applications, except those involving a private residence or an appurtenant structure such as a garage, barn or shed. For each individual permit application that does require public notice, applicants are
required to explain if they are requesting a hardship exception as codified at N.J.A.C. 7:13-16.6(a)3.

712.COMMENT: Proposed N.J.A.C. 7:13-9.8 would provide for the issuance of an individual permit based on a hardship exception. Pursuant to proposed N.J.A.C. 7:13-9.8(a), the Department would have to make one of three specific determinations in order for it to issue an individual permit for a hardship exception. One such determination set forth in proposed N.J.A.C. 7:13-9.8(a)1 would require the Department to determine that there is no “feasible and prudent” alternative to the proposed project. This section of the proposed regulations is unclear because the phrase “prudent alternative” is not defined. For permit applicants to know whether they will qualify for a hardship exception, the Department must provide guidance as to what factors it will consider when determining whether a hardship exception is appropriate. The ambiguous term “prudent” should be removed from the proposed regulation or at least clarified.

(40)

713.COMMENT: N.J.A.C. 7:13-9.8, dealing with a hardship exception for an individual permit, needs standards to enable the staff to provide consistent review. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 712 AND 713: The Department believes that N.J.A.C. 7:13-9.8 provides adequate standards for the review of hardship exceptions. Since hardship waivers by their nature are case specific, it would be difficult to provide more detailed standards that would be applicable to the various situations involving hardships. Due to the importance of requiring projects to meet all design and construction standards of the Flood Hazard Area Control Act rules, the standards for issuing a hardship exception to these rules are extremely stringent. As a result, the Department has historically issued very few hardship exceptions to the Flood Hazard Area Control Act rules, since very few applicants have been able to clearly demonstrate that strict compliance with the rules would create an “exceptional or undue” hardship, as provided at N.J.A.C. 7:13-9.8(b)1.

With regard to the proper meaning of the phrase “prudent alternative,” this language has been continued from repealed N.J.A.C. 7:13-4.8(a)1 into adopted new N.J.A.C. 7:13-9.8(a)1, which provides that the Department shall consider a hardship exception in cases where, “there is
N.J.A.C. 7:13-9.8(a)

714. COMMENT: We oppose N.J.A.C. 7:13-9.8(a). If the applicant meets the usual physical hardship conditions, he/she can invoke a choice of conditions including a hardship exception if the cost of compliance is unreasonably high in relation to the environmental benefits. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: N.J.A.C. 7:13-9.8(a) establishes three requirements that must be satisfied in order for the Department to issue an individual permit for an activity that does not comply with one or more of the requirements at N.J.A.C. 7:13-10 and 11. While an applicant may attempt to convince the Department that one or more of these requirements are satisfied, an applicant cannot simply invoke a choice of these conditions. N.J.A.C. 7:13-9.8(a) makes it very clear that it is the Department's responsibility to determine that at least one of these requirements has been satisfied.

Furthermore, even if the Department is able to make a positive determination, as required by N.J.A.C. 7:13-9.8(a), and the applicant submits an application that satisfies all of the physical conditions of N.J.A.C. 7:13-9.8(c), the applicant still has to demonstrate that they have satisfied all of the requirements of N.J.A.C. 7:13-9.8(b).

N.J.A.C. 7:13-9.8(b)

715. COMMENT: The Department should report the number of hardship waivers that have been issued under the existing rules. (7, 18, 33, 46, 53)
RESPONSE: The Department has historically issued very few hardship exceptions under the repealed Flood Hazard Area Control rules, since very few applicants have been able to clearly demonstrate that strict compliance with the rules would create an exceptional or undue hardship. However, the Department did not record the number of hardship approvals made under the repealed rules and cannot therefore provide the commenter with an exact count.

716. COMMENT: During the public comment period for these rules, a representative of the Department explained that the proposed hardship exception section would be used to approve redevelopment applications that otherwise fail to meet the requirements of the proposed new rules. We do not understand how this section can be used for this purpose, because the waiver criteria are so difficult to meet. (7, 18, 33, 46, 53)

RESPONSE: Applicants with proposed redevelopment projects that otherwise fail to meet the requirements of the proposed new rules have the option to submit a hardship exception request for their application for an individual permit. The Department may exercise some discretion in the review of hardship waiver applications for redevelopment projects to allow appropriate redevelopment beneficial to the public and smart growth concept to proceed. If the municipality is involved in a redevelopment project, as a co-applicant, the municipality may be able to demonstrate that compliance with this chapter would create an exceptional and/or undue hardship on the citizens of the municipality. However, the applicant still would have to satisfy all of the requirements for hardship exceptions to assure that public health, safety and welfare as well as the environment will be protected if the activity is approved.

717. COMMENT: The proposed new rules eliminate the reference in the existing rules to an “extraordinary or exceptional situation or condition of the property” and limit the issuance of a hardship exception to instances where there is “an extraordinary situation of the applicant or site condition.” There is no meaningful distinction between an “extraordinary site condition” and an “extraordinary or exceptional condition of the property.” Therefore the Department should either
retain the language of the existing rules or else provide an explanation of how an “extraordinary site condition” differs from an “extraordinary condition of the property.” (7, 18, 33, 46, 53)

RESPONSE: N.J.A.C. 7:13-9.8(b)1 provides that an applicant shall demonstrate to the Department that due to an extraordinary situation of the applicant or site condition, compliance with this chapter would result in an exceptional and/or undue hardship for the applicant. This provision which sets forth the demonstration that an applicant must make to be eligible for a hardship exception, is continued from repealed N.J.A.C. 7:13-4.8(d), with one minor substantive amendment. The proposed subsection changes the wording slightly, so that hardship may be based on an "extraordinary situation or site condition, rather than only upon an "extraordinary or exceptional condition of the property." Thus, an extraordinary situation arising from either the applicant's circumstances or the project itself, rather than solely from the property, could form the basis of a hardship exception, provided all other requirements for a hardship exception were satisfied. Furthermore, the word "exceptional" has been deleted since its meaning in this provision is nearly synonymous with the word "extraordinary" and therefore is redundant. The Department agrees that "the extraordinary condition of the property" and "the extraordinary site condition" have essentially the same meaning and therefore the Department believes that it is unnecessary to change the language of the rule in this regard.

N.J.A.C. 7:13-9.8(c)

718.COMMENT: For brownfield sites, the proposed rule should provide that a hardship exception shall be granted upon submission of evidence that the project site will be remediated in accordance with the applicable Department regulations. (7, 18, 33, 46, 53)

RESPONSE: The Department recognizes that situations do exist when strict compliance with the requirements of this chapter would create an undue hardship on an applicant. Therefore, in order to be able to address unanticipated situations or circumstances of the applicant or site condition, the Department has included a provision for hardship exceptions.
However, the remediation of a project site in accordance with the applicable Department regulations would not necessarily mean that compliance with this Rule would result in an exceptional and/or undue hardship for the applicant in accordance with N.J.A.C. 7:13-9.8(b)1. Furthermore, the remediation of a site would not necessarily mean that the applicant could satisfy any of the other requirements of N.J.A.C. 7:13-9.8 for hardship exception. For example, if an applicant proposes to place fill in a floodway to cap contamination on a site, the fill may significantly increase flooding on upstream properties. In such a case, the applicant would not be able to demonstrate that the proposed activities will pose no threat to the environment, or to public health, safety and welfare as required under N.J.A.C. 7:13-9.8(b)3. Nor would the applicant be able to demonstrate that the project will not adversely affect the hydraulic capacity of any water so as to cause or increase flooding upstream or downstream of the proposed project, as required by N.J.A.C. 7:13-9.8(c)6. Therefore, the Department cannot agree with the commenter's request to grant hardship exceptions for anything an applicant may want to construct on a brownfield site simply because the project site will be remediated in accordance with the applicable Department regulations.

However, if an applicant can demonstrate that remediation required on a site cannot be accomplished without a hardship exception, the applicant may choose to submit a request for a hardship exception for the remediation project itself, as well as any other construction that is necessary to facilitate the remediation of the site. The Department will then review the submitted hardship exception request to determine if the applicant has satisfied all of the requirements of N.J.A.C. 7:13-9.8 in order to assure that the public health, safety and welfare as well as the environment are fully protected.

719. COMMENT: The Department should provide for greater flexibility in issuing hardship exceptions than is allowed under proposed N.J.A.C. 7:13-9.8(c), as the more stringent requirements of the proposed new rules will necessarily have the effect of creating an increased number of hardship scenarios, particularly with respect to urban redevelopment. (7, 18, 33, 46, 53)

RESPONSE: It is true that the adopted new Flood Hazard Area Control Act rules have many requirements that are more stringent than the repealed rules. However, these new rules have been
proposed to provide for increased protection to environment and the public safety, health and general welfare. With the exception of the limited flexibility, for redevelopment projects, as addressed in the response to comment 718, the Department believes that it is not appropriate to provide greater flexibility in issuing hardship exceptions as proposed N.J.A.C. 7:13-9.8 already has enough flexibility to strike a fair balance between the needs of an applicant and the need to protect the environment and the public safety, health and general welfare.

720.COMMENT: The requirement to submit detailed financial documentation to support a request for a hardship exception under N.J.A.C. 7:13-9.8(c)4 should be waived for areas declared “in need of redevelopment” or “in need of rehabilitation” pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et. seq. and for Brownfield sites. (7, 18, 33, 46, 53)

RESPONSE: N.J.A.C. 7:13-9.8(c) provides that if a hardship exception is based on economic grounds, the applicant shall submit detailed financial documentation to support the request. If the applicant's hardship is not based on economic grounds then there is no need to satisfy this requirement. However, if the applicant's hardship is based on economic grounds, the applicant must submit detailed financial documentation so that the Department can determine if the standards for hardship exception are satisfied. This information is needed regardless of whether the project is in a area declared "in need of redevelopment" or in “need of rehabilitation".

721.COMMENT: The requirements of N.J.A.C. 7:13-9.8(c)5 and 6 should be modified to include only the impacts of the hardship waiver portion of the application. (3)

RESPONSE: A hardship exception request is submitted as part of an individual permit application. The overall project has a significant bearing on the justification for the hardship exception and how the overall project impacts existing development is relevant to the Department in the review of a hardship exception. This is especially true when the project may increase flooding upstream and/or downstream of the proposed project. Therefore, it would not be appropriate to modify N.J.A.C. 7:13-9.8(c)5 and 6 to only include impacts directly related to the hardship exception.
COMMENT: The requirement at N.J.A.C. 7:13-9.8(c)6 that an applicant must demonstrate that a project “will not adversely affect the hydraulic capacity of any water so as to cause or increase flooding upstream and/or downstream of the proposed project” in order to obtain a hardship exception will have a severe negative impact on redevelopment activities throughout the State. Any fill that is proposed in connection with a redevelopment activity will necessarily have an adverse hydraulic impact under the proposed new rules to and, therefore, it will be impossible to obtain a hardship exception for such activities. (7, 18, 33, 46, 53)

RESPONSE: Adverse impacts to the hydraulic capacity of a water can occur as a result of any number of alterations to topography or flow conditions. The placement of fill in excess of the flood storage displacement limits of N.J.A.C. 7:13-10.4 is only one type of activity that could cause such a potential adverse impact. While the Department strongly supports the concept of redevelopment, all prospective redevelopment should be located in areas that are safe from, and which do not contribute to, flooding. It is not economic for the owners of residential or commercial development, or the public at large, to inappropriately redevelop areas known to be subject to repeated flooding since this would also subject them to repeated loss or damage to property and business, increase risks to other property owners and the public at large, and because Federal flood insurance monies are supported by taxpayer dollars. Consequently, the proposed redevelopment activity must protect public safety, health and general welfare, and the environment if it is to be approved under a hardship exception.

However, the Department does agrees that the requirements of N.J.A.C. 7:13-9.8(c)6 are only relevant in cases where the hardship exception request relates to potential adverse impacts to flooding. The are situations where a hardship exception request is related to impacts to the riparian zone, aquatic resources or other environmental factors, where the hydraulics of the flood hazard area will not be altered or impacted in any way. This is also true of N.J.A.C. 7:13-9.8(c)3, which requires that the applicant disclose “the projected height, velocity and duration of the floodwaters expected at the site during the flood hazard area design flood.” It is not necessary to require applicants to provide engineering data in such cases, since the Department’s decision will not be based on this data. Furthermore, N.J.A.C. 7:13-9.8(c) requires that this information be
provided to the Department “as applicable” and these hydrologic and hydraulic characteristics are only applicable in cases where the hardship relates to flooding. As such, the language from both paragraphs has been combined at N.J.A.C. 7:13-9.8(c)3, and has been modified on adoption so that they are only required “if the hardship exception request relates to any potential impacts to flooding.”

Subchapter 10. Individual Permit Requirements within various regulated areas

N.J.A.C. 7:13-10.1 Requirements for a regulated activity in a channel

723. COMMENT: Work should not be done in the stream channel. There should be no building and activities, except as a special exception, in the flood hazard area and riparian zone and those areas should be naturally vegetated, unobstructed, and free of structures or activities that reduce their function. (10, 67)

RESPONSE: The adopted rules regulate numerous waters throughout the State as well as their riparian zones and also flood hazard areas for waters that have a drainage area of 50 acres or larger. Many infrastructure projects such as roadways, utility lines, etc. must cross through these areas. Furthermore, as noted in the response to comments 241 through 251, approximately 35 percent of the land within the State is located within a flood hazard area. A complete ban on development within all of these areas could create a hardship for a very large number of citizens in the State who have owned their property prior to the adoption of these Flood Hazard Area Control Act rules. The Department believes that the adopted Flood Hazard Area Control Act rules strike an appropriate balance between the needs of private citizens, businesses and government agencies to undertake construction in these areas and the need to protect the environment and the general public health safety and welfare.

N.J.A.C. 7:13-10.1(b)3
724. COMMENT: Various aspects of proposed N.J.A.C. 7:13-10.1(b) should not apply to linear development infrastructure. First, contrary to the implication that appears to underlie N.J.A.C. 7:13-10.1(b)3, perpendicular stream crossings are generally less costly than diagonal crossings, and utilities would have no economic incentive to use diagonal crossings. Diagonal crossings are used only when necessary, such as to avoid impact to Threatened and Endangered Species or due to siting constraints (for example, to avoid intruding on other utility infrastructure). There is neither need nor justification for the constraint in proposed N.J.A.C. 7:13-10.1(b)3, and we suggest modifying that provision to exclude utilities. (36)

725. COMMENT: Delete utility lines from N.J.A.C. 7:13-10.1(b)3 because public utility linear development should be exempted from Chapter 13. (42)

726. COMMENT: Public utility linear development should be exempted from Chapter 13 for the reasons stated in other comments submitted on this proposal. N.J.A.C. 7:13-10.1(b)3 should be revised to read as follows: “All roadway, railroad, pedestrian and other crossings are constructed…” (22)

RESPONSE TO COMMENTS 724 THROUGH 726: N.J.A.C. 7:13-10.1(b)3 requires that any channel crossing be placed as nearly perpendicular to the channel as possible. The Department has historically encouraged applicants to minimize channel disturbances from crossings of all kinds, and perpendicular crossings minimize the length of channel that will be disturbed. Perpendicular crossings also typically reduce the amount of channel transition that is necessary. This provision is similar to repealed N.J.A.C. 7:13-3.5(b)2, which requires crossings of trout associated waters to be at "right angles" to the feature, and N.J.A.C. 7:13-2.16(c)2, which requires that channel transitions be minimized. It is the Department's experience that utility crossings are often proposed to cross a channel at a skew, which could result in excessive disturbance to the channel. Therefore, the Department believes that there is need and justification to include utility crossings in this provision.

Furthermore, utility lines, whether public or private, have the potential to cause significant damage to the environment when constructed in the channel, flood hazard area or
riparian zone of a regulated water, unless such construction is properly controlled. These potential adverse impacts include excessive destruction of vegetation within the riparian zone, excessive disturbance to the channel and the placement of fill in the floodway or flood fringe. The improper construction of utilities may lead to erosion and threaten the future integrity of the utility lines themselves. All of these potential impacts could adversely affect the environment and the public safety, health and general welfare. Therefore, the Department strongly believes that it is not appropriate or in the public interest to exempt utility linear development public or private, from the requirement of this section.

N.J.A.C. 7:13-10.1(b)7

COMMENT: “Riffles” should be added to the list of stream characteristics in this provision. (66)

RESPONSE: N.J.A.C. 7:13-10.1(b)7 provides that all temporarily disturbed sections of the channel are restored to pre-construction conditions. Characteristics that shall be replicated include the channel shape, width and meandering, ratio of shallow areas to deep areas, anticipated flow rate and velocity and substrate type. The Department believes that the adopted provision provides enough clarity to allow the Department to request that riffles be replicated if it determines that it would be necessary to do so along a particular channel reach. Therefore, the Department finds it unnecessary to add "riffles" to this section.

N.J.A.C. 7:13-10.1(b)9

COMMENT: The rule should define and/or quantify the meaning of “enhancement” in this provision. (66)

RESPONSE: N.J.A.C. 7:13-10.1(b)9 specifies aquatic habitat shall be enhanced where preservation in not possible, such as through the placement of habitat enhancement devices, replacement of vegetation removed during construction, creation of tree canopy along a channel,
where no canopy exists and/or enhancement of existing tree canopy along a channel. This provision gives clear examples of what the Department considers to be enhancement. The Department is further unable provide an exhaustive or quantitative definition, since every project and every stream channel is different.

N.J.A.C. 7:13-10.1(c)1

729. COMMENT: The wording of this section will limit the ability to conduct stream restoration projects. Ecological health should be added as a basis for conducting projects. (66)

RESPONSE: As proposed, N.J.A.C. 7:13-10.1(c)1 allows channel modifications for cases that are “necessary to control existing flooding or erosion which poses an immediate threat to life, property or a lawfully existing structure.” Although the proposed language does not specifically address ecological health, it is not the Department’s intention to prevent the conduct of beneficial stream restoration projects that are undertaken for that purpose.

It is the Department’s experience that properly designed and constructed stream restoration projects serve to greatly reduce erosion and flooding, improve water quality and increase riparian zone habitat. Given the far-reaching environmental and flood control benefits of such projects, the Department intends to encourage their implementation under these rules.

Given the above, the Department believes it is often appropriate to consider stream restoration projects as a means by which to accomplish the requirements of this provision. In order to clarify that channel modifications are often a necessary part of stream restoration projects, which are undertaken to improve ecological health, N.J.A.C. 7:13-10.1(c)1 has been amended to specifically reference “ecological health” as an appropriate reason for channel modification. Notwithstanding the above, stream restoration projects, like any other project in the flood hazard area or riparian zone, must meet all requirements throughout the adopted new rules in order to be authorized by the Department.

N.J.A.C. 7:13-10.1(c)2
730. COMMENT: The 200-foot allowable channel disturbance (including a bridge or a culvert) may not always be sufficient to construct a bridge or culvert. This could necessitate the need for a hardship exception. Additionally, it would be extremely useful for State roadway projects if the standards in this regulation were made to be consistent with New Jersey Department of Transportation design standards and general public safety. (28)

731. COMMENT: The 200 feet maximum channel disturbance associated with a bridge construction is too restrictive. For instance, a four-lane bridge can have a width of close to 100 feet, allowing only 50 feet of channel disturbance on each side of the bridge. The paragraph should be modified to read "minimum disturbance necessary", to allow for a case-by-case determination of disturbance limits. (3)

RESPONSE TO COMMENTS 730 AND 731: N.J.A.C. 7:13-10.1(c)2 provides that if channel modification is necessary for the construction of a bridge or culvert, the following requirements must be satisfied: The disturbance to the channel is minimized; a bridge is constructed rather than a culvert, where feasible; the length of the channel covered by a bridge or enclosed by a culvert is the minimum feasible; and no more than 200 linear feet of channel (including the bridge or culvert) is disturbed.

It is the Department's experience that applicants often do not design projects with the minimum amount of disturbance to the stream channel. The adopted provisions therefore encourage bridges rather than culverts. Bridges usually span a channel and thus typically involve much less disturbance to a channel than the placement of a culvert. Additionally, bridges often require less permanent stabilization within the channel or surrounding riparian zone. The Department believes limiting channel modifications for bridges and culverts to 200 linear feet will further the Department’s goal of limiting channel disturbance, since long reaches of such disturbance often result in adverse impacts to the ecological health of the channel.

The Department believes that most bridge and culvert projects should be able to satisfy the limit without conflicting with the intent of the project or jeopardizing public safety. However, the Department does acknowledge that some projects, such as large highway bridges, may require more than 200 linear feet of channel disturbance to construct. In such cases, applicants
for these projects would be required to submit a request for a hardship exception under N.J.A.C. 7:13-9.8 with their individual permit application. The Department believes that these situations are likely to be rare, however. Furthermore, if there is a clear need to exceed the limit to accommodate transportation and safety needs, which cannot be accomplished by other reasonable means, the applicant should be able to demonstrate that a hardship exception is warranted. Therefore, the Department believes that it is appropriate to adopt a 200 linear foot limitation for channel modifications under N.J.A.C. 7:13-10.1(c)2iv.

The Department also acknowledges that the Department of Transportation has many standards for their roadways in order to facilitate the safe and adequate design and construction of roadways. In contrast, the adopted Flood Hazard Area Control Act rules have incorporated essential provisions designed to protect the public from adverse impacts to flooding or the environment. Although the goals of the two Departments are sometimes different, the Department recognizes that the Department of Transportation has to address numerous public safety issues. Consequently, those issues will be given due consideration as part of the review of any hardship exception submitted for cases that cannot satisfy the 200 linear foot limit or any other provision of the Flood Hazard Area Control Act rules.

N.J.A.C. 7:13-10.1(d) and (e)

732. COMMENT: N.J.A.C. 7:13-10.1(d) and (e) should be amended to clarify that the use of construction equipment in a channel and the driving and operation of vehicles across a channel are authorized when conducted in the support of a public utility linear development project, as such activities should be exempted from these proposed new rules. (22, 36, 42)

RESPONSE: N.J.A.C. 7:13-10.1(d) allows the use of construction equipment to perform activities in a channel (whether situated in a channel, reaching into a channel or driven across a channel) only if there is no feasible alternative that will result in less environmental damage; the bed is firm, the approaches are stable and the proposed construction activities will not cause or exacerbate bank erosion; contact with flowing water is minimized where possible through the use of temporary bridges or culverts, coffer dams and/or sediment control devices, which are
removed after completion of the project; fording the channel is avoided; where unavoidable, fording is made as nearly perpendicular to the channel as possible; and adequate precautions are taken to prevent sediment, petroleum products and other pollutants from entering the channel.

N.J.A.C. 7:13-10.1(e) provides that a person shall not drive or operate a vehicle across a channel except where it is necessary to operate construction equipment in or across a channel as described in (d) above as part of a temporary construction activity. The above provisions clearly allow the operation of construction equipment and other vehicles in a channel when used for utility linear development infrastructure or for any other activity, as long as the requirements of N.J.A.C. 7:13-10.1(d) are satisfied.

Therefore, the Department believes that it is not necessary to revise the proposed language in this section. Furthermore, as set forth in the response to comments 724 through 726, the Department is strongly of the opinion that it is not appropriate, nor in the public interest, to exempt utility linear development, public or private, from the requirements of the Flood Hazard Area Control Act rules.

N.J.A.C. 7:13-10.2 Requirements for a regulated activity in a riparian zone

733. COMMENT: The proposed new rules do not recognize that utilities have made significant investments in their infrastructure, and they need to be able to maintain, repair and replace that infrastructure in a timely and effective manner to ensure continued provision of these essential services without going through extensive permitting. It is appropriate for the Department to maintain the current utility activity exemptions and rescind those portions of the proposed regulations that relate to the formation of a riparian zone in which the applicability of flood hazard rules to utility activities would be extended. (1)

734. COMMENT: Public utility linear development activities, including vegetation maintenance, clearing and cutting of utility rights-of-way should be exempt from this section and all subsequent references to utility line activities should be deleted from this section. Accordingly this section should be revised to read as follows: “(a) This section sets forth specific design and construction standards that apply to any regulated activity that will result in the clearing, cutting
or removing of vegetation in a riparian zone. Public utility linear development activities, including vegetation maintenance, clearing and cutting of utility rights-of-way are exempt. The width of the riparian zone is set forth at N.J.A.C. 7:13-4.1” (22)

735.COMMENT: If the Department continues to pursue the adoption of regulations establishing a riparian zone, then public utility linear development and all subsequent references to utility line activities should be deleted from this section because public utility linear development should be exempted from Chapter 13. (42)

RESPONSE TO COMMENTS 733 THROUGH 735: Because of the pressing need to protect the quality and integrity of surface waters throughout New Jersey, the Department does not believe that it is appropriate to rescind riparian zone limitations wherein utilities are concerned. Furthermore, the repealed rules did not exempt utilities from regulation. Several minor activities that were classified as “non-regulated uses” have been recodified as permits-by-rule under the adopted new rules. Periodic maintenance, replacement and repair activities, which are not permitted-by-rule, can qualify for an individual permit under N.J.A.C. 7:13-11.9(f).

It is the Department’s belief that all projects within the jurisdiction of this chapter, including utility lines, must be designed and constructed in accordance with the standards of the adopted new rules. Recognizing that certain circumstances exist in which riparian zone disturbance is warranted, Table C (proposed as Table B) at N.J.A.C. 7:13-10.2(d) sets forth maximum disturbances. With respect to utility lines, should these limits not be sufficient to accomplish the goals of the proposed project, then N.J.A.C. 10.2(k)1 establishes the criteria under which the applicant can justify disturbances in excess of that which is listed in Table C in order to qualify for an approval.

736.COMMENT: The proposed new rules will make brownfields remediation nearly impossible if any portion of the landfill is located in a riparian zone. This concern is specific to addressing historic fill, and other areas of concern, on filled waters edge sites and landfill closure activities. The proposed new rules, N.J.A.C. 7:13-10.2 (Table B), establish maximum allowable disturbances to vegetation in the riparian zone for various types of regulated activities.
Because the Department is, in effect, defining all ground disturbance as vegetation disturbance (see N.J.A.C. 7:13-10.2(c)1) and because site remediation, including landfill closure activities, is not listed among the regulated activities for which vegetation disturbance limits will be established, these activities will be classified as “All other regulated activities” under the proposed new rules. Applicants conducting activities that fall into this category are, according to proposed Table B, allowed to disturb a maximum of 1000, 3000, or 6000 square feet of vegetation for 50, 150, and 300-foot riparian zones, respectively.

Brownfields redevelopment projects, specifically those conducted on filled waters edge sites and landfills, necessarily require the disturbance of vegetation on the entire site where unregulated fill and landfill disposal occurred. Landfill closure requires the clearing of all vegetation in order to properly cap the landfill so that it may be redeveloped. If a landfill or other brownfields redevelopment project is located on a site with any regulated waters, a riparian zone of at least 50 feet would extend from both banks of the waterbody. As a result, vegetation could not be cleared in these riparian zones, which would make completing remediation of a site impossible.

The proposed new rules should be amended prior to adoption to include an exception to the vegetation disturbance limits within the riparian zone for site remediation activities. (23)

737.COMMENT: Assuming that the Department were to amend the proposed new rules prior to adoption to clearly restrict the scope of the disturbance limitations to areas of vegetation, the proposed new rules should also be amended prior to adoption to include an exception for the disturbance of riparian zone vegetation that was planted as a Department approved interim measure during site remediation or landfill closure activities. Often, as part of a site remediation or landfill closure plan, once the remediation is complete in a portion of the site, grass is planted for soil erosion measures. Most remediation or landfill closure work is only the first phase of a unified multi-phase program of remediation and redevelopment of a single site, with the subsequent phases involving vertical redevelopment of the remediated property to return the site to economically productive uses.

If a property is vegetated during the remediation phase, this vegetation will have to be disturbed in the subsequent vertical redevelopment phase(s). If there is a riparian zone present on
the site, then the proposed new rules will prohibit disturbance of vegetation in excess of the limits contained in the proposed new rules. In essence, the presence of vegetation from the remediation phase will result in the inability to redevelop the property in subsequent phases, which would defeat a primary purpose of conducting the remediation.

Given the hardship imposed on future phases of redevelopment, the proposed new rules should include an exception as described above. (23)

738. COMMENT: The enlargement of riparian zones and consequent restrictions on structures, which include impervious surfaces, and the removal of vegetation can have impacts on the ability to develop segments of the Hudson River Walkway, as well as other walkways emerging on rivers, such as the Hackensack and the Passaic. Such walkways are usually required by DEP when reviewing waterfront development permits, yet there is no exception in the regulations for such situations.

Typically, urban redevelopment has been encouraged by the State of New Jersey with initiatives such as the Office of Smart Growth and the "regional center" designation in the State Plan. Even so, urban communities find it difficult to comply with current flood hazard rules. The proposed new rules will reduce the ability to effectively and economically redevelop urban sites, in some instances to zero. (46)

739. COMMENT: In many of the urban waterfront areas, which may be abandoned brownfields, vegetation often has sprung up on disused bulkheads or piers. Does this now have to be preserved? Brownfields site remediation conducted on filled waters edge sites and landfills requires the disturbance of vegetation on the entire site where unregulated fill and landfill disposal occurred. Landfill closure requires the clearing of all vegetation so that the landfill can be properly capped prior to redevelopment. If a landfill or other brownfields project is located on a site with any regulated waters, a riparian zone of at least 50 feet would extend from both banks of the waterbody. As a result, vegetation could not be cleared in these riparian zones, which would make completing remediation of a site impossible. On contaminated sites, or sites with historical fill where the Department has approved capping as a method of control, no vegetated riparian zone should be required. At a minimum, exceptions must be provided to accommodate
and add incentives for redevelopment and cleanups on brownfields, and properties in centers and planning areas 1 and 2 pursuant to the State Plan. (46)

RESPONSE TO COMMENTS 736 THROUGH 739: As noted in the response to comments 252 through 254, riparian zones perform an essential environmental function. As such, the Department cannot preclude from regulation any project that would impact such a vital area. Should an environmentally responsible site cleanup be proposed, and should this cleanup necessitate disturbance within a riparian zone greater than what is allowable under the adopted rules, then this disturbance may be permitted, provided that the applicant meet the requirements for a hardship exception under N.J.A.C. 7:13-9.8. Therefore, the Department disagrees that site remediation is made unfeasible by the adopted rules. In addition to this, when a developer wishes to move forward with a vertical redevelopment on a remediated site, that developer is still required to set forth an environmentally sensitive site design, mindful of the benefits offered by the riparian zone. With responsible site design, the adopted rules will not reduce the ability to redevelop any site.

With respect to public access ways, public access areas or water dependent development, note that Table C (proposed as Table B) at N.J.A.C. 7:13-10.2(d) places no limitation on the amount of vegetation disturbance in the riparian zone, provided that such development meet the applicable requirements of other rules and regulations. Furthermore, in cases where no riparian zone vegetation exists, redevelopment or reconstruction is generally facilitated by the adopted new rules. The Department therefore believes that the adopted riparian zones are appropriate.

740.COMMENT: Does "vegetation disturbance" include areas of existing grass that have been disturbed by previous development? (8)

RESPONSE: All vegetation, including grass, is protected under the riparian zone standards of the adopted new rules at N.J.A.C. 7:13-10.2. Areas that have been previously developed, but which still contain vegetation of any kind, are therefore considered “vegetated” for the regulatory purposes of this chapter. However, the Department has created several permits-by-rule to allow property maintenance and other minor activities associated with the use and expansion of
existing buildings, where previous development or disturbance has occurred in the riparian zone (such as an area maintained as a lawn or garden or an abandoned parking area that has partially revegetated). See, for example, N.J.A.C. 7:13-7.2(b)1i.

COMMENT: N.J.A.C. 7:8-5.5(h)1ii in the Stormwater Management regulations, allows encroachment into the 300-foot buffer of the special water resource protection area in previously disturbed areas to within 150 feet from the top of bank. Will the proposed new Flood Hazard Area Control Act rules also allow for development in this (previously developed) zone? (8)

RESPONSE: The Flood Hazard Area Control Act rules and Stormwater Management rules approach disturbance within 300 feet of a Category One water and its tributaries differently. The Special Water Resource Protection Area under N.J.A.C. 7:8-5.5(h) applies to projects that are defined as major development at N.J.A.C. 7:8-1.2. The Stormwater Management rules are designed to ensure that development within 300 feet of any Category One water does not diminish the functional value of this area. The Flood Hazard Area Control Act rules, however, focus on whether a given project justifiably disturbs vegetation within the 300-foot riparian zone along these waters. Disturbance is not allowed under an individual permit unless the requirements of N.J.A.C. 7:13-10.2 are satisfied. Furthermore, the amount of disturbance allowed within 300 feet of a Category One water and its tributaries is a function of the nature of the proposed project. These disturbances are quantified in Table C (proposed as Table B) at N.J.A.C. 7:13-10.2(d). For example, in an area with a 300-foot wide riparian zone, up to 30,000 square feet of disturbance is allowed to accommodate the construction of a public roadway crossing a water, but only 1,000 square feet of permanent disturbance is allowable to accommodate the construction of a stormwater discharge structure. Unlike the Stormwater Management rules at N.J.A.C. 7:8-5.5(h), however, there is no distinction in the Flood Hazard Area Control Act rules between the inner 150 feet and outer 150 feet of the 300-foot riparian zone.

As noted in the response to comment 740, all vegetation is protected under the riparian zone standards of the adopted new rules at N.J.A.C. 7:13-10.2. However, several permits-by-rule at N.J.A.C. 7:13-7.2 allow property maintenance and other minor activities associated with the use
and expansion of existing buildings, where previous development or disturbance has occurred in the riparian zone (such as an area maintained as a lawn or garden or an abandoned parking area that has partially revegetated).

742.COMMENT: It is very difficult to believe that 50-foot riparian wildlife buffers running through the middle of a city where town homes and row homes have existed for 150 years are necessary, and that the State would tell a resident that she can't have pepper and tomato plants in her yard, but has to instead grow weeds and vines in this area. The entire concept of stream buffers has little to do with stormwater management. It has everything to do with water quality. Water quality and storm water management are very separate issues, and including those provisions into this rule proposal brings into question the scientific basis of the rules. (32)

RESPONSE: The Department believes that preserving water quality is very much a part of local and regional stormwater management. The buffer to which the commenter refers is designated under the Flood Hazard Area Control Act rules as a riparian zone. The minimum width of this zone under the adopted new rules is 50 feet, pursuant to N.J.A.C. 7:13-4.1(c). Providing wildlife habitat is only one function of the riparian zone. Other important functions, as noted more fully in the summary of the proposal and in the response to comments 334 through 341, include flood attenuation, water quality and bank stability. Because the riparian zone plays an essential role in environmental protection, the preservation of the zone is itself important. As such, disturbance within the zone is limited to the areas defined in the adopted N.J.A.C. 7:13-10.2. The Department has, however, identified a number of minor activities, which will not adversely impact flooding or the environment, and which are permitted-by-rule under N.J.A.C. 7:13-7.2. Certain minor activities within riparian zones are allowed under these permits-by-rule, such as maintaining an existing garden and other normal property maintenance activities, as well as small construction projects associated with a private residence. Furthermore, a new garden of up to one acre in area can be established under the permit-by-rule at N.J.A.C. 7:13-7.2(a)2, in a riparian zone where previous development or disturbance has occurred, such as an area currently maintained as a lawn, provided several other conditions are met to ensure that the garden will not adversely impact flooding or the environment.
743. COMMENT: The proposed buffer increase from 25 to 50 feet reduces the developable area of the commenter’s property on Swan Creek to 10,000 square feet, out of an approximately 20,000 square foot lot that could accommodate up to seven town homes for which the urban lot has been zoned. (31, 32)

RESPONSE: The Department acknowledges that the establishment of wider riparian zones throughout the State can reduce the area of developable land on certain lots that lie near surface waters. It is not the Department’s goal, in the adoption of these riparian zones, to prevent people from responsibly and lawfully developing their land. However, given the manifold environmental benefits provided by riparian zones, and based on numerous scientific studies, the Department has determined that a minimum riparian zone width of 50 feet is appropriate, and that the Department must protect vegetation within this area from unnecessary disturbance.

The Department is also aware of the impacts that the adopted new rules have on proposed development projects that have not yet been approved by the State or local government. Therefore, as noted in the response to comments 241 through 251, the adopted new rules provide, at N.J.A.C. 7:13-2.1(c), that the stringent new requirements of this chapter would not apply to any project for which a stream encroachment permit application was submitted prior to the adoption date of these rules (provided the application is subsequently approved). A similar provision applies to the submittal of applications for coastal permits from projects in tidal areas. In cases where no stream encroachment or coastal permit was required prior to the adoption date of these rules, certain municipal approvals would also grandfather a project from the requirements of the new rules (see N.J.A.C. 7:13-2.1(c)4). The Department’s intentions to expand riparian zones Statewide were first made public on August 22, 2006, when the intention to propose these rules was announced by Governor Corzine and a draft of the proposed new rules was posted on the Department’s internet webpage. The official rule proposal was then published in the New Jersey Register on October 2, 2006. Thus, the regulated community has been given more than one year (from proposal to adoption) to apply for and/or receive a qualifying approval under N.J.A.C. 7:13-2.1(c). Given the extreme importance of minimizing flood damage, protecting the welfare of the State’s residents and preserving the integrity of our surface waters,
if a proposed development project has not been sufficiently planned and designed (after having over one year of notice of these new rules) to be able to apply for a stream encroachment or coastal permit prior to the adoption of these new rules, the Department does not believe that such a project warrants grandfathering form the adopted new rules.

Finally, at N.J.A.C. 7:13-9.8, the Department provides a hardship exception for the issuance of an individual permit. The hardship exception is intended for circumstances where there is no feasible and prudent alternative to the project, the cost of complying is unreasonably high in relation to the benefits, or the Department and the applicant have agreed to alternative requirements that the Department determines will provide equal or better protection of the environment and public health, safety, and welfare. Property owners, who believe that the adoption of these new rules has placed an exceptional hardship on them, can apply for an individual permit with a request for a hardship exception.

744.COMMENT: A rule change should be made to eliminate the concept of Category One streams with 300-foot borders and consider the concept of parks and purchasing the property from the people as opposed to inversely condemning it with a rule change. In this way, the trout and the water quality, which is the intent of classifying streams as Category One, can be preserved and the people who want to go trout fishing don't have to trespass on someone else's property. What makes sense to me as a citizen is if the land were purchased and treated as a State park, with proper parking and possibly bathroom facilities, as well as trails to go to the stream so they can be used for their intended purpose. (32)

RESPONSE: The Department designates a special level of protection for a number of waterways in New Jersey known as Category One waters. Waterways can be designated Category One because of exceptional ecological significance, exceptional water supply significance, exceptional recreational significance, exceptional shellfish resource, or exceptional fisheries resource. The Category One designation provides additional protections to waterbodies that help prevent water quality degradation and discourage development where it would impair or destroy natural resources and environmental quality.
Because of the special characteristics possessed by Category One waters, the Department believes that it is appropriate to establish 300-foot riparian zones to preserve the quality and integrity of these surface waters and their tributaries. However, the Department notes that establishing a riparian zone on a property does not condemn that property. As illustrated in Table C (proposed as Table B) at N.J.A.C. 7:13-10.2(d), certain disturbances are allowable within the 300-foot riparian zone, such as construction of a private residence, provided certain standards are met.

745. COMMENT: Please clarify whether redevelopment along a stream requiring 150 or 300-foot buffers would be reduced to 25 feet. (27, 49)

RESPONSE: Redevelopment does not reduce the size of riparian zones established under this chapter. The Flood Hazard Area Control Act rules set forth riparian zones independent of existing or proposed land coverage or usage. However, the riparian zone requirements of the chapter are designed to preserve existing vegetation and would not therefore impact a site that is devoid of vegetation due to previous, lawful development. Except for N.J.A.C. 7:13-10.2(v), which requires restoration of riparian zone vegetation for some redevelopment projects located within 25 feet of the top of bank or edge of water, redevelopment that will not disturb riparian zone vegetation is not affected by the riparian zone standards of N.J.A.C. 7:13-10.2

746. COMMENT: N.J.A.C. 7:13-10.2 should be deleted in its entirety. This proposal should be limited to those items that deal with protecting the size and availability of the flood hazard area. This proposal should not attempt to establish or maintain a riparian zone. (42)

RESPONSE: As described fully in the response to comments 329 through 333, the Department believes that the inclusion of a regulated riparian zone under the adopted rule is appropriate and in the best interests of protecting public safety, health, general welfare and the environment.

747. COMMENT: In this subchapter, there are limits to the maximum allowable disturbance resulting from activities in the riparian zone. If the allowable limits (from Table B) are exceeded,
as permitted in certain circumstances, a two-to-one compensation is required for the area of exceedance. However, in other circumstances, the allowable limits (in Table B) are not permitted to be exceeded unless a hardship exception is granted and a two-to-one compensation is provided (for the area of total disturbance). Alternative mitigation should be allowed in circumstances where it is not feasible to meet all of the requirements for compensation for disturbance in the riparian zone. (28)

RESPONSE: The limits on riparian zone disturbance described at N.J.A.C. 7:13-10.2 have been established based on the Department’s experience with thousands of projects and on various research. A limitation on the area of vegetation that can be disturbed for a given project therefore reflects the Department’s determination of the maximum amount of riparian zone disturbance that should be required to conduct that project under normal conditions.

The Department acknowledges that there are situations that warrant greater disturbances than provided for in Table C (proposed as Table B) at N.J.A.C. 7:13-10.2. For those activities which sometimes justifiably exceed the maximum limits, as well as for certain activities which provide a public benefit, the Department has established tests under each appropriate subsection of N.J.A.C. 7:13-10.2 by which a project can be measured, in order to determine whether the excess disturbance is warranted.

If, for example, a public entity proposes to expand an existing roadway, and the entity demonstrates that the riparian zone limits at Table C cannot be met, N.J.A.C. 7:13-10.2(f)1 allows the project to exceed the limitations of Table C, provided 2:1 compensation is provided for the area in excess of that allowed in Table C, pursuant to N.J.A.C. 7:13-10.2(t). In other cases, such as the construction of a private residence under N.J.A.C. 7:13-10.2(m), it is the Department's experience that the limits in Table C adequately allow the construction of a home in most cases. As such, N.J.A.C. 7:13-10.2(m) does not provide for the construction of a private residence that exceeds the maximum allowable riparian zone disturbance. In order to qualify for larger riparian zone disturbance to construct a private residence, an applicant would need to receive a hardship exception form the Department under N.J.A.C. 7:13-9.8. If the Department does approve a hardship exception, the excess riparian zone disturbance would be required to be mitigated at a 2:1 ratio, pursuant to N.J.A.C. 7:13-10.2(s).
748. COMMENT: Riparian vegetation must be stabilized to maintain bank stability and prevent erosion. (51)

RESPONSE: The Department believes that vegetation is itself a stabilization measure. One of the reasons riparian zone vegetation is protected under the Flood Hazard Area Control Act rules is to maintain bank stability.

749. COMMENT: We strongly agree with the incorporation of standards for riparian areas and support your recognition of their importance. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Department acknowledges this comment in support of the incorporation of standards for riparian zone disturbance.

N.J.A.C. 7:13-10.2(b)

750. COMMENT: The proposal to establish riparian zones separate from and in addition to other similar zones or buffers established to protect surface waters under other the Department regulatory programs (such as the Department’s Stormwater Rules at N.J.A.C. 7:8) should not be adopted. The creation of yet another regulatory program to protect surface waters is duplicative and will create unnecessary costs and complexities in the development application process. The Department should adopt one regulatory program to protect surface waters to provide a universal and uniform set of regulations. (7, 18, 33, 46, 53)

RESPONSE: The Department has not created another regulatory program by adopting new Flood Hazard Area Control Act rules. The adopted new rules simply expand the area within vegetation near surface waters is protected, which the Department already regulated under the repealed rules. As noted in the response to comments 334 through 341, the Department has determined that the near-stream buffers under repealed N.J.A.C. 7:13-1.3(a) did not adequately protect the surface waters of the State or the ecosystem associated with these waters. The
adoption of wider riparian zones with more stringent construction standards was therefore
determined to be in the best interests of protecting the environment as well as public safety,
health and general welfare. Aside from the new riparian zone widths, one of the important
distinctions between the repealed rules and the adopted new rules is that the adopted rules are
more specific in terms of what disturbances are allowed under different scenarios. These
provisions were added to more effectively protect riparian zone vegetation, as well as to provide
applicants more predictability in the implementation of the adopted rules.

N.J.A.C. 7:13-10.2(c)

751. COMMENT: The Department’s proposed definition of “total area of vegetation disturbed”
is unclear as currently worded, and clarification as to the meaning of the phrase “limit of
disturbance” is needed. We believe that the Department intended for this to refer to the area of
the property being developed that is currently disturbed and devoid of vegetation. The phrase
should therefore be reworded to read: “limit of current disturbance”. In the alternative, the
Department should provide further clarification as to its meaning and how to calculate the “total
area of vegetation disturbed”. (22)

752. COMMENT: This section is ambiguous with respect to the issue of whether the limitations
on the area of vegetation that can be disturbed for various regulated activities are intended to be
applied on a per occurrence basis for each regulated activity at a project site, or on a cumulative
basis for all of the proposed regulated activities within a riparian zone at a project site.
Additionally, the Department’s reference to “the total area of vegetation cleared, cut and/or
removed within the riparian zone” with respect to the various subsections of N.J.A.C. 7:13-10.2
for proposed individual permits for regulated activities supports this interpretation. Based on the
representations made by the Department’s representative in explaining the proposed new rules,
the Department should modify the proposed rule to make explicit that the limitations on
vegetation disturbance within the riparian zone apply on a per occurrence basis for each
regulated activity. (7, 18, 33, 46, 53)
753. COMMENT: The inclusion of “the area under the canopy of trees to be cleared, cut or removed” is unreasonable and should be deleted. This will add unnecessary costs (surveying and mapping each tree by caliper and canopy diameter) to the project. (33)

754. COMMENT: It is understood that the term disturbance to the “riparian zone” is implicitly limited to disturbance of vegetation and not land. The rule should be revised to make this explicit. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 751 THROUGH 754: As noted in the response to comment 583, riparian zone disturbance is calculated differently under general permits than under individual permits.

Activities under individual permits are evaluated on a per-occurrence basis. For example, if an applicant proposes to construct three stormwater outfall structures on a site under an individual permit, each separate outfall would be allowed a maximum permanent vegetation disturbance of 1,000 square feet, pursuant to N.J.A.C. 7:13-10.2, provided all other requirements are met for each outfall.

However, N.J.A.C. 7:13-8.1(h), which applies to a general permits, provides that "Multiple or repeated activities proposed to be undertaken on a site that would individually qualify for authorization under a general permit shall require an individual permit if the cumulative impacts exceed any limit contained in the applicable general permit." Therefore, all activities under a given general permit that are proposed onsite are viewed cumulatively, and must collectively meet any general permit threshold that may apply.

With respect to the reference to “the total area of vegetation cleared, cut and/or removed within the riparian zone” at N.J.A.C. 7:13-10.2(c), this subsection sets forth the areas the Department will consider in determining the size of the area from which vegetation may be removed in a riparian zone for the purposes of determining compliance with this the riparian zone requirements of the adopted new rules. Particularly, this subsection provides that the area of vegetation to be disturbed include all areas that are depicted as disturbed on the submitted drawings, the area under the canopy of trees that will be cleared and all other areas where vegetation will be cleared, cut or removed. However, the Department’s intention in this section is
to calculate the total area of vegetation that will be removed from within the riparian zone. Areas within the riparian zone that are lawfully devoid of vegetation should not count toward this total. Therefore, in order to clarify the Department’s intent, N.J.A.C. 7:13-10.2(c)1 has been amended to refer to the “the area of any vegetation within the limit of disturbance shown on submitted drawings.” Furthermore, in response to these comments, N.J.A.C. 7:13-10.2(c)2 and 3 have been similarly modified on adoption to apply to the area under the canopy of “any” tress to be cleared, cut or removed, and all other areas from which “any” vegetation is to be “temporarily or permanently” cleared, cut or removed.

N.J.A.C. 7:13-10.2(d)

755. COMMENT: The proposed limitations on disturbance of vegetation within the riparian zone fails to allow the removal or replacement of vegetation that is considered undesirable from an ecological perspective (i.e. invasive species) or vegetation that is not appropriate from a public health and safety standpoint. The removal/replacement of ecologically undesirable vegetation should be authorized. (7, 18, 33, 46, 53)

RESPONSE: The adopted rules protect all vegetation located within the riparian zone for its ecological value, including invasive species and those species which might be considered undesirable from a public health and safety standpoint. Should an applicant propose to remove invasive or undesirable species in order to enhance the functional quality of the riparian zone, such disturbances may still be permitted under an individual permit. However, a proposal to remove invasive species from a given riparian zone must be carefully considered, in terms of determining the size and density of the vegetation to be removed, the density of the replacement vegetation, the likelihood that the replacement vegetation would successfully establish itself, how it could be guaranteed that the invasive species would not re-establish after construction, and how the replacement vegetation would enhance the functionality of the riparian zone

756. COMMENT: The requirements presented throughout this section that the applicant has to demonstrate that there are no feasible alternatives to perform a regulated activity within a
riparian zone are too burdensome and subjective. The Department should define certain allowable impacts to riparian zones and be clear that they will be permitted. For example, the first 100 feet from the developable uplands of a 300-foot riparian zone should be a location where activities can be performed in association with development outside the riparian zone. The last 200-feet of the riparian zone towards the regulated water should be more restrictive. This type of approach will provide more clear guidance to applicants and the Department reviewer. (12)

RESPONSE: Table C (proposed as Table B) under N.J.A.C. 7:13-10.2(d) defines allowable impacts within the riparian zone. The alternatives analysis to which the commenter refers is required when a project is proposed wherein the thresholds contained within Table C are exceeded for certain projects, as well as for some activities proposed within a 150-foot or 300-foot riparian zone. If these activities are not proposed, then no alternative analysis is required, except for the general justification of the project under N.J.A.C. 7:13-10.2(d). The Department therefore believes that the guidance set forth at N.J.A.C. 7:13-10.2 is sufficiently clear.

The commenter has also suggested that the requirements in the riparian buffer should vary depending on how far away from the water an activity is proposed. As discussed in the proposal summary at 38 N.J.R. 3971-3, the Department believes it is important to protect the entire riparian buffer. However, that Department agrees that the inner 25-feet of any riparian buffer requires even greater protection to ensure that the channel of the water is stable. Accordingly, many of the activities listed in Table C are not allowed within the inner 25-feet of a riparian buffer.

757. COMMENT: We support N.J.A.C. 7:13-10.2(d) and urge the Department to apply these conditions strictly. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Department does intend to apply the stringent new standards of N.J.A.C. 7:13-10.2 strictly to all proposed riparian zone disturbances under each individual permit application.
Comment: The proposed restrictions on riparian zone disturbance under this section will significantly impact and quite possibly completely eliminate the ability of electric utilities to locate transmission lines within riparian zones. Such a far-reaching rule would greatly increase the cost of electricity and significantly impair the reliability of electric service to the citizens of New Jersey. We do not believe the Department intended such far-reaching impacts. Accordingly, utilities should be exempted entirely from these requirements. However, if the Department proposes to include utilities under these regulations, the Department must defer to the Federal Energy Regulatory Commission (FERC), PJM Interconnection and the Board of Public Utilities (BPU) standards when making these determinations. Accordingly, the following provision should be included in this section: “The requirements of this section shall be not apply to the disturbance of vegetation in areas which have been reviewed by either FERC, PJM or NJBPU.”

(22)

Response: The Department believes that it is not appropriate to exempt public utilities from all riparian zone requirements of this chapter, since the Department believes that other rules, requirements, standards or practices of the State or Federal government will not adequately preserve riparian zone vegetation. As indicated in the proposal summary and in these responses to comments, riparian zone preservation is of the utmost importance to the quality and integrity of surface waters. The Department has therefore chosen to implement this chapter specifically to ensure that the most stringent standards are set forth for any activity proposed within a riparian zone, whether by a public or private entity.

It is not the Department’s intention to eliminate the ability of electric utilities to locate transmission lines within riparian zones, or to create major obstacles to the electric industry that would greatly increase the cost of electricity or significantly impair the reliability of electric service to the residents of the State. Establishing the riparian zones promulgated under this chapter is appropriate and necessary to adequately protect the quality and integrity of New Jersey’s surface waters. Furthermore, adequately preserving riparian zones is not in conflict with the necessary and normal maintenance of New Jersey’s public utility networks.

As noted in the response to comments 441 and 502, the Department has adopted a number of permits-by-rule specifically designed to allow public utilities to perform maintenance,
reconstruction and repair activities. For cases where maintenance, reconstruction and repair activities exceed the limitations of a permit-by-rule, or for the installation of new electric transmission lines, the Department believes that it is appropriate to perform a project-specific review of such activities under an individual permit, pursuant to N.J.A.C. 7:13-9, 10 and 11, in order to determine if such riparian zone disturbance is warranted. Also, as noted in the response to comments 497 and 498, a public utility can apply for an individual permit under N.J.A.C. 7:13-11.9(f) to cover any maintenance, repair and replacement activities within an entire utility network for a five-year period, in cases where such work is not covered under the adopted permits-by-rule. This provision has been specifically adopted to assist public utilities in the proper undertaking of their duties. Finally, in cases where the individual permit standards create an exceptional or undue hardship, or would interfere with the best interests of the public safety, health and general welfare, public utilities can request a hardship exception from strict compliance with the adopted new rules, under N.J.A.C. 7:13-9.8.

Given the above, the Department believes that applying riparian zone standards to public utilities is both necessary and appropriate, and is furthermore not in conflict with the basic goals of public utilities to safely and effectively satisfy the energy needs of the residents of New Jersey in an environmentally responsible manner.

N.J.A.C. 7:13-10.2(d)3

759. COMMENT: The Department should specify the size and density for replacement of vegetation within the riparian zone. (66)

RESPONSE: N.J.A.C. 7:13-10.2(d)3 requires that all temporarily cleared, cut or removed vegetation within a riparian zone is replanted with indigenous, non-invasive vegetation upon completion of the project in accordance with N.J.A.C. 7:13-10.2(u), which sets forth specific standards for the replanting and maintenance of vegetation. The Department believes that the guidance provided at N.J.A.C. 7:13-10.2(d)3 and N.J.A.C. 7:13-10.2(u) are clear and sufficient, specifically requiring at N.J.A.C. 7:13-10.2(u)4 that the replanted vegetation shall be of equal or
greater density as the cleared, cut or removed vegetation. Further guidance for the proper restoration of vegetation can be obtained from local Soil Conservation District offices.

N.J.A.C. 7:13-10.2(d), Table C (proposed as Table B)

760. COMMENT: The proposed maximum allowable disturbance to riparian zone vegetation is overly restrictive. For instance, it would not be possible to construct a 50’ wide roadway under the current proposal without mitigation. The currently proposed requirements effectively eliminate construction or reconstruction of roadways and bridges without mitigation that may be difficult, or impossible, to accomplish considering the linear nature of the project. (3)

RESPONSE: The Department does not agree that the allowable disturbance limits are overly restrictive. The disturbance limits set forth in Table C (proposed as Table B) were based on the Department’s experience for disturbances normally required to construct a given project. Reconstructed roadways have a lesser allowance for disturbance than new roadways, because riparian zone vegetation was already disturbed during initial construction of the roadway, and the path of disturbance through riparian zones necessary to improve a roadway is less than what is required to build a new roadway. For instance, a new public roadway across a regulated water with a 50-foot riparian zone is permitted up to 5,000 square feet of vegetated disturbance. Should additional disturbance be required to construct a new roadway, then it is feasible that the proposed project may qualify for hardship exception as codified at N.J.A.C. 9:8 provided that the applicant satisfies all of the requirements of this section.

761. COMMENT: The summary of the proposed new rules states, in support of the proposed vegetation disturbance limits presented on Table B, that the proposal is “based on the Department’s experience with thousands of projects reviewed over the past 20 years.” The summary however offers no data to support this statement. (7, 18, 33, 46, 53)

762. COMMENT: What entity provided the maximum acreage allowed and on what science or engineering analysis is this based? (26)
763. COMMENT: It is unclear how the Department arrived at the figures presented at 10.2. (26)

RESPONSE TO COMMENTS 761 THROUGH 763: The disturbance amounts present in Table C (proposed as Table B) were based on what has been reasonably required to enable the construction of a given type of project. For example, for utility crossings, the Department has typically approved easements of 20 feet in width. For a regulated water with a 50-foot wide riparian zone, given a 20-foot wide easement and 50 feet on either side of the water, this amounts to 2,000 square feet of disturbance. This corresponds to the limitation for utility lines crossing a water with a 50-foot wide riparian zone as found in Table C. Limitations were placed on the disturbance amounts as part of an effort to minimize the disturbance to the riparian zone. This provides better predictability for applications and improved protection to the overall functionality of the riparian zone.

764. COMMENT: We understand that the proposed allowable regulated activities and the derivation of disturbance limits for each allowable regulated activity were based upon what was approved in prior stream encroachment permits (so, reflect historic permit and development practices). If this is true, then how does the proposed rule additionally limit disturbance, establish protected riparian buffers, or increase environmental protections more stringent or broad in scope than those that were afforded historically by the Flood Hazard Area Control Act Rule via the stream encroachment permit program? The Department should clarify this upon adoption, and explain specifically how the proposed new rule would reduce regulated activities, narrow the scope of regulated activities, impose additional technical requirements, and increase environmental protection, compared to the status quo. (69)

765. COMMENT: Have activities that historically were approved by the stream encroachment program been eliminated in the riparian zone by the proposed rule? Are additional activities that were not historically regulated, now regulated? Are historic activities regulated more stringently? If so, how? For example, if a developer historically received stream encroachment permit approvals for private driveways, infrastructure and development, and the regulated activities and
disturbance limits in the proposed new rule is based on the approved site plans for those developments, how does the new rule provide additional protections? Also, are the specific regulated activities listed in the proposed rule and Table B the only allowable disturbances in the riparian zone? (69)

RESPONSE TO COMMENTS 764 AND 765: The limits at Table C (proposed as Table B) represent the Department’s experience as to the maximum area of riparian zone disturbance that is justified for various types of projects. The values in Table C are not an average of all previous disturbances by type, but reflect the maximum reasonable area of disturbance that should be expected for atypical project.

Under the repealed rules, disturbances within the near-stream buffers, now referred to as riparian zones, had to be minimized to the maximum extent possible prior to the issuance of a permit. As such, during the review of permit applications, the Department made determinations as to whether or not disturbances within the riparian buffer were minimized on a case-by-case basis. After making a determination that the disturbances were minimized, the Department could move forward with an approval, provided the application met all other applicable standards of the repealed rules. However, if the Department determined that proposed disturbance was not minimized, the Department would deny the application.

The adopted rules quantify acceptable disturbances that are reasonably required to construct projects located partially or wholly within a riparian zone. The limitations set forth in Table C have been explicitly established so that the adopted rules would lend themselves to more predictability in determining what would constitute a minimized disturbance. Additional environmental protection has therefore been provided by the adopted rules in that the width of the riparian zone has been increased over what it had been under the repealed rules. This will serve to protect a greater area of vegetation, which should contribute to preserving the overall functionality of the riparian zone. Because of the increased width of the riparian zone, some projects that were not regulated under the repealed rules would be regulated under the adopted rules. It is important to note that the adopted rules do not seek to prohibit development. Rather, they intend to steer development in a more environmentally sensitive direction and ensure public
health, safety, and general welfare is protected by assuring that only appropriate development occurs.

While Table C lists a number of activities that could be constructed in a riparian zone, the presence of an item in this table does not guarantee that the Department will grant a permit for a particular activity. Under N.J.A.C. 7:13-10.2(d), in order for the Department to consider the approval of any activity under an individual permit in a riparian zone, the applicant must demonstrate: (1) That the basic purpose of the project cannot be accomplished onsite without disturbing vegetation in the riparian zone; (2) That disturbance to the riparian zone is eliminated where possible; where not possible to eliminate, disturbance is minimized through methods including relocating the project, reducing the size or scope of the project and/or situating the project in portions of the riparian zone where previous development or disturbance has occurred; and (3) That all temporarily cleared, cut or removed vegetation within a riparian zone is replanted with indigenous, non-invasive vegetation upon completion of the project in accordance with N.J.A.C. 7:13-10.2(u). These are stringent standards that the Department believes are necessary to prevent unwarranted and avoidable impacts to the riparian zone. Furthermore, N.J.A.C. 7:13-10.2(e) through (f) set forth addition, stringent criteria that the Department will apply to the review of various projects. A project not listed in Table C is not eligible for an individual permit, except through a hardship exception under N.J.A.C. 7:13-9.8.

Given the above, the Department believes that N.J.A.C. 7:13-10.2 appropriately regulates and protects riparian zone vegetation from unjustified impacts and provides protection to a greater area, and accordingly public health, safety, and general welfare than the repealed rules.

766. COMMENT: Table B should provide for an increase or scalability of allowable impacts for project sites of different sizes, or project sites with different linear footage of regulated waters. This scalability has already been incorporated into the fee structures for applications where fees are increased based on project site size (see Table 2 in 7:1C-1.5 and Table E in N.J.A.C. 7:13-17). This same project site scalability could be incorporated into the maximum allowable disturbance to riparian zone vegetation matrix. (12)
767. COMMENT: The maximum area of vegetation disturbance as set forth in the Table B should contain a provision that allows for the flexibility to consider the maximum area of vegetation disturbance in light of the total acreage of a project site. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 766 AND 767: The maximum areas of disturbance in Table C (proposed as Table B) at N.J.A.C. 7:13-10.2(d) are designed to apply per regulated activity (such as per road, house or utility crossing) and not in proportion to the size of a site. The Department does not believe that the size of a site is a reasonable measure of how much riparian zone vegetation should be disturbed on that site. If, for example, a road crossing of the riparian zone is justified, that road should be constructed according to reasonable limitations of its width and other factors, not how large the site is. This approach is equivalent to freshwater wetlands disturbances under the Freshwater Wetlands Protection Act rules, which provide a maximum area of disturbance per regulated activity.

768. COMMENT: The maximum areas of vegetation disturbance presented in Table B are inconsistent with the Soil Conservation Service requirements, which may require greater vegetation clearing in relation to outfalls and slope stability. Therefore the Soil Conservation Service’s requirements should be substituted for those proposed in Table B. (7, 18, 33, 46, 53)

RESPONSE: The Department does not agree that the amount of riparian zone disturbance allowed under Table C (proposed as Table B) conflicts with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90. When proper attention is paid to site constraints, the Department believes that a project can be constructed in an environmentally conscious manner which satisfies both the requirements of this chapter and N.J.A.C. 2:90.

769. COMMENT: The rule proposal does not provide objective guidelines and, therefore, lacks predictability for planning purposes as the amount of the area of vegetation disturbance will be a discretionary decision of the Department staff on a case-by-case basis. It should be revised to provide clearer, more predictable guidance. (7, 18, 33, 46, 53)
RESPONSE: The Department believes that the stringent requirements of N.J.A.C. 7:13-10.2 provide exceptionally clear guidance regarding the amount of riparian zone vegetation that will be allowed for a given regulated activity. The adopted rules provide explicit limitations for maximum allowable disturbances within the riparian zone and, in this way, provide for a more objective and predictable outcome for individual permit application reviews.

770.COMMENT: The summary explains that “the values established in Table B are those determined by the Department to be the maximum levels allowable to assure that healthy riparian zones are preserved.” Therefore, any project that is designed in accordance with the limitations of Table B should not be subject to any additional water quality review under the proposed new rules as the required limitations on disturbance to riparian zone vegetation will assure that healthy riparian zones exist notwithstanding any water quality impacts. (7, 18, 33, 46, 53)

RESPONSE: N.J.A.C. 7:13-4.1(d) and N.J.A.C. 7:13-10.2(b) state, “The riparian zones established by this chapter are separate from and in addition to any other similar zones or buffers established to protect surface waters…Compliance with the riparian zone requirements of this chapter does not constitute compliance with the requirements imposed under any other Federal, State or local statute, regulation, or ordinance.” The riparian zone is a protected feature under the adopted new rules, for the benefit of the receiving watercourse and watercourse ecosystem. Proposed development can result in additional pollutant loadings that are not present in the preconstruction condition. Without prior treatment, the additional pollutant loading could negatively impact the quality of the riparian zone, which could, in turn, negatively impact the health of the receiving watercourse and watercourse ecosystem. Furthermore, the discharge of stormwater directly into a watercourse, without first flowing through a riparian zone, will result in even greater increases in pollutants discharged into the watercourse if that discharge does not receive prior water quality treatment. For these reasons, the riparian zone can not be used as a water quality BMP to satisfy the requirements of the Stormwater Management rules at N.J.A.C. 7:8 and compliance with the limitations on disturbance established in Table B cannot be used as a reason not to comply with the water quality requirements of the Stormwater Management rules.
771. COMMENT: The proposed calculations of the maximum allowable disturbance to riparian zone vegetation for various regulated activities are unreasonable and unduly restrictive. The proposed rule should provide flexibility to allow applicants to demonstrate that it is not feasible to undertake a regulated activity in compliance with the maximum area of vegetation disturbance specified for the activity under Table B; further, a procedure should be established to permit applicants to demonstrate that compliance with the maximum vegetation disturbance levels is not feasible and may be exceeded on a case-by-case basis. (7, 18, 33, 46, 53)

772. COMMENT: The proposed new rules fail to provide for flexibility in the riparian zone requirements to allow for appropriate development to occur on a case by case basis. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 771 AND 772: In order to ensure the protection of the riparian zone, the Department must set clear standards against which to measure riparian zone impacts and to make individual permit reviews more predictable. In so doing, the adopted rules set specific limits, which were established with the intention of not being exceeded. These limits were established based on what has been reasonably required to facilitate construction for a number of projects which are typically proposed in riparian zones. Therefore, the limits set forth in Table C (proposed as Table B) are neither unreasonable nor unduly restrictive. Furthermore, should a proposed project necessarily have to exceed these allowable disturbance amounts, then such a project can still be permitted on a case-by-case basis under a hardship exception, pursuant to N.J.A.C. 7:13-9.8 if all requirements of that section are satisfied.

773. COMMENT: The numerical standards provided under Table B should be the maximum areas of permanent vegetation disturbance. Areas of temporary disturbance should be permitted with no limitation subject to a requirement to revegetate those areas. (7, 18, 33, 46, 53)

774. COMMENT: The difference between temporary and permanent disturbance in Table B should be clarified. (66)
RESPONSE TO COMMENTS 773 AND 774: The values in Table C (proposed as Table B) represent the combined area of both temporary and permanent disturbances to riparian zone vegetation for a given activity. This is appropriate since N.J.A.C. 7:13-10.2(c)3 explains that all vegetation to be cleared, cut or removed onsite counts toward the “total area of vegetation disturbed in a riparian zone.” It is furthermore the Department’s experience that temporary disturbance to riparian zone vegetation can take many years to recover. Such “temporary” impacts can be quite long-lasting, and should therefore be limited where possible.

For example, a portion of mature forested land may need to be cleared in order to construct a roadway through a riparian zone. Some of the riparian zone disturbance is permanent, in that the roadway surface itself will permanently displace some of the previous vegetation. However, some of the riparian zone disturbance is temporary, in that a certain width must likely be cleared through the riparian zone simply to accommodate the construction of the road. N.J.A.C. 7:13-10.2(d)3 requires that this temporarily disturbed vegetation be restored. However, the restoration of a mature forest to its original condition would take decades. The Department therefore believes that it is appropriate to count both temporary and permanent impacts under the limits of Table C.

775.COMMENT: In "Table B Maximum Allowable Disturbance to riparian zone Vegetation," under "all other regulated activities (r)," I would suggest it be clarified to say, "All other regulated activities include, but are not limited to, septic systems, underground utilities, public sewer connections, private driveways and other activities" listed under (r). (58)

RESPONSE: The Department felt it sufficient to leave the heading as “All other regulated activities” as an umbrella to catch other project elements that were not described elsewhere in the table. Hypothetically, if the heading were changed pursuant to this comment, and someone proposed grading within the riparian zone, which wouldn’t be included in the revised heading, then this could lead to confusion. In order to avoid such confusion, the Department determined it best to leave the heading as proposed. Furthermore, please note that underground utilities and private driveways have already been incorporated into the table under different headings.
COMMENT: Please clarify whether the vegetation disturbance for different sections is cumulative. For instance, the construction of a home allows 5,000 square feet disturbance in a 300-foot zone and "All other regulated activities" allows 6,000 square feet. Does this mean there is a possible total disturbance of 11,000 square feet for driveways, septic fields and utilities? (58)

COMMENT: Regarding the limits on riparian zone disturbance in Table B, if a proposed development will use a public sewer system that happens to be within the buffer, some credit should be given to the property owner. (58)

RESPONSE TO COMMENTS 776 AND 777: The riparian zone disturbance limitations in Table C (proposed as Table B) are established for each discrete activity onsite. For example, for a regulated water with a 50-foot wide riparian zone, the Department can allow 2,500 square feet of disturbance to construct a private residence and another 1,500 square feet of disturbance to construct a private roadway crossing the water. Construction of a septic field, since it is not listed separately under Table C, could be considered under N.J.A.C. 7:13-10.2(r), which addresses “all other activities.” However, since this section requires 2:1 compensation for all cleared, cut and removed vegetation in the riparian zone and a new private residence does not require the compensation and allows a greater area of disturbance, an applicant may choose to have the septic field disturbance be considered as part of the disturbance allowed for a private residence under N.J.A.C. 7:13-10.2(m). This scenario assumes that the applicant has first avoided and minimized riparian zone disturbance pursuant to N.J.A.C. 7:13-10.2(d)1 and 2.

It should also be noted applicants cannot reassign or combine disturbances under various headings of Table C for different project elements. For example, in a 50-foot riparian zone, an applicant is permitted up to 1,000 square feet of riparian zone disturbance for an outfall structure under N.J.A.C. 7:13-10.2 (j), and up to 2,500 square feet of riparian zone disturbance for a private residence under N.J.A.C. 7:13-10.2(m). The total maximum combined riparian zone disturbance onsite for this project is therefore 3,500 square feet. An applicant cannot, however, lawfully disturb 1,500 square feet for the outfall structure and 2,000 square feet for the private residence. In such a case, although the total disturbance has not been exceeded onsite, the maximum allowable area for an outfall structure has been exceeded.
COMMENT: If an existing deeded building lot (deeded prior to 1989 and subject to approval for wetland transition area exemption) falls completely within a riparian zone and the riparian requirements are necessary, how can approval be obtained given the restrictions in Table B? A typical 4-bedroom colonial house and driveway require 12,048 square feet and, if the septic and reserve fall outside the house disturbance, they may require 7,700 square feet plus miscellaneous disturbance for well and utilities. Area around the house may be required for tree protection and the areas around the driveway and septic beds are recommended for proper maintenance. The restrictions within Table B are so prohibitive it eliminates the possibility of building an average-size new home on a lot that is presently compliant with all rules and regulations. (58)

RESPONSE: N.J.A.C. 7:13-10.2(m) sets forth standards for constructing of a new private residence in a riparian zone. In general, the Department discourages such construction within riparian zones because a house typically does not meet proposed N.J.A.C. 7:13-10.2(d)1, which requires applicants to demonstrate that the basic purpose of the project cannot be accomplished without disturbing vegetation in the riparian zone. If a regulated activity can be conducted outside a riparian zone and still serve its intended purpose and function as well as if it were conducted within a riparian zone, then N.J.A.C. 7:13-10.2(d)1 requires that the activity must be conducted outside the riparian zone. While some projects cannot serve their basic purpose or function without impacting the riparian zone, this is not true with a house. Nevertheless, the Department recognizes that cases exist where an existing lot may lie partially or completely within a riparian zone such that preventing the construction of even one house could constitute a hardship on the owner. This subsection is intended to allow the construction of one house within the riparian zone in such cases with certain limitations.

Under N.J.A.C. 7:13-10.2(m)1, the total area of vegetation cleared, cut and/or removed within the riparian zone cannot exceed the limits set forth in Table C. A total of 2,500 square feet of disturbance may be allowed within a 50-foot riparian zone and a total of 5,000 square feet of disturbance may be allowed within a 150-foot or 300-foot riparian zone. The Department's experience is that this amount of disturbance is sufficient for the construction of a new private...
residence in a riparian zone. The 2,500 square foot limit for a 50-foot riparian zone assumes that not all of all the private residence is located within the riparian zone, considering that no construction is permitted within 25 feet of the top of bank under N.J.A.C. 7:13-10.2(m)4. Furthermore, additional areas of disturbance may be allowed area under N.J.A.C. 7:13-10.2(g) for the driveway and under N.J.A.C. 7:13-4.7(r) for other regulated activities such as the septic system.

The Department believes that the combined limits of disturbance that may be allowed under N.J.A.C. 7:13-10.2(g), (m) and (r) provide sufficient flexibility to construct most houses. However, the rules provide that proposed activities which cannot meet disturbance limits may apply for hardship exception under N.J.A.C. 9:8 and be permitted if they satisfy all requirements therein. If construction of this size of house entirely within the riparian zone cannot satisfy those standards, the applicant would need to reduce the size of the residence or otherwise redesign the project to reduce impacts to acceptable levels.

779. COMMENT: The disturbance allowed for private driveways should be measured based on a single car width as opposed to five cars. Driveway widths greater than necessary for a single vehicle should require mitigation. (56)

RESPONSE: The maximum allowable disturbance areas were not based on the room required to accommodate 5 cars. The allowable disturbance amounts In Table C (proposed as Table B) represent the maximum amounts allowable under the regulations. This is not to imply that an applicant is automatically entitled to the maximum amount of disturbance. For example, all disturbances must be justified. Per N.J.A.C. 7:13-10.2(d)2, the applicant would first have to prove that “Disturbance to the riparian zone is eliminated where possible; where not possible to eliminate, disturbance is minimized through methods including relocating the project, reducing the size or scope of the project and/or situating the project in portions of the riparian zone where previous development or disturbance has occurred.”

780. COMMENT: There should a category for stream restoration and linear foot limitations for appropriate sections. (66)
RESPONSE: Table C (proposed as Table B) at N.J.A.C. 7:13-10.2(d) allows for vegetation disturbances in order to stabilize stream banks. If a purely vegetative stabilization measure is proposed, there is no limit to the allowable disturbance. All other projects have maximum limits for both temporary and permanent disturbance depending on the width of the riparian zone. The Department could not assign linear footage limitations for stream restoration projects because of the complexity involved with any such project. Some stream restoration projects may involve replacement of the existing watercourse with an entirely new watercourse with an entirely new flow path and riparian zone. In order to ensure that the best possible design is brought forward, the Department determined it best not to assign specific limitations, as such limitations would be too varied and difficult to predict.

N.J.A.C. 7:13-10.2(f) and (g)

781.COMMENT: The Department offers no valid basis for its distinction in the permitting requirements between the maximum area of vegetation disturbance for a public versus a private roadway. Many roadways are initially constructed as private roadways, but then dedicated to the municipality post-construction. Additionally, private roadways are subject to the Residential Site Improvement Standards, which are the same standards applicable to the construction of public roadways. The Department should remove the disparate treatment of roads from the proposed new rules. (7, 18, 33, 46, 53)

RESPONSE: Typically, public roadways are designed to service the public at large, whereas private roadways are meant to service a distinct segment thereof. The design of a private roadway is usually done to accommodate a specific development. Applicants in such cases generally have a comparatively larger area of land available to plan the alignment and accommodate their roadway than a public agency proposing a roadway within a previously defined, limited right-of-way. Consequently, the Department deemed it appropriate to differentiate allowable disturbances within the riparian zone for private verses public roadways.
782. COMMENT: Private roadways within a development that has a homeowners association or community association subject to The Planned Real Estate Development and Full Disclosure Act, N.J.S.A. 45:22A-21 et seq., should be treated as public roadways under the proposed regulations because such roadways meet a public purpose even if not dedicated to the municipality. (7, 18, 33, 46, 53)

RESPONSE: As noted in the response to comment 781, if such a roadway is not designated as a public roadway, then it is required under the adopted rules to be treated as a private roadway. Unlike public roadways, there is more flexibility in designing private roadways associated with specific developments because of the land area available for development.

N.J.A.C. 7:13-10.2(g)

783. COMMENT: Proposed N.J.A.C. 7:13-10.2 enumerates specific requirements for regulated activities in riparian zones. Pursuant to proposed N.J.A.C. 7:13-10.2(g), an individual permit would be necessary to construct a new private roadway that results in the clearing, cutting and/or removing of vegetation in a riparian zone. Under section, N.J.A.C. 7:13-10.2(g), there would be six conditions for a roadway permit including whether the roadway accesses a lot that did not receive preliminary or final subdivision approval after October 2, 2006. The receipt of preliminary or final subdivision approval has no bearing on protection of the environment or flood mitigation. This condition is inappropriate and should be omitted. (40)

RESPONSE: The Department believes that the date of subdivision approval is significant in determining minimization of environmental impacts and in justifying the need for the disturbance. The Department’s intentions regarding the establishment of new riparian zones throughout the State were first made public on August 22, 2006, when the intention to propose these rules was announced by Governor Corzine and a draft of the proposed new rules was posted on the Department’s internet webpage. The official rule proposal was then published in the New Jersey Register on October 2, 2006. Thus, property owners first became aware that the State was intending to expand riparian zones onto previously unregulated areas.
It has been the Department’s experience that some people, when they realize that the State is intending to regulate their land in a new way in the future, will attempt to circumvent these new rules by attempting to subdivide the land in such a way as to maximize its development potential in anticipation of the new rules. For example, consider a land owner with a large lot that lies completely within 300 feet of a stream which, upon adoption of the new Flood Hazard Area Control Act rules, would be completely engulfed by the new riparian zone. N.J.A.C. 7:13-10.2(m) allows the construction of one house on one lot in the riparian zone. This property owner could therefore conceivably have proposed to divide the lot into many smaller lots, all of which lie within the 300-foot riparian zone, and all of which would therefore theoretically be eligible to receive one new house per new lot. However, by requiring that a house constructed under N.J.A.C. 7:13-10.2(m) be situated on a lot that was not created after the October 2, 2006, proposal date of these rules, the Department thereby prevented such properties from being subdivided simply to circumvent the new rules.

Thus, the Department believes that, for certain provisions under N.J.A.C. 7:13-10.2 where applicants could have subdivided lots in order to circumvent these new rules, it is reasonable to establish the proposal date of the rules as an appropriate cutoff date.

784. COMMENT: If the Department considers the conditions at N.J.A.C. 7:13-10.2(g) to be appropriate, it should exempt mining industries from it. Unlike other development projects in regulated areas, mining activities are not subject to site plan or subdivision approvals under the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq., because mining industries typically do not require the subdivision of lots. The proposed regulation would only become applicable to mining sites upon commencement of reclamation activities. (40)

RESPONSE: N.J.A.C. 7:13-10.2(g)4 provides that a new private roadway through a riparian zone cannot access a lot that was subdivided after October 2, 2006. If the lot to be accessed by the proposed roadway was in existence on or prior to October 6, 2006, then the roadway could be authorized under this section, provided all other relevant criteria are met. This condition only impacts properties that have been subdivided after October 2, 2006. Accordingly, properties that
were subdivided on or prior to October 6, 2006 or properties that have never been subdivided would not be affected by this condition.

N.J.A.C. 7:13-10.2(i)

785. COMMENT: The limitations placed on the clearance of vegetation for bank stabilization projects and stream restoration projects may be too narrow. (66)

RESPONSE: The Department believes that the maximum allowable disturbance limits under Table C (proposed as Table B) are sufficient to accommodate most bank stabilization projects. Should larger disturbances be warranted, then the Department could still authorize the disturbance should the proposed project qualify for a hardship exception under N.J.A.C. 7:13-9.8.

786. COMMENT: Please clarify whether stream restoration projects must meet the 2:1 mitigation of revegetation, which may be problematic and inappropriate given the benefits of stream restoration. (66)

RESPONSE: For bank stabilization and stream restoration projects, Table C (proposed as Table B) at N.J.A.C. 7:13-10.2(d) sets forth limits for both temporary and permanent riparian zone disturbance. Projects that are accomplished using vegetation alone are not subject to any limitations under Table C, provided the disturbance is justified under N.J.A.C. 7:13-10.2(i). The 2:1 ratio is intended as compensation for projects where vegetation will be permanently altered or removed, such as through the placement of hard armoring, in excess of 2,000 square feet, as provided in Table C.
N.J.A.C. 7:13-10.2(j)

787. COMMENT: Agricultural operations do not seem to have the ability to place stormwater discharge within 25 feet of the top of bank. (55)
RESPONSE: The placement of a stormwater outfall structure is not prohibited within 25 feet of the top of bank, except for certain cases described at N.J.A.C. 7:13-10.2(j), which are necessary to protect a 150-ft and 300-ft riparian zone from unwarranted impacts, in order to preserve water quality and channel integrity.

788. COMMENT: This section should be modified to include a reference to the “Standards for Soil Erosion and Sediment Control in New Jersey”. This manual contains specific standards (Standard for Grassed Waterway, 18-1 and Standard for Conduit Outlet Protection, 12-1) that contain site-specific design criteria for both practices. (55)

RESPONSE: All activities authorized under a general permit or individual permit must conform to the New Jersey Standards for Soil Erosion and Sediment Control at N.J.A.C. 2:90, pursuant to N.J.A.C. 7:13-8.1(b)5 and 11.1(c), respectively. Therefore, the Standard for Grassed Waterway, 18-1, and Standard for Conduit Outlet Protection, 12-1, are incorporated by reference.

N.J.A.C. 7:13-10.2(j)2i

789. COMMENT: This section should be revised to clarify that meeting the water quality requirements of the Stormwater Management rules at N.J.A.C. 7:8-5.5 will be considered adequate for meeting the requirement that water quality is "not altered". (15, 57)

790. COMMENT: The volume, discharge rate and quality of stormwater runoff is already regulated by Stormwater Management rules at N.J.A.C. 7:8, which is implemented through numerous permit programs including the Flood Hazard Area Control Act rules. Furthermore, the Stormwater Management rules allow increases in runoff volume under certain conditions at N.J.A.C. 7:8-5.4(a)3iii. This section needs to be revised to be consistent with the provisions of N.J.A.C. 7:8. (15, 57)
RESPONSE TO COMMENTS 789 AND 790: N.J.A.C. 7:13-10.2(j)2i has been clarified to reference the Department’s Stormwater Management rules in determining compliance with this provision.

N.J.A.C. 7:13-10.2(j)2ii

791.COMMENT: Construction of a new discharge point along an existing roadway is often required as a result of an unavoidable change in drainage patterns introduced by the nature of the project itself. For example, the reconfiguration of ramps at an existing interchange often results in changes to drainage patterns. This section should be revised to allow for these circumstances. (15, 57)

RESPONSE: N.J.A.C. 7:13-10.2(j)2ii allows the construction of a new stormwater discharge along an existing roadway (within a 150-foot or 300-foot riparian zone) provided that the discharge is necessary to ameliorate erosion and/or flooding; and provided there is no feasible alternative means of constructing the discharge outside the riparian zone due to topography, soil type, vegetative cover and/or location of the roadway or other existing structures. The Department acknowledges that the construction of a new discharge point along an existing roadway is often required as a result of changes in drainage patterns and other unavoidable changes resulting from roadway reconfiguration. This provision is therefore intended to permit the construction of a new stormwater discharge in such cases, where preventing a new discharge would result in increased flooding or erosion, whether on the roadway itself, neighboring properties or nearby regulated waters. Therefore the Department believes that the adopted language is appropriate.

N.J.A.C. 7:13-10.2(k)

792.COMMENT: The disturbances allowed in Table B do not allow flexibility during construction activities so as to allow for proper trenching, sloping or benching according to the OSHA standards found at 29 CFR Part 1926.652 – Requirements for protective systems. Design
and configuration of cave-in protection systems are developed on a case-by-case basis based on soil conditions, depth of excavation, and other site-specific limitations. While Section N.J.A.C. 7:13-10.2(k)1(ii) does provide a stipulation for an allowance to provide a safe trench width when crossing under a regulated waterbody, it does not allow for excavation pits or other construction activities which may be necessary during construction, thus violating the OSHA standards referenced above. Section N.J.A.C. 7:13-10.2(l) does not carry any provision for disturbances which may exceed those found in Table B due to safety concerns and therefore, will jeopardize the safety of personnel. (22)

RESPONSE: Table C (proposed as Table B) at N.J.A.C. 7:13-10.2(d) sets standards for maximum allowable disturbances of vegetation within the riparian zone. N.J.A.C. 7:13-10.2(k), which pertains to the placement of utility lines within a riparian zone, requires that the total area of vegetation cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in Table C, unless the applicant demonstrates that the construction of an open trench through the riparian zone is necessary to install the utility line; and also that the width of the trench required to safely install the utility line necessitates that disturbance to vegetation in the riparian zone exceeds the limits set forth in Table C, as described at N.J.A.C. 7:13-11.9(b)4 (see N.J.A.C. 7:13-10.2(k)). This provision is intended, therefore, to allow temporary excavation pits or other construction activities associated with the safe placement and operation of this trench, which may be necessary during construction to meet OSHA standards. The Department therefore believes that this provision adequately provides for the safe construction of trenches for utility lines.

N.J.A.C. 7:13-10.2(m)2

793.COMMENT: As the rule proposal is extremely intricate and lengthy and was not available to the public in written form until published in the N.J. Register, on October 2, 2006, it seems only fair that the people who own potentially subdividable properties that fall within the proposed buffer areas be given an opportunity to protect their assets. The process of obtaining preliminary or final subdivision approval (especially if it involves any type of DEP approval or
confirmation) can easily take over a year. Under "maximum allowable disturbance to riparian zone vegetation" for a private residence, item 2 under subsection (m) should be revised from October 2, 2006 to the date of adoption of these rules. (58)

RESPONSE: The Department acknowledges that the adopted new rules will make it more difficult to construct within riparian zones, and that the grandfathering provisions at N.J.A.C. 7:13-2.1(c) are limited. However, as noted in the response to comment 783, the Department believes that the date of subdivision approval is significant in determining minimization of environmental impacts and in justifying the need for riparian zone disturbance. It has been the Department’s experience that some people, when they realize that the State is intending to regulate their land in a new way, will attempt to circumvent these new rules by attempting to subdivide the land in such a way as to maximize its development potential in anticipation of the new rules, which can significantly reduce the positive benefits in protect of public health, safety and general welfare and the environment that the rules are designed to achieve. Thus, the Department believes that, for certain provisions under N.J.A.C. 7:13-10.2 where applicants could have subdivided lots in order to circumvent these new rules, it is reasonable to establish the proposal date of the rules as an appropriate cutoff date.

N.J.A.C. 7:13-10.2(m)4i

794. COMMENT: The requirement that an applicant demonstrate that “there is no other reasonable use for the site” which “may exist” that “would reduce or eliminate the impact to the riparian zone” is unduly burdensome and effectively nullifies the practical usefulness of the proposed rule. The Department must clarify what constitutes a “reasonable use.” The proposed language should be changed to read “there is no other reasonable use that may exist under the applicable zoning for the property, which would reduce or eliminate the impact to the riparian zone.” (7, 18, 33, 46, 53)

795. COMMENT: The requirement that an applicant demonstrate that “there is no other reasonable use for the site” which “may exist”. NJDEP staff have indicated to the public that the
Department can direct the applicant to reduce the size and scope of the project to less than that which is permitted under the municipal zoning standards. NJDEP does not have the authority to prescribe zoning criteria. This portion of the rule should be struck from the proposal. (33)

RESPONSE TO COMMENTS 794 AND 795: N.J.A.C. 7:13-10.2(m) deals with riparian zone disturbance associated with the construction of a private residence. An alternate, reasonable use of the property is defined in this section as any such use where the disturbance to the riparian zone would be reduced or eliminated. This includes a dwelling of a reduced size or one located at a different portion of the same property. The Department’s intention under the adopted new rules is to balance proposed development with the needs of the environment, not to prescribe local zoning. To this end, any proposed riparian zone disturbance must be carefully weighed against the resource that will be impaired or lost as a result of proposed construction. The Department does, however, agree that a “reasonable use” for a site would be a use that is allowed under current zoning requirements so that a use variance would not be necessary. As such, N.J.A.C. 7:13-10.2(m)4i has been clarified to reflect the Department’s intent.

N.J.A.C. 7:13-10.2(o)

796.COMMENT: The disturbance limit for flood control projects within the riparian zone are too restrictive. Flood control projects should be handled on a case-by-case basis, with the merits of the project outweighing an arbitrary disturbance limit. (3)

RESPONSE: While the Department acknowledges that flood control projects often provide great benefits to the residents of New Jersey, the need to reduce flooding in a given community through engineered flood controls must be balanced with the environmental impacts that such projects can sometimes cause. To this end, the Department has established limits to riparian zone disturbance that the Department believes are appropriate, given the size and scope of many flood control projects the Department has reviewed. In cases where riparian zone disturbance necessarily exceeds the limitations under Table B at N.J.A.C. 7:13-10.2(d), and the applicant demonstrates that public safety cannot be adequately ensured without exceeding these limits,
riparian zone disturbance in excess of the limits of Table C can be allowed. In such a case, the applicant shall provide 2:1 compensation for all cleared, cut and removed vegetation in excess of the limit set forth in Table C in a manner described at N.J.A.C. 7:13-10.2(t). The Department therefore believes that the standards in this section are appropriate.

N.J.A.C. 7:13-10.2(r)

COMMENT: We support the demonstrations an applicant must make at N.J.A.C. 7:13-10.2(r)3 in order to get an individual permit in a riparian zone and urge DEP to apply them strictly. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Department acknowledges your comment in support of N.J.A.C. 7:13-10.2(r)3, and does intend to strictly apply the new standards contained therein.

COMMENT: Please consider allowing a private driveway to cross a riparian zone to access a newly constructed home under "all other regulated activities (r)." Vegetation disturbance is minor and could be limited to a restricted number of square feet. Table B allows for a private roadway that serves as a driveway to one private residence, but under N.J.A.C. 7:13-10.2(g) it must have been approved prior to October 2, 2006. It seems like a driveway is a minor environmental impact that allows people the ability to preserve some of the value of their land. (58)

RESPONSE: Under N.J.A.C. 7:13-10.2(g), the residence does not have to be approved prior to October 2, 2006. Rather, the lot upon which the residence is proposed to be constructed must have been created before October 2, 2006. If this condition is met, then the applicant can seek up to the maximum disturbance allowance for the driveway under N.J.A.C. 7:13-10.2(g). However, in cases where a driveway or any other activity does not meet the requirements at N.J.A.C. 7:13-10.2(e) through (q), an applicant can request a hardship exception to the strict compliance with one or more requirements of this chapter, pursuant to N.J.A.C. 7:13-9.8, if strict compliance would create a hardship on the applicant.
N.J.A.C. 7:13-10.2(s), (t)

799. COMMENT: The requirement for revegetation of temporarily cleared riparian zones should be at a 1:1 acreage ratio and separated in the rules from those provisions addressing permanently cleared areas. For permanently cleared riparian zones, the compensation for vegetation replacement should be at a 1:1 acreage ratio for emergent vegetation and shrubs, while a higher ratio is warranted for forested sites. (12)

800. COMMENT: Please explain the logic behind requiring 2:1 compensation for all disturbed areas under a hardship. (26)

801. COMMENT: The Department has failed to provide any substantive rationale to justify the requirement that an area twice the size of the area disturbed be provided as compensation. The Department has failed to provide any study demonstrating that an area of vegetation greater than the area of vegetation disturbance is required to mitigate the impacts associated with disturbance of the vegetation. Moreover, the compensation area would be an enhanced form of vegetation because it will be subject to a deed restriction and protected against future disturbance. Therefore, requiring compensation greater than the area of disturbance is completely unjustified and stands as a blatant land grab without having to pay just compensation. The fact that it may take several years to replicate the size and density of the original vegetation is off-set by the fact that the area is required to be deed restricted and, thus, protected from future disturbance in perpetuity, the fact that the applicant is required under N.J.A.C. 7:13-10.2(u)5 to monitor the site, and the fact that the permittee is required to maintain the replanted vegetation for a minimum of three growing seasons, and possibly longer to ensure proper establishment and survival. Therefore, the Department is assured that the size and density of the original vegetation will be achieved and be enhanced in that it will be protected from future disturbance through the requirement to record a deed restriction. Therefore, the Department’s purported justification for the 2:1 compensation requirement is completely unsubstantiated. (7, 18, 33, 46, 53)
802. COMMENT: The requirement that an application provide 2:1 compensation for all cleared, cut and removed vegetation and dedicate the compensation area as open space through a deed restriction with rights granted in favor of the State to qualify for a hardship exception and to qualify for certain individual permits (see proposed N.J.A.C. 7:13-10.2(f)1, (i), (o), (r)4) is inappropriate and is tantamount to regulatory extortion. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 799 AND 802: The Department has determined that 2:1 compensation for all temporary and permanent riparian zone disturbances is appropriate. First, it is the Department’s experience that replacement vegetation will generally not equally provide the functions of the removed vegetation. A study performed by King and Adler, in applying the economic concept of discounting, suggests that an undisturbed resource has more value than a disturbed resource. Second, it can take many years for vegetation to reestablish to the same density and coverage as the removed vegetation, and during this time there can be adverse water quality impacts. The Department therefore believes that it is appropriate to apply a 2:1 ratio regardless of the type of vegetation to be disturbed by a specific project. (Reference: King, Dennis M. and Adler, Kenneth J. 1992. Scientifically Defensible Compensation Ratios for Wetlands Mitigation. U.S. Environmental Protection Agency Office of Policy, Planning and Evaluation.)

803. COMMENT: The requirement that an applicant provide 2:1 compensation for all cleared, cut and removed vegetation in excess of the limits set forth in Table B in order to qualify for a hardship exception may itself impose an insurmountable hardship on an applicant that will preclude an applicant from obtaining an individual permit. (7, 18, 33, 46, 53)

RESPONSE: N.J.A.C. 7:13-10.2(s) does not require 2:1 compensation for all cleared, cut and removed vegetation in excess of the limits set forth in Table C (proposed as Table B) in order to qualify for a hardship exception under N.J.A.C. 7:13-9.8. Rather, N.J.A.C. 7:13-10.2(s) provides that, if the Department determines that requiring an applicant to meet a limit of disturbance set forth in Table C constitutes a hardship, and the Department subsequently grants an individual permit for an activity that exceeds that limit, the applicant shall provide 2:1 compensation for all
cleared, cut and removed vegetation in excess of that limit. The qualifications for issuing a
hardship exception are listed at N.J.A.C. 7:13-9.8, and are independent of an applicant’s ability
to provide 2:1 compensation for excess riparian zone disturbance. Should the Department
determine that the requiring of 2:1 mitigation for riparian zone disturbance would cause, in itself,
a hardship upon an applicant, N.J.A.C. 7:13-9.8(a)3 allows applicants flexibility to provide
alternative means of compensating for riparian zone disturbance.

804. COMMENT: Projects that are granted a hardship waiver to exceed the allowable
disturbance under Table 2 should be required to mitigate at a 5:1 ratio instead of a 2:1 ratio as
proposed. (56)

RESPONSE: The Department does not believe a 5:1 ratio is justifiable at this time. The 2:1 ratio
required under the adopted rules was implemented to compensate for any lost functionality the
riparian zone will incur as a result of vegetation removal. This loss would reasonably be
expected to last until such time that the replacement vegetation can sufficiently establish itself to
the point where it could effectively provide the same level of environmental protection as existed
in the pre-construction condition.

805. COMMENT: In compensating for vegetation removal in a riparian zone, the standard for
demonstrating the area was lawfully disturbed needs clarification. (19)

806. COMMENT: How will the Department verify where a riparian zone was lawfully disturbed
when considering the same area for use as a riparian mitigation restoration zone? (44)

RESPONSE TO COMMENTS 805 AND 806: As used in this section, “lawfully disturbed”
refers to an area that has been subject to a previous development, disturbance or use, which was
in compliance with all Federal, State and local requirements that applied to the site and the
activity, at the time the activity was undertaken. Applicants can provide verification that an area
was lawfully disturbed in a number of ways, such as interpretation of aerial photography, as well
as performance of permit searches and investigations into prior land use regulations at the Federal, State, county, and municipal levels.

807. COMMENT: The rule states that the 2:1 mitigation site needs to be deed restricted. Areas that fall within the riparian zone will already be regulated by the State and must meet the requirements of this proposed rule. The requirement for a deed restriction seems to be redundant especially since the mitigation must occur within the existing riparian zone. (9)

RESPONSE: Mitigation is required in situations where an activity on a site is approved at an intensity of riparian disturbance that would not be allowed under this Chapter without the creation and protection of the 2:1 mitigation area to offset the impacts of the level of disturbance on the development site. The mitigation area is intended to ensure that, when the overall property area (the developed area and the mitigation area) is taken into account, the values of the riparian zone are maintained. In order to assure that the mitigation area continues to serve this counterbalancing function, it is necessary that assurance be provided through the deed restriction that the mitigation area can not be developed in the future. The deed restriction additionally serves to put all prospective future purchasers of the property on notice that the property is subject to restrictions on development. Without a requirement that the mitigation area be permanently protected by a deed restriction, the mitigation area may be the subject of a further permit application which could result in disturbance of some portion of this area. Any such further disturbance would result in the mitigation area failing to provide its necessary function and would negatively impact the functions provided by the riparian zone.

808. COMMENT: Why is the term “devoid of trees” used for the area of planting at N.J.A.C. 7:13-10.2(t)4ii? If trees are senescent (aging), scattered or only landscaped trees are present, the buffer would benefit long-term from under-planting. (26)

RESPONSE: The term “devoid of trees” is used for a replanting area because this is typically the type of area wherein additional vegetation could be accommodated. N.J.A.C. 7:13-10.2(t)4ii assumes that the area “devoid of trees” at one time was populated with trees and that these trees
were lawfully removed. With this in mind, it is appropriate to replace the lost trees within this area. The Department is unsure how the riparian zone would benefit from under-planting. However, the Department recognizes that an area that has been previously developed or disturbed may still possess a small number of trees that are scattered throughout the area at large distances, such as a lawn or park sparsely populated with trees. The Department does not object to replanting such an area with trees to meet the requirements of this paragraph by restoring the riparian zone to its original functionality. The language proposed at N.J.A.C. 7:13-10.2(t)4ii is therefore unintentionally limiting in that it implies the placement of trees is only acceptable in areas that are completely devoid of trees. As such, N.J.A.C. 7:13-10.2(t)4ii has been clarified to state that, “The applicant shall plant new trees in the riparian zone in an area that is substantially devoid of trees…” so that areas with very few trees can be replanted and thereby benefit the environment.

N.J.A.C. 7:13-10.2(u)

809. COMMENT: The rule states that the 2:1 mitigation for impacts to the riparian zone shall be in the riparian zone of the same regulated water as the cleared, cut or removed vegetation. In densely overgrown areas along the riparian zone, replanting within the riparian zone can be difficult, if not impossible. An entity such as the New Jersey Turnpike Authority may potentially be forced to buy right-of-way many miles downstream to find an area that is not significantly overgrown and can be replanted. This poses an undue hardship. It is suggested that the mitigation be allowed to take place along the riparian zone (outside the buffer zone), instead of inside it. For instance, if there is an impact 200 square feet above the limitation, a 20 foot by 20 foot strip outside the buffer zone should be able to be utilized to satisfy this mitigation. (9)

RESPONSE: Continuity of the vegetated portion of the riparian zone is an important parameter in the context of the overall functionality of the riparian zone. Because of this, the Department cannot entertain compensation areas located outside of the riparian zone. Fragmentation of the riparian zone in the manner described by this comment defeats the purpose of protecting the riparian zone.
N.J.A.C. 7:13-10.2(u)2

810. COMMENT: Please clarify whether ‘close’ in this provision refers to geographic location or type of vegetation. (66)

RESPONSE: The term “close” refers to geographic location, not the type of vegetation. N.J.A.C. 7:13-10.2(u)2 has been clarified accordingly. N.J.A.C. 7:13-10.2(u) has also been modified on adoption to add further related clarifications in ways that do not affect the meaning of the provision.

N.J.A.C. 7:13-10.2(u)4

811. COMMENT: The rules should specify a vegetative density (for example, stems per acre) that revegetation must meet. (66)

812. COMMENT: How do you determine “equal or greater density”? It is not clear whether consultants can use “accepted” ecological field methods or if the Department will require another undocumented methodology such as that used in the Coastal Zone Management Rules at N.J.A.C. 7:7E, which more often exclude true forest habitat than include it and do not reflect actual statistical tree density or distribution by species. (26)

RESPONSE TO COMMENTS 811 AND 812: The required vegetative density is a function of the density of the vegetation to be removed. The standard employed by the adopted rules is “equal or greater density.” In order to determine the required amount of revegetation, the applicant would have to first quantify the density of vegetation within a given area wherein vegetation will be removed.

N.J.A.C. 7:13-10.2(u)5
813. COMMENT: The Department should specify a survival rate, requirements for replacement, and the submission of a monitoring report. Also, “maintenance” should be defined. (66)

814. COMMENT: Please clarify if the monitoring requirement in this section is the same as the Freshwater Wetlands Protection Act Rules and what agency/division this report gets submitted to. (26)

815. COMMENT: The wording of this subsection is rather vague regarding assurance of "proper establishment and survival". The term "proper" needs clarification. This could be interpreted as the applicant being responsible for a 100 percent vegetative survival rate after monitoring and maintaining replanted vegetation for at least three growing seasons. If this is the intent, and 100 percent vegetation cannot be achieved in three consecutive growing seasons, this is cause for concern. What happens if this cannot be achieved? It would also be useful if this regulation was made to be consistent with the Department's Freshwater Wetlands requirements for wetlands mitigation sites. These regulations require an 85 percent woody plant survival rate and an 85 percent aerial coverage for planted vegetation. (28)

RESPONSE TO COMMENTS 813 THROUGH 815: N.J.A.C. 7:13-10.2(u)5 provides that, in cases where replanting of riparian zone vegetation is required under N.J.A.C. 7:13-10.2, the applicant shall “monitor and maintain replanted vegetation for at least three growing seasons to ensure proper establishment and survival.” In the past, the Department has routinely required the submission of monitoring reports for similar mitigation projects under the repealed rules to demonstrate proper establishment and survival of replanted areas. The intent of the adopted new rules is to continue the Department’s longstanding requirements in this regard by establishing monitoring and reporting standards consistent with the Department's Freshwater Wetlands requirements for wetlands mitigation sites, as described by the Flood Hazard Area Technical Manual. Monitoring reports, when required by the technical manual, should be submitted to the Department’s Division of Land Use Regulation.
With respect to the term “maintain,” the Department intends that necessary measures be taken by the applicant to ensure the survival of the replanted vegetation. Examples of activities to maintain vegetation will be addressed in the Flood Hazard Area Technical Manual.

With regard to the commenter’s concern that the Department will expect 100 percent vegetative survival after three growing seasons, the Department agrees that such a requirement would not be possible to achieve in many cases. As such, it is the Department’s intention to consider the type of vegetation being planted and the conditions of the area being restored in determining whether an acceptable survival rate has been achieved, consistent with the requirements for wetlands mitigation sites, as noted above.

N.J.A.C. 7:13-10.2(v)

816. COMMENT: The Department should be clear about what “redevelop a site” means and how this impacts riparian zone requirements. This provision has profound implications for redevelopment projects. The Department should state that on brownfield sites or currently developed sites with existing impervious coverage that are being redeveloped, the riparian zone will be no more than 25 feet from the top of bank or edge of water. Then the 25 feet of riparian zone should be vegetated or made as a public walkway as suggested in the rule proposal. On contaminated sites or sites with historical fill where the Department has approved capping as a method of control, no vegetated riparian zone should be required. (12)

817. COMMENT: N.J.A.C. 7:13-10.2(v) requires that for redevelopment projects, the applicant must remove the first 25 feet of existing pavement from top of bank and replace it with vegetation. This is inconsistent with the smart growth concepts that encourage redevelopment. There would be no flood hazard benefit gained by “taking” this first 25 feet of land from the applicant. (33)

RESPONSE TO COMMENTS 816 AND 817: N.J.A.C. 7:13-10.2(v) sets forth requirements for redevelopment activities within the riparian zone. The redevelopment of a site means a new development to be placed on a site, which has been subject to prior development and which still
has physical evidence of the prior development. This evidence includes existing buildings, foundations and/or existing parking areas. Accordingly, a prerequisite to having the ability to locate redevelopment to 25 feet of the top of the stream bank is that the proposed redevelopment area already has existing impervious surfaces contained within that area.

In cases where an applicant proposes to redevelop a site within 25 feet of any top of bank or edge of water, N.J.A.C. 7:13-10.2(v) requires that all existing impervious surface within 25 feet of the top of bank or edge of water must be removed, and the riparian zone must be replanted with vegetation, with two exceptions discussed below. It is not uncommon in older developments for structures and other impervious surfaces to exist very close to the top of bank, and in some cases, pavement can extend up to the top of bank itself. Such development causes increased erosion within the channel, degrades water quality and poses a public safety risk since such structures can become undermined and sustain structural damaged and/or collapse as the size and shape of the channel changes over time. In order to prevent such conditions from continuing, N.J.A.C. 7:13-10.2(v) requires that the area within 25 feet of the channel be adequately stabilized and restored with indigenous, non-invasive vegetation. This requirement applies only to those areas where redevelopment is proposed within 25 feet of the channel. If redevelopment occurs elsewhere on a site, and no work is proposed within 25 feet of the channel, N.J.A.C. 7:13-10.2(v) does not require that the existing impervious areas within 25 feet of the channel be removed.

Under the rules, there is no riparian zone width of 25 feet. The widths are 50 feet, 150 feet or 300 feet, pursuant to N.J.A.C. 7:13-4.1. Based on the Department experience and the available scientific literature on riparian zones, as discussed in the proposal summary at 38 N.J.R. 3971-3, the Department believes that these riparian zone widths are necessary. Accordingly, the does not believe that the size of the riparian zone should be reduced on a site simply as a result of the presence of development on that site. However, the riparian zone standards on N.J.A.C. 7:13-10.2 apply only to the removal of riparian zone vegetation. Construction within a riparian zone, in an area that is lawfully devoid of vegetation, is not restricted under N.J.A.C. 7:13-10.2, with the exception of redevelopment within 25 feet of the top of bank of edge of water as discussed above, pursuant to N.J.A.C. 7:13-10.2(v). Consequently, contaminated sites, or sites with historic fill, are not entitled to the placement of new structures located as close as 25 feet from the watercourse under this section, unless this area contains existing impervious coverage (asphalt or
concrete). On these sites, vegetated riparian zones within 25 feet of the watercourse are still required, because of the environmental benefit they provide.

However, N.J.A.C. 7:13-10.2(v) also provides for two situations where an applicant is not required to restore and replant the riparian zone within 25 feet of the top of bank or edge of water. N.J.A.C. 7:13-10.2(v)1 provides for cases where an applicant demonstrates that removing the existing impervious surface, or preventing the replacement of the existing impervious surface, within 25 feet of the top of bank or edge of water would likely threaten public safety, exacerbate flooding or erosion or cause an undue economic hardship upon the applicant. In such a case, the riparian zone within 25 feet of the top of bank or edge of water must be restored, stabilized and replanted only to the extent feasible. N.J.A.C. 7:13-10.2(v)2 also provides for cases where an applicant proposes to construct a public walkway within 25 feet of the top of bank or edge of water. A walkway in this area is permissible, provided it is constructed of permeable material where feasible in order to reduce potential impacts to water quality. Furthermore, the remainder of the area within 25 feet of the top of bank or edge of water must be replanted with indigenous, non-invasive vegetation.

The Department believes that these requirements are appropriate and necessary to protect public safety, health and general welfare and the environment, and that they strike an appropriate balance between the need to accomplish these goals while encouraging redevelopment where appropriate.

818. COMMENT: We note the provision to encourage redevelopment in the 25-foot separation from a stream for redevelopment versus 50-foot offset for new development. The Department should consider additional "smart growth" incentives, such as net-fill credits to promote low impact design and redevelopment. Additional incentives must be consistent with intelligent floodplain management. (27, 49)

RESPONSE: The Department acknowledges the comment supporting incentives to encourage redevelopment. In developing these new rules, the Department endeavored to structure the net-fill and riparian zone requirements in such a way that redevelopment would not be hindered. It is not clear, however, what exactly would constitute “net-fill credits” for redevelopment. The
Department does not believe that instituting “net-fill credits,” which would result in an overall decrease in flood storage volume, is appropriate since this runs counter to the Department’s goals of preserving flood storage where possible to ameliorate flooding.

However, as noted in the response to comments 76 through 87, the new restrictions on flood storage displacement at N.J.A.C. 7:13-10.4 allow for the creation of additional flood storage through the removal of previous, lawful development in the flood fringe. Thus, if an applicant removes old development from the flood fringe on a site, a volume of flood storage is created, which can be applied to the future redevelopment of the site. For example, if an existing building that displaces 10,000 cubic feet of flood storage is removed from the flood fringe, a new building that displaces up to 10,000 cubic feet of flood storage can be erected onsite under the adopted new rules. Thus, redevelopment activities can take credit for the removal of unused material from the flood fringe. Only that volume of flood storage that is proposed in excess of the existing flood storage displacement onsite would need to be compensated for under the adopted new rules.

819. COMMENT: We support N.J.A.C. 7:13-10.2(v) which requires vegetation restoration and removal of all impervious when an applicant proposes to redevelop a site. We support increasing the distance of the disturbance from the top of bank to greater than 25 feet to promote better redevelopment. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Department acknowledges these comment in support of N.J.A.C. 7:13-10.2(v).

820. COMMENT: The Department should add the following exception under this section. “The property is under the jurisdiction of the Office of Site Remediation and the applicant is performing construction/remedial actions pursuant to an approved plan.” (22)

RESPONSE: The Department does not believe that it is appropriate to exempt a site from regulation under this chapter, solely because the remediation on that site is also under the jurisdiction of the Office of Site Remediation. The Flood Hazard Area Control Act rules are specifically designed to address impacts to flooding and riparian zones that may be cause by
development in these areas. The rules that are administered by the Department’s Office of Site Remediation do not adequately encompass these issues.

N.J.A.C. 7:13-10.2(v)2

821. COMMENT: This rule will inhibit public agencies and private entities from constructing public access to waterways, though such access is stipulated in other regulations (Coastal Zone Management Rules 7:7E-1.1 et seq.). (26)

RESPONSE: The Department believes that the new rules will not inhibit the construction of public access ways required by other regulations, such as the Coastal Zone Management rules. Within Table C (proposed as Table B) of N.J.A.C. 7:13-10.2(d), there is no disturbance limit for the construction of public access ways or public access areas provided that the disturbance is justified. N.J.A.C. 7:13-10.2(p) requires a public accessway or public access area to be designed in accordance with the public access to the waterfront rule at N.J.A.C. 7:7E-8.11 and if this is done, such construction does not need to comply with the requirements of N.J.A.C. 7:13-10.2(d)1 and 2 to justify and minimize the disturbance in the riparian zone for the public accessway or public access area.

822. COMMENT: Please provide a definition for “permeable”. Based on current rule interpretation, virtually every material consistent with American with Disabilities Act (ADA) surface standards is considered “impervious”. (26)

RESPONSE: A permeable material is any such material that allows for the passage of water through the material. It is the Department’s experience that the use of porous pavement is compliant with the American with Disabilities Act. However, construction of impervious walkways is also allowed under the N.J.A.C. 7:13-10.2(v)2, if it can be proven to the Department that the construction of the walkway from permeable materials is not feasible.

N.J.A.C. 7:13-10.3 Requirements for a regulated activity in a floodway
COMMENT: The proposed requirements applicable to regulated activities within the floodway constitute a significant expansion of the scope of the Department’s regulation of land in New Jersey, well beyond the proposed new rules’ ostensible objectives. Since the enhanced floodway regulations are independently adequate to address flooding impacts, the proposed regulation of “riparian zones” will have no flood control benefit, and, therefore, are not necessary to address flooding because the expanded scope of the Department’s regulations within the floodway will adequately address flooding impacts associated with regulated activities. Accordingly, the proposed creation and regulation of “riparian zones” should be eliminated from the proposed new rules. (7, 18, 33, 46, 53)

RESPONSE: The standards under N.J.A.C. 7:13-10.3 for regulated activities in a floodway are, for the most part, carried over from repealed N.J.A.C. 7:13-2.2(a), which prohibited any activity that would obstruct the flow of floodwaters in floodways. The floodway is the portion of the flood hazard area which is subjected to the greatest depths and highest velocities. N.J.A.C. 7:13-10.3(b) therefore provides that the Department shall not allow any regulated activity in a floodway which causes any of four different results, with certain exceptions listed at proposed N.J.A.C. 7:13-10.3(c). No aboveground structure, fill, raising of the ground elevation, or obstruction to floodwaters is permissible in a floodway. This provision is taken from existing N.J.A.C. 7:13-2.2(a) where such activities are prohibited in a floodway. Such restrictions are necessary to prevent adverse impacts to flooding and to protect public safety.

It is unclear why the commenter believes the floodway standards at N.J.A.C. 7:13-10.3 are "enhanced floodway regulations" since the new standards governing activities in floodways are generally equal to the repealed standards. While it is obvious that the floodway standards are one of the requirements of the rules that are intended to limit flooding, these standards alone do not sufficiently limit disturbances within the riparian zone. For example, a parking lot proposed at or below existing grade, in the floodway, would be allowed under N.J.A.C. 7:13-10.3 even if it involved extensive clearing of vegetation within the riparian zone. Furthermore, in many cases, the floodway is confined within the watercourse channel and would not provide any protection whatsoever to the riparian buffers. The limitations on the disturbance to vegetation in riparian
zones at N.J.A.C. 7:13-10.2 are necessary to maintain the functions of the riparian zone which include but are not limited to sediment removal, streambank stabilization, nutrient removal, contaminant removal, flood storage, wildlife habitat, aesthetics, recreation and education. Therefore, the Department believes it is not appropriate to eliminate the riparian zone standards from the rules.

824. COMMENT: No obstructions in the floodway should be allowed, including any new structure or the rebuilding, expansion or maintenance of structures. (10, 67)

RESPONSE: Most obstructions in the floodway are prohibited except for unavoidable obstructions such as bridges, culvert crossings, outfalls and water control structures, as provided under N.J.A.C. 7:13-10.3(c). The construction of new buildings or other types of structures are generally prohibited in the floodway. Reconstruction, expansion and maintenance activities associated with existing structures was permitted under the repealed rules in certain cases, which has been continued in these adopted new rules. In such cases, applicants must demonstrate compliance with N.J.A.C. 7:13-10.3(c) as well as N.J.A.C. 7:13-11.5(f). The standards of these two subsections ensure that activities that are permitted in a floodway will not exacerbate flooding or put the public at additional flood risk.

825. COMMENT: It is unclear whether N.J.A.C. 7:13-10.3, requirements for a regulated activity in a floodway (placement of fill in a portion of a manmade impoundment of water), applies to mining operations, some of which may involve filling. If so, the regulation may impose significant burdens on mining operations. Please clarify the applicability of the proposed regulation. (40)

RESPONSE: The standards under N.J.A.C. 7:13-10.3 for regulated activities in a floodway are, for the most part, carried over from repealed N.J.A.C. 7:13-2.2(a), which prohibited any activity that would obstruct the flow of floodwaters in floodways. Most excavated areas for mining operations would not likely be in areas regulated under this chapter. However, if an existing mine has been lawfully created within the floodway of a regulated water, and the mining
operation involves fill, then the placement of fill in a floodway would be subject to the
requirements of this section.

826. COMMENT: Public utility linear development and remediation activities should be exempt
from requirements at N.J.A.C. 7:13-10.3, requirements for a regulated activity in a floodway.
With respect to public utility activities, this is consistent with present Flood Hazard Control
Regulations at N.J.A.C. 7:13-1.3(e) which specify certain utility activities as non-regulated uses
in the floodway. (42)

RESPONSE: The Department notes that a decision to regulate an activity under this chapter is
not a decision to prevent that activity from occurring. The Department has identified various
activities, under both the repealed and adopted new rules which, in order to prevent adverse
impacts to flooding or the environment, are appropriate for regulation under this chapter.

Given the extreme importance of maintaining obstruction-free floodways for proper flood
control, the Department does not believe that it would be appropriate to exempt any person or
agency from the requirement of this section. However, many of the “non-regulated” uses under
repealed N.J.A.C. 7:13-1.3(e) and (f) have been adopted as permits-by-rule under new N.J.A.C.
7:13-7.2. The Department believes that it is appropriate to consider all construction activities
within floodways to be regulated under this chapter, and to then adopt various permits-by-rule to
cover those activities which the Department has determined will not adversely impact flooding
or the environment provided they are conducted in accordance with the requirements specified
by that permit-by-rule. For example, whereas repealed N.J.A.C. 7:13-1.3(e)2viii exempted the
placement of utility poles in a floodway, the adopted new permit-by-rule at N.J.A.C. 7:13-
7.2(c)1 allows the placement of utility poles in a floodway with certain restrictions.

With regard to remedial activities, the Department does not agree that they should be
exempt from regulation under this chapter, given the extensive filling, grading and re-grading
that is normally associated with many remediation projects. However, in most cases a site that
would be returned to pre-existing grades after remediation could therefore easily satisfy the
requirements of the floodway section if it is conducted in a manner consistent with the rules thus
assuring flooding and impacts to the environment are minimized.
827. COMMENT: We oppose N.J.A.C. 7:13-10.3 which allows reconstruction of a previously existing house in the floodway. This provision is contrary to public safety mandates and argues against better flood control. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Flood Hazard Area Control Act at N.J.S.A. 58:16A-55.1 provides that “No rule or regulation . . . shall prevent the repair or rebuilding within a flood hazard area of any lawful preexisting structure which was damaged by a flood or by any other means.” As such, the Department does not have the statutory authority to prevent the reconstruction of a lawfully existing private residence, or any other structure, in a floodway. The Department has, however, adopted provisions in these new rules, which require that such reconstruction is undertaken responsibly and with no adverse impacts to flooding or the environment. N.J.A.C. 7:13-11.5(e) sets forth individual permit requirements that are designed to ensure that such reconstruction will minimize any flood damage potential.

828. COMMENT: Ecological health and habitat value should be included at N.J.A.C. 7:13-10.3(c)6i as reasons why fill can be placed within a floodway to restore or stabilize an eroded stream bank. (66)

RESPONSE: New N.J.A.C. 7:13-11.14 establishes the requirements for bank stabilization and restoration activities. Where possible, an eroded bank shall be stabilized simply by cutting back the bank to a stable slope and planting with vegetation. In addition, N.J.A.C. 7:13-7.2(a)7 provides a permit-by-rule for the construction of fish habitat enhancement devices in a channel. However the Department acknowledges that there are situations that warrant channel restoration, such as projects that seek to restore or improve the ecological health or habitat value of a regulated water, which may require the placement of fill in a channel or floodway. It is not the Department’s intention to preclude such projects, given their obvious ecological benefits, provided the other requirements of this chapter are satisfied. As such, N.J.A.C. 7:13-10.3(c)6i has been amended to clarify that the Department will consider individual permit applications to place fill in a floodway, in cases where, “The placement of the fill is necessary to protect nearby
structures or trees from undermining or failure, or to restore or improve the ecological health or habitat value of a regulated water, and not simply to reclaim land that has been lost due to erosion.” This amendment should not be understood as a guarantee that the Department will allow the placement of fill in a floodway for these purposes, but simply that fill is not automatically precluded in these cases. Applicants must demonstrate that any floodway fill will not cause adversely impact flooding or the environment.

829. COMMENT: If a flood hazard area and floodway encompass a developed area that is slated for redevelopment, is it possible to increase the water’s channel size and flood storage in order to minimize the floodway width to allow for redevelopment? (19)

RESPONSE: Channel modifications of this kind are prohibited under N.J.A.C. 7:13-10.1, except as provided at N.J.A.C. 7:13-10.1(c), which provides certain cases where channel modification is necessary modification is necessary to improve the ecological health of the regulated water and its riparian zone, or to control existing flooding or erosion which poses an immediate threat to life, property or a lawfully existing structure. In addition, the proposed work would likely cause adverse impacts to the riparian zone, which is also prohibited under N.J.A.C. 7:13-10.2. Furthermore, the increase in channel cross-section area would likely result in a drop in water surface elevations, which would result in a loss of flood storage and hence compliance with the flood storage displacement limits could not be attained under N.J.A.C. 7:13-10.4.

N.J.A.C. 7:13-10.4 Requirements for a regulated activity in a flood fringe

830. COMMENT: Where is the historical and/or scientific data that supports the need to impose zero net-fill restrictions? What assurances are there that this will help to alleviate flood damage? Enactment of these rules will come at a significant cost with no guarantee of benefits, since the scientific proof that these rules will reduce flooding is questionable at best. (46)
831. COMMENT: The Department has not provided any supporting historical, scientific and/or mathematical data to demonstrate that the zero net-fill restrictions are hydrologically and hydraulically warranted. (16)

832. COMMENT: The proposal fails to provide any supporting historical, scientific and/or mathematical data to confirm that the proposed zero-percent net-fill restrictions are hydrologically and hydraulically warranted. (7, 18, 33, 46, 53)

833. COMMENT: The Department has presented no evidence that regulated activities completed after 1995 when the Department’s current 20 percent net-fill rule was first adopted have increased flooding or caused flooding within the State. The Department has not referenced or performed any modeling or other study to demonstrate that the proposed “zero net-fill” rule will decrease flooding in comparison to current flooding levels that exist while the 20 percent net-fill rule is being employed under the current rules. The Department has not demonstrated any need for the zero net-fill rules. The proposed rule should not be adopted. (7, 18, 33, 46, 53)

834. COMMENT: The Department has failed to provide any meaningful analysis and justification for replacement of the existing 20 percent net-fill rule with the proposed zero percent net-fill rule, despite the enormous socio-economic costs that will result from its imposition. The Department should identify any studies that were completed to calculate the anticipated hydraulic benefits of the zero percent net-fill rule in comparison to the existing 20 percent net-fill rule. The Department should identify any studies that were completed to support its conclusion that the Department’s 20 percent net-fill rule failed. (7, 18, 33, 46, 53)

835. COMMENT: In its response to comments associated with the adoption of the current Flood Hazard Area Control Act rules on March 20, 1995 (see response to comment 134), the Department stated that imposing rate and volume reductions on stormwater runoff, in conjunction with maintaining a floodway based on a 0.2-foot rise and a 20 percent net-fill restriction on flood fringe development, would adequately protect the public from increased flood damages over time. Nevertheless the Department is now proposing to establish a zero
percent net-fill restriction on flood fringe development. We must therefore conclude that either the laws of physics have changed since 1995 or else that the proposed zero percent net-fill restriction is unnecessary. (7, 16, 18, 33, 46, 53)

RESPONSE TO COMMENTS 830 THROUGH 835: The Department has adopted these stringent net fill regulations because it has been determined to be in the best interest of the public safety, health and general welfare of the residents of New Jersey.

It has been clearly demonstrated that developments within flood hazard areas increases flood damage by reducing the flood storage in the flood fringe. Therefore the Department is confident that the adopted restrictions on flood storage displacement is based on sound engineering judgment and is necessary to protect the residents of the State from increased flood damage potential. The loss of flood storage volume increases the depth and velocity of flooding, which can lead to expanded flood hazard areas, as well as increased public safety hazards and loss of property. Furthermore, deeper and faster flows in channels increase the potential for erosion, stream bank failure and sediment deposition, all of which adversely impact fishery resources and other aquatic biota.

The State's earliest settlements were established along navigable waters and, thus, many of New Jersey's older communities lie partially or completely within flood hazard areas. As development continued over the years, more flood storage volume was displaced in flood hazard areas, causing flood conditions to progressively worsen Statewide. In order to protect public safety, the Department, therefore, imposed a no net fill restriction within the Central Passaic Basin in 1977 and a 20 percent net fill limitation along all non-tidal flood hazard areas throughout the rest of the State in 1984, standards which were promulgated at repealed N.J.A.C. 7:13-2.14 and 2.15. A more stringent standard was established in the Central Passaic Basin because of the high degree of historical flooding and the number of people that were affected by these floods in that basin. Nevertheless, in spite of these net fill restrictions, flooding in New Jersey has continued to worsen during the years since their implementation. Since 2004, there have been a number of significant flood events that have caused millions of dollars of property damage and have repeatedly placed the State's residents at significant risk as discussed in more detail in the proposal summary discussion for N.J.A.C. 7:13-10.4 (see 38 N.J.R. 4001-7).
Given the above, the Department believes that the need to preserve all of New Jersey’s remaining flood storage is apparent and has been adequately demonstrated. The Department believes that it is logical to conclude that, since the State has serious flooding problems which are known to be adversely impacted by flood storage displacement, it is incumbent upon the Department to ensure that development in flood hazard areas does not displace flood storage wherever possible.

836. COMMENT: The proposed requirement for offsite compensation of onsite flood storage displacement is not substantively justified. Displacement of flood storage volume can be addressed onsite through various engineering mechanisms such as detention basins. Additionally, under the Stormwater Management rules, onsite detention basins must provide flood volume storage for the 100-year storm. Therefore, the Department’s current regulatory program already accounts for flooding impact through onsite design measures and the proposed requirement will have no practical effect from a flood control perspective. (7, 18, 33, 46, 53)

837. COMMENT: Under the Department’s current regulatory program, development projects must be designed to address potential flooding impacts associated with flood storage volume. The Stormwater Management rules requires that projects be designed so that there is a decrease in the pre-construction peak rates of runoff for the 100-year storm event to mitigate against a rise in water volume for downstream water bodies. Since a project must be designed to meet the Stormwater Management rules standards, the proposed zero percent net-fill rule is inconsequential and will have no practical effect in controlling flooding impacts. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 836 AND 837: A stormwater detention basin does not serve the same purpose as the preservation of flood storage. Any time a vegetated site is replaced with impervious areas, the site will generate more runoff. The purpose of a detention basin is to safely store the additional runoff that is generated onsite due to the proposed development and then release this runoff slowly. However, if the site is located in a floodplain, the flood fringe on the site serves to mitigate for the flooding that occurs along the stream. This flood fringe storage
volume needs to be preserved otherwise the floodwaters will flow at faster speeds. The loss of flood storage volume increases the depth and velocity of flooding which can lead to expanded flood hazard areas as well as increased public safety hazards and loss of property. A detention basin cannot serve the same function as a flood fringe storage. Furthermore, it appears that the commenters believe that offsite compensation for flood storage displacement is required under this chapter. Rather, applicants have the choice to compensate for flood storage displacement either onsite, under N.J.A.C. 7:13-10.4(m), or offsite, under N.J.A.C. 7:13-10.4(o).

838. COMMENT: The Department should have relied on stream modeling to predict the long-term effects of net-fill in flood hazard areas, which was offered by professionals from the regulated community prior to the proposal. (7, 18, 33, 46, 53)

839. COMMENT: Stream modeling utilized to confirm the peak reduction requirements in the Department's Stormwater Management rules could have been utilized to predict the effects of net-fill and in fact professionals from the regulated community offered this service but were ignored by the Department. (16)

RESPONSE TO COMMENTS 838 AND 839: The Department relied on many experts in the field of hydrology and hydraulics prior to the proposal of the zero percent net fill rules. Several public hearings were held and input was obtained from the public, township officials, environmental organizations, counties and other State agencies. Many people have commented that the adoption of the net fill rules is very critical and long over due, as is supported by a number of comments in this section. With regard to using the Department’s Stormwater Management rules to comprehensively address flooding, as noted in the response to comments 836 and 837, the Stormwater Management rules do not address the impacts of the loss of flood fringe storage. N.J.A.C. 7:8 and N.J.A.C. 7:13 have different regulator intents, and thus the two rules cannot be completely correlated.
840. COMMENT: We recommend that compensatory storage to satisfy the “no net-fill” standard be required to have ecological benefits and to provide habitat instead of simply excavation and that the storage provided have no undue impact to onsite or offsite natural areas. (27, 49)

RESPONSE: Pursuant to N.J.A.C. 7:14-10.4(n)3 and (n)4, the compensation area for net fill cannot be located within any environmentally sensitive areas, such as a previously undisturbed riparian zone, 300-foot Highlands buffer or Special Water Resource Protection Area, and also cannot have other significant adverse environmental consequences, such as adverse impacts upon threatened or endangered species, aquatic biota, fishery resources or Highlands resource areas. By virtue of these conditions, the flood storage being provided will have no undue impact to onsite or offsite natural areas. Furthermore, since the compensatory area will often not be developed, by virtue of the fact that it has been excavated and is therefore likely subject to frequent flooding, as well as the fact that compensatory areas must be deed restricted if created offsite (pursuant to N.J.A.C. 7:13-10.4(p)8), the Department anticipates that such excavated areas will revert to a natural condition, and thereby in many cases result in ecological benefits and provide additional habitat.

841. COMMENT: The restrictions on regulated activities within a floodway (see N.J.A.C. 7:14-10.3) render proposed N.J.A.C. 7:13-10.4, regarding the requirements for regulated activity in a flood fringe, superfluous and unnecessary. Floodway impacts are what should be addressed to alleviate flooding. Therefore, proposed Section N.J.A.C. 7:13-10.4 should be eliminated. (7, 18, 33, 46, 53)

RESPONSE: Restrictions on construction in the floodway do not obviate need for additional regulations for flood fringe areas, specifically the net fill limitations provided pursuant to N.J.A.C. 7:13-10.4. The flood fringe serves an important function in mitigating for the impacts of flooding. Without preservation of the flood storage in the flood fringe, the magnitude, duration and velocity of a flood event can increase significantly. The loss of flood fringe storage volumes can also lead to expanded flood hazard areas, as well as increased public safety hazards and loss of property. Hence, the Department believes that it is essential to preserve flood storage
volume in the flood fringe, in combination with requirements that prevent obstructions in floodways.

842. COMMENT: An applicant should be allowed to undertake 20 percent net-fill if a project is designed to meet the required standard of ensuring that there is no more than 0.2 foot rise in the flood hazard area design flood as required under the existing Flood Hazard Area Control Rules. (7, 18, 33, 46, 53)

RESPONSE: The requirements for ensuring that there is no more than 0.2 foot rise in the flood hazard area design flood is an exception that is allowed only for unavoidable in-channel projects such as a new bridge or culvert. There would be a severe increase in public safety hazards and loss of property from cumulative impacts of allowing all property owners to increase the flood elevations by 0.2 feet. This would be especially more detrimental in areas of the State where the flood hazard area has already been heavily populated.

843. COMMENT: I live in the community of Bloomfield which has a density of approximately 10,000 people per square mile. It would be considered densely populated. I am supportive of the zero percent net-fill requirements. I do not believe that there should be any construction within a flood hazard area. Any development within a flood hazard area moves the water storage capacity to other places. Presently the existing regulations will allow retention of 80 percent of storage capacity. Where is that other 20 percent going when the proposed area for development is in a flood hazard area surrounded by two rivers and the entire circle around the development has a preexisting flooding problem as defined by FEMA? (34, 43)

RESPONSE: The Department acknowledges the commenter's support of the more stringent net fill requirements adopted under this chapter.

844. COMMENT: We object to permitting structures and activities in the flood hazard area and the riparian zone except as a special exception. The flood hazard area and riparian zone should
be naturally vegetated and free of structures or activities that reduce the functions of these areas.
Deposition of sediment taken from the channel should be regulated as fill. (10, 67)

RESPONSE: The new rules implement the New Jersey Flood Hazard Area Control Act, N.J.S.A.
58:16A-50 et seq., and thereby satisfy the statutory directive to "adopt land use regulations for
the flood hazard area, to control stream encroachments, to coordinate effectively the
development, dissemination, and use of information on floods and flood damages that may be
available, to authorize the delegation of certain administrative and enforcement functions to
county governing bodies and to integrate the flood control activities of the municipal, county,
State and Federal Governments" (N.J.S.A. 58:16A-50b). The Flood Hazard Area Control Act
therefore gives the Department the authority to “control” stream encroachments in the State but
not to eliminate them. The Department does not therefore believe it is appropriate to prevent all
development in flood hazard areas, or to force existing development in flood hazard areas to
relocate, but rather to ensure that development does not further exacerbate flooding, and also to
ensure that the State’s residents are not placed in undue risk as a result of such development.

845.COMMENT: We generally support the adoption of a “no net-fill” policy statewide.
However, its application to linear development (i.e. road) expansion and infrastructure upgrades
is cause for concern. The permissible flexibility in supporting urban area needs and promoting
State smart growth policy is unclear. (27, 49)

846.COMMENT: On road improvement/widening projects within the Flood Hazard area, for
which applicants have demonstrated the need for the widening based on traffic congestion relief,
exceptions should be considered to the no net-fill regulations and compensation rules. The fill
compensation areas may be difficult or impossible to acquire, and the hardship exceptions may
require expensive and time consuming applications. Traffic congestion abatement is beneficial to
stream pollution abatement and should not be hindered by excessively stringent riparian buffer
and no net-fill regulations in flood fringe areas. (44)
847. COMMENT: On road improvement/widening projects within the flood hazard area that have demonstrated the need for the widening based on traffic congestion relief, please confirm that the Department can exercise its discretion regarding the no net-fill regulations and compensation rules, since the fill compensation areas may be difficult or impossible to acquire. (19)

RESPONSE TO COMMENTS 845 AND 847: The Department agrees that flexibility is required when net fill regulations are applied to the expansions to public roads. N.J.A.C. 7:13-10.4(d)3 therefore excepts the reconstruction, improvement or enlargement of a lawfully existing railroad or public roadway from net fill limitations, provided that the flood storage volume displacement of such projects is minimized and the activity is not associated with a major Highlands Development.

With regard to permissible flexibility in supporting urban area needs and promoting State smart growth policy, the new restrictions on flood storage displacement under N.J.A.C. 7:13-10.4 allow for the creation of additional flood storage through the removal of previous, lawful development in the flood fringe. Thus, if an applicant removes old development from the flood fringe on a site, a volume of flood storage is created, which can be applied to the future redevelopment of the site. Only that volume of flood storage that is proposed in excess of the existing flood storage displacement onsite would need to be compensated for under the new rules. The Department therefore believes that, in this way, redevelopment in the State will not be hampered as a result of the new flood storage displacement limitations.

848. COMMENT: Regarding fill requirements for roadways, we appreciate the consideration for relief from the normal fill requirements for projects involving improvements to existing roadways. However, for new roadway projects, the requirements are subject to the new and stricter zero percent net-fill rules. It may not be possible to meet these strict requirements in all circumstances. Therefore, a hardship waiver may be required for public roadway projects with a compelling public need. (28)
RESPONSE: New railroads and new public roadways are subject to the flood storage displacement limitations set forth in N.J.A.C. 7:13-10.4. In the case of a new linear development, a new right-of-way must be obtained prior to construction. Therefore, an applicant can generally plan to obtain a right-of-way that is wide enough to accomplish all necessary aspects of the work, including the appropriate width of the roadway and providing sufficient area for stormwater management and to balance the loss of flood storage volume. In case where this is not possible, the applicant can apply for a hardship exception under proposed N.J.A.C. 7:13-9.8.

849. COMMENT: How does the Department intend to provide for the removal of fill in the Flood Hazard area in areas where it is difficult or impossible to retrieve records to verify whether or not the fill was lawfully placed due to lack of record keeping? (44)

850. COMMENT: Where it is difficult or impossible to retrieve records of the fill placement due to poor recordkeeping to verify whether or not it was lawfully placed, it is unclear how the Department will provide for the removal of fill in the flood hazard area. An applicant should obtain a credit for the amount of any unlawfully placed fill that is removed provided they were not the party responsible for the placement. (19)

851. COMMENT: We support the zero net-fill or flood storage provisions at N.J.A.C. 7:13-10.4(f) taking into account flood storage reductions allowed prior to 1980 and 1977. There could be problems, however, in accurately verifying the volumes from that long ago. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 849 THROUGH 851: Most State studied flood hazard maps have topography that dates back to the late 1970s or early 1980s. In addition, some municipalities may possess past topography of areas under their jurisdiction. If such prior topography cannot be located, aerial photography may also be useful in determining the extent of fill or structures on a site. Engineering and/or environmental consultants can also visually inspect surrounding areas and compare undisturbed areas with filled areas to determine the height of fill. Another means of estimating the amount of previous fill onsite is by conducting soil borings to determine the
original ground surface elevation. Thus the Department believes there are a number of adequate methods by which the Department can verify an applicant's claims that they have used the original topography of a site in order to determine the volume of fill that may have been placed within the flood hazard area.

With regard to applicants receiving credit for removing unlawfully placed fill, the Department does not agree that doing so would be in the best interests of the public. If fill or structures are placed onsite in violation of this chapter, that material displaces a certain volume of flood storage. Removing such fill or structures from the flood hazard area restores the site to its original flood storage capacity. If the Department were to allow a credit for the removal of illegally placed fill or structures, there would be no net gain of flood storage in their removal. Thus, all illegal flood storage displacements would persist forever in one form or another. The Department does not find this an acceptable manner of flood hazard area management.

852. COMMENT: Adding fill, which includes construction material, buildings, and roads to a flood hazard area can make a river more prone to flooding. Current development rules require that if any fill is added to a flood hazard area, an 80 percent equivalent of that fill must also be removed from the same flood hazard area. The proposed new rules will increase the requirement to 100 percent, resulting in what is called zero percent net-fill. We agree with this new requirement. (51)

RESPONSE: The Department acknowledges the commenter's support of the adopted restrictions on flood storage displacement under N.J.A.C. 7:13-10.4.

853. COMMENT: Public utility linear development and remediation activities should be exempt from requirements at N.J.A.C. 7:13-10.4, requirements for a regulated activity in a flood fringe. With respect to public utility activities, this is consistent with present Flood Hazard Control Regulations at N.J.A.C. 7:13-1.3(f) which specify the above utility activities as non-regulated uses in the floodway. (42)
RESPONSE: As noted in the response to comment 826, the Department does not believe that it
would be appropriate to exempt any person or agency proposing activities which may adversely
impact flooding or the environment from the requirements of this section. However, many of the
“non-regulated” uses under repealed N.J.A.C. 7:13-1.3(e) and (f) have been adopted as permits-
by-rule under new N.J.A.C. 7:13-7.2. The Department believes that it is appropriate to consider
all construction activities within the flood fringes to be regulated under this chapter, and to then
adopt various permits-by-rule to cover those activities which the Department has determined will
not adversely impact flooding or the environment provided they are conducted in accordance
with the requirements specified by that permit-by-rule.

With regard to remedial activities, the Department does not agree that they should be exempt
from regulation under this chapter, given the extensive filling, grading and re-grading that is
normally associated with many remediation projects. However, in most cases a site that would be
returned to pre-existing grades after remediation could therefore easily satisfy the flood storage
displacement requirements of N.J.A.C. 7:13-10.4.

854.COMMENT: Any fill that displaces flood storage should provide an additional 25 percent
flood storage volume. (10, 67)

RESPONSE: As discussed in the proposal summary at 38 N.J.R. 4000-7, the Department has
concluded that preserving flood storage volume in flood hazard areas is essential to ensuring that
new development will not exacerbate flooding throughout the State. The Department does not,
however, believe that it is necessary or appropriate to require developers to create additional
flood storage volume in excess of the volume that a proposed development will displace. While
the Department acknowledges that indiscriminate flood storage displacement by past
development has exacerbated or even created many of New Jersey’s flooding problems, the
Department does not believe that it would be appropriate to require new developers to
compensate for the flood impacts of previous developers. Therefore, the Department believes
that it is appropriate to require equivalent flood storage compensation for new developments, so
that such developments will not cause flood elevations to rise.
855. COMMENT: Modifications to the Net-fill requirements from a "20-percent net-fill" to a "zero-percent net-fill" would further exacerbate the ability of the commenter to continue to nurture business operations at its Kenilworth site with limited flood hazard area benefit. The additional flood storage required would not improve conditions on the Kenilworth site, nor would it provide upstream relief, as the commenter’s campus is also the headwaters to the delineated water body. Historical storm experiences have shown the floodplain has not exceeded theoretical elevations, and all floodplain issues have been adequately addressed under the current regulations. Specific consideration should be given to campus facilities with documented flood elevations and historical data. (11)

RESPONSE: Preservation of existing flood storage volumes is important for upstream as well as downstream properties. Loss of flood fringe can result in higher velocity of flow and increased depth of flood waters on the downstream properties. The introduction of “zero-percent net fill” is an important regulation for New Jersey’s flood prone areas. In cases such as the commenter’s existing campus, the large size of the site allows for ample opportunity for the creation of new flood storage volume to compensate for any future development proposed within the flood fringe onsite.

856. COMMENT: Somerville Borough is an example of an urban center that is essentially built out. The zero percent net-fill provision (20 percent net-fill provision allowed if the developer offers off site compensation) complicates redevelopment, since there is no "off-site" land available in Somerville Borough for this purpose. Approximately 20 percent of the structures (located within the flood hazard area) within the Borough will not be allowed to expand, or these properties be filled, in any way. This is inconsistent with the State Plan designation of the Borough as a Regional Center, and will be a serious and long-lasting impediment for redevelopment efforts within the Borough. (46)

RESPONSE: Many older municipalities lie within the Central Passaic Basin, which has possessed zero percent net-fill requirements since 1977. This same concept is now being expanded statewide. Design of new projects can be challenging but it has not stopped
development within the Central Passaic Basin. The Department therefore anticipates that the requirements of N.J.A.C. 7:13-10.4 will not stop development throughout the rest of New Jersey either.

New developments within Somerville Borough can be designed to minimize fill. For example, construction of buildings on crawl spaces with openings in the foundation allows for the storage of floodwater under the building. In the case of lawfully-existing fill or structures on a site, applicants can take credit for the removal of such existing development from the flood fringe and design new projects which displace an equal volume of flood storage as the original development, in order to meet the requirements of N.J.A.C. 7:13-10.4. Furthermore, in cases where compliance with these requirements causes a hardship upon an applicant, the hardship waiver provisions at N.J.A.C. 7:13- 9.8(a) are available to applicants.

857.COMMENT: In cases in which private landowners have held off from developing their lands for various reasons, they bear the burden of providing the "extra" 20 percent flood storage for those that developed in prior years, adding to discharges and flooding in the waterways. The Department is requiring current landowners, both public and private, to bear the brunt of the cumulative years of development, which is unfair to the landowners. Should not the landowners, including municipal entities, who will be most impacted by the proposed regulations be given another opportunity to use their land to their fullest degree under the current regulations, for a period of, for example, two years? (44)

RESPONSE: As noted in the response to comments 830 through 835, in just the past three years alone, there has been a number of significant flood events, causing millions of dollars of property damage and repeatedly placing the States residents at significant risk. Stringent new regulations of New Jersey’s flood hazard areas are long overdue. Accordingly, the Department will not provide a further period of time during which the problems that have led to the State's increasing flooding problems are allowed to be exacerbated. However, recognizing that there may be situations in which property owners have reached a certain stage in attempting to develop a property before the new rules became effective in reliance on the repealed rules, that it would be unduly burdensome to require complete redesign of a project. Therefore, the rules do contain
provisions under which certain projects can be "grandfathered" (see adopted new N.J.A.C. 7:13-2.1(c) and responses to comments 241 through 251). Additionally, the rules provide an applicant with the ability to seek a hardship exception under N.J.A.C. 7:13-9.8. The Department believes the rules provide an appropriate balance between protection of public safety, health, general welfare and the environment, and the potential economic impacts that would be imposed if these projects were required to be redesigned under the new rules.

Regarding the commenter’s assertion that current and future developers are paying for the excesses of past developers, the Department fails to see how this could justify allowing such excesses to continue for any additional time. Now that the damages caused by flood storage displacement have been more fully recognized, the Department has the obligation to adopt stringent new rules that preserve New Jersey’s remaining flood storage.

858.COMMENT: Asphalt should be considered fill and thus should be limited inside of flood hazard areas because it is an impervious surface that will add to increased flooding. Buildings and structures should also be considered fill also because the area that they displace means less area for flood storage. (54, 60, 63)

RESPONSE: Any structure that occupies space and reduces the flood fringe storage on a site is considered fill. This includes buildings, structures and asphalt if it extends above existing grades. N.J.A.C. 7:13-10.4(b) offers further clarifications of what is considered fill.

859.COMMENT: The Department’s reliance in the summary on monetary damage associated with flooding that occurred from 1995 through 2005 is not a valid indicator of the effectiveness of the current Flood Hazard Control Rules adopted at 1995 in addressing flooding impacts. The reliance on monetary damage on a yearly basis fails to take into account annual rainfall levels. Additionally, the Department has not conducted any evaluation of the percentage of annual claim payments associated with development that occurred prior to implementation of the current rules in 1995 as compared to the amounts of claims paid for development that occurred after the current rules were in place. Additionally, there is no breakdown as to the percentage of annual total claim payments attributable to development that occurred within the floodway and one
hundred year flood area. Until this information is evaluated and presented to the public for consideration and comment, the proposed zero percent net-fill rule should not be adopted. (7, 18, 33, 46, 53)

RESPONSE: The presentation of the statistics referenced by the commenters was intended only to demonstrate that flood damages in the State have been increasing over recent years despite the limitations provided in the repealed rules since 1995. The Department does not believe it is necessary to perform further data analysis to conclude that development causes flood storage displacement and that flood storage displacement causes flooding to increase. Thus, the Department believes that it is appropriate to adopt the zero-percent flood storage displacement requirements at N.J.A.C. 7:13-10.4 to protect the public health, safety and general welfare as well as the environment.

860.COMMENT: The proposed requirement that a regulated activity displace no flood storage volume on site could exacerbate flooding, particularly along waterways such as the Delaware River, because the stored waters will likely release during the peak storm. Rather than requiring over-detention of water, the proposed new rules should be based on regional planning that focuses on water removal to mitigate against a larger scale flooding impacts associated with peak storms. This section should not be adopted. (7, 18, 33, 46, 53)

RESPONSE: Preservation of existing flood fringe storage will not exacerbate flooding, as it mimics existing conditions. Preservation of flood storage also mitigates for the flood regardless of the timing of the flood. The net fill requirements at N.J.A.C. 7:13-10.4 do allow for 20 percent net fill on a project site, provided proper offsite compensation is created pursuant to N.J.A.C. 7:13-10.4(o). The Department believes that in many flood hazard areas, and especially along large rivers, the option to provide offsite compensation will offer flexibility in the design or new development.

861.COMMENT: The proposed zero percent net-fill rule will have minimal effect in addressing flood impacts throughout the State. Other engineering mechanisms exist that would better
address potential negative impacts associated with new development. The potential benefit of the proposed rule is minimal in comparison to the economic impact on individual land owners and applicants. The Department should implement regional stormwater and flooding control measures to more effectively mitigate against the economic hardship that will result through implementation of the proposed new rules. (7, 18, 33, 46, 53)

RESPONSE: The Department agrees that regional stormwater and flooding control measure are important for reducing and minimizing flood hazard potential. However, as noted in the response to comment 859, development causes flood storage displacement and flood storage displacement causes flooding to increase. Thus the Department believes that it is appropriate to adopt the zero-percent flood storage displacement requirements at N.J.A.C. 7:13-10.4 to protect the public health, safety and general welfare as well as the environment.

862. COMMENT: To the extent the proposed rule is adopted, it should be revised to include a waiver provision that would eliminate the need for offsite flood storage volume mitigation if evidence is submitted to the Department to demonstrate that a proposed project will be designed to negate potential flooding impacts without providing for offsite flood storage volume mitigation. (7, 18, 33, 46, 53)

RESPONSE: Flood storage displacement is a cumulative phenomenon. It may be possible to demonstrate in certain instances that flood storage displacement on any one site will not cause flood elevations to rise significantly. However, if many developments occur in a watershed, which collectively deplete the available flood storage volume in the flood fringe, such development will cause significant changes in flood depths. Thus, it is appropriate to adopt the zero-percent flood storage displacement requirements at N.J.A.C. 7:13-10.4 to protect the public health, safety and general welfare as well as the environment.

863. COMMENT: The proposed requirement to provide for off-site compensation for all flood storage displacement on-site will require applicants to purchase off-site property rights. This will render many development and redevelopment projects economically infeasible. The economic
hardship of the proposed new rules will be greater in the context of residential developments because of the added costs associated with design of such developments under the proposed new rules to meet habitable standards. The proposed new rules will also create an economic hardship by eliminating substantial areas from being developed or redeveloped, thereby significantly reducing the availability and affordability of housing statewide. For those projects that remain economically feasible notwithstanding the added costs that will be associated with the proposed new rules, the added costs associated with compliance with the proposed new rules will significantly increase the already high cost of housing throughout the State. (7, 18, 33, 46, 53)

RESPONSE: Offsite compensation under N.J.A.C. 7:13-10.4(o) is an option, not a requirement. Applicants can instead choose to balance all proposed fill on a site by creating an equal volume of flood storage on the same site, without the need for any work offsite. While the Department acknowledges that the zero-percent net fill limitations of the adopted new rules will cause the size of many developments in flood hazard areas to be reduced, the Department believes that, given the clear association between flood storage displacement and increased flooding, any economic impacts to prospective developers cause by reduced profits are greatly outweighed by the socioeconomic benefits of protecting residents from increase flood damages.

864. COMMENT: Although areas of Carneys Point Township are within a tidal flood hazard area, portions are subject to fluvial flooding. The extent of fluvial flooding during the ten-year storm, as well as the 100-year storm, is unknown at this time; however, the proposed fill restrictions on placing fill could stop the township from redeveloping. (16)

RESPONSE: Based on available FEMA flood mapping of Carneys Point Township, most of the municipality is subject to tidal flooding. This includes such waters as Delaware River, Salem River, Game Creek, Whooping John Creek, Henby Creek and many tributaries. In accordance with N.J.A.C. 7:13-10.4(d)1, any activity located in a tidal flood hazard area is exempt from the flood storage volume displacement limits of this section. This would exempt the project from both the fill below the flood hazard design flood elevation as well as fill below the ten-year flood elevation. Only a few minor tributaries within the Carneys Point Township would be subject to
fluvial flooding. The extent of the fluvial flood hazard area would not be as extensive as the limits of the tidal flood hazard area. Projects within the fluvial flood hazard area in Carneys Point would have to be designed using the same standards as the rest of the state. This would not necessarily stop the township from redeveloping and, as noted in the response to comment 863, any economic impacts to prospective developers caused by reduced profits are greatly outweighed by the socioeconomic benefits of protecting residents from increased flood damages.

865. COMMENT: We support the proposed reductions in flood storage displacement. Currently, within the Central Passaic Basin and the Highlands Preservation area, a zero percent net-fill requirement is imposed. This means that, in these areas, all flood storage displacement on a site must be compensated for by the creation of equal flood storage elsewhere in the same basin so that there is no overall depletion of flood storage in that basin. The new rule expands this zero percent net-fill requirement to all non-tidal flood hazard areas statewide. Specifically, a project can displace up to 20 percent of the flood storage on site as long as flood storage compensation is provided off-site to meet the zero percent requirement. We support that the new rule requires that the flood storage compensation must be made within the same flood hazard area and watershed as the proposed fill and cannot be separated from the proposed fill by a water control structure, such as a road or a dam. In addition, we support that two sets of calculations must be performed to demonstrate that the 20 percent onsite and zero percent overall fill limitations are met for both the typical flood and 10-year flood events. (37)

866. COMMENT: We support the proposed no net-fill requirement, which is based on the premise that the preservation of flood storage capacity along the land adjacent to streams and rivers is crucial during flooding periods in order to hold excess flood waters. The requirement that any transfer of fill remain within the same flood hazard area is also supported. This is essential to assure that fill is not transferred somewhere out of the basin or away from the waterway that actually floods, where it would not provide additional protection from flooding. (48)
RESPONSE TO COMMENTS 865 AND 866: The Department acknowledges the comment in support of the rules. In the Department’s experience, despite the 20 percent net fill restrictions of the repealed rule, flooding in New Jersey continued to worsen. Therefore, in order to preserve enough flood storage volume onsite to prevent local flood conditions from being exacerbated, it is important to expand the zero percent net fill to all non-tidal areas. Such expansion will curb the loss of flood storage volume, decrease the depth and velocity of flooding, increase public safety, and minimize loss of property. Furthermore, expansion of the zero percent net fill requirement will lessen stream bank erosion, stream bank failure and sediment deposition, all of which adversely impact fishery resources and other aquatic biota. As such, the new requirement makes economic and environmental sense.

N.J.A.C. 7:13-10.4(d)

867.COMMENT: Please define the word "minimized" as used in N.J.A.C. 7:13-10.4(d)3. (3)

868.COMMENT: Regarding the reconstruction/expansion of a lawfully existing public roadway, this is allowed provided flood storage volume displacement is minimized. In terms of determining what is considered to be "minimized" under N.J.A.C. 7:13-10.4(d)3, we suggest that for its roadway projects, this section should reference the NJDOT Design Manual as the standard. (28)

RESPONSE TO COMMENTS 867 AND 868: N.J.A.C. 7:13-10.4(d)3 states that “The reconstruction of a lawfully existing railroad or public roadway, including any improvement or enlargement, provided flood storage volume displacement is minimized” In this context, the word “minimized” refers to a design in which the least amount of flood storage displacement is proposed within the flood fringe, balanced with the need for a safe design that adequately serves the needs of the community, which is not cost-prohibitive or environmentally compromising. In general, the Department recommends the following measures be explored as a means of reducing flood storage displacement: channel crossings should be constructed perpendicular to the stream or flood hazard area where possible; widening of roadways should be accomplished on the side
of the road that has the least depth of floodwater; fill for the roadway itself should be minimized using sleeper slopes or retaining walls where possible; incidental fill adjacent to the roadway should be minimized; and the applicant should explore if any areas that are going to be temporarily disturbed for construction of the project could be also be excavated for compensation of fill.

It should also be noted that N.J.A.C. 7:13-10.4(d)3 continues the exemption under repealed N.J.A.C. 7:13-2.14(a)7 and N.J.A.C. 7:13-2.15(a)3, which waive net-fill requirements for public roadways that cannot meet these restrictions due to limited rights-of-way, provided net fill is minimized and the public agency demonstrates that there is a need for the project that cannot be otherwise met without the fill. The Department has not changed the intent of this provision, and therefore will apply it the same under the adopted new rules as it has historically done under the repealed rules.

With regard to the use of the NJDOT Design Manual, while the Department acknowledges that this is a valuable resource for determining the safe design of roads in New Jersey, there may be other ways to minimize fill that are not clearly spelled out in the NJDOT Design Manual. The Department believes there are many ways to achieve the elevations, vertical and horizontal curves, and other geometric characteristics of a safe roadway. The Department would require applicants for roadway projects to explore all reasonable alternatives that would minimize the fill.

869.COMMENT: We disagree with the provision at N.J.A.C. 7:13-10.4(d)7 which states that flood storage displacement does not apply to depositing sediment removed from a channel. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: N.J.A.C. 7:13-11.15(f) sets forth special cases in which dredged sediments may be deposited in regulated areas. The first condition states that the applicant must demonstrate that the transport of the sediment out of the regulated area is not economically or physically feasible and/or would cause greater environmental damage than depositing the sediment within the regulated area. In certain wetlands or forested areas, the removal of sediments would require the use of machinery, such as by large trucks that would have to drive through the wetlands or forest.
to reach the stream. In such a case, trees may have to be removed to gain access, and compaction of soil may result in further environmental impacts. Thus, removing sediments may cause greater environmental damage than allowing the sediment to remain in the flood hazard area. Additionally, as further outlined in the regulations, sediments may be deposited no greater than 3 inches deep and must be 25 feet away from the stream. This criteria would allow for the natural re-vegetation of the area without damage to woody vegetation. The Department therefore believes that allowing sediment disposal in flood hazard areas is appropriate in the limited circumstances envisioned by the rules.

N.J.A.C. 7:13-10.4(f)

870. COMMENT: Table C should note that all compensatory offsite flood storage in must occur within the same HUC-14, as referenced in N.J.A.C. 7:13-10.4(p)(3). (66)

RESPONSE: Table C (modified on adoption to Table D) is a simple chart that allows a user to gain knowledge about the allowable percentage of fill. All compensatory offsite flood storage must be accomplished in accordance with all sections of N.J.A.C. 7:13-10.4. The requirement that the compensation area be located within the same HUC-14 as the proposed fill is just one of many requirements provided in this section. The Department does not believe that it is necessary to complicate the Table by including reference to all applicable limitations.

871. COMMENT: It is unclear under the proposal if actions by the applicant to compensate for fill within the Department’s guidelines can occur in the riparian zone. The Department should clarify this section to indicate that this compensation can occur in the riparian zone and reference back to the appropriate methods for restoring vegetation. (22)

RESPONSE: N.J.A.C. 7:13-10.2 prohibits the removal of riparian zone vegetation unless the activity is specifically described in Table C (proposed as Table B). Furthermore, N.J.A.C. 7:13-10.4(n)3i and 10.4(p)5i both require that compensatory flood storage onsite and offsite, respectively, can only be created within a riparian zone if it has been subject to previous, lawful disturbance.
N.J.A.C. 7:13-10.4(j)

872. COMMENT: N.J.A.C. 7:13-10.4 requires flood storage volume calculations for both the design flood and the ten-year flood when fill is placed within the flood fringe. This requirement means that a detailed hydraulic analysis will be required for all projects that place fill in the flood fringe in excess of five cubic yards, since none of the other methods for calculating the flood hazard area will provide the necessary ten year flood elevation. Is that the intent or is there a way to approximate the ten year flood elevation as well? (8)

873. COMMENT: The Department must provide a valid method for computation of the 10 year flood flow where FEMA or NJDEP have not provided same. There is no scientific basis for substituting a flood depth halfway between the flood hazard area design flood elevation and the lowest ground elevation on the site for the 10 year flood elevation. (33)

RESPONSE TO COMMENTS 872 AND 873: In order to better protect the public from increases in the frequency and intensity of smaller flood events as well as large flood events, the zero-percent net fill standard of the adopted new rules must be met for both the 10-year flood and the flood hazard area design flood. The repealed rules required only that the net fill standards be met for the flood hazard area design flood. However, site grading is sometimes accomplished in such a way that a large volume of flood storage is displaced during smaller flood events, while the overall site still meets the net fill standards for the flood hazard area design flood. This change will ensure that flood storage is preserved for small floods and large floods alike.

N.J.A.C. 7:13-10.4(j)3 outlines the procedure for the balancing of net fill below the ten-year flood elevation. This paragraph states that in cases where the ten-year flood elevation is not provided on State or Federal flood maps, calculations can instead be performed using a flood depth halfway between the flood hazard area design flood elevation and the lowest elevation onsite. For example, if the flood hazard area design flood elevation onsite is 90.0 feet NGVD and the lowest ground elevation onsite is 80.0 feet NGVD, flood storage calculations can be performed using a flood elevation of 85.0 feet NGVD if the ten-year flood elevation is unknown.
Hence a detailed hydraulic analysis to determine the ten-year flood is not necessary. The Department has modified on adoption N.J.A.C. 7:13-10.4(j)3 to clarify that this calculation should be made based on the lowest ground elevation “within the flood fringe” onsite. This is appropriate since the section applies to regulated activities in the flood fringe, and flood storage displacement calculations are only applicable in a flood fringe.

N.J.A.C. 7:13-10.4(j)3 has been further modified on adoption to explain that “this halfway depth must be determined separately for each cross-section in the flood fringe, and at close intervals throughout the site in order to provide an accurate estimate of the upper and lower flood storage volumes.” It is necessary to require that the halfway depth be calculated separately for each cross-section, since the ground elevation and the design flood elevation can vary greatly throughout a site. As such, providing an “average halfway depth” for a site by averaging the depths from several cross-sections would not produce accurate flood storage volumes.

Furthermore, it has been the Department’s experience that cross-sections taken at close intervals throughout a site will result in greater accuracy when calculating flood storage volumes. Since the proximity of cross-sections and the means of calculating flood storage volumes can vary greatly depending on the topography and level of development on a given site, N.J.A.C. 7:13-10.4(j)3 has additionally been modified on adoption to explain that “an illustration of how to properly calculate these volumes is provided in the Flood Hazard Area Technical Manual.”.

The Department believes that, in cases where the 10-year flood elevation is not reported by either the Department or FEMA, it is appropriate to allow applicants to estimate the 10-year flood depth on a site by using a depth that is halfway between the ground elevation and the flood hazard area design flood elevation. Since the purpose of the provision is to ensure that fill placed on sites within an area that more frequently floods is balanced by the creation of an equal volume of flood storage, the Department believes that approximating the 10-year flood onsite in this manner is adequate to accomplish this goal. Furthermore, without the ability to approximate the 10-year flood elevation, applicants would be forced to perform costly hydrologic and hydraulic calculations where no FEMA or Department delineation is available. The Department does not believe that the expense of performing such calculations is warranted for the purposes of this section.
874. COMMENT: The Department should clarify if the ten-year flood elevation for State studied streams has been established and whether the FEMA Flood Insurance Study elevations for the ten-year flood be acceptable to use. (4)

RESPONSE: The Department would accept the use of the FEMA Flood Insurance Study elevations for the ten-year flood for the basis of seeking compliance with the zero percent net fill. However, the study to be used must meet the criteria as outlined at N.J.A.C. 7:13-3.4(b)ii and iii, which state that any flood insurance study used must be dated January 31, 1980, or later and must be the most recent study published by FEMA for that municipality. If such a flood study is not available, the applicant can use half the height between the flood hazard area design flood elevation and the ground, as outlined in N.J.A.C. 7:13-10.4(j)3.

875. COMMENT: The Department has not provided any substantive justification for use of the ten-year flood. The proposed requirement to calculate flood storage volume based on the ten-year flood will unnecessarily increase the cost of development. Many State-adopted studies are based on a 100-year flood model and do not include a ten-year flood model. Therefore, property owners will, in most cases, be required to undertake a site-specific ten-year flood analysis. The benefits of performing a ten-year flood analysis when a 100-year flood model is available are negligible. Therefore, unless the State has prepared a ten-year flood delineation, an applicant should not be required to undertake a ten-year flood analysis. (7, 18, 33, 46, 53)

RESPONSE: As stated in the response to comment 872, it will not be necessary to perform a hydraulic analysis to determine the extent of the ten-year flood. Instead the applicant can estimate the depth of the ten-year flood as outlined in N.J.A.C. 7:13-10.4(j)3. The requirements for the balancing of fill below the ten-year flood elevation were promulgated in order to better protect the public from increases in the frequency and intensity of smaller flood events as well as large flood events, hence, it is proposed that the zero-percent net fill standards be met both below the ten-year flood and between the ten-year flood and the flood hazard area design flood. Site grading sometimes is accomplished in such a way that a large volume of flood storage is displaced during smaller flood events, while the overall site still meets the net fill standards for
the flood hazard area design flood. In other cases, an applicant may propose to place fill at higher elevations in the flood fringe and compensate with excavation at lower elevations thereby eliminating storage for the larger storms. Therefore, new N.J.A.C. 7:13-10.4 is necessary to ensure that the flood storage is preserved for small floods and large floods alike.

876. COMMENT: The Department should amend N.J.A.C. 7:13-10.4(j)2 by including the following sentence at the end; “Except if the applicant can prove to the Department through modeling that the addition of fill in the area below the ten-year flood elevation does not have adverse impacts on the adjacent floodway.” (22)

RESPONSE: As noted in the response to comment 862, flood storage displacement is a cumulative phenomenon. It may be possible to demonstrate in certain instances flood storage displacement on any one site will not cause flood elevations to rise significantly. However, if many developments occur in a watershed, which collectively deplete the available flood storage volume in the flood fringe, such development will cause significant changes in flood depths. Thus, it is appropriate to adopt the zero-percent flood storage displacement requirements at N.J.A.C. 7:13-10.4 to protect the public health, safety and general welfare as well as the environment.

877. COMMENT: N.J.A.C. 7:13-10.4(j)7 should be clarified to state that changes in the flood profile that do not exceed 0.2 feet are considered to be in compliance with this requirement. (15, 57)

RESPONSE: N.J.A.C. 7:13-10.4(j)7 states that in cases of a channel modification or the reconstruction of a water control structure such as a bridge or culvert, where the project results in a drop of the water surface elevations, the resultant loss of storage would be considered as fill. This provision recognizes that the main purpose of the zero-percent net fill rule is to preserve existing flood storage volumes. Therefore, a project that causes the water surface elevation to drop during a flood would cause a loss of flood storage. On some sites, where the stream has a very flat flood profile, even a small drop in water surface elevations could result in excessive
loss of flood storage over a large area. Hence, the Department does not believe it is appropriate to waive net fill calculations for projects that cause a drop in the water surface elevation by less than 0.2 feet.

N.J.A.C. 7:13-10.4(k)

878. COMMENT: N.J.A.C. 7:13-10.4 (k) sets forth the base volume of flood storage space on a site in 1980, after which any fill placement without a permit was unlawful. Please clarify the correct interpretation of this provision. For example, will fill placed without a permit after 1980 become legal fill and count towards the 20 percent allowable volume of fill to be placed on site and must be compensated for with fill removal in the flood fringe. Applicants should be able to remove previously un-permitted fill without it being included in the calculation and should receive credit for removal of this type of fill. (19)

RESPONSE: This provision is not intended to imply that all fill placed on a site after 1980 was unlawful. For instance, such fill could have resulted from a non-regulated activity. Furthermore, net fill restrictions did not take effect outside the Central Passaic Basin until 1984, so any volume of fill placed outside the Central Passaic Basin between 1980 and 1984 would have been unrestricted. If a site contains legal fill in excess of the requirements of this section, N.J.A.C. 7:13-10.4(u) provides that the existing fill can remain but that no more fill can be placed onsite. Similarly, if a site contains illegal fill in excess of the requirements of this section, N.J.A.C. 7:13-10.4(v) provides that all fill in excess of the current limitations must be removed before the Department can grant an individual permit for more development on that site.

N.J.A.C. 7:13-10.4(n)

879. COMMENT: The requirement to compensate for flood volumes outside the riparian zone, outside the Highlands open water and outside a Special Water Resources area is not feasible or practical. Flood volume needs to be compensated for as close to the watercourse as possible. This requirement will result in the State “taking” all lands along these water features. (33)
RESPONSE: N.J.A.C. 7:13-10.4(n)3 requires that the onsite compensation for the creation of flood storage volume does not disturb vegetation within riparian zones, Special Water Resource Protection Areas or within 300 feet of a Highlands open water, unless the area in question has already been lawfully disturbed. The Department has adopted strict measures to protect riparian zones throughout the adopted new rules and does not want to encourage the disturbance of these areas simply to compensate for flood storage. Furthermore, the Department’s Stormwater Management rules at N.J.A.C. 7:8-5.5 prohibits such disturbances within Special Water Resource Protection Areas. Additionally, the Highlands Water Protection and Planning Act rules at N.J.A.C. 7:38-3.7(d)3 provides that compensatory flood storage “is not created within 300 feet of a Highlands open water, unless the area where the compensation will be created has been subject to previous, lawful disturbance.” Thus the Department believes that the adopted standard is necessary to preserve the environment of these crucial areas of the State. In cases where an applicant believes that strict compliance with this requirement would create an undue or exception hardship, applicants can request a hardship exception under N.J.A.C. 7:13-9.8.

N.J.A.C. 7:13-10.4(o) and (p)

880.COMMENT: We support strict application of the conditions proposed for allowing flood storage volume replacement off-site. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Department acknowledges this comment and intends to strictly apply the conditions of N.J.A.C. 7:13-10.4(o) and (p).

N.J.A.C. 7:13-10.4(s)

881.COMMENT: We strongly support the phase-out of the use of fill credits at N.J.A.C. 7:13-10.4(s). (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Department acknowledges this comment in support of N.J.A.C. 7:13-10.4(s).
N.J.A.C. 7:13-10.5 Requirements for a regulated activity in or along a water with fishery resources

882. COMMENT: We support protection of waters that support fisheries. Low flow aquatic passage and protections during breeding and passage are critically important to maintain. (10, 67)

883. COMMENT: We strongly support the requirements that will protect fishery resources at N.J.A.C. 7:13-10.5. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 882 AND 883: The Department acknowledges these comments in support of the rule requirements that protect fishery resources at N.J.A.C. 7:13-10.5.

N.J.A.C. 7:13-10.6 Requirements for a regulated activity in a documented habitat for threatened or endangered species

884. COMMENT: The protection of endangered and threatened species habitat accomplished by the new rules is supported. (48)

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

885. COMMENT: We strongly support the protections for threatened and endangered species for both animal and plant species at N.J.A.C. 7:13-10.6, and urges strict application of the proposed conditions. (20, 38, 41, 54, 60, 63, 69)

886. COMMENT: We support provisions to protect threatened and endangered species and their habitat. Review and analysis needs to be performed with careful oversight by the appropriate agencies. (10, 67)
887. COMMENT: No approval should be granted in the flood plain if endangered plant species will be impacted. (56)

RESPONSE TO 885 THROUGH 887: N.J.A.C. 7:13-10.6(d) provides that the Department shall issue an individual permit only if the activity will not adversely affect a threatened or endangered species or its habitat. The Department acknowledges the commenters’ support for this provision.

888. COMMENT: Protection of threatened and endangered species is beyond the scope of a flood mitigation program. There does not appear to be any correlation between the requirements in the proposed regulations for protection of threatened and endangered species and the purpose of the regulations, that is flood control and flood mitigation. There is already an extensive regulatory scheme designed to protect threatened and endangered species. See N.J.S.A. 23:2A-1 et seq.; N.J.A.C. 7:25-4.1 et seq. Therefore, the proposed regulations should be limited to its stated objectives (flood mitigation) and leave protection of threatened and endangered species to those programs that are designed to protect those resources. (40)

889. COMMENT: The Department lacks statutory authority to deny a flood hazard area control act permit based upon habitat impacts. Rather than addressing habitat issues piecemeal through different and conflicting rules, the Department should seek statutory clarification of its powers under the State endangered species laws and then adopt rules to implement those laws separately from each regulatory program having its own threatened and endangered species provision. (65)

RESPONSE TO COMMENTS 888 AND 889: The Flood Hazard Area Control Act rules are promulgated pursuant to authority delegated to the Department by several statutes in addition to the Flood Hazard Area Control Act. One of these statutes is N.J.S.A. 13:1D-1. Section 9 of that Act directs the Department to "formulate comprehensive policies for the conservation of the natural resources of the State, the promotion of environmental protection and the prevention of pollution of the environment of the State." Comprehensive policies encompass "not only end-point objectives but also the means that should be used to attain those ends."
The Department's authority to protect the stream environment as well as associated flora and fauna in a single set of rules was affirmed in Society for E.E.D. v. New Jersey DEP, 208 N.J. Super. 1 (App. Div., 1985), in which the Court stated: "The broad scope of environmental concerns expressed by the Legislature in its various enactments and the totality of powers accorded by the Legislature to DEP to enable it to address those concerns persuades us that DEP has ample power to deal comprehensively in a single set of regulations with the overlapping areas of flood hazards, water pollution, and preservation of plant and animal life dependent upon the streams being encroached upon." This authority was recently affirmed in Stormwater Management Rules, 384 N.J. Super. 451, 461-462 (App. Div. 2006). The rules cited by the commenters, N.J.A.C. 7:25-4.1 et seq., regulate the possession and sale of certain wildlife species, list endangered species and establish the Endangered and Nongame Species Advisory Committee. The rules adopted here do not conflict with N.J.A.C. 7:25-4.1 et seq. since they address other wildlife and habitat concerns related to activity proposed in flood hazard areas, floodways and adjacent riparian zones.

890.COMMENT: The Department should reserve decision on adoption of proposed N.J.A.C. 7:13-10.6, and any other section of the rules pertaining to regulation of threatened and endangered species, until it takes final action on its draft Threatened and Endangered Species Rule, in order to ensure consistency of regulation and avoid duplicative regulations. To the extent that action is taken on the proposal, regulations should include provisions that will make them null and void when and if the Department adopts its Threatened and Endangered Species Rule. (7, 18, 33, 46, 53)

RESPONSE: The adopted new rules continue protections found in the repealed rules with regard to endangered and threatened species. Therefore, to eliminate this provision would weaken existing protections. Furthermore, the Department drafts rules ensuring consistency among rules, and does not consider it prudent to relax one regulation in anticipation of the adoption of another.
891.COMMENT: Threatened and endangered species are an “existing use” that must be protected from secondary & cumulative impacts. Do the proposed threatened and endangered protections apply to secondary and cumulative impacts of the full project on threatened and endangered and their habitat? Do the rules apply to Natural Heritage Priority sites? As an example, for a road crossing flood hazard permit application, if the stream crossing itself does not disturb threatened and endangered habitat, but the upland development served by the road does disturb threatened and endangered habitat, how would the rules protect the species and their habitat? The presence of aquatic, aquatic dependent, or threatened and endangered plant or animal species, or their habitat, in the riparian zone - including rare plants and ecological communities recognized and mapped under the Natural Heritage Program - are existing uses that must be protected under the antidegradation policies. (69)

RESPONSE: N.J.A.C. 7:13-10.6(d) provides that the Department shall issue an individual permit only if the activity will not adversely affect a threatened or endangered species or its habitat. Therefore, the “existing use” as habitat is maintained. As the language at N.J.A.C. 7:13-10.6(d) indicates all impacts that “adversely affect” the species or habitat are considered and restricted, however, the rules are limited to the areas within the scope of jurisdiction, that is, flood hazard areas and riparian zones. Impacts outside of this jurisdiction are not subject to this rule. With respect to Natural Heritage Priority sites, the adopted rule does not specifically protect these areas. However, many of these sites are protected by virtue of the fact that they are also endangered and threatened species habitat.

892.COMMENT: The proposal language is inconsistent with the definition of a riparian zone provide at N.J.A.C. 7:13-4.1(c)2iii. Documented habitat has a specific meaning. The Landscape Project contains not only documented habitat, but also habitat that might be suitable for threatened and endangered species. The Department should rewrite this section to only reference the Landscape Project as a source of information and that it does not identify just documented habitat. (12)
893. COMMENT: Proposed N.J.A.C. 7:13-10.6 would require individual permits for certain activities in a documented habitat for threatened or endangered species. Pursuant to proposed N.J.A.C. 7:13-10.6(d) the Department would grant individual permits only if it is shown that the regulated activity will not adversely impact (1) a threatened or endangered species and (2) a documented habitat for threatened or endangered species. "Documented habitat" would be defined to include areas that the Department has determined are suitable for use by specific documented threatened or endangered species during the normal periods that the species would use the habitat. Based on this broad definition, any habitat that may be able to sustain an endangered species is within the definition "documented habitat" – regardless of whether the endangered or threatened species has ever made that area its home. Under this definition, the entire Pinelands region may be a suitable habitat for the pine snake. Any regulated activity in the Pinelands would, therefore, be subject to the proposed regulation set forth at N.J.A.C. 7:13-10.6(d) despite the fact that there is no documented evidence that a pine snake (or other alleged threatened or endangered species) ever utilized that property for its habitat. (40)

RESPONSE TO COMMENTS 892 AND 893: The definition of "threatened & endangered species" in the new rules, continues the definition from the repealed Flood Hazard Area Control rules. This definition and that of “riparian zone” is provided at N.J.A.C. 7:13-1.2. Documented habitat means that evidence of use or a past species occurrence exists. The Landscape Project maps use a peer reviewed method and model that uses documented occurrences to identify habitat. More detailed information on the Landscape project method can be found in the Landscape Project Report at www.state.nj.us/dep/fgw/ensp/landscape/lp_report.pdf. N.J.A.C. 7:13-10.6 states that the Department uses the Landscape maps to identify documented habitat. This approach is already employed successfully in the Department’s Freshwater Wetlands and Highlands programs and therefore the Department disagrees that the language in this provision should be revised.

894. COMMENT: The Department is using the Landscape Project method in a manner that is beyond its intended purpose. In addition, this rule proposal goes beyond the Department's authority to regulate threatened and endangered species habitat. If the Department intends to
provide such regulation under the Flood Hazard Area Control Act, it must adopt rules specifically providing a mechanism for challenging the landscape project maps, provide information concerning alleged documentation of threatened and endangered species, and provide an overall general mechanism for addressing such issues. (65)

RESPONSE: The Landscape Project is not being used “beyond its intended purpose”. While the Department uses the Landscape maps to identify documented habitat, an applicant can rebut the Department’s assertion that an area is documented and suitable habitat by providing supporting evidence. An applicant is strongly encouraged to address such issues prior to the submission of an application as the outcome may determine the design of the project. With regard to the authority to regulate endangered and threatened species, note the Department’s response to comments 889 and 890.

895. COMMENT: In order to comply with this rule, specific Natural Heritage Program (NHP) data must be shared with the applicant so that proper habitat evaluations and/or surveys can be performed. NHP should no longer decline to provide documented locations, including OPRA requests. (26)

RESPONSE: The Department provides data from the Natural Heritage Database, in many cases including occurrence location information to landowners and their agents, upon their submission of a Natural Heritage Data Request Form and the payment of the associated fee. An application form is available at: www.nj.gov/dep/parksandforests/natural/heritage/ However, in order to meet its legislative mandate to protect endangered and threatened animal species, and due to the risk to rare species, including illegal collection, purposeful destruction, increased human disturbance and similar factors, posed by release of specific location information, it is the policy of the Department to consider records or portions of records containing the precise location of endangered and/or threatened animal species to be confidential. The Department will only release those Department records containing the location(s) of endangered and/or threatened animal species specifically relied upon by the
Department in any permit, approval, determination or enforcement action and only when such action is the subject of a challenge or appeal in any administrative or judicial forum.

In such cases, where detailed locations are not provided, the peer-reviewed literature regarding habitat requirements and site-specific species surveys, as well as the general location data provided in a Natural Heritage Data Request should provide sufficient information to proceed with project design.

896. comment: The Department previously approved a development in a known rattlesnake area and was not sufficiently protective. The rule should contain more stringent language regarding threatened and endangered species. (56)

response: The adopted rule language is intended to clarify and strengthen the protection of endangered and threatened species. The Department considers the language at adopted N.J.A.C. 7:13-10.6, which prohibits the issuance of an individual permit if it will adversely impact an endangered or threatened species or its habitat, to be appropriate.

897. comment: A citation should be added allowing applicants to design their project and permit application on the presumption that threatened or endangered species are present at the site. The presence of suitable habitat and likelihood of the presence of such species on the project site may be discussed in the environmental report based on known information, thus saving an applicant the expense of a survey. In this manner, the applicant may agree up front to requirements for species protection. Alternatively, DEP could provide this option to stream restoration projects that are not undertaken as mitigation for a development, or restrict this option to certain agencies. (66)

response: At N.J.A.C. 7:13-10.6(c) the rule requires an applicant to submit a survey if the proposed project will disturb an area containing an endangered or threatened species or habitat that is suitable for an endangered or threatened species. This is necessary to insure that an individuals or habitat located on site are protected and in the case of restoration projects, appropriately restored.
N.J.A.C. 7:13-10.7 Requirements for a regulated activity in an area with acid producing soils

898. COMMENT: N.J.A.C. 7:13-10.7, requirements for a regulated activity in an area with acid producing soils, should be deleted in its entirety as duplicative of the controls imposed by the County Soil Conservation District Offices in carrying out their authority to oversee the implementation of the New Jersey Standards for Soil Erosion and Sediment Control. (42).

899. COMMENT: This section should be deleted in its entirety since it is duplicative of the controls imposed by the District Offices in carrying out their authority to oversee the implementation of the New Jersey Standards for Soil Erosion and Sediment Control. (22)

RESPONSE TO COMMENTS 898 AND 899: The proper management of acid producing soils is essential to the maintenance of vegetative cover and to water quality. The Department acknowledges that local Soil Conservation Districts provide oversight for projects under their jurisdiction which have the potential to disturb acid-producing soil deposits. However, under the Flood Hazard Area Control Act rules, the Department regulates many activities that are not regulated by the Soil Conservation Districts. Furthermore, it is the Department’s experience that applicants often apply for permits from the Department prior to seeking Soil Conservation District approval. By incorporating into this chapter standards for the proper management of acid producing soils, the Department believes that it will best ensure that all projects under its jurisdiction will comply with these standards.

900. COMMENT: The requirements for a regulated activity in an area with acid producing soils as proposed should be modified to include a reference to the “Standards for Soil Erosion and Sediment Control in New Jersey” This manual contains a specific Standard (Standard for Management of High Acid Producing Soils, 1-1) which provides comprehensive assessment and treatment methodologies for proper handling of acid producing deposits. This Standard also includes a generalized map of New Jersey depicting where these deposits are likely to be found. Furthermore, to ensure consistency with the definition of Acid producing soils at N.J.A.C. 7:13-
1.2, N.J.A.C. 7:13-10.7 should also direct the applicant to seek assistance from the local soil conservation district in dealing with acid producing deposits. (55)

RESPONSE: All activities authorized under a general permit or individual permit must conform to the New Jersey Standards for Soil Erosion and Sediment Control at N.J.A.C. 2:90, pursuant to N.J.A.C. 7:13-8.1(b)5 and 11.1(c), respectively. Therefore, the Standard for Management of High Acid Producing Soils, 1-1, is incorporated by reference. Furthermore, N.J.A.C. 7:13-10.7 explains that additional guidance on minimizing adverse effects of exposing acid-producing soils can be found in the Flood Hazard Area Technical Manual, which in turn recommends that applicants seek assistance from the local soil conservation district in dealing with acid producing deposits.

901. COMMENT: Acid-producing soils are found in several areas of the state, including the Manasquan River Watershed. The rules provide for stabilizing and “neutralizing” of these soils. This type of treatment can result in producing an unnatural pH in the receiving stream. Acid-producing soils should be stabilized by immediately covering the disturbed area with organic topsoil and limiting the amount of lime, if any, needed to “neutralize” the soil for vegetation. A cross-reference to section N.J.A.C. 7:13-10.7 should be included in section N.J.A.C. 7:13-9.2(c). (66)

RESPONSE: Detailed information for treatment of acid producing soils is contained in the Flood Hazard Area Technical Manual, and in the Soil Erosion and Sediment Control Standards at N.J.A.C. 2:90, which are available from local Soil Conservation Districts. Since N.J.A.C. 7:13-10.7 applies to all individual permits, the Department disagrees that a cross-reference is necessary.

902. COMMENT: It is unclear whether tests are required to verify the presence of acid producing soils or if information may be submitted by the applicant to dispute inaccurate mapping of acid producing soils. (26)
RESPONSE: Tests to dispute the mapping of acid soils may be submitted before or during the application review process. However, an applicant is strongly encouraged to address such issues prior to the submission of an application as the outcome may determine the design of the project. An applicant may determine the size of the riparian zone on a site by applying for a verification, as provided for in N.J.A.C. 7:13-6, as noted in the response to comments 423 and 424. The Flood Hazard Area Technical Manual contains additional information on the testing and treatment of acid producing soils.

SUBCHAPTER 11 Individual permit requirements for various regulated activities

N.J.A.C. 7:13-11.1 Requirements that apply to all regulated activities

903. COMMENT: We support analysis to demonstrate how activities will impact critical resources and functions. We oppose activities that interfere with the optimal function of the flood hazard area and riparian zone. (10, 67)

RESPONSE: The Department acknowledges the commenter’s support. The Department believes that the new Flood Hazard Area Control Act rules appropriately balance the necessity to maintain the functions of the flood hazard area and the riparian zone, against the allowance of specific activities within the regulated areas.

N.J.A.C. 7:13-11.1(d)

904. COMMENT: Please clarify the approval or jurisdictional of the NRCS, since NRCS is not a regulatory agency. If the approval refers to approved conservation or resource management system plans, please specify. (66)

905. COMMENT: Reference is made to “all necessary approvals from the USDA Natural Resources Conservation Service or its designee”. The NRCS does not grant “approvals” and any reference to such should be removed. (55)
RESPONSE TO COMMENTS 904 AND 905: The Department’s intention at N.J.A.C. 7:13-11.1(d) is to ensure that any project that may require NRCS approval receives such approval prior to the issuance of an individual permit under this chapter. It is not the Department’s intention to require applicants to seek NRCS approval where no such approval is warranted. However, it is the Department’s understanding that NRCS does approve and/or oversee certain projects that it has designed. As such, N.J.A.C. 7:13-11.1(d) has been modified on adoption to clarify the Department’s intent that a permittee shall obtain all necessary approvals from the USDA Natural Resource Conservation Service or its designee prior to commencing any activity “designed or overseen by the NRCS, which is” approved in an individual permit issued under this chapter.

N.J.A.C. 7:13-11.1(e)

906.COMMENT: Please specify a survival rate, requirements for replacement, and the submission of a monitoring report referenced under N.J.A.C. 7:13-11.1(e)4. Maintenance should be defined. (66)

RESPONSE: N.J.A.C. 7:13-11.1(e)4 requires that, in cases where the Soil Conservation District and USDA Natural Resource Conservation Service do not have jurisdiction over an activity, all permanent, indigenous, non-invasive vegetation shall be established on all exposed soils immediately following construction. The applicant shall furthermore monitor and maintain all such vegetation for at least three growing seasons to ensure proper establishment and survival. As noted in the proposal summary at 38 N.J.R. 4008, these requirements will primarily apply to single family homes and small in-stream disturbances, and are necessary to ensure that sediment does not enter waters during and after construction and thereby degrade water quality or negatively affect the riparian zone. In the past, the Department has routinely required the stabilization of disturbed areas in this way, and has required the submission of monitoring reports for projects under the repealed rules to demonstrate proper establishment and survival of replanted areas. The intent of the adopted new rules is to continue the Department’s longstanding
requirements in this regard by establishing monitoring and reporting standards consistent with
the Department's Freshwater Wetlands requirements for stabilization of disturbed sites, as
described by the Flood Hazard Area Technical Manual. Monitoring reports, when required,
should be submitted to the Department’s Division of Land Use Regulation.

907. COMMENT: In the event that a soil disturbance is proposed that does not fall under the
jurisdiction of the local soil conservation district, the applicant should be required to utilize the
Standards for any and all erosion control measures. (55)

RESPONSE: N.J.A.C. 7:13-11.1(e) requires that any project subject to neither SCD nor NRCS
review must implement certain basic soil erosion and sediment control measures. Since most
large projects fall under the jurisdiction of one of these agencies, this provision will primarily
apply to single family homes and small in-stream disturbances. The Department does not believe
that it is appropriate to require small projects to meet the requirements of the New Jersey
Standards for Soil Erosion and Sediment Control at N.J.A.C. 2:90, in cases where such projects
are exempt from these requirements. Rather, it is more appropriate to set forth simplified
standards designed to ensure that sediment does not enter waters during and after construction
and thereby degrade water quality or negatively affect the riparian zone.

N.J.A.C. 7:13-11.1(f)

908. COMMENT: This section should require the applicant to meet all applicable Standards for
Offsite Stability. The direct discharge of concentrated stormwater onto tilled agricultural fields
should not be permitted. (55)

RESPONSE: Pursuant to N.J.A.C. 7:13-8.1(b)5, all activities authorized under a general permit
must conform to the New Jersey Standards for Soil Erosion and Sediment Control at N.J.A.C.
2:90. Similarly, N.J.A.C. 7:13-11.1(c) requires that “a permittee shall obtain all necessary
approvals from the local Soil Conservation District or its designee prior to commencing any
activity approved in an individual permit issued under this chapter.” Any project that is subject to
Soil Conservation District review must conform to the requirements of the New Jersey Standards for Soil Erosion and Sediment Control at N.J.A.C. 2:90. Since the Standards for Offsite Stability are included in N.J.A.C. 2:90, the adopted new rules effectively require that all activities authorized under a general permit or individual permit must meet all applicable Standards for Offsite Stability.

N.J.A.C. 7:13-11.1(f)4 and 5

909. COMMENT: There is no rational basis for any proposed distinction between regulated activities in a floodway that span a regulated water as compared to regulated activities in a floodway that do not span a regulated water. Under current regulation N.J.A.C. 7:13-2.18(a)1, the limitations on the amount of increase of flood elevation on off-site properties is 0.2 feet if the applicant’s property includes the flood plain on both sides of the water body or 0.1 feet if the applicant’s property is only on one side of the water body. It appears that the Department’s reference to whether a regulated activity “spans” or “does not span” a regulated water is intended to have the same meaning as current rule N.J.A.C. 7:13-2.18(a)1. The Department should confirm that the proposed rule is intended to be consistent with the existing rule and reword the proposal accordingly. (7, 18, 33, 46, 53)

RESPONSE: N.J.A.C. 7:13-11.1(f)4 and (f)5 continues repealed N.J.A.C. 7:13-2.18(a)1, and sets forth certain conditions which the Department considers will result in adverse impacts on a property not owned by the applicant. As noted in the proposal summary at 38 N.J.R. 4009, these provisions were intended to continue the repealed requirements with no change in meaning. Therefore the Department has modified N.J.A.C. 7:13-11.1(f)4 and (f)5 upon adoption to clarify that, if the applicant’s property lies on both sides of a regulated water, a 0.2 feet rise in water surface elevation is allowable. However, if an applicant’s property is located only on one side of a regulated water, the allowable increase in water surface elevation is limited to 0.1 feet.

910. COMMENT: We object to N.J.A.C. 7:13-11.1(f) that deals with regulated activities that create adverse impacts to a property not currently owned by an applicant. Unless an activity
meets the requirements for the activity, it shouldn’t be permitted. In addition, passing impacts to adjacent property even with permission or with a pending contract to purchase is contrary to the Water Pollution Control Act. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The intention of adopted new N.J.A.C. 7:13-11.1(f), which is continued from repealed N.J.A.C. 7:13-2.18(a), is to ensure that activities performed within the flood hazard area or riparian zone do not adversely affect properties not owned or controlled by the applicant. The Department will therefore not issue an individual permit for an activity that will cause adverse offsite impacts, as describe in this subsection.

N.J.A.C. 7:13-11.2 Requirements for stormwater management

911.COMMENT: The proposed rule is duplicative of the Department’s Stormwater Management regulations set forth at N.J.A.C. 7:8 and is likely to create confusion. Any stormwater management control measures should be adopted as part of the Department’s Stormwater Management rules to establish one single uniform set of regulations. Therefore, the Department should strike proposed section N.J.A.C. 7:13-11.2 from the proposed regulations. (7, 18, 33, 46, 53)

RESPONSE: N.J.A.C. 7:13-11.2 provides that for individual permits, the stormwater management rule requirements are triggered and cross-references N.J.A.C. 7:8 for the details of the standards. This section does not establish separate stormwater management design and performance standards; however, additional details are provided regarding design of stormwater facilities located within the flood hazard area consistent with the stormwater management rules at N.J.A.C. 7:8-5.6(a)5.

N.J.A.C. 7:13-11.2

912.COMMENT: We oppose the location of stormwater systems and outfalls, especially basins, within the flood hazard area and riparian zone. The use of BMPS, as outlined in the New Jersey
Stormwater Best Management Practices Manual must be followed and referenced in this section (10, 67)

RESPONSE: These adopted new regulations do not promote the placement of stormwater management basins and outfalls within the regulated area, but recognize that stormwater management structures may be proposed within the flood hazard area and the riparian zone and provide the requirements when such activities are proposed. N.J.A.C. 7:13-11.2 requires compliance with the stormwater management rules at N.J.A.C. 7:8, where the use of the New Jersey Stormwater Best Management Practices manual (BMP manual) to assist with demonstrating compliance is detailed. Therefore, since the stormwater management design and performance standards are not required under this new rule, the requirement for the use of the BMP manual is not appropriate in this section.

N.J.A.C. 7:13-11.2(a)

913. COMMENT: We object to the use of the Stormwater Rule’s definition for “major development” as the threshold for a flood hazard area permit for stormwater management activities at N.J.A.C. 7:13-11.2(a). Stormwater activities are not necessarily equivalent to flood hazard area issues. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Stormwater Management rules at N.J.A.C. 7:8, which contain the Department’s standards for the design and construction of acceptable stormwater practices, apply only to projects that are defined as a “major development” at N.J.A.C. 7:8-1.2. The Department does not believe it is appropriate to apply specific stormwater management practices to projects that are not defined as a major development under the Flood Hazard Area Control Act rules, since the primary purpose of this chapter is to prevent adverse impacts to flooding or the environment by controlling development within flood hazard areas and riparian zones. Note, however, that the requirements of this chapter apply to all regulated activities, independent of a project’s status as major development.
N.J.A.C. 7:13-11.2(c)4

914. COMMENT: The mandatory use of "mechanical devices to prevent flood water from backing up the pipe into the basin" is overly restrictive and contrary to good engineering design. Changing the sentence to read "may be" in place of "shall be" provides a better definition. (3)

RESPONSE: The requirement to use mechanical devices to prevent floodwaters from backing up into basins is intended to ensure the proper functionality of basins. The Department does not intend to create maintenance problems or require the design of systems that are contrary to good engineering. While the Department believes that such mechanical devices are appropriate in most cases, the Department acknowledges that cases exist where the use of such devices is not appropriate. N.J.A.C. 7:13-11.2(c)4 has therefore been clarified to require the use of such devices “where appropriate.”

N.J.A.C. 7:13-11.3 Requirements for excavation, fill and grading activities

N.J.A.C. 7:13-11.3(b)2

915. COMMENT: The Department should provide clarification as to what is meant by the use of the term “soil bioengineering.” (7, 18, 33, 46, 53)

RESPONSE: Under N.J.A.C. 7:13-1.2, the definition of “soil bioengineering” means the method of stabilizing eroded banks using vegetation, and sometimes in conjunction with other natural materials, as described at section 650.1601(d)(2) of Chapter 16 in the USDA Natural Resource Conservation Service Engineering Field Handbook, published December 1996.

916. COMMENT: This section should be revised to require stabilization measures only for slopes that exceed 2:1. A slope of 2:1 (horizontal to vertical) has been widely accepted for many years within the engineering industry as a stable slope without the need for stabilization measures, as evidenced by existing design standards such as AASHTO, and many State DOT design manuals.
This standard will result in the use of slopes greater than 2:1 which will lead to increased costs and greater environmental impacts. (15, 57)

RESPONSE: The Department modified the rule upon adoption to clarify that stabilization measures are required for slopes that exceed 2:1, in order to conform to these universally accepted engineering and design practices.

N.J.A.C. 7:13-11.3(b)4

917. COMMENT: Stream restoration projects should be included in the list of allowable projects where excavation below the water table is permitted. (66)

918. COMMENT: Proposed N.J.A.C. 7:13-11.3 requires the issuance of an individual permit for excavation, fill and/or grading activities in regulated areas. This proposed regulation would have a significant impact on mining operations. N.J.A.C. 7:13-11.3(b)4 requires that a permanently excavated area may not extend below the seasonal high water table unless the excavation is for a stormwater retention basin. That condition would effectively preclude the operation of many mining activities in New Jersey, such as sand dredging operations because they typically involve resources that are located below the seasonal high water table. This provision of the proposed regulations would eliminate the ability of many mining activities to continue operations in New Jersey, even if such mining activities are protective of the environment and do not adversely impact flooding. Due to the nature of their activities, most mining operations result in increased flood storage. Therefore, mining operations do not result in the hazards that the proposed regulations are intended to address. (40)

RESPONSE TO COMMENTS 917 AND 918: N.J.A.C. 7:13-11.3(b)4, which requires that permanent excavation not extend below the seasonal high water table, is derived from repealed N.J.A.C. 7:13-2.6(a)2, which broadly prohibited groundwater pollution and adverse effects on wells. The provision was proposed to be further broadened in order to prevent adverse effects on groundwater, in addition to pollution or effects on wells, such as continuous leaching of
groundwater onto the site after completion of the project. However, upon further consideration, the Department acknowledges that this provision will cause a number of unintended prohibitions on certain activities, such as mining in the flood hazard area, which may necessarily require excavation below the seasonal high water table, with no adverse impacts to flooding or the environment. The Department further acknowledges that many projects undertaken within a channel, such as the construction of a bridge or culvert, or undertaking channel stabilization work, often justifiably requires such excavation. Furthermore, other provisions are established within this chapter, which are intended to prevent adverse impacts due to excavation below the seasonal high water table, such as N.J.A.C. 7:13-10.4(r)3, which prevents such excavation for the creation of flood storage, and N.J.A.C. 7:13-11.15(e)6, which addresses sediment removal activities that could adversely affect such areas. The Department has concluded that these additional standards contained in the adopted new rules adequately preclude adverse impacts to groundwater resulting from permanent excavation, such as continuous leaching of groundwater after completion of a project, which N.J.A.C. 7:13-11.3(b)4 was intended to prevent.

Given the above, the Department believes that N.J.A.C. 7:13-11.3(b)4 is unintentionally broad, that the adverse impacts it was intended to prevent are adequately covered under other requirements of the chapter, and that its adoption would cause adverse impacts to the mining industry as well as preventing necessary projects within stream channels. Therefore, the Department has not adopted N.J.A.C. 7:13-11.3(b)4.

N.J.A.C. 7:13-11.4 Requirements for a structure

919. COMMENT: I do not support the construction of new structures, or the maintenance or expansion of existing structures in the flood hazard area or riparian zone. Exceptions need to be rare and based on historic and cultural (such as recreational) considerations and should be regulated through individual permits. (10, 67)

RESPONSE: The Department recognizes the need for proper controls of the development within the flood hazard area and the riparian zone. Accordingly, these new rules incorporate more stringent standards for development in flood hazard areas and the riparian zone, while
recognizing that development can occur in a manner that would be protective of both flood
hazard area and the riparian zone and the residents within the floodplain.
N.J.A.C. 7:13-11.4(a)

920. COMMENT: N.J.A.C. 7:13-11.4 should be revised to delete the phrase “regulated area” and
replace it with “flood hazard area.” The requirements are set forth to ensure the stability and
integrity of the structures when exposed to flood waters. Structures constructed in areas of the
riparian zone, when that zone is outside the bounds of the flood hazard area, should not be
subject to floodwaters and therefore should not need to meet these requirements. (42)

921. COMMENT: We do not agree with the Department’s proposal that this section applies to
any structure in “any regulated area”. Since the requirements are set forth to ensure the stability
and integrity of the structures when exposed to flood waters, we propose that “any regulated
areas”, be replaced with “flood hazard area”. Structures constructed in areas of the riparian zone
outside the bounds of the flood hazard area should not need to meet these requirements. (22)

RESPONSE TO COMMENTS 921 AND 922:
N.J.A.C. 7:13-11.4(b)1 requires that structures must resist impact from water and debris during
the flood hazard area design flood. Similarly, N.J.A.C. 7:13-11.4(b)2 requires that structures
must resist uplift, flotation, collapse and displacement due to hydrostatic and hydrodynamic
forces resulting from the flood hazard area design flood. Furthermore, N.J.A.C. 7:13-11.4(b)4
requires that if the structure is located in or adjacent to a channel, it must resist undermining
caused by channel erosion. These are important requirements that ensure the safety of structures
constructed within flood hazard areas and in close proximity to channels.

The Department acknowledges that in some cases the riparian zone extends outside the flood
hazard area. If a structure is erected in a riparian zone outside a flood hazard area, the structure
will not be subject to hydrostatic, hydrodynamic and erosional forces. In such cases, the
requirements of N.J.A.C. 7:13-11.4(b)1, 2 and 4 do not apply. However, N.J.A.C. 7:13-11.4(b)3,
which requires that structures resist overturning and sliding pressure, as well as pressure from the
freeze/thaw cycle of the soil, is an important requirement for structures within both flood hazard
areas and riparian zones, since such forces are present in both areas. Since the standards of N.J.A.C. 7:13-11.4(b) can therefore apply to structures within the flood hazard area and/or the riparian zone, it is appropriate that N.J.A.C. 7:13-11.4 apply to structures in any “regulated area.”

N.J.A.C. 7:13-11.4(b)4

922. COMMENT: This section is too vague. The Department should provide details as to the design standard and flood frequency. Please reference an industry standard, such as HEC-18 (FHWA). (15, 57)

RESPONSE: The Department did not cite specific industry standards and allows the applicant and the design engineer to select the appropriate industry standard, provided that at the time of application, information to support the selected methodology is submitted to the Department.

N.J.A.C. 7:13-11.5 Requirements for a building

923. COMMENT: We recommend including reference to the no net-fill provisions found at N.J.A.C. 7:13-10.4 in N.J.A.C. 7:13-11.5. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The design and construction standards in this chapter are intended to be applied cumulatively to a project, and so it is unnecessary to repeat standards from one section in another. For example, adopted new N.J.A.C. 7:13-11.6(b) requires railroads and roadways to be constructed at least one foot above the flood hazard area design flood elevation; however, any proposed railroad or roadway must also demonstrate compliance with all applicable standards in the rules such as N.J.A.C. 7:13-10.2, Requirements for a regulated activity in a riparian zone, and N.J.A.C. 7:13-11.1, Requirements that apply to all regulated activities, as well as the net fill requirements at N.J.A.C. 7:13-10.4.
924. COMMENT: The proposal should not be applicable to public utility or electric generating facilities or structures. Without waiving the foregoing, if the Department adopts the proposal, then this section should not apply to public utilities or to electric generation stations. Simply put, utility and power generation facilities are essential. There are substantial cost impacts on utility or power facilities that may have to be considered if a project needs to comply with the requirements of this section. In addition, very often there are very significant physical limitations where equipment can be constructed that must be considered. These regulations will compound issues in supporting power generation and utility infrastructure. Accordingly, the following language should be added: This section does not apply to any building that is constructed or reconstructed by a public utility or an electric generating station.” (22)

RESPONSE: The Department recognizes the value of public utilities and power generating facilities. However, the construction of a structure within a flood hazard area or riparian zone, regardless of its benefits, may result in adverse impacts to flooding and the health of the receiving water, which must be addressed as part of an application. In cases of unique and undue hardship, the applicant has the option at adopted new N.J.A.C. 7:13-9.8 to demonstrate that the particular project complies with the requirements for a hardship exception under an individual permit.

N.J.A.C. 7:13-11.5(c)

925. COMMENT: Construction of a building should not be allowed within 25 feet from top of bank and instead a minimum of 75 feet should be required. (56)

926. COMMENT: N.J.A.C. 7:13-11.5(c)1, which allows construction of a new building if it is located only 25 feet from the top of bank or edge of water, should not be adopted. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 925 AND 926: N.J.A.C. 7:13-11.5(c) requires any new building or expansion of a new building to be located a minimum of 25 feet away from the top or bank or
edge of water. The Department believes that the requirements for structures to be a minimum of 25 feet away from the top of bank, in addition to other requirements within the adopted new rules, such as prohibitions on structures in floodways, and limitations of flood storage displacement and riparian zone disturbance, will cause many buildings to be located more than 25 feet from the top of bank. However, in cases where all other requirements of this chapter are met, the Department believes it is appropriate to allow a new building to be constructed near a channel, provided it is at least 25 feet away, so that future channel migration or erosion does not affect the building.

N.J.A.C. 7:13-11.5(m), (n) and (o)

927.COMMENT: The proposed new rules call for deed restrictions to make it clear to future owners that the portion of the structure that is below base flood elevation cannot be converted to habitable space. We support the use of a deed restriction and other measures to ensure that compliance with the flood resistant construction requirements is maintained. (14)

RESPONSE: The Department acknowledges this comment in support of deed restrictions.

N.J.A.C. 7:13-11.5(o)

928.COMMENT: Please explain the rationale for the 25 percent permanent opening requirement for enclosures greater than six feet in height. We are concerned that owners will close the opening and have no way to equalize water pressure. Enforcement of deed restrictions on space occupation must be done by the zoning officer. (27, 49)

929.COMMENT: The New Jersey Uniform Construction Code (UCC), N.J.A.C. 5:23, contains requirements for construction in flood hazard areas. Under the UCC, the flood resistant construction requirements of the International Building Code and the International Residential Code are utilized. These requirements mirror those of the Federal Emergency Management Agency (FEMA) Flood Plain Management Regulations (44 CFR 60.). Both national model codes
reference standards developed by the American Society of Civil Engineers (ASCE): ASCE 7, “Minimum Design Loads for Buildings and Other Structures,” and ASCE 24, “Flood Resistant Design and Construction.” These standards represent a national consensus on what measures are reasonable and necessary to prevent structural damage due to flooding.

The key difference between the requirements of the UCC, the referenced national model codes and Federal regulations, and the rules proposed by the Department of Environmental Protection (DEP), is that the Department proposed new rules require openings of at least 25 percent of the surface area of the outer wall, much more than the UCC and the FEMA rules, which require one square inch of opening for every square foot of enclosed area.

The proposed rule’s summary statements indicate that this great increase in the size of the required openings is due to homeowners illegally finishing this space, converting it to habitable space, which creates flood hazards. Hence, this proposed change addresses an enforcement problem (illegal conversion to habitable space) by creating huge openings in foundation walls. The requirement for openings of 25 percent of each exterior basement wall is without any justification or basis, and in fact would lead to designs that are not structurally sound. We cannot support imposing a requirement for foundation wall openings that has no basis in engineering or science.

The proposed rule summary also states that the existing UCC and FEMA requirements “focus mainly on the safe construction of buildings in flood prone areas, and do not go into great detail regarding the impacts that such construction may cause to other properties.” This is not correct with regard to the requirements for openings in foundations. The openings provided for in the UCC and FEMA requirements allow flood waters to flow through the basement or other portion of the structure that is below base flood elevation, thus protecting the structural integrity of the foundation and preventing the displacement of floodwater that might adversely affect properties downstream from the site. The placement of restrictions on construction in a flood plain is properly under the jurisdiction of DEP, but not construction techniques for buildings that are permitted in the flood plain. A valid reason for deviating from the national consensus standards on foundation wall design has not been offered in the proposed new rules. (14)
RESPONSE TO COMMENT 928 AND 929: Applicants will often propose to elevate a structure to comply with the requirement at N.J.A.C. 7:13-11.5(k) that the first floor of a building be above the flood hazard area design flood elevation. This is necessary to prevent habitation below the design flood elevation, as well as to ensure that enclosed areas displace minimal flood storage volume. However, it is the Department’s experience that such areas required to be left open for the passage of floodwaters are often enclosed by the owner when the ceiling is sufficiently high to accommodate habitation despite the permit requirements and assurances at the time of application. This creates the unsafe condition of a habitable living space below the flood hazard elevation, with increased hydrostatic pressure during a flood than was reviewed and approved by the Department, as well as unaccounted losses of flood storage volume. These conditions create unsafe conditions not only for the property owner, but also adjacent homeowners and structures.

In many cases, an applicant will propose to construct a crawl space below the lowest finished floor of a building, in order to satisfy the above requirements. However, in order to prevent habitation of the crawl space, the vertical distance from the crawl space floor to the finished elevation of the first floor of the building must be six feet or less, as required at N.J.A.C. 7:13-11.5(m). If this distance is greater than six feet, the area beneath the finished first floor is not considered a crawl space. Nevertheless, the Department recognizes that some buildings may need to be elevated by more than six feet in order to meet the lowest floor requirements of this section and, therefore, cannot have a crawl space that meets the requirements of N.J.A.C. 7:13-11.5(m). N.J.A.C. 7:13-11.5(o), therefore, provides minimum requirements for a building with an enclosed area below the lowest floor that does not meet the requirements for a crawl space or garage. These limits are similar to those for crawl spaces and garages, and are intended to ensure that the area will not be used for habitation and will be permanently open to the flow of floodwaters. The requirement that at least 25 percent of the external wall be left permanently open will prevent the area from being enclosed and inhabited, and will allow floodwaters to freely enter the building to balance hydrostatic pressure during a flood. The requirements for the size and shape of the permanent openings are different than the requirements for flood vents for a crawl space or garage because flood vents are much smaller and are intended for areas which
may be heated and/or accessed more frequently. The open area described under this section, however, necessarily prevents any such use.

The Department does not agree that requiring at least 25 percent of the external wall be left permanently open will lead to designs that are structurally unsound. N.J.A.C. 7:13-11.5(o) does not specify the precise size or location of these openings, except that at least one permanent opening in the outer wall must extend down to the floor elevation of the enclosed area, in order to allow floodwaters to enter and exit the building. The Department notes that many freestanding garages, for example, typically have external doors and windows that collectively approach or exceed the 25 percent requirement. Since such open areas constructed for doors and windows do not detract from the structural stability of the building, the Department concludes that requiring such openings would not present an unsafe condition. The Department does acknowledge that in some cases, architects or engineers may require that buildings constructed with 25 percent open areas may require additional structural support. The Department does not believe that this would be cost prohibitive. Furthermore, it is the Department’s experience that deed restrictions or other such written requirements placed on the use of a building do not guarantee that the restriction will be followed or even that future owners of the building may be fully aware of the requirements.

In light of the extreme importance of preventing unauthorized uses of enclosed areas below the flood hazard area design flood elevation, and the many abuses the Department has witnessed regarding the unauthorized conversion of enclosed areas below the design flood elevation into unsafe habitable areas, the Department believes that the requirements at N.J.A.C. 7:13-11.5(o) are appropriate and necessary.

The Department notes that the new rules are not intended to supersede the requirements in the Uniform Construction Code and associated requirements, including those structural requirements for the stability for structures in the flood hazard area. Buildings constructed in flood hazard areas and riparian zones must satisfy all Federal, State and local requirements, including the Uniform Construction Code, as well as the requirements of this chapter. Should a local construction official determine that the requirements of N.J.A.C. 7:13-11.5(o) cannot safely be met for a given building, or would cause an unsafe condition at a given site, an applicant will need to explore other options that result in compliance with all applicable laws and ordinances.
N.J.A.C. 7:13-11.5(p)

930. COMMENT: The proposed rule specifies that flood vents should be not more than one foot above the floor. This requirement is already contained in the New Jersey Uniform Construction Code, N.J.A.C. 5:23, which is the proper location for construction requirements and not N.J.A.C. 7:13. (14)

RESPONSE: The Department acknowledges that requirements for flood vents, as well as other standards related to the construction of buildings in flood hazard areas, are contained in the New Jersey Uniform Construction Code. It is the Department’s experience, however, that builders often apply for a flood hazard area permit prior to obtaining local building permits. Given the importance of proper flood venting to relieve hydrostatic pressure and thereby protect the integrity of the building during a flood, the Department believes that it is appropriate to repeat flood venting standards in this chapter. The Department also recognizes that the Uniform Construction Code may have additional requirements for flood vents than what is stated at N.J.A.C. 7:13-11.5(p). Thus the provision has been modified on adoption to require that a flood vent constructed in the outer wall of a building shall meet the requirements of N.J.A.C. 7:13-11.5(p) “unless otherwise required under the New Jersey Uniform Construction Code at N.J.A.C. 5:23.”

N.J.A.C. 7:13-11.6 Requirements for a railroad, roadway or parking area

N.J.A.C. 7:13-11.6(b)2

931. COMMENT: The proposed requirement to construct roadways and parking areas at least one foot above the flood hazard area design flood elevation will severely limit development and redevelopment opportunities throughout the State. (7, 18, 33, 46, 53)
RESPONSE: N.J.A.C. 7:13-11.6(b) requires a railroad or public roadway to be elevated one foot above the flood hazard area design flood elevation where feasible. These requirements will improve public safety by ensuring that as many public roadways as possible will be elevated above flood levels. The Department recognizes that there are cases where certain physical or economic limitations prevent the elevation of some public roadways above this elevation. However, since public safety is at stake, every reasonable effort should be made to elevate public roadways wherever feasible. Note that N.J.A.C. 7:13-11.6(g) sets forth a procedure by which an applicant can demonstrate that the elevation of roadways and parking areas is not feasible.

N.J.A.C. 7:13-11.6(f)

932. COMMENT: Proposed N.J.A.C. 7:13-11.6(f) provides that the Department will issue an individual permit to construct or reconstruct private roadways or parking areas in flood hazard areas only if certain criteria are satisfied. Proposed N.J.A.C. 7:13-11.6(f) would have a broad impact on mining operations in flood hazard areas. Mining operations require the use of machinery and trucks to remove materials and frequent creation of new private roads onsite as new areas of the mine are utilized. Mining operations are unique in that they enhance flood storage as, for example, sand and gravel resources are extracted from the subsurface. For an industry where operations enhance flood storage, it would be an unnecessary burden to have to seek an exemption from the 1 foot road surface elevation requirement. Therefore, mining operations should be exempt from the proposed regulation. (40)

RESPONSE: The purpose of elevating roadways and parking areas at least one foot above the flood hazard area design elevation is to reduce the hazard to the vehicle occupants during a flood event and is not related to flood storage volume. The applicant has the option to demonstrate to the Department that a particular project, such as a mining operation, meets all the requirements of N.J.A.C. 7:13-11.6(f) and as a result, does not need to fully comply with the roadway elevation standards. N.J.A.C. 7:13-11.6(f) includes, but is not limited to, requirements for assessing risk to persons using the roadway and providing signage to indicate areas subject to flooding. It should also be noted that the requirements of N.J.A.C. 7:13-11.6 apply to the
construction new roadways and parking areas, and do not in any way affect the use of lawfully existing roads and parking areas. Accordingly, the Department does not believe it is appropriate to exempt mining operations from the requirements of this section.

N.J.A.C. 7:13-11.6(g)

933. COMMENT: The proposed rule offers some latitude where compliance may result in “prohibitively high construction costs” or where costs are disproportionate to the benefits obtained. Similar sensitivity to economic impacts is not evident elsewhere in the proposed new rules. The Department is encouraged, throughout the proposed new rules, to provide flexibility to mitigate the severe negative economic impacts that the proposed new rules may have, particularly as the proposal affects the availability and affordability of housing. (7, 18, 33, 46, 53)

RESPONSE: The Department recognizes that project costs may impact compliance in situations other than those specified in adopted new N.J.A.C. 7:13-11.6(g). N.J.A.C. 7:13-9.8 (a)2 and (c)4 therefore provides the applicant the flexibility to demonstrate to the Department that the cost the compliance is prohibitively high as part of a hardship exception for standards other than those at adopted new N.J.A.C. 7:13-11.6(g).

934. COMMENT: The proposed new rules do not provide any objective standard to quantify what constitutes “prohibitively high construction costs.” Such cost can be quantified; it is recommended that a benchmark of a five (5 percent) percent increase in construction costs be used to define “prohibitively high construction costs.” (7, 18, 33, 46, 53)

RESPONSE: Since project costs differ greatly, and the limit at which a percentage of costs will be prohibitive for projects will also vary, the Department did not set a specific numerical value on this standard. The Department will evaluate “prohibitively high construction costs” at adopted new N.J.A.C. 7:13-11.6(g) based on whether or not the cost of compliance would result in rendering the project infeasible.
N.J.A.C. 7:13-11.7 Requirements for a bridge or culvert

N.J.A.C. 7:13-11.7(b)1

935. COMMENT: Please reference the appropriate industry standards for the construction of bridges and culverts, as set forth by the U.S. Department of Transportation Federal Highway Administration, such as HEC-18 (for evaluating scour at bridges), HEC-20 (for determining stream stability at highway structures), and HEC-23 (for designing bridge scour and stream instability countermeasures). (15, 57)

RESPONSE: The adopted new Flood Hazard Area Control Act rules prescribe the standards with which the applicant has to demonstrate compliance, but do not specify the methodologies to be utilized. For example, N.J.A.C. 7:13-11.7(b)1 requires that bridges remain stable and scour resistant, but does not specify that a given Federal Highway Administration publication be utilized to make this determination. This is appropriate, since accepted methodologies improve over time, and new methodologies are constantly being developed. Therefore, the design engineer is encouraged to select the most appropriate available methodology for the project being designed. In cases where a particular methodology being utilized is unfamiliar to Department staff, the Department may request that supporting documentation be submitted to demonstrate that the chosen method is appropriate.

936. COMMENT: The requirements of this section appear to conflict with existing “recommendations” from NJDEP Fish and Wildlife where the use of rip-rap for stabilization around bridge and culvert abutments is often not accepted. (55)

RESPONSE: The Department encourages all in-channel construction activities to provide low-flow aquatic passage and to be sensitive to adverse impacts on aquatic biota. However, the Department also acknowledges that bridges and culverts can be subject to scour, which can threaten public safety, health and general welfare. As such, N.J.A.C. 7:13-11.7(b)1 requires that
a bridge or culvert be designed to remain stable and resist displacement or damage during certain flood events which may, in some cases, require in-channel armoring to accomplish. In addition, N.J.A.C. 7:13-10.1(b)5 requires that if stabilization measures such as rip-rap or scour holes are proposed in a channel, the applicant must demonstrate that such measures are necessary to stabilize the channel and/or to withstand scour along a bridge or culvert, and cannot be avoided through alternative designs, such as construction of deeper abutment footings or a larger bridge opening. Furthermore, any proposed rip-rap shall be embedded in the channel bed in such a way as to provide low-flow aquatic passage and withstand velocities associated with bank-full flows. The Department believes that these requirements will ensure that rip-rap in the channel be used only as necessary and that it will not impede low-flow aquatic passage.

N.J.A.C. 7:13-11.7(b)2

937.COMMENT: We support the concept of parallel culverts to improve transport of higher flows. The Department should refer to Maryland State Highway Administration standards that require the parallel culverts to have a higher invert than the primary structure in order to ensure that only higher flows utilize the parallel culverts. (66)

RESPONSE: The Department acknowledges the commenter’s support. N.J.A.C. 7:13-11.7(k)2 specifies that one culvert must be sized to match the capacity of the channel and additional culverts shall be designed to convey flood events that exceed the channel’s capacity. Consequently, any additional culverts beyond the one required to convey the channel capacity must be higher in order to capture only those flows above the existing channel capacity, as depicted in the Flood Hazard Area Technical Manual. Therefore, there is no need to refer to the Maryland State Highway Administration standards to ensure that the parallel culverts have a higher invert than the primary structure. However, the Department does not object to the use of helpful design material form other jurisdictions, provided all the requirement of this chapter are satisfied.

N.J.A.C. 7:13-11.7(f)
938. COMMENT: Regarding the replacement of existing culverts, the use of culverts instead of three sided arches is prudent for pipes 6 feet in diameter or less. Replacing a small existing culvert with a bridge or three sided arch is more expensive than using a pipe. In addition, construction of footings required for a three sided arch or bridge would disturb the entire channel. For small culverts the footings will occupy most, or all of, the channel, effectively making it a concrete bottom. Finally, the bridge or pipe arch can not be installed as quickly as a pipe, thereby requiring more time working in the stream. This section should be modified to say that for small culverts (6 feet wide or less) the use of a pipe to replace an existing pipe is acceptable. (3)

RESPONSE: The new rules provide a hierarchy for the selection of structures to cross a stream, from the lowest to the greatest impact. The Department recognizes that there may be occasions, such as those described by the commenter, where differences in the impact of a bridge, arch or three-sided culvert versus a standard culvert in the stream channel are negligible, and the cost of a standard culvert is significantly less. Such information may be sufficient to demonstrate to the Department that the use of a bridge, arch or three-sided culvert versus a standard culvert is not feasible at adopted new N.J.A.C. 7:13-11.7(f)2, (g)2, and (h)2. However, because of the positive benefits generally associated with the use of a bridge, arch or three-sided culvert as compared to a standard culvert, the use of a standard culvert should be the exception and not the normal practice.

N.J.A.C. 7:13-11.7(f) and (g)

939. COMMENT: Please clarify whether the requirement for a channel to be completely spanned with one bridge allows for multi-spanned structures, such as bridges with piers, multiple arches, etc. (9)

RESPONSE: The new rules do not preclude the use of multi-span structures where appropriate. However, N.J.A.C. 7:13-11.7 does require an applicant to assess the use of the structure with the
least impact to the stream prior to proceeding to a structure with a greater impact. While the use of multi-spanned bridges is allowable, under N.J.A.C. 7:13-11.7(f) and (g), the applicant must first demonstrate whether or not a single span bridge is feasible under adopted new N.J.A.C. 7:13-11.7(i) before moving to additional spans.

N.J.A.C. 7:13-11.7(f)1, (g)1 and (h)1

940. COMMENT: Structures should span the floodway, rather than just the channel, in order to permit passage of higher flows. A natural bottom substrate should be required under the bridge or culvert for trout production and trout maintenance waters. (66)

RESPONSE: N.J.A.C. 7:13-11.7(f)1, (g)1, and (h)1 refer to N.J.A.C. 7:13-11.7(i) as the first option that must be attempted when constructing or reconstructing a bridge or culvert. N.J.A.C. 7:13-11.7(i) requires the span to be sized to pass the full flood hazard area design flood, which is the maximum flow regulated under these new rules as opposed to the lower flow located within the floodway limits. The applicant may only reduce the flow capacity under N.J.A.C. 7:13-11.7(f)2, (g)2 and (h)2 if the first option is not feasible. Where armoring is necessary for scour protection or a circular or elliptical culvert is proposed, the armoring/culvert is required to be submerged below two feet of native substrate pursuant to N.J.A.C. 7:13-11.7(i)3, (j)3 and (k)5. Finally, the requirement for the backfill of native substrate is not limited to trout production and trout associated waters, but is required for all regulated waters.

N.J.A.C. 7:13-11.7(f)2, (g)2 and (h)2

941. COMMENT: The Department proposed use of the term “excessive costs” in each of these proposed subsections of the rules. Previously in proposed N.J.A.C. 7:13-11.6(g) the Department proposed use of the term “prohibitively high construction costs.” One single phrase should be utilized for consistency. The term “excessive costs” should be replaced with “prohibitively high construction costs” used in N.J.A.C. 7:13-11.6(g)1. (7, 18, 33, 46, 53)
RESPONSE: The Department agrees that there is no substantive difference between the term “excessive costs” as used in N.J.A.C. 7:13-11.7 and the term “prohibitively high construction costs” used at N.J.A.C. 7:13-11.6. Therefore the Department has changed the rule upon adoption to utilize the term “prohibitively high construction costs” at adopted new N.J.A.C. 7:13-11.7(f)2, (g)2, and (h)2.

N.J.A.C. 7:13-11.7(i)3 and (j)4

942.COMMENT: We support the Department requiring the use of native substrate above channel armoring. (66)

RESPONSE: The Department acknowledges this comment in support of requiring the use of native substrate above channel armoring.

943.COMMENT: The design of armor to prevent scour should be left up to the design engineer. The requirement that armoring be buried beneath 2 feet of native substrate is overly restrictive, and may interfere with good design. (3)

944.COMMENT: Reference is made to covering rip-rap stone (by embedding the stone several feet) with native soil materials. We believe that if rip-rap stone is specified, it is because there are strong erosive forces present that “native” materials will not withstand. Rip-rap will resist scouring. Burying the rip-rap will only allow the native materials to be eroded away until the non-scouring layer of rip-rap is exposed. We believe that this requirement is problematic and should be removed from the rules. (55)

RESPONSE TO COMMENTS 943 AND 944: It is not the Department’s intention to require unstable construction practices within a channel. While the Department believes that, in many cases, burying armoring beneath 2 feet of substrate in the channel will help restore the channel to pre-construction conditions and provide low-flow aquatic passage, the Department also acknowledges that some channel configurations may not support such a design. As such, the
Department has modified the rule upon adoption at N.J.A.C. 7:13-11.7(i)3, (j)4, (k)3 and (l)1i to clarify that armoring shall be buried beneath at least two feet of native substrate only “where feasible.”

N.J.A.C. 7:13-11.7(i) through (l)

945. COMMENT: The artificial placement of “natural” soil material inside a culvert is not necessary, as the deposition of material will occur naturally, assuming channel hydraulics and soil conditions are appropriate. (55)

RESPONSE: It is the Department’s experience that, when areas inside a bridge or culvert are not backfilled with native, stable material upon completion of the structure, the natural accretion of streambed material can sometimes require an extended period of time. During this time, low-flow aquatic passage is unduly impeded. Therefore, the Department believes that it is appropriate to require applicants to properly backfill and stabilize a natural streambed through the bridge or culvert.

N.J.A.C. 7:13-11.7(m)1

946. COMMENT: The proposed rule should be completely reworded to clarify the intent and scope of the rule. The proposed standard (i.e., demonstration that the cost of compliance greatly outweighs the environmental benefit that would be achieved) lacks any meaningful objective standard to guide applicants and the Department. The Department should not include such a standard in the proposed rule. (7, 18, 33, 46, 53)

RESPONSE: The "cost of compliance" refers not only to economic cost to the applicant but also real or potential adverse impacts to the environment, flooding or public safety. This standard allows the applicant the ability to demonstrate that the project is more critical for the public health, welfare and safety than compliance with a particular standard. For example, where a culvert is proposed due to an extremely unstable channel that cannot safely be spanned by a
bridge without risking public safety, this demonstration would be satisfied. The Department believes that this standard provides guidance to those interested in this provision while providing a regulatory framework that will allow appropriate decision making on a case by case basis.

N.J.A.C. 7:13-11.9 Requirements for a utility line

947. COMMENT: Proposed N.J.A.C. 7:13-11.9 for linear development infrastructure serves no meaningful environmental purpose and should be deleted from this chapter. (22, 36, 42)

RESPONSE: Due to the adverse impacts to flooding and/or the environment that improperly constructed utility lines can cause, the Department does not believe that it is appropriate to exempt public utilities from the requirements of this chapter. The requirements at N.J.A.C. 7:13-11.9 provide a hierarchy to demonstrate that a less disruptive method for installing a utility line is not feasible before proceeding with a construction method that would result in greater adverse impact to the environment. This section also has requirements including, but not limited to, minimization of impacts, restoration of disturbed areas, measures to prevent leakage or future exposure in pipes containing liquids and gasses, and requirements to prevent changes to the channel and the floodplain that may result in additional flooding. The implementation of the regulations at N.J.A.C. 7:13-11.9 is consistent with the Department’s goals of preventing increases in the frequency and intensity of flooding and protecting the ecological function provided by a healthy riparian zone. The Department recognizes the value of public utilities and power generating facilities. However, construction within the regulated area, regardless of its benefits, may result in adverse impacts to flooding and the health of the receiving water, and must be addressed by all projects, including linear development of public utilities.

N.J.A.C. 7:13-11.11 Requirements for a dam or a low dam

948. COMMENT: Any new flood studies or delineations undertaken as part of this new permit process should also be required to account for potential dam breach inundation scenarios. (33)
RESPONSE: The Department’s Dam Safety Standards at N.J.A.C. 7:20 regulate the construction and potential flood hazards of dams. Therefore, the Department does not believe it is necessary to require a dam breach analysis as part of a construction permit under N.J.A.C. 7:13.

N.J.A.C. 7:13-11.12 Requirements for a flood control project

949. COMMENT: What activities are permitted under a "flood control project"? Does this mean that other individual permits are not needed for basins, channel modifications, outfalls, etc.? Please clarify. (15, 57)

RESPONSE: The requirement at N.J.A.C. 7:13-11.12 provides design and construction standards that apply for flood control projects, but does not set limitations on what constitutes a flood control project. “Flood control project” is defined at N.J.A.C. 7:13-1.2 as “a structural or topographic modification to a channel, flood hazard area and/or riparian zone, performed for the public benefit and undertaken by a public entity, which is designed primarily to reduce flood elevations, reduce the risk of damage from flooding and/or protect an area from flooding or flood damage.”

N.J.A.C. 7:13-11.12 recognizes that flood control projects may require the piping or armoring of a stream at N.J.A.C. 7:13-11.12(d). However, this subsection requires that all other avenues first be explored and utilized including, but not limited to, elevating habitable structures, revising existing ordinances, creating bypass areas, and constructing regional stormwater management basins. Any activities regulated under this section must also demonstrate compliance with all other applicable requirements of these adopted new rules unless such activity has been specifically exempted from a particular standard. For example if, as part of a proposed flood control project, a stormwater outfall structure is proposed, compliance with N.J.A.C. 7:13-11.10 must be demonstrated in order to obtain the individual permit for the flood control project. If activity is proposed in the riparian zone, compliance with N.J.A.C. 7:13-10.2 must also be demonstrated. However, under N.J.A.C. 7:13-10.4(d)6, a flood control project is specifically exempted from compliance with the flood storage displacement provisions provided that the applicant demonstrates that the displacement is minimized. Compliance with the
individual permit standards must be demonstrated for each individual permit triggered by the proposed project. However, the Department will issue a single individual permit to cover an entire project in appropriate cases.

950. COMMENT: The rules lack detailed requirements for flood control projects. The cost/benefit analysis (does it include all costs for all agencies and local partners?), the environmental studies (long term and cumulative impacts, secondary impacts), stakeholder impacts (upstream and downstream effects, health and safety impacts), the stated goal of the project (reduce flooding or reduce flood damages?), alternatives study (were all alternatives, including off-site and multi-site, non-structural and preventive studied?) accurate data (flood elevations, current cross-section information, causes of flooding), extent of reduction of flood impacts (how far and how much?), and the hydrologic and hydraulic effects (impacts to natural flow regime and to balance of hydrologic regime) are among the key issues that are typically not adequately assessed. (10, 67)

RESPONSE: The Department recognizes that flood control projects vary greatly, are often complex and often include significant changes to the hydrology and hydraulics of a channel. Any entity interested in doing a flood control project should work closely with the Department beginning early in the planning stages to ensure consistency with the regulatory requirements that will be imposed upon that project. The amount and details of supporting documentation associated with the project will depend upon the proposed flood control project submitted by the applicant. Every project must indicate the specific goal, whether to reduce flooding for the flood hazard design storm events, more frequent flood events or a combination under N.J.A.C. 7:13-11.12(b)6.

N.J.A.C. 7:13-11.12(c) indicates that portions of flood projects that result in disturbance to a channel and/or riparian zone may only occur if the there is no feasible alternative project located outside the channel and riparian zone that would satisfactorily reduce flooding. These cost/benefit analysis should include all the costs incurred for the design, permitting, and construction of the projects as well as non-monetary costs such as environmental impacts and impacts to personal property. The alternatives analysis should include the monetary and non-
monetary costs for each alternative evaluated, a “no action” alternative, as well as the rationale for the flood control option selected. N.J.A.C. 7:13-11.12(b)3 has therefore been clarified to require that the cost/benefit analysis must include a comparison of any adverse environmental impacts that may be caused by the project with the benefits for flood relief for each investigated alternative. If any significant changes are proposed in cross-sectional area or hydraulic capacity of a channel or floodway, the applicant must provide hydrologic and/or hydraulic calculations that prevent impacts to flooding under N.J.A.C. 7:13-11.1(g) or evaluate and address impacts to properties not owned by the applicant under N.J.A.C. 7:13-11.1(f).

N.J.A.C. 7:13-11.12(c)

951. COMMENT: The wording "no feasible alternative" should be revised to "no cost effective alternative". Flood control projects are often driven by the cost/benefit ratio, and this should be reflected in the flood hazard area rules. (3)

RESPONSE: The Department believes that changing the language at N.J.A.C. 7:13-11.12 from “no feasible alternative” to “no cost effective alternative” is overly restrictive. The Department recognizes that there may be factors other than cost that may indicate that the only feasible alternative for a flood control project includes the disturbance of a channel or a riparian zone.

N.J.A.C. 7:13-11.13 Requirements for a retaining wall or bulkhead

952. COMMENT: This section appears inconsistent. N.J.A.C. 7:13-11.13(b) requires a stability analysis by an engineer, whereas 11.13(c) requires that it is "designed to be stable." How will the Department know it is designed to be stable unless a stability analysis prepared by an engineer is provided? Please clarify. (15, 57)

RESPONSE: N.J.A.C. 7:13-11.13(b) applies to retaining walls and bulkheads in fluvial flood hazard areas, where the channel flow can undermine retaining walls and bulkheads, resulting in erosion, obstructions to flows and possible damage to offsite property. Therefore, the
Department requires signed and sealed stability calculations to be submitted for retaining walls and bulkheads in fluvial flood hazard areas. The Department recognizes that stability computations need to be performed by the design engineer to certify the stability of structures. However, in tidal areas, retaining walls and bulkheads are not subject to the same type of erosive and undermining forces as retaining walls and bulkheads in fluvial areas. It is the Department’s experience that submission of a stability certification without the associated calculations is sufficient.

N.J.A.C. 7:13-11.14 Requirements for bank stabilization

953.COMMENT: Please expand this section to include a wider variety of stream restoration projects, including modifying the pattern and profile of the stream, along with traditional and non-traditional methods of bank stabilization. (66)

RESPONSE: As proposed, N.J.A.C. 7:13-11.14 sets forth requirements for the issuance of an individual permit for “bank stabilization” projects. As discussed in the proposal summary at 38 N.J.R. 4019, the Department intends N.J.A.C. 7:13-11.14 to apply to a wide range of stabilization and restorative activities, which are necessary to preserve channel integrity and restore or improve ecological health. The Department has approved, funded and monitored numerous stabilization and restoration projects with great success.

Stream channels are dynamic, complex systems, which include not only the active channel but also the flood hazard area and surrounding riparian zone. A natural stream system remains stable while transporting a wide range of flows and sediment produced in its watershed, maintaining a state of dynamic equilibrium. When changes to the channel, flood hazard area, vegetation, flow or sediment supply significantly affect this equilibrium, the stream may become unstable and start adjusting toward a new equilibrium state. This transition may take a long time and cause adverse impacts to water quality, near-stream vegetation, habitat and adjacent property and structures. Comprehensive restoration projects re-establish the general structure, function and self-sustaining behavior of the stream system that existed prior to destabilization. It is a process that requires an understanding of the physical and biological components of the stream.
system and its watershed. Restoration includes a broad range of measures, including the removal of the watershed disturbances that are causing stream instability; installation of structures and planting of vegetation to protect stream banks and provide habitat; and the reshaping or replacement of unstable stream reaches into appropriately designed functional streams and associated floodplains.

Given the far-reaching environmental and flood control benefits of restoration projects, the Department intends to encourage their implementation under the adopted new rules. It is furthermore the Department’s experience that properly designed and constructed restoration projects serve to greatly reduce erosion and flooding, improve water quality and increase riparian zone habitat. In order to clarify the Department’s intention for proposing the requirements of N.J.A.C. 7:13-11.14, a number of amendments have been made to this section on adoption as described below.

The word “channel restoration” has been added to the title of the section, as well as at N.J.A.C. 7:13-11.14(a) and throughout the section. This is appropriate for a number of reasons. First, a “bank” is part of a “channel” as these terms are defined at N.J.A.C. 7:13-1.2. Properly stabilizing a bank therefore necessarily requires restorative work within the channel itself. All bank stabilization projects therefore constitute a type of channel restoration project. Second, all channel restoration projects necessarily involve the creation of a stable bank, which is part of the channel. “Bank stabilization” and “channel restoration” are thus overlapping and inseparable concepts, which require integrated and comprehensive design standards.

This is illustrated throughout proposed N.J.A.C. 7:13-11.14(c), which sets forth a hierarchy of preferred stabilization methods. Stabilization projects can vary from fixing localized erosional problems with vegetation, to the placement of soil bioengineering or other materials along the bank (and therefore within the channel), to lining or piping the channel itself. These provisions thus describe and set forth standards for projects that are not limited solely to “bank stabilization” but which can include reshaping and/or restoring the entire channel to a stable condition. Furthermore, proposed N.J.A.C. 7:13-11.14(b)2i specifically addresses situations which are “indicative of erosive forces that are likely to continue to wash away the natural channel,” and proposed N.J.A.C. 7:13-11.14(c)3 explains that “where nuisance flooding is a related issue, flood capacity outside the regulated water is increased by terracing the overbank
areas where appropriate, so that the channel is not forced to convey excessive flows.” Thus, throughout N.J.A.C. 7:13-11.14, standards are established to preserve and restore both banks and channels to a natural and stable condition.

Given the above, N.J.A.C. 7:13-11.14(b) is modified on adoption to clarify that, under this section, the Department shall approve “an individual permit to restore to a stable condition a bank or channel, which has become eroded, unstable and/or ecologically degraded” in certain cases. This is appropriate since channel instability can result from any number of causes, and can be undertaken for ecological as well as hydrodynamic reasons. The Department’s intentions in this matter are illustrated by the permit-by-rule at N.J.A.C. 7:13-7.2(a)7, which allows certain channel modifications for the placement of aquatic habitat enhancement devices. Additionally, general permit 2A at N.J.A.C. 7:13-8.4(c)1 authorizes certain channel modifications for “soil erosion control, bank stabilization and bank restoration projects” on agricultural lands. This reflects the Department’s intent to encourage such projects if there is an ecological benefit.

N.J.A.C. 7:13-11.14(b)1, which requires a “complete description of the existing problem onsite” in order to justify the project, has been modified on adoption to reverse N.J.A.C. 7:13-11.14(b)1i and ii for clarity, and also to require, at new N.J.A.C. 7:13-11.14(b)1ii that the applicant must disclose the “likely causes of any erosion, instability or ecological degradation” onsite. Minor clarifications are also made throughout N.J.A.C. 7:13-11.14(b)2 to indicate that, in addition to bank stabilization projects, activities that address channel instability and/or ecological degradation will be reviewed under this section as well. Proposed N.J.A.C. 7:13-11.14(b)2v, vi and vii, which address maintenance and monitoring requirements, have been recodified on adoption as N.J.A.C. 7:13-11.14(b)3 for further clarity.

N.J.A.C. 7:13-11.14(c) has been amended to refer to the same type of projects listed at amended N.J.A.C. 7:13-11.14(b). Furthermore, proposed N.J.A.C. 7:13-11.14(c)3 has been recodified as N.J.A.C. 7:13-11.14(d) for the following reasons. N.J.A.C. 7:13-11.14(c) sets forth a hierarchy of preferred methodologies for accomplishing bank stabilization and channel restoration projects. Proposed N.J.A.C. 7:13-11.14(c)3, however, noted that, if nuisance flooding is a related issue, flood capacity outside the channel should be increased by terracing the overbank areas so that the channel is not forced to convey excessive flows. Since this statement
is not directly related to the hierarchy of methodologies presented in N.J.A.C. 7:13-11.14(c), it is more appropriately located in its own subsection at N.J.A.C. 7:13-11.14(d).

The Department is also making related changes at Table C (proposed as Table B) under N.J.A.C. 7:13-10.2(d), which sets forth the maximum allowable area of riparian zone vegetation that can be disturbed for various projects, as well as at N.J.A.C. 7:13-10.2(i), which addresses riparian zone impacts for bank stabilization projects. Both Table C and the text at N.J.A.C. 7:13-10.2(i) have been amended to refer to both bank stabilization and channel restoration projects, in order to be consistent with the amendments to N.J.A.C. 7:13-11.14 described above.

The Department believes that these amendments will serve to clarify its original intent in proposing this section..

N.J.A.C. 7:13-11.14(b)1ii

954.COMMENT: Please clarify the extent and detail of the history required for this citation. (66)

RESPONSE: The intent of proposed N.J.A.C. 7:13-11.14(b)ii (recodified on adoption at N.J.A.C. 7:13-11.14(b)1i as noted in the response to comment 953 above), is to have the applicant assemble a history of the problem that is being addressed. By better understanding the historical causes of the erosion, instability or ecological degradation, the Department can more effectively evaluate whether the proposed solution will be successful. To this end, the applicant should discuss the history of the erosion, instability or ecological degradation, including the timeframe when the problems began onsite, the changing land use in the upstream drainage area and its impacts on the stream, dates when the problem was exacerbated including any specific storm events or construction activities associated with the acceleration of the problem, as well as the extent and efficacy of previous stabilization projects at or near the site. The compilation of this history is not intended to be an exhaustive analysis of every facet of the project site. Rather, it is simply helpful to understand what has occurred onsite in order to best decide how to proceed in the future.

N.J.A.C. 7:13-11.14(b)2v
955. COMMENT: We support the Department for requiring maintenance and monitoring of stabilization projects. The Department should develop an example maintenance and monitoring plan. (66)

RESPONSE: The Department acknowledges the commenter’s support. The Flood Hazard Area Technical Manual provides additional guidance regarding maintenance and monitoring of stabilization projects and includes an example maintenance and monitoring plan.

N.J.A.C. 7:13-11.14(c)1

956. COMMENT: We support the Department for requiring stream geomorphology experience when designing a bank stabilization project. The Department should develop a definition of such experience and specify the type of documentation to be provided. (66)

RESPONSE: The Department acknowledges the comment in support of this provision. The Department will require a resume from the designer including education, specific training taken in stream geomorphology and/or soil bioengineering, along with descriptions of bank stabilizations projects designed and constructed.

N.J.A.C. 7:13-11.15 Requirements for sediment and debris removal from a water

957. COMMENT: We again express concerns regarding potential impacts from debris removal and stream cleaning. (10, 67)

RESPONSE: The Department believes that conditions at N.J.A.C. 7:13-11.15 ill ensure that any such project will not adversely impact flooding or the environment. The Department intends to strictly apply the requirements of this section to all debris removal and stream cleaning projects that require an individual permit.
958. COMMENT: N.J.A.C. 7:13-11.15(f) allows sediment removed from a regulated water to be deposited in the regulated area if certain criteria are met, but N.J.A.C. 7:13-11.15(f)3 requires that sediment be deposited at least 25 feet from any top of bank or edge of water. Current flood hazard regulations make an exception to this 25 foot distance for watercourse cleaning projects approved by the Department. The Department should continue this exception. By allowing disposal within 25 feet of the stream bank, the disturbed area is limited to where the equipment is already working. Requiring the minimum 25 foot distance would result in more riparian area and vegetation to be disturbed. (29, 52)

RESPONSE: The rules prior to this adoption at N.J.A.C. 7:13-2.7(b)1 prohibited deposition of excavated material within 25 feet of a channel except for sediment removed from a stream. However, the Department has determined that this exception is not warranted. Adopted new N.J.A.C.7:13-11.14(f) which requires disposal at least 25 feet away from the top of the bank ensures that sediment is places sufficiently far from the channel so that it will not likely be carried back into the water.

959. COMMENT: Given that the Department has already set up different criteria in the rule for stream cleaning for mosquito control, the Department should create a general permit under this chapter for mosquito control activities similar to the Freshwater Wetlands GP15. The permit should be broadened like the GP15 to include other mosquito control activities such as creating a swale and removing a berm, and not be limited to removing sediment and debris from waters. The application fee should be adjusted to that of other general permits. (29)

RESPONSE: The Department recognizes the benefits of mosquito control activities and has provided specific language throughout this adopted new rule to allow additional flexibility to address mosquito issues, such as in N.J.A.C. 7:13-11.15(d). The construction of swales and berms in the regulated area will impact existing drainage patterns and may result in adverse impact to the receiving waters; therefore, these activities must be reviewed for possible hydrologic and hydraulic impacts that are beyond the scope of general permits.
960. COMMENT: If a general permit for mosquito control activities cannot be developed (as requested in comment 959 above), the individual permit for removal of sediment should allow for more than one site to be covered by an application and application fee. This would be consistent with a Freshwater Wetlands GP-15. (29)

RESPONSE: The Department recognizes that it may be more efficient for a public entity to receive one permit allowing for the removal of sediment at multiple sites. For this reason, N.J.A.C. 7:13-11.15 does not limit the permit for sediment removal to be applicable to only one site and a permit may be obtained for multiple sites. Accordingly, the Department does not believe any change is needed to this section.

961. COMMENT: The proposed new rules require an individual permit to remove trash and debris from water. At what scale of clean up is this necessary? This should not be required for small scale community stream clean-up projects. (50)

RESPONSE: A permit-by-rule is provided at N.J.A.C. 7:13-7.2(d)3 for removal of sediment adjacent to a bridge, culvert or discharge pipe. Similar activities are permitted-by-rule at N.J.A.C. 7:13-7.2(a)5 and (b)1, which allow removal of trash and other channel obstructions in certain cases. Furthermore, a general permit for stream cleaning is available at N.J.A.C. 7:13-8.3 for projects performed by the county, municipality or their designated agency. The individual permit at N.J.A.C. 7:13-11.15 is only required for stream cleaning projects beyond the scope of these permits-by-rule or general permit.

962. COMMENT: A provision should be included at N.J.A.C. 7:13-11.15(c)1 to permit removal of accumulated sediment as part of a comprehensive stream restoration project to improve ecological health and habitat value of the stream ecosystem. (66)

RESPONSE: The Department does not believe that it is necessary to list all of the projects that may benefit public health, welfare and safety under adopted new N.J.A.C. 7:13-11.5(c)1. The removal of accumulated sediment as part of a stream restoration project to restore ecological
health is recognized by the Department as a project that benefits public health, welfare and safety as well as the environment. Accordingly such a project could be allowed under this provision.

N.J.A.C. 7:13-11.16 Requirements for the storage of unsecured material

N.J.A.C. 7:13-11.16(a)

963. This section could have serious impacts at several of the commenter's existing facilities. For example, the commenter operates two coal-fired generating facilities. Each of those facilities has coal piles, where coal is stored prior to combustion. The commenter is concerned that the Department may consider the coal piles as “unsecured material” and impose the onerous requirements on these existing facilities. Such requirements impose additional costs at a time when these facilities are being upgraded. The coal piles are only one example of material at the commenter's our facilities that may be considered “unsecured material” under the proposal. In order to avoid a potential sweeping regulation of the commenter's existing operations, which are crucial to the residents of New Jersey, the Department should include the following additional language to clarify the extent of this section: “This section does not apply to the existing storage of unsecured materials and existing uses do not need to apply for a permit to continue unsecured storage.” In the alternative, the Department should include the following language specifically addressing electric generating facilities and utilities: “This section shall not apply to the storage of unsecured materials at existing electric generating facilities, or existing public utility facilities.” (22)

RESPONSE: The storage of unsecured material associated with a lawfully existing building or non-residential facility is addressed under the permit-by-rule of adopted new N.J.A.C. 7:13-7.2(e)4. It is not the Department’s intention to prohibit or restrict the ongoing storage of unsecured material at a lawfully-existing facility. Should the volume of unsecured material expand within the flood hazard area or riparian zone onsite, however, the individual permit standards of N.J.A.C. 7:13-11.16 would apply.
N.J.A.C. 7:13-11.16(d)2

964. COMMENT: The Department should amend this section to include the following at the end of the current list: “and other facilities where unsecured materials are stored and used as raw materials in their onsite operations.” (22)

RESPONSE: The list of unsecured materials at N.J.A.C. 7:13-11.16(d)2 is not intended to be exhaustive, but provides examples of materials that may be unsecured. Therefore, it is not necessary to add “other facilities where unsecured materials are stored and used as raw materials” to the list at adopted new N.J.A.C. 7:13-11.16(d)2.

N.J.A.C. 7:13-11.17 Requirements for the placement, storage or processing of hazardous substances

965. COMMENT: This section sets forth standards for any proposed storage or processing of hazardous substances. This section is duplicative and unnecessary. The Department already regulates the storage of hazardous substances under existing regulations, including requirements related to Discharge Prevention, Control and Countermeasure Plans (“DPCC”), regulations governing the Toxic Catastrophe Prevention Act (“TCPA”) and the Federal Resource Conservation and Recovery Act, “RCRA”). If facilities are regulated under programs such as DPCC, TCPA or RCRA, those facilities should not be required to apply for a permit but should be considered to be in compliance with the proposal if they hold and maintain approved plans under DPCC, TCPA or RCRA. Accordingly, the Department should amend this section to include the following additional language that clarifies the extent of this section. “This section does not propose to regulate existing storage or processing of hazardous substances and existing uses do not need to apply for a permit to continue this use, individual or otherwise.” (22)

RESPONSE: Storage or processing of hazardous substances in existing facilities are addressed under the permits-by-rule at N.J.A.C. 7:13-7.2(e)3 through (e)5. The Department recognizes that permits other than the Flood Hazard Area Control Act rules have authority in the regulation of
hazardous materials; however, the requirements within these adopted new rules for hazardous substances address the Department’s goals of preventing increases in the frequency and intensity of flooding and protecting the ecological function provided by a healthy riparian zone.

N.J.A.C. 7:13-11.18 Requirements for the placement, storage or processing of solid waste

966. COMMENT: This section sets forth standards for any proposed placement, storage or processing of solid waste. The Department should amend this section to include the following additional language that clarifies the extent of this section. “This section does not propose to regulate existing operations that require placement, storage or processing of solid waste and existing uses do not need to apply for a permit to continue this use, individual or otherwise.” (22)

RESPONSE: The placement, storage or processing of solid waste at lawfully existing solid waste facilities are addressed under the permit-by-rule at N.J.A.C. 7:13-7.2(e)6. It is not the Department’s intention to prohibit or restrict the ongoing placement, storage or processing of solid waste at a lawfully-existing facility. Should the volume of solid waste expand within the flood hazard area or riparian zone onsite, however, the individual permit standards of N.J.A.C. 7:13-11.18 would apply

SUBCHAPTER 12 Emergency Permits

N.J.A.C. 7:13-12.1 Requirements for issuing an emergency permit

967. COMMENT: Careful oversight of emergency permits is recommended, since some of these permits have been abused in the past. We support the extra oversight that has been included. (10, 67)

RESPONSE: The Department acknowledges the commenter’s concern regarding abuse of emergency permits. The Department believes that built-in safeguards such as the requirement to complete regulated activities within 60 days of emergency permit approval, and the requirement
that a formal individual or general permit application be submitted within 90 days of emergency permit approval, will minimize abuse of emergency permits.

968. COMMENT: The emergency permit provisions of proposed N.J.A.C. 7:13-12.1 should not apply to public utilities and the regulation should be modified accordingly. In that regard, an important reality for public utilities is the pressing need to respond very promptly to power outages and similar emergencies. That is necessary to minimize disruption in electricity and other utility services not only to residents and businesses, but also to the critical needs of facilities ranging from schools and hospitals to public safety and homeland security facilities. Given that context, emergency permit requirements and after-the-fact notifications will only serve to cause delay and add an unnecessary administrative burden. Furthermore, while New Jersey’s electric utilities’ proven record of sound environmental stewardship is itself sufficient to obviate the need for the emergency permit regulation, it also bears repeating that coordination of a utility’s public service obligations and environmental management of electric transmission infrastructure is the responsibility of the Board of Public Utilities under N.J.S.A. § 48:2-23. See Boss v. Rockland Electric Co., supra, 95 N.J. at 41-42. (36, 42)

969. COMMENT: The following provision should be adopted in this section: “Public utilities are exempt from the requirements of obtaining an emergency permit for any maintenance, repair, reconstruction, rehabilitation or restoration of the public utility lines, rights-of-way, linear development, or system necessary to restore the public utility service or to protect against loss or interruption of the public utility service during the time of any emergency, whether that emergency was caused by acts of nature or man, provided the emergency was not caused by acts of negligence on the part of the effected utility.” In the interest of protecting the general public heath, safety and welfare, public utilities must respond quickly to restore their services to the general public should those services be interrupted, or threatened with interruption. Particularly during and following periods of natural disaster, such as severe storms (including rain, wind, snow, ice and heat storms), hurricanes, and the like, it is imperative that utility services be restored as quickly and efficiently as possible. Such natural disasters often affect large areas at a time, and in so doing often affect numerous utility infrastructure, rights-of-way, linear
development and systems simultaneously. Events of this nature can severely stretch the human resources of an impacted utility, sometimes even requiring the importation of work crews from hundreds of miles away to assist in the recovery and restoration process. At such times, even identifying when work is being done within a regulated area is virtually impossible. Requiring the utility to submit notifications of such work and filing for permits after the fact serves no useful purpose and only serves to divert useful human resources away from necessary activities to help in the restoration and recovery process to satisfy an unrealistic and unnecessary administrative burden. (22)

RESPONSE TO COMMENTS 968 AND 969: The Department acknowledges the commenter’s concern about the ability of public utilities to respond quickly and effectively to power outages and similar emergencies via the proposed emergency permit procedure. The Department does not intend to impede the undertaking of emergency work on utilities, which is in the best interest of public safety. Several permits-by-rule have been established at N.J.A.C. 7:13-7.2, which would enable public utilities to undertake maintenance and repair activities without prior approval of the Department. N.J.A.C. 7:13-11.9(f) also established an individual permit for the maintenance, repair and reconstruction of utility structures, which can cover an entire network and be valid for five years.

However, in cases where emergency repair activities cannot be accomplished under a permit-by-rule or network-wide individual permit as described above, the Department believes that it is appropriate to require public utilities to contact the Department in order to request an emergency permit pursuant to N.J.A.C. 7:13-12.1 for several reasons. Alerting the Department to such activities enables the Department’s staff to monitor the work to ensure compliance with this chapter. Furthermore, the Department may require that the emergency activities be undertaken in a specific way, or at a specific time, as necessary to prevent adverse impacts to public safety, health, general welfare and the environment, as well as to ensure that proper restoration of any disturbed areas is accomplished. Additionally, as a result of an emergency permit request, the Department is better informed to answer questions from third parties regarding any regulated activities being undertaken in flood hazard areas and riparian zones.
Given the above benefits, and the fact that Department staff can verbally authorize emergency repairs via telephone, pursuant to N.J.A.C. 7:13-12.1(d), the Department believes that requiring public utilities to request an emergency permit for repair work not covered under either N.J.A.C. 7:13-7.2 or 11.9(f) is both reasonable and necessary.

Subchapter 13. Revisions of an approval

N.J.A.C. 7:13-13.1 Revision of a verification

N.J.A.C. 7:13-13.1(i)

970. COMMENT: The words "workload permitting" at N.J.A.C. 7:13-13.1(i) and in other rule sections are vague. It seems that there is no limitation on the amount of time the Department can take to make a ruling on an application. There is no justification, definition or way to gauge the workload of the Department. In the sections where this is implemented, the time frames are not binding to the Department; however, the applicant is obligated to submit to the Department within a specified number of calendar days. It is unfair to the applicants and their representing agents. Agents will be unable to provide their clients with an appropriate estimate of time as to when the Department will rule upon an application. (19, 44)

RESPONSE: The Department is committed to allocating sufficient and proper staff resources to handle anticipated workloads. It is anticipated that the Department will be able to adequately handle applications in a timely and reasonable fashion.

The Department has utilized the new term “workload permitting” in various instances to indicate anticipated timeframes for reviewing certain types of applications that are not covered by the 90-day review period required in the Construction Permits Law, N.J.S.A. 13:1D-29 et seq. It is the Department’s intention that these timeframes, while not binding, will give the regulated community more certainty of when they may anticipate Department responses that are not covered by the 90-day review period of N.J.S.A. 13:1D-29 et seq. The Department has also developed 46 permits-by-rule, which do not require prior Department approval, and 16 general...
permits with a 45-day review. Furthermore, verifications under this chapter will be subject to a 90-day review like individual permits. Only applicability determinations, application transfer requests and revisions are not subject to automatic approval under this chapter.

N.J.A.C. 7:13-13.2 Revision of a General Permit

N.J.A.C. 7:13-13.2(c)

971. COMMENT: We support N.J.A.C. 7:13-13.2(c) that a proposed revision to a general permit will not be allowed if there is a substantial redesign of the project or it will increase the environmental impact of the project. (20, 38, 41, 54, 60, 63, 69)

972. COMMENT: We support that a general permit cannot be substantially revised. (10, 67)

RESPONSE TO COMMENTS 971 AND 972: The Department acknowledges these comments in support of various provisions regarding revisions to general permits.

N.J.A.C. 7:13-13.3 Revision of an individual permit

N.J.A.C. 7:13-13.3(d)

973. COMMENT: We support N.J.A.C. 7:13-13.3(d) that a proposed revision to an individual permit will not be allowed if there is a substantial redesign of the project or it will increase the environmental impact of the project. (20, 38, 41, 54, 60, 63, 69)

974. COMMENT: We support that a general permit and an individual permit cannot be substantially revised. (10, 67)

RESPONSE TO COMMENTS 973 AND 974: The Department acknowledges these comments in support of various provisions regarding revisions to individual permits.
N.J.A.C. 7:13-13.4 Revision of a Department delineation by the Department

975.COMMENT: The Department should delete on adoption the proposed opportunity for a site specific map revision process. Given the cost and complexity of this process, it is likely to work in one direction only: to relax, instead of strengthen, protections. It is not likely that the public sector or interest oriented groups would have the resources to revise maps to reflect current conditions and expand necessary protections. The only entities with the resources and economic incentives to do this are likely to be those that seek an economic benefit in reducing the scope of regulatory control and allowing more development. (69)

RESPONSE: The Department acknowledges the commenter’s concern regarding revisions to Department delineation of flood hazard areas, but does not agree that it will necessarily lead to relaxing protections. The Department believes that accurate mapping, no matter who it is initiated by, is critical to the deliberative process of application review. In the past, the Department, or interested parties, have sometimes discovered errors in mapping due to incorrect elevations, or incorrect hydrologic or hydraulic data. However, the former rule did not contain an administrative process to amend mapping.

The application and review process to amend delineation of flood hazard areas includes application and review requirements to assure a thorough review by the Department. Necessary application materials include, but are not limited to, all supporting hydrologic and hydraulic calculations necessary to demonstrate that the new, proposed delineation is necessary and accurate; a narrative that explains the submitted calculations; and, all maps, references and other supporting materials that were used to prepare the submitted calculations. In addition, an invitation for interested parties to submit written comments and to attend a public hearing, and consideration of any information received through this process by the Department is required. Finally, the Department cannot approve the application until it concludes that revising the delineation is in the best interest of public safety, health and general welfare. It is the Department’s opinion that these application and review requirements will result in accurate and...
necessary delineation revisions, and as such the Department believes that it is appropriate the
have this provision to revise delineations in the adopted Flood Hazard Area Control Act Rules.

N.J.A.C. 7:13-13.5 Revision or Suspension of a Department Delineation by the Department

976. COMMENT: At this time, theoretically, any and all flood hazard area delineations which
have been made by the Department could be suspended due to insufficient topographic,
hydrologic and hydraulic data. The current NJDEP Flood Hazard Maps are 20 to 30 years old
and are based on hydrology and topography that are also 20 to 30 years old. This section of the
proposal also calls for the Department to also “review all valid verifications, general permits and
individual permits issued for the flood hazard area of the suspended delineation” and allow them
to “suspend or terminate such approvals…” This potential for suspension “at will” is
unpredictable and unacceptable. The potential for abuse of this provision by the Department (to
stop a project or projects due to public outcry) is unacceptable. This rule proposal should be
withdrawn until such time as the Department confirms the adequacy of their existing flood maps
and hydraulic models which the public will be relying upon. (33)

RESPONSE: N.J.A.C. 7:13-13.5 has been adopted in order to create a process by which the
Department can revise or suspend a Department delineation in cases where the Department
determines that its flood mapping is inaccurate and in need of revision. The extent of flooding is
subject to a number of factors that can change over time, such as upstream development, changes
in weather patterns and the construction or removal of water control structures. Any of these
changes may cause the flood hazard area and floodway limits at a given location to expand. In
cases where the Department does determine that its flood mapping is a inadequate or inaccurate
at a given location, this adopted new provision will facilitate the correction of any mapping error.

This provision is intended to protect public safety, health and general welfare by facilitating
the Department’s revision of inadequate flood studies, which could lead to severe adverse
impacts to projects that are built to withstand flooding based on an incorrect flood depth. If the
Department determines that an existing delineation underestimates the extent of the floodway
and/or flood hazard area, and that it is in the best interest of public health, safety and welfare to
revise a delineation, the Department has an obligation to revise the delineation where possible. However, if the Department does not have sufficient topographic, hydrologic and hydraulic data to adequately revise the delineation, or if the Department determines that a serious threat to public health, safety and welfare will exist if an existing delineation is allowed to remain in place, it is appropriate for the Department to initiate an emergency suspension of the delineation for a one-year period pursuant to N.J.A.C. 7:13-13.5(b). The purpose of this suspension is to allow the Department adequate time to acquire data necessary to accurately revise the delineation. Furthermore, the Department will initiate a review of all currently valid verifications, general permits and individual permits that have been issued in the flood hazard area of the suspended delineation to determine whether the public is at risk due to the inaccuracies of the suspended delineation. The Department can subsequently suspend or terminate approvals where necessary to protect public safety under N.J.A.C. 7:13-14.

With regard to the age and reliability of the existing Department delineation, as noted in the response to comments 103 and 104, the Flood Hazard Area Control Act rules are designed to protect the residents of the State from the increased impacts of flooding and environmental degradation that would otherwise be caused by unregulated development in flood hazard areas and riparian zones. Creating and adopting State flood hazard area mapping is a separate and independent process, which extends beyond the scope of the adopted new rules. Furthermore, while the Department strives to keep State flood mapping as accurate as possible, an immediate remapping of the entire State, and the updating of these maps on a regular basis to assure that no adjustments are needed, is not practical. However, the department believes that the new revision process at adopted N.J.A.C. 7:13-13.4 and 13.5 will facilitate more frequent updates of the State’s flood mapping as better flood information becomes available.

Subchapter 14. Transfer, suspension and termination of an approval

N.J.A.C. 7:13-14.1 Transfer of an approval

977.COMMENT: The proposed requirements and limitations on a transfer of approvals issued by the Department under the proposed new rules violate the general rule that land use approvals
run with the land. The proposed regulation will unnecessarily increase the workload burden on an already overburdened the Department staff and should be eliminated. (7, 18, 33, 46, 53)

978.COMMENT: How can a property transfer alter a basic condition of approval? Define “alter”. The approval is for a project, not a person or entity. If a project is constructed per the approval, the owner should not matter. This opens up the possibility for the Department to make a decision based on conceptions or misconceptions concerning an individual or entity and open the door to arbitrary and capricious decision making. (26)

RESPONSE TO COMMENTS 977 AND 978: When the Department issues an approval under this chapter, it takes into consideration not only what project is being proposed, but in some cases who is proposing the project. Many of the requirements of this chapter are associated with the person or entity that is proposing construction, and different standards apply to different parties. For instance, a number of approvals in this chapter are specifically designed to be granted to public entities. In such a case, the public entity may be entitled to certain considerations or flexibility, due to the nature of the project and also due to the fact that a public entity is mandated to perform work in the public interest. It follows, therefore, that the Department may allow a public entity to undertake a project which it would not allow a private entity to conduct. In such a case, if the public entity were to obtain a permit from the Department and then divest itself of that property to a private entity, the conditions upon which the Department’s approval was given have substantially changed. It is therefore appropriate for the Department to review a request to transfer the approval to the new owner in order to determine if the new owner is entitled to the same approval as the original owner. This could also be the case where an applicant proposes to construct a building for a particular use in a flood hazard area, which has certain access requirements under N.J.A.C. 7:13-11.6. A change in ownership may result in a change in use, which in turn may require wholly different access requirements. A hospital or school has different access requirements than a commercial building, for example. Thus it is appropriate for the Department to review the transfer of such projects in order to ensure that a basic requirement of the Flood Hazard Area Control Act rules is not being circumvented as a result of the transfer.
Another example, which is provided at N.J.A.C. 7:13-14.1(b), involves an applicant who proposes to construct a road across a channel. When reviewing an individual permit for a channel crossing, the Department considers whether there is another means of accessing the site which would reduce the amount of disturbance to the channel, or which would avoid crossing the channel altogether. If there is no other feasible means of accessing an otherwise developable portion of a site without crossing the channel, the Department would grant an individual permit, provided the road crossing meets all other standards of this chapter. But if the owner of the lot first obtains an individual permit for a road crossing, and then sells the lot to an adjacent land owner who already has a roadway across the stream, the basic premise upon which the individual permit was granted would no longer exist. In other words, if the new owner of the lot had been the person to apply for the permit to cross the stream, the Department may have concluded that the disturbance to the stream was not justified because another access into the property already existed. By combining the two properties into one, the justification for the road crossing under the individual permit becomes invalid. This example illustrates the complications that can arise over transferring an approval to a new owner. The Department must, therefore, determine that transferring the approval to a new owner would not circumvent any standard of the rules that would otherwise apply.

979. COMMENT: The transfer of approvals is detrimental to the State. There are situations where renewed approvals have occurred over a twenty year period. Any new owner must obtain new approvals and comply with new regulations, particularly with the current global warming issues. (56)

RESPONSE: The Department believes that conditions to transfer approvals will safeguard against abuse. The conditions include: the original approval must still be valid; the original approval was not an emergency permit or an individual permit based on a hardship exception; the approval is transferred to a person who currently owns the site or who is under contract to purchase the site; and, the Department determines that the transfer will not alter a basic condition upon which the original approval was granted. Furthermore, the transfer of an approval does not affect the expiration date of a permit. The new owner will still have to apply for a new permit if
the regulated activity is not complete by the expiration date of the original permit. As such, the Department has adopted the approval transfer section as originally proposed.

Subchapter 15. Application Requirements

N.J.A.C. 7:13-15.1 General provisions

N.J.A.C. 7:13-15.1(a)

980. COMMENT: Applicants are required to submit all required information on the Department’s application checklists. The Department failed to include copies of required checklists with the proposed new rules. Any required checklists for proposed regulated activities should be made a part of the rule proposal and subject to public notice and comment, and attached in an appendix to any final rule adopted by the Department. Because the required checklists have not been made available as part of the rule proposal, the rule proposal should be withdrawn and re-noticed to provide for a meaningful opportunity for public comment consistent with the Administrative Procedure Act. (7, 18, 33, 46, 53)

RESPONSE: The Department provides application checklists as guidance and simplification purposes, to better ensure required items and detail are submitted with an application. If required items and detail are submitted with an application, the Department’s review and processing time will be minimized. The actual application requirements for each type of approval that are included on the checklist are detailed in the sections pertaining to each approval in the adopted new rule and have been subjected to notice and public comment as part of this rulemaking.

N.J.A.C. 7:13-15.1(f)

981. COMMENT: Because municipalities can have stricter requirements than these regulations, it is important that applications include information regarding conformance or non-conformance
with municipal ordinances. In addition, DEP should require submission of an actual copy of the submission to the municipality. (20, 38, 41, 54, 60, 63, 69)

982. COMMENT: Municipalities should be notified and copied on all information pertaining to applications to ensure consistency with municipal ordinances and review which may be stricter than Department criteria. Early public involvement is critical and is often brought into decision making at the municipal level. (10, 67)

RESPONSE TO COMMENTS 981 AND 982: The Department directs the commenters to subchapter 16 of the adopted new rules, which includes public notice requirements to municipal and county governments and adjacent property owners for verifications and individual permits. Such notice should adequately initiate important public involvement into the decision process. N.J.A.C. 7:13-16.4 includes further requirements for documentation of public notice of an application. It is the Department’s experience that certified receipts, lists of persons to whom the application was sent, and copy of newspaper notice (if applicable) is sufficient to document that proper public notice of an application was performed by the applicant.

The Department does not agree that an applicant should provide information on how an application conforms or does not conform to municipal ordinances. The Department does not have expertise on the ordinances of the 566 municipalities in the State, and review of such would cause Department application review times to be increase dramatically, without significantly adding to the Department’s review of a project with regard to the adopted new rules. Conformance with both Department and municipal ordinances is the responsibility of the applicant, and review should be done by appropriate staff at each level. Furthermore, it is important to note that all permits issued by the Division of Land Use Regulation have the following condition "You must obtain all necessary local, Federal and other State approvals before you begin work." This language should make it clear to applicants that it is their responsibility to comply with municipal ordinances.

N.J.A.C. 7:13-15.2 Pre-application conference
983. COMMENT: The Department should not deny requests for pre-application meetings. The proposed rule should be revised to specifically provide that the Department shall conduct a pre-application meeting whenever it receives a request for such a meeting. (7, 18, 33, 46, 53)

RESPONSE: The Department does not intend the language in the adopted new rule to mean that it will regularly deny pre-application conferences with prospective applicants. Indeed, the Department anticipates that it will grant most pre-application conference requests. The language in the rule is meant to allow the Department the flexibility to answer any questions on the phone that are relatively simple, straightforward or general in nature. It is the Department's experience that many questions can be properly addressed in this way, thus saving Department staff time, as well as time for the prospective applicant, their consultant and/or attorney, including time to travel and meet with Department staff in Trenton. Furthermore, the Department staff has encountered countless situations where pre-application conferences were held, but the discussion was so cursory or general in nature as to have not necessitated a meeting in Trenton. Therefore, the Department has adopted N.J.A.C. 7:13-15.2 as proposed.

984. COMMENT: Interested parties should be provided with the opportunity for interested parties to attend pre-application conferences. Such inclusion can help inform the application and avoid public concern about some large projects. Such inclusion can result in much-improved projects. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The Department does not believe that it is appropriate to allow interested parties the option of attending pre-application conferences. These conferences are intended to allow a frank and open discussion between the Department and prospective applicant and to provide guidance to prospective applicants regarding permit application submittals. The Department believes that the rules provide adequate opportunity for comments by interested parties which can be submitted during the public comment period and, if applicable, at a public hearing.

N.J.A.C. 7:13-15.2(c)
985. COMMENT: N.J.A.C. 7:13-15.2 (c) requires the applicant to submit a "set of drawings" before the Department will schedule a pre-application meeting. What detail will be required on the drawings? Schematic plans showing the anticipated project configuration submitted early in the project planning process would be most beneficial to the applicant so that time and expense are not spent on a concept that the Department finds to be unacceptable. (8)

986. COMMENT: An applicant should not be required to submit a set of drawings depicting a proposed development in order to obtain a pre-application conference with the Department. Pre-application conferences are often useful at the preliminary development planning stage where no specific development plan has been proposed in order to determine what substantive concerns the Department has with respect to a parcel so that what is ultimately proposed can be designed to accommodate and satisfy those concerns. Additionally, the Department often has information about a parcel or adjacent parcels that is not readily available to the regulated public that can be useful in helping to design a project in accordance with the Department’s requirements. Therefore, the requirement to submit a specific proposed development plan should be eliminated. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 985 AND 986: N.J.A.C. 7:13-15.2(c) does not require applicants to submit a set of drawings before the Department will schedule a pre-application meeting in all cases. Rather, N.J.A.C. 7:13-15.2(c) provides that, prior to scheduling a pre-application conference, the applicant shall submit a set of drawings depicting the proposed development and an application report, if the Department determines that such information is necessary to properly advise the applicant regarding the proposed project and application procedures. The Department will not in all cases require drawings or an application report, especially in cases where projects are in a preliminary stage of development and the applicant wishes to discuss general questions (which cannot be adequately handled via telephone with Department staff).

The requirement for drawings and other materials in some cases is not intended to create an obstacle for meeting with Department staff. Rather, this requirement is designed to assist the Department in gathering the appropriate information and guidance relative to the applicant’s project, so that the pre-application meeting will be productive for all parties. Generally, the
minimum amount of detail required by the Department is a scaled, conceptual plan showing buildings, internal roads, and other relevant features of the proposed project as they relate to regulated features such as flood hazard area, floodway and riparian zone, if present. If other regulated features such as freshwater wetlands are present, and the applicant has a general idea of their location and extent, these should also be shown. In general, enough detail should be presented that a relevant discussion of the proposed project can take place. Detailed calculations and cross-sections are generally not required.

The Department disagrees with the comment that applicants should not be required in any situation to submit a set of drawings to obtain a pre-application conference. Without at least conceptual plans, a relevant discussion of a proposed project cannot take place in a meeting. Any questions prior to development of a conceptual site plan can be handled via telephone with the Department. Finally, most information relevant to a project, such as flood hazard area limits, approximate location of freshwater wetlands and Category One waters, are available to the public and should be reviewed by the applicant prior to any pre-application conference. If a prospective applicant has requested a pre-application meeting and is unsure of the scope of information that needs to be provided to result in a meaningful discussion, the requester always has the option of contacting Department staff to clarify what should be submitted for that purpose.

N.J.A.C. 7:13-15.2(d)

987.COMMENT: Any substantive guidance provided by the Department in the context of a pre-application conference should be in writing and binding on the Department if an application is submitted within one year of the pre-application conference. (7, 18, 33, 46, 53)

RESPONSE: The Department disagrees with the commenter that substantive guidance provided by the Department at a pre-application conference should be in writing and binding on the Department. 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. Since
formal detailed plans and detailed calculations are not required for a pre-application conference, and the fact that any material submitted by the potential applicant is not given complete and thorough Department review to confirm its accuracy and relevance, it cannot be expected that Department guidance would be binding.

N.J.A.C. 7:13-15.2(g)

988.COMMENT: A specific timeframe should be provided within which the Department is required to conduct a pre-application meeting. The reference to “workload permitting” is vague and unenforceable and highly prejudicial to applicants as the discretionary standard will allow the Department to delay action on pre-application meeting requests for unlimited periods of time without any repercussion. (7, 18, 33, 46, 53)

RESPONSE: The Department is committed to providing adequate staffing so that pre-application conferences can mostly be held within three weeks of receiving a request. In the past, the Department has generally been able to abide by this timeframe, and believes in can do so in the future. However, the applicability of the Construction Permit Law to Department permit decisions under this chapter necessarily makes review of active permit applications that may be approaching the end of their review period the Department's first priority.

N.J.A.C. 7:13-15.5 Environmental Report

N.J.A.C. 7:13-15.5(c)4

989.COMMENT: Will there be a mechanism in which a proposed survey protocol specific to a species and/or habitat type can be submitted to the Department for review and approval. This is warranted in particular due to the vague survey protocol referenced in the rules. Once a protocol is approved, the Department should be required to accept the methodology used in the study and therefore the results of the study. This does not necessarily mean that the study conclusions must be accepted by the Department, but will ensure that studies are performed according to accepted
scientific methods. The Department should have a set time frame for review of submitted protocols due to time sensitive survey periods. (26)

RESPONSE: The Department does not believe it is necessary to review and/or approve a specific survey protocol for any species or habitat type. The Department believes that any individual meeting the education and experience requirements at N.J.A.C. 7:13-15.5(c) will possess sufficient knowledge of appropriate survey protocols Furthermore, N.J.A.C. 7:13-10.6(b) provides that, for the purposes of this chapter, the Department identifies present and/or documented habitat for most threatened or endangered wildlife species using the Landscape Project method, which focuses on habitat areas required to support local populations of threatened and endangered wildlife species. The Department believes that qualified professionals in combination with the readily available threatened and endangered species information on the Department’s Landscape maps, will ensure adequate identification of threatened and endangered species and their habitat.

Subchapter 16. Public notice of applications

N.J.A.C. 7:13-16.1 General requirements for public notice of applications

N.J.A.C. 7:13-16.1(a)

990.COMMENT: : Wide public notice should be provided for general permits for the benefit of the public and the municipality. Copies of the application should be submitted early to the municipality to allow for project adjustments prior to obtaining all state approvals. (10, 67)

991.COMMENT: We oppose exclusion of public notice requirements for general permit project applications. Public notice for general permit applications should be sent to the Zoning Enforcement Officer in the municipality where the activity is proposed to take place. It is possible that some general permit applications could violate municipal ordinance requirements. (20, 38, 41, 54, 60, 63, 69)
RESPONSE TO COMMENTS 990 AND 991: The Department selected activities to permit by way of general permits based upon the level of impact that could result from performing the activity. Consequently, the general permits represent activities that will have minimal impacts on flooding and the environment and that therefore require less scrutiny by the Department and by the public. In addition, many of the general permit activities also require review and approval by another entity, in addition to the Department. For example, general permit 1 can only be performed by a public entity; general permits 2A through 2G for agricultural activities all require approval and supervision by the Natural Resource Conservation Service; general permits 3 and 4 for bridge or culvert scour protection, and stormwater maintenance, respectively, will have to be approved and supervised by a public entity; and general permits 8 (utility line crossing), 9 (roadway or footbridge) and 10 (stormwater outfall structures) are limited to activities that also require a freshwater wetlands general permit from the Department. Consequently, the Department believes that, due to the potential for limited impacts and the oversight that is afforded both by the Department and other agencies, there is no need to require direct public notice. Furthermore, the Department does provide notice of all applications it receives in the DEP Bulletin, so the public and municipal official will be aware of received and pending flood hazard area general permits, and therefore have an opportunity to comment on these applications to the Department.

992.COMMENT: The Department is to be commended for exempting permit-by-rule and general permit activities from public notice requirements. (29)

RESPONSE: The Department acknowledges your support for the exemption of permit-by-rule and general permit activities from public notice requirements.

N.J.A.C. 7:13-16.1(c)1

993.COMMENT: The proposed timing of public notice can be problematical. If the proposed project is not being reviewed by the municipality at the time of public notice, its relevance is
frequently overlooked by the affected adjacent neighbors and the public and important local information may not be supplied to Department. (20, 38, 41, 54, 60, 63, 69)

RESPONSE: The requirement at N.J.A.C. 7:13-16.1(b), that public notice shall be provided no more than 30 calendar days prior to the submittal of the application is designed to ensure that the notice of an activity is given in a time frame that allows meaningful input to the Department's review of applications. Since the Department's permit reviews under this Chapter are subject to the time limit in the Construction Permit Law, the Department does not have a lot of flexibility to coordinate our review with the local review process. As such, the Department has adopted the public notice requirement as proposed.

N.J.A.C. 7:13-16.2 Public notice requirements for an application for a verification

994.COMMENT: What is the purpose of requiring public notice for a verification since no construction can be undertaken until the project is permitted, at which time public notice can be required depending on the size and impacts of the project? (44)

RESPONSE: Under the repealed rules, notice is required for major elements, which includes establishing stream encroachment lines based on calculations. Similarly, notice is required in the adopted rule for verifications that are based on Methods 4 and 6, which require a hydraulic analysis and Method 5, which relies on the new approximate method. Since verifications only establishes flood elevations and boundaries, and does not include authorization for construction, the list of persons to be provided notice has been simplified. However, the Department believes that some public notice is necessary, and will provide an opportunity for public comment on the proposed flood hazard area, floodway and riparian zone verifications and will, in fact, increase the level of transparency and public involvement, as well as helping to ensure that the Department obtains all available information necessary to assure that the it’s determination of the verification is accurate. Therefore, the Department has required that notice be provided to the municipal and county clerks, and property owners within 200 feet.
995. COMMENT: Verifications affirm the flood hazard area design flood elevations on site. The applicants should be required to provide public notice to the same entities as are copied currently – the planning board, the engineer and the environmental commission. Municipalities should not have to take on work that applicants should do. (20, 38, 41, 54, 60, 63, 69)

996. COMMENT: Applicants should be required to submit copies of applications to all appropriate municipal boards so as not to place the burden on the municipality. (10, 67)

997. COMMENT: We strongly oppose the proposed change to the public notice requirements at N.J.A.C. 7:13-16.2(a)1 and 16.3(a)1, that require that three copies of an application be submitted to the municipal clerk. In many towns, the copies would go into limbo. The applicant should take on the responsibility of notifying the planning board, the town engineer and the environmental commission as the current regulations require. Such a requirement helps applicants as it is consistent with public notice requirements under the Freshwater Wetlands Protection Act rules. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 995 THROUGH 997: As noted in the response to comment 994, the Department simplified the list of notices for verifications since verifications only establish flood elevations and boundaries, and do not include authorization for construction. The Department does not agree that having three copies of the notices for verifications or individual applications sent to the municipal clerk will create an undue burden on municipal officials. It is typically the responsibility of a municipal clerk to ensure that documents are forwarded to the appropriate municipal officials. Furthermore, by requiring all of the notices to be sent to the clerk, each municipality can establish their own protocol to forward the notice to municipal officials or municipal agencies of their choice.

N.J.A.C. 7:13-16.2(a)3 and 16.3(a)5

998. COMMENT: We oppose N.J.A.C. 7:13-16.2(a)3 that provides that if a property within 200 feet of the project property is located outside the flood hazard area, public notice need only be by
newspaper notice. The public interest in flooding and riparian protection is such that individual notice to all property owners within 200 feet is important. (20, 38, 41, 54, 60, 63, 69)

999. COMMENT: Adjoining property owners should be notified within 200 feet from the adjoining property. Newspaper notification alone is insufficient. (10, 67)

RESPONSE TO COMMENTS 998 AND 999: N.J.A.C. 7:13-16.2(a)3 provides that, for an application for a flood hazard area verification, each property located within 200 feet of the site must receive public notice. However, if a property within 200 feet of the site is located outside the flood hazard area, newspaper notice pursuant to N.J.A.C. 7:13-16.5 can be provided for that property instead of certified mail notice. A similar provision for individual permit applications is established at N.J.A.C. 7:13-16.3(a)5, which exempts public notice to any party that lies outside the flood hazard area and at least 500 feet from all proposed regulated activities onsite.

The Department’s intention in adopting these provisions is to limit the public notice to only those parties who could potentially be impacted by the proposed flood hazard area verification or individual permit application. It is the Department’s experience that requiring notice to properties that are so removed from a site, and outside a flood hazard area, does not serve any valid function. The Department fails to see how a verification of the flood hazard area on a site can adversely affect another nearby property that is not located in a flood hazard area. Furthermore, regulated activities are sometimes proposed on a very large lot that is bordered by a large number of lots. If an activity is proposed on such a site, and a neighboring lot is situated outside the flood hazard area and more than 500 feet away from the proposed work, it is unclear how such a property could be affected by the proposed project. In lieu of direct mail notice to these parties, the Department has determined that newspaper notice pursuant to N.J.A.C. 7:13-16.5 is acceptable. It should also be noted that all received applications are listed in the DEP Bulletin, so the public and municipal official will be aware of received and pending flood hazard area permits, and therefore have an opportunity to comment on these applications to the Department.

N.J.A.C. 7:13-16.3 Public notice requirements for an application for an individual permit
N.J.A.C. 7:13-16.3(c)

1000. COMMENT: The Department should include newspaper notice as satisfying notice to individual property owners for mosquito control application projects. As standard operating procedure, right-of-entry forms are required from every property owner so they are made aware of the project, without the cost of certified mail. (29, 52)

RESPONSE: N.J.A.C. 7:13-16.3(c)2 sets forth special notice provisions for an application for a linear development that is more than one-half mile long. Stream cleaning for mosquito control is a type of linear development that is addressed by this provision. The provision allows newspaper notice, pursuant to N.J.A.C. 7:13-16.5, to some neighboring landowners within 200 feet of the project, rather than direct public notice.

N.J.A.C. 7:13-16.3(b)1

1001. COMMENT: Single residences should not be exempted from public notice requirements since a single residence can have significant environmental and flooding impacts. (10, 67)

1002. COMMENT: We oppose N.J.A.C. 7:13-16.3(b)1 that construction of a private residence not part of a larger residential subdivision be excused from providing any public notice. (20, 38, 41, 54, 60, 63, 69)

RESPONSE TO COMMENTS 1001 AND 1002: In an effort to simply the permitting process for homeowners, and in light of the relatively minor impact of constructing one private residence or appurtenant structure, the Department has determined that public notice is not required for such projects. It is the Department’s experience that public notice for such projects does not generate relevant public interest. Furthermore, this provision is continued from repealed N.J.A.C. 7:13-4.2(a), which did not require notice for most minor projects such as these. In fact, the adopted
new rules extend public notice to many types of projects that were not previously required to provide notice, and has only exempted projects by homeowners from notice. The Department also notes that have only exempted projects by homeowners from notice. The Department also notes all received applications are listed in the DEP Bulletin, so the public and municipal officials will be aware of received and pending flood hazard area permits, and therefore have an opportunity to comment on these applications to the Department. Therefore, the Department believes that the exemption of private residences and appurtenant structures from the public noticing requirements of this subchapter is appropriate.

N.J.A.C. 7:13-16.4 Documenting public notice of an application

1003. COMMENT: All applications should provide public notice through the newspaper twice and on the internet for a 30-day public comment period. (56)

RESPONSE: The noticing requirements of N.J.A.C. 7:13-16 for verification and individual permits are intended to ensure that property owners and government entities are alerted to prospective local projects, and to assist the Department in gathering comments which would be helpful to the Department in its decision making on these applications. The Department believes that the adopted noticing requirements appropriately accomplish this and does not believe adopting the commenter’s suggestion is necessary or appropriate.

N.J.A.C. 7:13-16.4(a)1

1004. COMMENT: The requirement to submit green return receipt cards with an application is unduly burdensome, excessive and unnecessary. Notice of an application is effective upon mailing and, therefore submission of copies of the white postal receipts should be sufficient to establish that proper notice was given. (7, 18, 33, 46, 53)

RESPONSE: The Department disagrees with the commenters. The Department cannot be certain if public notice was received by intended recipients unless it can verify such via its review of green return receipt cards. Furthermore, the Department believes that mailing of green return
receipt cards is not burdensome or excessive, but is a reasonable request as part of the application and review process.

N.J.A.C. 7:13-16.5 Newspaper notice

N.J.A.C. 7:13-16.5(a)

1005. COMMENT: We strongly recommend that the requirement for publication in a local newspaper be more specific. The requirement should be for publication in the municipality’s official local newspaper since the public is attuned to finding public notices for local applications in the official newspaper. (20, 38, 41, 54, 60, 69)

1006. COMMENT: Any newspaper notice should be to the official newspaper for the municipality (10, 67)

RESPONSE TO COMMENTS 1005 AND 1006: The Department acknowledges these comments regarding what constitutes appropriate newspaper notice and has consequently amended N.J.A.C. 7:13-16.5(a) to require that newspaper notice shall be “published in the official newspaper of the municipality (or in a newspaper of general circulation in the municipality if there is no official newspaper) as well as in one newspaper of regional circulation (relative to the location of the project).” Identical modifications have also been made on adoption at N.J.A.C. 7:13-13.4(i) and 13.5(b), which set forth the newspaper notification procedure of the Department revises a Department delineation.

Subchapter 17. Application fees

N.J.A.C. 7:13-17.1 Application fees

1007. COMMENT: The proposed rule should specify that an annual audit by the Inspector General of Finance is required of the Flood Hazard Area Control Act regulatory program and the
audit must determine that the specified fees are sufficient to ensure effective implementation of
the program and that its revenues are being used solely for the processing of applications
submitted pursuant to the requirements of the program. (7, 18, 33, 46, 53)

1008. COMMENT: The fees significantly increased in the last round of changes to the
stormwater management regulations. They have become onerous to applicants in relation to
smaller size projects. Has any analysis been done as to the actual review time required for
various permits; the review fees can now be from 30-50 percent of the design fee. (4)

1009. COMMENT: Application fees are too low, particularly for major development. This fee
structure appears to benefit the developers to the detriment of the public. The proposed fee
adjustment factor is unfair, and should be correlated to municipal taxes which have been
increased by as much as 100 percent in a given year. (56)

RESPONSE TO COMMENTS 1007 THROUGH 1009: In proposing and adopting and
amendments to the fee schedule for the Flood Hazard Area Control Act permit program, the
Department provided a detailed analysis of the costs to implement the program, including all
administrative and technical work involved. The most recently adopted fees for Flood Hazard
Area Control Act permitting established in January 2006 included a detailed summary and
analysis of costs to fully process and review permit applications and a justification of permit fees
based on the operational costs identified. The Department believes that the established permit
application fees accurately represent the cost to the Department to review these applications. In
addition, the Department will periodically review these permit fees and associated costs to
process the applications, and propose amendments to the fee schedule, as appropriate.

N.J.A.C. 7:13-17.1(g)

1010. COMMENT: The current and proposed fee of $1000, up to $4000 per sediment removal
project, is onerous for public entities, which would most likely be the applicants where streams
are impaired but cross multiple properties. The fee alone will discourage maintenance of streams.
Although the Department has created a general permit for removing sediment from up to 500 feet of stream, most streams have been silted in by decades of development upstream, and 500 feet is not enough to solve the flooding problems. While the proposed new rules may reduce flooding from future development, they do not necessarily facilitate correction of existing problems caused by silted-in streams. The Department needs to come up with a regulatory process that systematically allows these streams to be cleaned and maintained. (29, 52)

RESPONSE: In establishing the permit application fees for Flood Hazard Area Control Act permit applications, the Department carefully analyzed the full cost to review the applications, and those costs are reflected in the actual fees. As the commenter indicates, general permit 1 is available to conduct sediment removal (dredging) for a distance up to 500 feet along certain waters, with no application fee to the Department. However, this free general permit is not applicable to dredging projects for reaches greater than 500 feet in length, due to the potential for these projects to adversely impact floodplain hydrology, stream channel geomorphology and surface water quality. The fees for the individual permits are higher than those for the general permit due to the increased scope of review on the part of Department staff. In an effort to achieve efficiencies in dredging and sediment removal, public entities have the opportunity to develop regional plans and solutions so that the overall costs can be shared, thereby reducing the impact of the permit fees on any one entity. In addition, financial resources may be available to assist public entities with these projects, including but not limited to funding through the Natural Resource Conservation Service (NRCS) programs, DEP Watershed Management grants, and FEMA Hazard Mitigation grants.

1011. COMMENT: The $500 application fee for a general permit is exorbitant. (55)

RESPONSE: Permit applications must be processed by the Department’s staff, which generates various costs that are appropriately compensated by application fees. The adopted general permit fee is half of the fee for a minor stream encroachment permit under the repealed rules, and is comparable to the general permit application fee under both the freshwater wetlands and coastal permitting programs. Since the time and effort to review the adopted new flood hazard area
general permits is expected to be comparable to the review time and effort for these other general permits, the Department believes that the adopted fee is appropriate.

N.J.A.C. 7:13-17.1(h)

1012. COMMENT: The proposed regulation should be revised to specify that the annual fee adjustment should be calculated based upon the average cost to process an application submitted to the Department. (7, 18, 33, 46, 53)

RESPONSE: Pursuant to N.J.A.C. 7:13-17.1(h), which continues the repealed provision of the Ninety-Day Construction Permits rules at N.J.A.C. 7:1C-1.5(h), the fees under this chapter will be annually adjusted based upon the average cost to process an application. This would be done by numerous factors the Department has to consider when annually adjusting the fee under this subsection. These factors include: projecting the total amount of money required to fund the program in the coming year projecting the total amount to be available from sources other than fees; calculating the fee revenue necessary for the coming year; dividing the fee revenue necessary for the coming year, by the fee revenue which was necessary for the current year; and dividing the volume of applications the Department received in the current year by the volume it expects to receive in the coming year. Finally, utilizing the preceding factors, the Department calculates the fee adjustment factor, which in effect is the average cost to process an application.

N.J.A.C. 7:13-18. Requests for adjudicatory hearings

N.J.A.C. 7:13-18.1 Requests for adjudicatory hearings

1013. COMMENT: A fee of $300 should be required for adjudicatory hearing requests, which is consistent with fees for property tax hearings. Fees should be charged each time a hearing is requested and the fee should be increased commensurate with property tax increases. (56)
RESPONSE: The Department budgets into permit application fees the annual cost of legal services rendered by the Department of Law and Public Safety, Division of Law, to the Division of Land Use Regulation. Department legal fees for adjudicatory hearing requests are therefore already covered. Furthermore, it is a person’s right to request an adjudicatory hearing. Given these factors, the Department believes that it would not be appropriate to charge fees for hearing requests.

Subchapter 19. Enforcement

N.J.A.C. 7:13-19.1 Penalties

1014. COMMENT: The maximum penalty of $2,500 for each violation is too low, and should be raised to $150,000, particularly since it is difficult to establish when a violation has occurred. The penalty should be charged each day that the violation continues. (56)

RESPONSE: The Department believes that a penalty of $150,000 per violation is excessive. The Department also notes that if a violation is of a continuing nature, each day that the violation continues constitutes an additional, separate and distinct offense. So for example, if a violation continues for six months the Department can levy a penalty up to $450,000 ($2,500 times 180 offenses).

1015. COMMENT: The commenter suggests that wording similar to that in proposed N.J.A.C. 7:7-1.5(b) (DEP Docket Number 19-06-09/482 - proposed Public Trust Rights rule for coastal permitting program) regarding "responsible party, such as, the site operator or contractor", be included to this subsection of the proposed Flood Hazard Area Control Act rules. This would allow the responsible party, and not just the permittee, to be held responsible for violations, and be subject to enforcement actions. (28)

RESPONSE: At N.J.A.C. 7:7-2.1(a), the rule states that no person shall engage in a regulated activity in a regulated area without a permit listed at N.J.A.C. 7:13-2.1(b), and, furthermore, that
initiation of a regulated activity without the necessary permits shall be considered a violation of this chapter and shall subject the party or parties responsible for the regulated activity to enforcement action, as set forth at N.J.A.C. 7:13-19. The language in the adopted new rules regarding the assessment of penalties makes clear that enforcement action, under N.J.A.C. 7:13-19, may be taken against any person responsible for undertaking a regulated activity not in conformance with one of the flood hazard area permits listed at N.J.A.C. 7:13-2.1(b).

N.J.A.C. 7:13-19.2 Grace period applicability; procedures

1016. COMMENT: The Department should delete its proposal at N.J.A.C. 7:13-19.2 to classify various administrative and/or court recording deficiencies/failures as a "Non-Minor Violation" under the Grace Period Law N.J.S.A. 58:16A-63, and subject to the imposition of civil penalties and/or injunctive relief. The Department can and does return or deny permit applications. Said actions are penalty enough so long as there is no threat or damage to public/environmental public safety, health and general welfare. (47)

RESPONSE: The Department's experience in the implementation of the Flood Hazard Area Control Act over time has shown that failure to comply with certain provisions, including administrative conditions requiring the recording of deed restrictions and/or conservation easements, often results in adverse impacts to floodplains and increased vulnerability of people and property to flood events. The Department believes that the classification of these "deficiencies" as non-minor is appropriate and is will result in increased compliance with conditions upon which a permit has been granted.

Appendix 1: Approximating the Flood Hazard Area Design Flood Elevation

1017. COMMENT: There is no authoritative source or scientific basis for Method 5, for approximating the Flood Hazard Area Design Flood Elevation. In addition, it does not take into account online or run-of-river dams. Furthermore, it assumes that 1 ft or 2 ft contour interval
topographic mapping will be readily available to the public. This is rarely the case and would therefore require detailed topographic mapping and added costs. (33)

1018. **COMMENT:** We would like to review the technical basis for the flood “depth” table. The potential for error associated with this approach makes it unsuitable for design purposes. If a flood boundary must be determined, the NJDEP should require the applicant to perform a hydrologic/hydraulic study of the stream and determine the flood elevation and boundary for the area in question. It is unwise to depend on a “table” of gross estimates when public property and safety are concerned. (55)

**RESPONSE TO COMMENTS 1017 AND 1018:** The approximation method, referred to as Method 5, is an elective, new option. It is the Department's experience that an exact delineation of the flood hazard area is not always required in order to determine compliance with this chapter, and so calculating the exact flood hazard area design flood elevation can be unnecessarily burdensome and costly. For example, a person with a large site, who is proposing only a small activity and is willing to place the activity anywhere on the site, might prefer a conservative estimate of the flood hazard area in order to avoid the flood hazard area altogether. In such a case, a quick and inexpensive estimate of the flood hazard area is sufficient, even if it is a conservative estimate, rather than an expensive and time-consuming, yet more exact delineation. Since this method is conservative, in no case shall an applicant be required to use this method.

As noted in the proposal summary at 38 N.J.R. 3939-40, the approximation method is based on an extensive analysis of USGS data, FEMA flood insurance studies and methods used by other states to approximate flood hazard areas. Data was collected from every FEMA detailed flood insurance study in the State in order to generate a logarithmic relationship between the 100-year flood depth in a water and the water's drainage area. Flood depths that were artificially raised due to influences from road crossings, dams and/or confluence with other waters were not included, since these values would skew the data. Separate equations were then calculated for each of the State's 20 Watershed Management Areas. Each equation line was then plotted and subsequently raised so that all collected data points fell below the equation line. An additional
0.5 foot factor of safety was also added to each equation and flood depths were rounded up to the next-highest foot to provide even increments. These actions were necessary to ensure that the actual flooding along a stream will not be greater than what this method approximates. The FEMA data represents 100-year flood conditions at the time the FEMA study was produced. These added factors of safety therefore estimate the effects of development on each watershed as well as take into account the recently published increases in 100-year rainfalls in New Jersey.

Another factor that is used to approximate the depth of flooding is the presence of any roadways that may cross the water downstream of the site. If a small culvert or bridge is located downstream of a site, floodwaters may back up and even overtop the roadway. In such a case, the depth of flooding can be higher on a site than indicated by Table 1. While some road crossings are designed to pass the 100-year flood, most crossings will cause some impediment to flow and will therefore raise flood elevations upstream of the structure to some degree. Railroad crossings, dams and other water control structures have a similar effect. In absence of hydraulic calculations for each structure, the conservative assumption must therefore be made that any crossing will impede flow and increase flooding to the point that water actually overtops the road surface. As such, an applicant must determine the elevation of the lowest point of each roadway or other water control structure that crosses the stream within one mile downstream of the site, which is known as the "low-point" of the crossing. Using Table 2 in Appendix 1, and based on the drainage area of the water, the flood depth in the vicinity of the crossing will be between one and three feet above the crossing's low-point. These depths were calculated using typical road profiles and flow rates for streams of various drainage areas. Figures 1 through 4 in Appendix 1 illustrate these concepts. It is the Department's experience that water control structures more than one mile downstream of a project rarely have a significant impact to flooding on the site and therefore do not need to be considered. However, if the Department is aware of an unusual condition that would indeed affect flooding, such as an extremely large and/or inadequate water control structure more than one mile downstream, N.J.A.C. 7:13-3.5(e) allows the Department to adequately address this situation by preventing construction in the inadequately approximated flood hazard area.

With regard to the ability of the public to access topography of sufficient accuracy to utilize the approximate method, the Department acknowledges that applicants may often be required to
hire a surveyor to produce contours or cross-sections through a proposed development in order to properly apply this method. However, the Department believes that the costs of such surveying are outweighed by the savings that are gained through not requiring an applicant to hire a professional engineer to perform detailed hydrologic and hydraulic calculations. Finally, the Department notes that applicants can, in all cases where no Department delineation is available, perform detailed calculations to determine the flood hazard areas and floodway limits under Method 6 at N.J.A.C. 7:13-3.6.

Economic Impact Statement

1019. COMMENT: The proposal fails to adequately consider the economic impact of these new rules specifically with regard to the proposed increase in the riparian zones around streams and adoption of new restrictions on net-fill. The proposed changes may have a significant impact on development and redevelopment and have not been fully described. Prior to adoption of these rules, the Department should undertake a full economic analysis to determine both the number of acres affected, the impact of the rules on pending development and redevelopment projects, and otherwise, fully document and state the potential effect on development the adoption of these rules will have. (65)

1020. COMMENT: The proposal’s Economic Impact Statement does not include any meaningful analysis of the potential economic consequences of the adoption of the proposed new rules. (7, 18, 33, 46, 53)

RESPONSE TO COMMENTS 1019 AND 1020: As indicated in the Economic Impact Statement, various potential economic impacts are anticipated as a result of the adoption of the new rules, with the overall economic impact anticipated to be positive.

The economic impact analysis acknowledged various potential negative impacts. For example, compliance with the more stringent requirements of the new rules may often require a person seeking to construct within a flood hazard area to incur increased costs related to site evaluation, engineering, design and construction as compared with the existing rules.
Additionally, many projects that meet the existing net fill limitations without requiring the Department to review net fill calculations must include these calculations in order to demonstrate compliance with the new rules. Furthermore, the expansion of the width of riparian zones and the implementation of the zero-percent net fill limitation Statewide will likely reduce the level and type of development that will be possible adjacent to surface waters. As a result, the new rules are likely to further restrict development in many tidal areas. The new rules may, therefore, reduce the expected monetary return that a developer could otherwise have made on a given parcel under the existing rules. Additionally, the new rules are likely to reduce the profit margin on potential development in flood hazard areas.

However, as indicated in the Economic Impact Statement, the adoption will have numerous positive economic impacts. For example, the Department expects that the new rules will actually help to realize a positive economic benefit by establishing the improved construction standards and safety factors of the new rules, which are designed to further reduce the potential for loss of life and property as compared with the existing rules. Improper construction in flood hazard areas can subject housing, businesses and public infrastructure to flood damage and other related problems many years after construction, leaving home and business owners, or taxpayers, to pay for correction and remediation rather than the original developer.

The Department accordingly concluded that the positive economic impacts of this rule outweigh the negative impacts and that these rules were necessary to protect public safety, health and general welfare as well as the environment.

1021. COMMENT: In its economic impact statement, the Department cites that the overall impact will be positive. The reasons cited for this position are that the proposal will continue to prevent and minimize the substantial economic impacts from flooding. We agree that New Jersey and its citizens suffer substantial economic impacts from flooding. However, while this proposal could offset some of the impacts of future episodic flooding, it will decrease the safety and reliability of the electric and gas utility system available to these same New Jersey citizens. The utility industry provides essential services through utility facilities that need to be upgraded and maintained, and these rules will impact our ability to continue to upgrade our existing electric and gas infrastructure. Furthermore most if not all utility infrastructure has minimal impact on
flood areas, and is generally designed in a manner that allows for the free flow of floodwaters.

(22)

RESPONSE: The Department disagrees with the commenter that the adopted new rules will decrease the safety and reliability of the electric and gas utility system available to these same New Jersey citizens. With proactive planning by utility companies, the Department believes that upgrade and maintenance of electric and gas infrastructure can be readily accomplished. Even minimal impact(s) on flood areas by utility infrastructure, as noted by the commenter, has a cumulative impact over time on the natural environment to absorb and ameliorate the effects of flood waters.

Jobs Impact Statement

1022. COMMENT: The proposal’s Jobs Impact Statement does not adequately address the potential employment impact of the adoption of the proposed new rules. (7, 18, 33, 46, 53)

RESPONSE: It is the Department’s experience through many years of implementing the Flood Hazard Area Control Act rules that they have minimal, if any, negative impact on jobs. In fact, the rules often create additional jobs for consultants, engineers and attorneys for projects seeking approval to construct in regulated areas. For all of the reasons discussed in the Jobs Impact Statement at 38 N.J.R. 4037-8, it is anticipated that the new adopted rules will also have minimal, if any, negative impact on jobs.

Agriculture Industry Impact Statement

1023. COMMENT: The Agriculture Industry Impact statement does address the land equity implications of these rules. We believe that the required buffer widths will have a negative impact on farmland values. Maintaining the value of the land is critical to farmers, as it directly relates to a farmer’s ability to secure loans for operational costs. Reducing farmland values
reduces a farmer’s net worth, which affects individual farm viability and New Jersey’s efforts to retain productive farmland. (55)

RESPONSE: The Department does not intend to impede the ongoing operation of lawfully existing farms through the adopted new rules and, as such, as adopted four permits-by-rule at N.J.A.C. 7:13-7.2(f) to facilitate such operations. For example, the permit-by-rule at N.J.A.C. 7:13-7.2(f)1 authorizes the continuation of existing, ongoing agricultural activities in many situations. Furthermore, N.J.A.C. 7:13-7.2(f)2 authorizes new agricultural activities that do not result in the placement of fill or an aboveground structure. Vegetation in the riparian zone can be disturbed to accommodate new agricultural activities where previous development or disturbance has occurred. The permit-by-rule at N.J.A.C. 7:13-7.2(f)3 authorizes certain soil conservation and agricultural activities, and the permit-by-rule at N.J.A.C. 7:13-7.2(f)4 authorizes the construction of an agricultural building without a foundation. The Department has also adopted seven general permits at N.J.A.C. 7:13-8.4 which facilitate common agricultural projects, with NRCS oversight, under an expedited permitting process. The Department believes that these provisions will ensure that ongoing agricultural practices will not be hindered, and that the adopted new rules will not decrease the value of farmland in New Jersey.

Summary of Agency-Initiated Changes:

In addition to the changes made on adoption explained above in response to comments, the Department has made grammatical, stylistic, cross-reference, and typographical corrections throughout the rules. The Department has also made the following changes on adoption:

1. In the various provisions related to permit applications in the rules, reference is made to the LURP-1 application form. The Department has recently updated the application form, which is also required to be submitted under other DEP land use regulatory programs. The application form labeled “LURP-1” is no longer provided to applicants for land use permits. On adoption, the references in these rules to the “LURP-1” form are therefore simplified to reference the “LURP” form.
2. The waters along which riparian zones are established are described in the Coastal Zone Management rules at N.J.A.C. 7:7E-3.26(a), and in the Flood Hazard Area Control Act rules at N.J.A.C. 7:13-2.3(a) and 4.1(a). These sections state that, “A riparian zone exists along every regulated water, except there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon or oceanfront barrier island, spit or peninsula.” As explained in the proposal summary, the vegetation, topography, landscape and development typical along these exempted waters are significantly different from other riparian areas in the State. Since the primary purpose of a riparian zone is to maintain a water-quality protective vegetated buffer along the water, a riparian zone is not necessary or useful along such waters. On adoption, N.J.A.C. 7:7E-3.2(a) and N.J.A.C. 7:13-2.3(a) and 4.1(a) are modified to include stormwater management basins among the regulated waters not subject to a riparian zone. As defined at N.J.A.C. 7:13-1.2, a stormwater management basin is an “impoundment created by constructing an embankment, excavating a pit and/or erecting or placing a structure, for the purpose of managing stormwater runoff.” Stormwater management basins are manmade features designed to receive runoff from developed areas in order to provide water quality or quantity treatment of stormwater, and/or to promote groundwater recharge. Frequently, stormwater management basins are constructed very close to or in the midst of developed areas, and there is no existing vegetated buffer around them to preserve or protect by imposing a riparian zone. In this aspect, stormwater management basins are similar to manmade lagoons, which are exempted from riparian zones.

The Department notes that riparian zones are applicable along naturally-occurring ponds or other surface waters that have been converted into and/or are being used as stormwater management basins. Furthermore, in cases where a stormwater management basin has been constructed on-stream (such that a regulated water flows into one end of a basin and out of the other end), while the basin itself does not have a riparian zone, the regulated water that flows into and through the basin does have a riparian zone. The riparian zone in such a case would be measured landward from the top of bank along the regulated water, as described at N.J.A.C. 7:13-4.1(b), along the segments of the water that lie outside the basin. For the segment of the regulated water that originally passed through the basin, but which is currently engulfed by the basin, the riparian zone would be measured landward from the basin’s centerline, as described at
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N.J.A.C. 7:13-4.1(b)4. Thus, the original feature passing through the basin still receives a riparian zone, but the stormwater management basin itself does not.

Finally, it should be noted that a stormwater management basin with a drainage area of 50 acres or more will, like any regulated water having a drainage area of 50 acres or more, possesses a flood hazard area, pursuant to N.J.A.C. 7:13-2.2(a)1. Stormwater management basins that drain less than 50 acres are exempt from regulation under this chapter pursuant to N.J.A.C. 7:13-2.2(a)3ii.

3. In the proposed rules at N.J.A.C. 7:7E-3.26(b)4, as well as throughout N.J.A.C. 7:13, the terms “definable” and “discernible” are both used to describe a channel that possesses bed and banks. On adoption, N.J.A.C. 7:7E-3.26(b)4, N.J.A.C. 7:13-2.2(a)3i and N.J.A.C. 7:13-4.1(b)4 have been modified to replace “definable” channel with “discernible” channel because “discernible” more accurately reflects the fact that the presence of a channel is determined through visual observation during field investigations.

4. Proposed N.J.A.C. 7:7E-3.26(c)2i and N.J.A.C. 7:13-4.1(c)2i establish a 150-foot wide riparian zone along both sides of “any upstream tributary to a trout production water.” In many cases, waters that are designated as “trout production” are also designated under the Department’s Surface Water Quality Standards at N.J.A.C. 7:9B as Category One waters, which, along with all upstream tributaries situated within the same HUC-14 watershed, receive a 300-foot riparian zone under these rules at N.J.A.C. 7:7E-3.26(c)1 and N.J.A.C. 7:13-4.1(c)1. In such cases, the trout production water itself (and all upstream tributaries situated within the same HUC-14 watershed), would receive a 300-foot riparian zone, while all tributaries beyond the HUC-14 watershed boundary would receive a 150-foot riparian zone.

As proposed, N.J.A.C. 7:7E-3.26(c)2i and N.J.A.C. 7:13-4.1(c)2i establish a 150-foot wide riparian zone along both sides of “any upstream tributary to a trout production water.” Pursuant to N.J.A.C. 7:7E-3.26(c)2ii and N.J.A.C. 7:13-4.1(c)2ii, trout maintenance waters, which are of equal or lesser ecological significance as compared to trout production waters, receive a 150-foot riparian zone. Thus, under the rules as proposed, in cases where a trout production water is not a Category One water, the upstream tributaries of the trout production...
water would receive a 150-foot riparian zone, but the trout production water itself would receive only a 50-foot riparian zone because its riparian zone would be established under N.J.A.C. 7:7E-3.26(c)3 or N.J.A.C. 7:13-4.1(c)3 (for waters not identified under N.J.A.C. 7:7E-3.26(c)1 or 2 or under N.J.A.C. 7:13-4.1(c)1 or 2). It is not the Department’s intention to provide lesser protection along trout production waters than along trout maintenance waters. Furthermore, the Department has recently proposed to place a 150-foot around trout production and all upstream tributaries under its Water Quality Management Planning rules at N.J.A.C. 7:15-5.25(g)2ii(1) (see 39 N.J.R. 1870(a)). Therefore, N.J.A.C. 7:7E-3.26(c)2i and N.J.A.C. 7:13-4.1(c)2i have been modified upon adoption to provide that a 150-foot riparian zone applies to “any trout production water and all upstream waters (including tributaries).” This ensures that comparable riparian zone protection is provided for waters of comparable resource value.

5. As proposed, N.J.A.C. 7:7E-3.26(c)2ii and N.J.A.C. 7:13-4.1(c)2ii establish a 150-foot riparian zone along both sides of “any trout maintenance water and all upstream tributaries within one mile.” Similarly, as proposed, N.J.A.C. 7:7E-3.26(c)2iii and N.J.A.C. 7:13-4.1(c)2iii establish a 150-foot riparian zone along both sides of “any segment of a water flowing through an area that contains documented habitat for a threatened or endangered species of plant or animal, which is critically dependent on the regulated water for survival, and all upstream tributaries within one mile.” In each case, “all upstream tributaries within one mile” includes not only separate streams that flow into the regulated water having the trout maintenance or threatened or endangered species habitat designation, but also the regulated water itself upstream of such designation. In order to clarify this point, and in response to comments on proposed N.J.A.C. 7:13-4.1(c)2 regarding how to measure the one-mile limit (see response to comments 382 through 384, N.J.A.C. 7:7E-3.26(c)2ii and iii, and N.J.A.C. 7:13-4.1(c)2ii and iii, have been modified on adoption to apply to “all upstream waters (including tributaries) within one linear mile as measured along the length of the regulated water.”

6. The definition for “drawing” at N.J.A.C. 7:13-1.2 has been modified on adoption to clarify that, in addition to depicting land, water and/or structures on paper, a drawing can also indicate any physical features that appear on a site, such as vegetation.
7. The term “fish habitat enhancement device,” which is defined at N.J.A.C. 7:13-1.2 for purposes of the permit-by-rule at N.J.A.C. 7:13-7.2(a)7, has been replaced on adoption with “aquatic habitat enhancement device” in order to more accurately reflect that such devices can be designed and constructed to enhance habitat for various aquatic species, not only fish.

8. As proposed, N.J.A.C. 7:13-2.1(b)5 and 2.1(c)2 referenced certain applications for a CAFRA or waterfront development permit that are “accepted by the Department as complete for review”. The word “accepted” has been replaced with “declared” in order to be consistent with the terminology of the Coastal Permit Program rules at N.J.A.C. 7:7.

9. A flow chart for determining the flood hazard area on a site is included at the end of N.J.A.C. 7:13-3.2. Reference to footnote 5 has been added to the box in the flowchart which asks, “Can the Department approve the project without reviewing hydraulic or fill calculations?” and footnote 7 has been modified to delete reference to footnote 5.

10. Consistent with N.J.A.C. 7:13-3.4(a) and with the explanation of how to determine a flood hazard area at N.J.A.C. 7:13-3.1(b), the rules at N.J.A.C. 7:13-3.5(a) and 3.6(a) have been modified on adoption to indicate that each of these sections sets forth procedures for “determining a flood hazard area design flood elevation and floodway limit.”

11. N.J.A.C. 7:13-3.6 sets forth the procedure for determining a flood hazard area design flood elevation and floodway limit using hydrologic and hydraulic calculations under Method 6. As proposed, N.J.A.C. 7:13-3.6(c)2 provided that “a hydraulic analysis shall be performed to determine the flood hazard area design flood elevation using 125 percent of the 100-year flow rate” determined under N.J.A.C. 7:13-3.6(c)1. This methodology for determining the flood hazard area design flood elevation is appropriate for fluvial areas, and is equivalent to the provision at N.J.A.C. 7:13-3.4(f)1i under Method 4 for the same type of calculations. It is not appropriate for tidal areas, however. Accordingly, at N.J.A.C. 7:13-3.6(c)2, a provision setting forth the proper methodology for determining the flood hazard area design flood elevation in
tidal areas has been added on adoption, so that calculating the flood hazard area design flood elevation under both Methods 4 and 6 is equivalent.

12. N.J.A.C. 7:13-5.1(d) sets forth the procedure that the Department shall follow in reviewing a request for an applicability determination. As proposed, N.J.A.C. 7:13-5.1(d)2i explained that the Department may not be able to determine whether N.J.A.C. 7:13 applies to a proposed activity because the limit of the flood hazard area onsite cannot be determined without additional information. Since the Department makes its applicability determination based on the location of both the flood hazard area and the riparian zone, because these are the two regulated areas around regulated waters, N.J.A.C. 7:13-5.1(d)2 has been modified on adoption to also reference the riparian zone. In addition, the term “flood hazard area verification” has been modified to “verification,” since the latter is the term defined at N.J.A.C. 7:13-1.2.

13. Several permits-by-rule at N.J.A.C. 7:13-7.2 specify that an activity must be located within a flood fringe, in order to ensure that the activity does not cause an obstruction to floodwaters in a floodway. For example, as proposed, N.J.A.C. 7:13-7.2(a)1 allows the reconstruction of a lawfully existing structure under certain circumstances, provided the activity is not located in a flood fringe. Since the floodway and the flood fringe together comprise the flood hazard area, requiring an activity to be situated in a flood fringe necessarily requires that it not be located in a floodway. However, in some cases, the riparian zone along a regulated water may extend outside the flood hazard area limits (and therefore beyond the flood fringe limits). By stating that a permitted-by-rule activity must be located “in a flood fringe” rather than “outside a floodway”, the proposed rule inadvertently prohibited the regulated activity from taking place in a riparian zone that lies outside a flood fringe. In order to clarify the Department’s intent that regulated activities under various permits-by-rule be located outside a floodway, the following permits-by-rule have been changed on adoption to apply “outside a floodway” rather than “in a flood fringe”: N.J.A.C. 7:13-7.2(a)1 and 4; (b)2, 3, 7, 8, 9, 11 and 15; (c)2; (d)1; (e)1; and (f) 3 and 4. Table A at N.J.A.C. 7:13-7.1(e) has also been edited to reflect these clarifications, as well as to indicate that the activities permitted under N.J.A.C. 7:13-7.2(e)2 and 3 are not necessarily restricted to the flood fringe. Finally, N.J.A.C. 7:13-7.2(a)3ii, which as proposed required that
the regulated activity not be located in a floodway, has been incorporated into N.J.A.C. 7:13-7.2(a)3 for clarity and consistency with the other permits-by-rule.

14. As proposed, the permit-by-rule at N.J.A.C. 7:13-7.2(a)2 allowed “any construction activity at or below grade” provided certain conditions are met. A number of examples are given of activities that may meet the requirements of this paragraph. As noted in the summary, the intention of this permit-by-rule is to allow a range of activities that will not adversely impact flooding or the environment. In order to apply this permit-by-rule as intended and to reduce possible confusion over the type of activities that may be covered, the Department has made the following clarifications on adoption: (1) The Department recognizes that the riparian zone can sometimes extend outside of, or beyond, the limits of the flood hazard area. This is especially true along small streams that have a narrow flood hazard area but which can have a riparian zone of up to 300 feet in width. The requirement that an activity under this permit-by-rule be “at or below grade” is appropriate for activities situated in a flood hazard area, since aboveground activities in a flood hazard area can displace flood storage or create an obstruction to floodwaters. However, in cases where an activity is proposed outside a flood hazard area but within the riparian zone and therefore under the jurisdiction of these rules, there is no need to require the activity be situated “at or below grade.” Therefore, since this permit-by-rule was not intended to apply only to activities within flood hazard areas, the requirement that an activity be situated “at or below” grade has been moved to N.J.A.C. 7:13-7.2(a)2i in order to clarify that it only applies to activities situated in flood hazard areas. Activities situated outside flood hazard areas can therefore be aboveground, provided all other requirements of the permit-by-rule are met.

15. The permit-by-rule at N.J.A.C. 7:13-7.2(b)5 allows for the construction of a fence provided certain conditions are met. N.J.A.C. 7:13-7.2(b)5iv(2) requires that, if the fence is located in a floodway, it must have “sufficiently large openings so as not to catch debris during a flood and thereby obstruct floodwaters, such as a barbed-wire, split-rail or strand fence.” Furthermore, it is noted that a “fence with small or no openings, such as a chain link, lattice or picket fence” does not qualify for this permit-by-rule. General permit 2F at N.J.A.C. 7:13-8.4(c)6 allows the
construction of a fence in a floodway on agricultural land, and includes a similar requirement for a “fence with little or no open area, such as a chain link, lattice or picket fence.” For clarify and consistency, general permit 2F at N.J.A.C. 7:13-8.4(c)6 has been modified on adoption to refer to a fence with “small or no openings” rather than a fence with “little or no open area.”

16. The permits-by-rule at N.J.A.C. 7:13-7.2(e) apply to various activities associated with the storage of secured and/or unsecured material in a regulated area. N.J.A.C. 7:13-7.2(e)2 has been modified on adoption to clarify that the storage in a regulated area of unsecured material incidental to “the use or maintenance of” a lawfully existing private residence is permitted-by-rule. Furthermore, N.J.A.C. 7:13-7.2(e)2ii has been modified on adoption to clarify that “the storage of” certain types of material onsite is not permitted-by-rule. Similarly, N.J.A.C. 7:13-7.2(e)3 has been modified on adoption to clarify that the storage in a regulated area of unsecured material incidental to “the use or maintenance of” a lawfully business or other non-residential facility is permitted-by-rule. Finally, N.J.A.C. 7:13-7.2(e)3ii has been modified on adoption to clarify that this “permit-by-rule does not authorize the storage of” certain types of material onsite.

17. A typographical error at N.J.A.C. 7:13-7.2(f)4i is corrected on adoption by deleting the word “not.” As is the case with all of the permits-by-rule in this subsection, and as noted in the proposal summary at 38 N.J.R. 3981, it is the Department’s intention to allow the construction of the specified regulated activities on land that has been actively farmed since the October 2, 2006, proposal date of these new rules.

18. In order to assist prospective applicants in selecting a general permit that is appropriate for a proposed activity, a table identifying the general permits has been included on adoption at N.J.A.C. 7:13-8.1(a). Table B is similar to Table A at N.J.A.C. 7:13-7.1(d) for permits-by-rule. Table B replaces the list of general permits that had been proposed at N.J.A.C. 7:13-8.1(a)1-10. Proposed Table B through Table F are recodified on adoption as Table C through Table G.
19. N.J.A.C. 7:13-8.1(d) sets forth the procedure for the Department’s review of a general permit application to determine completeness. N.J.A.C. 7:13-8.1(d)2 provides that the Department may, within 20 working days of the receipt of a general permit application, “determine that all necessary information required by this chapter for a complete general permit application has not been provided, or that one or more submitted items are deficient, and request in writing that the applicant submit the missing or incomplete information within a reasonable time period.” This provision has been modified on adoption to clarify that the Department will request in writing that the applicant submit the missing “material and/or address any deficiencies” within a reasonable time period, rather than the missing “or incomplete information.” N.J.A.C. 7:13-8.1(d)2 also provides that “the Department may cancel the application if the missing information is not provided within 60 calendar days.” This provision has also been modified on adoption to refer to the information the Department has “requested” rather than to require “missing” information to be submitted. N.J.A.C. 7:13-8.1(d)2 has also been modified on adoption to clarify that the Department shall “subsequently” declare the application complete for review within 20 working days of receiving the requested information. Finally, N.J.A.C. 7:13-8.1(d)3 has been modified on adoption to clarify that, if the Department does not take action under N.J.A.C. 7:13-8.1(d)1 or 2, within 20 working days of the receipt of a general permit application, the application shall “automatically” be deemed complete for review.

20. N.J.A.C. 7:13-8.1(f) has been modified on adoption to clarify that, if the Department fails to take written action on a general permit application in accordance with N.J.A.C. 7:13-8.1(e), the general permit application shall “automatically be deemed to be approved,” rather than “be deemed to have been automatically approved.”

21. N.J.A.C. 7:13-8.1(k) has been amended to indicate that, pursuant to Table F at N.J.A.C. 7:13-17.1 (proposed as Table E), the $500.00 fee for a verification based on methods 1, 2, 3 and 5 does not apply if the verification application is submitted concurrently with an application for any general permit authorization for which verification of the flood hazard area is required to determine compliance with the general permit.
22. N.J.A.C. 7:13-8.2 sets forth the conditions that apply to all general permit authorizations issued under this chapter. The condition at N.J.A.C. 7:13-8.2(b)11, which provides that the Department can inspect and enter a site that has received a general permit authorization, has been modified on adoption to clarify that such access is required “at reasonable times.” This provision is already stated at N.J.A.C. 7:13-8.2(b)11ii and iii, and, by inclusion at N.J.A.C. 7:13-8.2(b)11, will also apply to N.J.A.C. 7:13-8.2(b)11i, which requires that the Department may “enter upon the permittee's premises where a regulated activity is located or conducted, or where records must be kept under the conditions of the permit authorization.”

23. N.J.A.C. 7:13-8.3(d)3i provides that activities under this permit-by-rule are limited to the “removal of accumulated silt, sediment, debris and/or garbage from a channel with a natural bed.” The second sentence of N.J.A.C. 7:13-8.3(d)3i has therefore been modified on adoption to provide that this general permit does not authorize removal of material below the natural “bed” of the channel, rather than the “bottom” of the channel, for consistency.

24. N.J.A.C. 7:13-8.3(g) and (h) set forth the procedures for the Department’s review of activities under general permit 1. Both subsections have been modified on adoption to clarify that within a prescribed number of calendar days “following” the receipt of an application, the Department will render a decision on the application. Furthermore, in order to be consistent with the language modified on adoption for the parallel provisions at N.J.A.C. 7:13-8.1(d), N.J.A.C. 7:13-8.3(g)1 and (h)1 have been modified on adoption to provide that the Department may cancel the request for a general permit if the “requested” information is not provided within the prescribed time. Furthermore, when the “requested” information is received, the Department shall take an action provided at N.J.A.C. 7:13-8.3 (g)2 or 3 , or N.J.A.C. 7:13-8.3(h)2 or 3, as appropriate.

25. N.J.A.C. 7:13-8.3(i) has been modified on adoption to provide that, if the Department fails to take written action on an application in accordance with N.J.A.C. 7:13-8.3(g) or (h), the general permit “application” shall “automatically” be deemed to be approved, in order to match the language of the parallel provision at N.J.A.C. 7:13-8.1(f).
26. N.J.A.C. 7:13-8.3(j) has been modified on adoption to clarify that if the Department's technical reasons for denying authorization under general permit 1 are based upon an inability to determine “the location of” the natural channel bed, the Department shall, at the request of the applicant, assist in identifying the natural channel bed.

27. Throughout the chapter, standards are established on the “clearing, cutting and removal” of vegetation within riparian zones. N.J.A.C. 7:13-8.4(c)1 establishes limitations on the amount of vegetation that can be disturbed under a soil erosion control, bank stabilization or bank restoration project under general permit 2A. In order to be consistent throughout the chapter, N.J.A.C. 7:13-8.4(c)1i has been modified on adoption to clarify that where solely re-sloping an eroded bank and planting vegetation will not stabilize erosion, or where more than 2,000 square feet of trees would be “cleared, cut or” removed using such methods, soil bioengineering, shall be used.

28. N.J.A.C. 7:13-8.5 establishes general permit 3 for bridge for culvert scour protection by a public entity. N.J.A.C. 7:13-8.5(a) provides that a public entity may place rip-rap and other stabilization material within or along a regulated water to replace material that has eroded away. It is not the Department's intention, however, to limit scour protection activities under this general permit to only one location per general permit authorization. The Department recognizes that, in order to best protect public safety, health and general welfare, scour protection activities performed by a public entity often encompass several locations along a given reach of stream or roadway. Therefore, N.J.A.C. 7:13-8.5(a) has been modified on adoption to clarify that a public entity can request authorization for scour protection activities along “one or more” regulated waters.

29. N.J.A.C. 7:13-8.7 establishes general permit 5 for the relocation of a building to reduce flood damage. N.J.A.C. 7:13-8.7(b)2 requires that a building being relocated under this general permit shall not be enlarged. However, permits-by-rule have been established under N.J.A.C. 7:13-7.2 in order to construct a small addition to buildings in various situations that will not
adversely impact flooding or the environment. In order to clarify that these permits-by-rule are available in certain cases, N.J.A.C. 7:13-8.7(b)2 has been modified on adoption to require that the building not be enlarged “except for an addition that meets a permit-by-rule at N.J.A.C. 7:13-7.2.” Furthermore, N.J.A.C. 7:13-8.7(b)7, which requires that no vegetation can be cleared, cut or removed in a riparian zone, except for vegetation within “20 feet of the building” if such disturbance is necessary to facilitate its relocation, has been modified on adoption to clarify that this requirement applies to both the existing building location and the proposed building location.

30. N.J.A.C. 7:13-8.8(a) erroneously cites N.J.A.C. 7:13-7.1(b), rather than N.J.A.C. 7:13-8.1(b), when referring to the standards applicable to all general permits. N.J.A.C. 7:13-8.8(a) has therefore been modified on adoption to cite N.J.A.C. 7:13-8.1(b).

31. N.J.A.C. 7:13-9.3 sets forth the Department’s review procedures for a verification or individual permit. N.J.A.C. 7:13-9.3(a) provides that this section does not apply to certain cases precluded by the Construction Permits Law at N.J.S.A. 13:1D-29 et seq. and Highlands Water Protection and Planning Act at N.J.S.A. 13:20-1 et seq. N.J.A.C. 7:13-9.3(a) has therefore been modified on adoption to provide citations to these acts for clarity. N.J.A.C. 7:13-9.3(b) has also been modified on adoption to clarify that its provisions apply to both verifications and individual permits. Finally, N.J.A.C. 7:13-9.3(b) and (h) have been modified on adoption to reflect clarifications made to the processing and approval of verification and individual permit applications, which match the modifications made to the parallel provisions for general permit 1 at N.J.A.C. 7:13-8.3(g), (h) and (i) and for all other general permits at N.J.A.C. 7:13-8.1(d) and (f).

32. N.J.A.C. 7:13-9.5 sets forth the conditions that apply to all general permit authorizations issued under this chapter. The condition at N.J.A.C. 7:13-9.5(b)11, which provides that the Department can inspect and enter a site that has received a general permit authorization, has been modified on adoption to clarify that such access is required “at reasonable times.” This provision is already stated at N.J.A.C. 7:13-9.5(b)11ii and iii, and, by inclusion at N.J.A.C. 7:13-9.5(b)11, will also apply to N.J.A.C. 7:13-9.5(b)11i, which requires that the Department may “enter upon
the permittee's premises where a regulated activity is located or conducted, or where records
must be kept under the conditions of the permit authorization.

33. N.J.A.C. 7:13-9.6 established the cases where a verification is required prior to obtaining an
individual permit. N.J.A.C. 7:13-9.6(a), (b) and (c) have been modified on adoption to include
additional text that better clarifies and summarizes the text with no change in meaning from
proposal, as well as to provide consistency between the parallel provisions at N.J.A.C. 7:13-
9.6(b) and (c).

34. N.J.A.C. 7:13-9.8 sets forth hardship exception provisions for individual permits. Certain
clarifying changes have been made on adoption to the requirements at N.J.A.C. 7:13-9.8(c) as
follows.

N.J.A.C. 7:13-9.8(c)1 requires a description of “the potential effects” of the proposed
project upon the environment. This has been modified on adoption to require a description of
“any potential impacts,” in order to use consistent language throughout the section.

N.J.A.C. 7:13-9.8(c)2 has been modified on adoption to clarify that if the hardship
exception “request” relates to the access requirements of N.J.A.C. 7:13-11.6, proposed access
routes to and from the property during a flood must be provided.

N.J.A.C. 7:13-9.8(c)3 has been modified on adoption to clarify that the requirement to
provide the projected height, velocity and duration of the floodwaters expected at the site during
the flood hazard area design flood are applicable only in cases where “the hardship exception
request relates to any potential impacts from or to flooding,” since this information would not be
relevant to the Department in any other case. The requirements of N.J.A.C. 7:13-9.8(c)6 have
also been combined with N.J.A.C. 7:13-9.8(c)3 since both paragraphs relate to the potential
adverse impacts that the project may cause to flooding.

N.J.A.C. 7:13-9.8(c)5 requires a description of the existing development in the area and
the impact of the proposed regulated activities on that development. This has been modified on
adoption to require a description of “any potential impacts” of the proposed regulated activities
on that development to provide consistency between N.J.A.C. 7:13-9.8(c)1, 3 and 5.
Finally, N.J.A.C. 7:13-9.8(c)7 has been modified on adoption to refer to a “hardship exception request” in order to be consistent throughout the section.

35. N.J.A.C. 7:13-10.1(e) has been modified on adoption to clarify that “a person shall not drive or operate a vehicle across a channel except “in the following cases” which are listed at N.J.A.C. 7:13-10.1(e)1, 2 and 3.

36. N.J.A.C. 7:13-10.2 contains requirements for individual permits for regulated activities in riparian zones. As proposed, N.J.A.C. 7:13-10.2(a) stated that N.J.A.C. 7:13-10.2 establishes specific design and construction standards for individual permits that apply to regulated activities that “will result in the clearing, cutting or removing of vegetation in a riparian zone.” N.J.A.C. 7:13-10.2(v) addresses situations where an applicant proposes to redevelop a site within 25 feet of any top of bank or edge of water. In such a situation, applicants are required to remove “all existing impervious surface within 25 feet of the top of bank or edge of water” and the reclaimed riparian zone must be “adequately stabilized and replanted with indigenous, non-invasive vegetation” except in certain cases set forth at (v)1 and 2. In some cases, redevelopment within 25 feet of a top of bank or edge of water will not result in the clearing, cutting or removing of vegetation in a riparian zone, since the entire riparian zone is already paved, occupied by structures or otherwise lawfully devoid of vegetation. In order to address the possible conflict between N.J.A.C. 7:13-10.2(a) and (v), subsection (a) has been modified on adoption to delete reference to the qualification that the activities governed by N.J.A.C. 7:13-10.2 result in clearing, cutting, or removal of vegetation. When vegetation disturbance in the riparian zone is relevant for the purpose of any of the other requirements in N.J.A.C. 7:13-10.2, it is specifically mentioned in the respective subsections.

37. N.J.A.C. 7:13-10.2(m)4iii requires, for the construction of a private residence in a riparian zone, that all disturbance within the riparian zone is located at least 25 feet from any top of bank or edge of water and as far from the regulated water as possible, unless the private residence is constructed adjacent to a “man-made tidal waterway.” However, most manmade tidal waters do not possess a riparian zone pursuant to N.J.A.C. 7:7E-3.26(a), N.J.A.C. 7:13-2.3(a) and N.J.A.C.
7:13-4.1(a). As such, N.J.A.C. 7:13-10.2(m)4iii has been modified on adoption to clarify that the requirement of this subparagraph applies only if the manmade tidal waterway has a riparian zone.

38. N.J.A.C. 7:13-10.2(n)2ii, for the construction in a riparian zone of an addition to an existing building, or the construction of a building appurtenant to an existing building, such as a garage, barn or shed, has been modified on adoption to provide the same exception for constructing an addition to an existing building in the riparian zone along a manmade tidal waterway that is provided for the construction of a new house under N.J.A.C. 7:13-10.2(m)4iii. As explained in the summary of N.J.A.C. 7:13-10.2(m)4, the potential undermining of the bank by migration of the stream is not a concern along a manmade tidal waterway.

39. N.J.A.C. 7:13-10.2(p) sets forth requirements for the construction in a riparian zone of a public accessway or public access area along a tidal water. At N.J.A.C. 7:13-10.2(p)1, a grammatical change has been made on adoption to link the two sentences of the subparagraph. At N.J.A.C. 7:13-10.2(p)3, the qualifier “reasonable” is replaced with “feasible” with regard to the location of a parking area for the public access for consistency with similar requirements at N.J.A.C. 7:13-10.2(m)4ii, (n)2i and (r)3ii.

40. N.J.A.C. 7:13-10.2(q) sets forth requirements for the construction in a riparian zone of a water dependent development along a tidal water. At N.J.A.C. 7:13-10.2(q)3 “feasible” is inserted with regard to the location of the development on site, for consistency with similar standards at N.J.A.C. 7:13-10.2(m)4ii, (n)2i, (p)3 and (r)3ii.

41. N.J.A.C. 7:13-10.2(t)4 sets forth certain requirements for replanting vegetation as 2:1 compensation for disturbances under N.J.A.C. 7:13-10.2(f)1, (i)2, (o), (r)4 and (s). On adoption, the statement that “replanting vegetation that was removed in violation of this chapter does not constitute compensation under this section” has been moved from N.J.A.C. 7:13-10.2(t)4ii to N.J.A.C. 7:13-10.2(t)4, since this caveat applies to any replanting conducted for purposes of compensation for disturbance in the riparian zone.
42. N.J.A.C. 7:13-10.4(j) establishes parameters for calculating flood storage volumes under N.J.A.C. 7:13-10.4. N.J.A.C. 7:13-10.4(j)2 provides that any flood storage displacement above the 10-year flood elevation must be compensated for by the creation of flood storage above the 10-year flood elevation, and that any flood storage displacement proposed below the 10-year flood elevation must be compensated for by the creation of flood storage below the 10-year flood elevation. Accordingly, N.J.A.C. 7:13-10.4(c)2, (e)3, (f) and (j)1, as well as Table D (proposed as Table C), where calculation of the flood storage volume is referenced, have been modified on adoption to use the more specific and accurate terminology used at N.J.A.C. 7:13-10.4(j)2.

43. N.J.A.C. 7:13-10.4(n) sets forth requirements for the onsite creation of flood storage in compensation for a proposed project that will displace flood storage. N.J.A.C. 7:13-10.4(p) sets forth similar standards for the offsite creation of flood storage in compensation for a proposed project that will displace flood storage. As noted in the proposal summary at 38 N.J.R. 4005, in order for created flood storage to effectively compensate for fill, floodwaters must be able to access the compensation area without affecting intervening properties and exacerbating local flooding. Accordingly, a number of conditions are listed at both N.J.A.C. 7:13-10.4(n) and (p) to ensure that the created flood storage volume will be safe and effective.

As proposed at both N.J.A.C. 7:13-10.4(n)1 and (p)1, the requirement is made that any compensatory flood storage must be “created within or adjacent to the flood hazard area of the same water as the proposed flood storage displacement, or a tributary to the same water as the proposed flood storage displacement, if the flood hazard area of both waters connect onsite.” As noted in the proposal summary at 38 N.J.R. 4005, this requirement is necessary because both the fill and the compensation must lie within the same flood hazard area complex in order to be effectively balanced. In most cases, the Department anticipates that compensatory flood storage will occur along the same water that the fill is proposed. In some cases, however, an applicant may be able to create compensatory flood storage along a nearby tributary to the water onsite, provided all other conditions of N.J.A.C. 7:13-10.4(n) and (p) are met, as appropriate.
With regard to eligible tributaries, proposed N.J.A.C. 7:13-10.4(n)1 and (p)1 allow compensatory flood storage to be created along a tributary to the water onsite, only if the flood hazard area of both waters connect onsite. This is appropriate, in that it prevents tributaries downstream of the site from being eligible for compensation, as this would not constitute effective flood storage. However, any tributary to the water that lies upstream of the site could provide effective compensatory flood storage, provided all other requirements of subsections (n) and (p) are met, as appropriate. The flood hazard area of the tributary need not connect with the flood hazard area of the water onsite in order to provide effective flood storage compensation. Therefore, in order to clarify the Department’s intent as set forth in the proposal summary, N.J.A.C. 7:13-10.4(n)1 and (p)1 have been modified on adoption to require that compensatory flood storage can be created within or adjacent to the flood hazard area of the same water as the proposed flood storage displacement, or a tributary to the same water as the proposed flood storage displacement, “provided the tributary lies upstream of the site or” the flood hazard area of both waters connect onsite.

44. Table E at N.J.A.C. 7:13-10.5(d) (proposed as Table D), which sets forth restricted time periods for waters with fishery resources, has been modified on adoption to add detail to the names and locations of the Pennsylvania Turnpike bridge and the Interstate 295 crossing of the Delaware River.

45. N.J.A.C. 7:13-11.5(n)5 requires, in the case of the construction of a garage with a floor below the flood hazard area design flood elevation, that the deed of the affected property be modified to disclose certain facts designed to alert future owners of the garage that flood damages may occur. N.J.A.C. 7:13-11.5(n)5ii has been modified on adoption to match the deed disclosure requirement at N.J.A.C. 7:13-11.6(c)2ii for construction of a garage, since both requirements may apply to the same construction project.

46. N.J.A.C. 7:13-11.9(b)6iii and iv(2), which apply to the placement of a 0.25-inch thick stainless steel above a utility line being constructed under a channel, have been modified on adoption to describe this plate in the same way.
47. As proposed, N.J.A.C. 7:13-11.9(f) established requirements to authorize, over the five-year term of an individual permit, necessary and periodic repair or replacement of damaged or unsafe sections of lawfully existing utility lines. As explained in the proposal summary, the Department recognizes that utility lines must be properly maintained on a regular basis and that, in many cases, such maintenance must be done as soon as a problem in the utility line is discovered. Because fixing these problems cannot often safely wait for the typical individual permit application process, the Department developed this individual permit to allow for maintenance as it is needed, rather than repeatedly issuing emergency permits. Therefore, N.J.A.C. 7:11.9(f) is clarified on adoption to reference “maintenance,” to delete the qualifier “damaged and unsafe” with regard to the utility line to be repaired or replaced (because proper maintenance does not apply only to damaged or unsafe parts of the lines), and to specify that the utility line to be maintained may be above or below ground (because maintenance is necessary for both types of lines). N.J.A.C. 7:13-11.9(f)ii is similarly modified, as is N.J.A.C. 7:13-16.3(d), which discusses the public notice requirements for these individual permit applications.

48. Subchapter 12 establishes emergency permits. N.J.A.C. 7:13-12.1(c)10 has been modified on adoption to require a “drawing” of the proposed emergency activities rather than a “sketch,” since “drawing” is a defined term at N.J.A.C. 7:13-1.2 and more accurately describes the type of information necessary for the Department to make its determination under this section. N.J.A.C. 7:13-12.2(a), (b) and (c) have been modified on adoption to refer consistently to certain actions that are required “within” a number of calendar days “of the Department's verbal approval” of the emergency permit.

49. N.J.A.C. 7:13-13.1 applies to a revision of a verification. Verifications are issued under N.J.A.C. 7:13-6.1, and N.J.A.C. 7:13-6.1(g)5 requires that a note be recorded in the deed for each lot referenced in the verification that states certain facts about the site and its potential for being flooded. N.J.A.C. 7:13-13.1(j)5 also requires that such a statement be recorded in the deed for the lot to which the revised verification applies. Since both statements are intended to convey
the same information, N.J.A.C. 7:13-13.1(j)5 has been modified on adoption to match the language at N.J.A.C. 7:13-6.1(g)5.

50. N.J.A.C. 7:13-13.1(c)1, 13.2(b), 13.3(c)1 and 13.4(b)1 refer to the minor revision of a verification, general permit, individual permit and Department delineation, respectively. As noted in each of these provisions, a minor revision is one that does not require the Department to review detailed engineering calculations in order to determine whether a revised project element complies with this chapter. Examples are given in each section of the types of activities that may qualify for a minor revision. To emphasize that the examples of activities constitute minor revisions only if no review of calculations is required, this qualifying phrase, which is already included at N.J.A.C. 7:13-13.3(c)1, has been added on adoption at N.J.A.C. 7:13-13.1(c)1, 13.2(b) and 13.4(b)1.

51. N.J.A.C. 7:13-13.1(h), 13.2(e), 13.3(g), 13.4(e) and 13.4(h) set forth the Department’s review procedures for various types of revisions under this chapter. Under each provision, the Department can notify the applicant that the application did not include all the required information, or that supplemental information is needed to determine if the application complies with this chapter. In such a case, the Department will request the missing information, and the Department may cancel the application if the missing information is not provided within 60 calendar days. In order to provide clarity, and also for consistency with the modifications made on adoption to the review procedures for verification, general permit and individual permit applications described previously, N.J.A.C. 7:13-13.1(h), 13.2(e), 13.3(g), 13.4(e) and 13.4(h) have each been modified on adoption to refer to the missing information as the “requested” information.

52. N.J.A.C. 7:13-13.2 and 13.3 set forth the requirements for the revision of a general permit and an individual permit, respectively. The Department can, under a revision, modify certain aspects of an approved project within certain guidelines established by these sections. N.J.A.C. 7:13-13.2(b) and 13.3(c) provide examples of minor revisions. Any number of activities can be approved under a permit and therefore become the subject of a revision. In order to clarify that
modifying an “activity” can in some cases qualify for a revision under these sections in addition to the revision of a “structure,” N.J.A.C. 7:13-13.2(b)5 and 13.3(c)1v have been modified on adoption to include the term “activity.” Furthermore, N.J.A.C. 7:13-13.2(d)6 and 13.3(e)6 require drawings that detail the proposed activities and show the project elements to be revised, including existing and proposed topography if fill or grading is proposed. In order to determine whether a proposed revision continues to comply with the riparian zone requirements, the Department must evaluate the amount of riparian zone disturbance proposed under the revision. N.J.A.C. 7:13-13.2(d)6 and 13.3(e)6 have therefore been modified on adoption to provide that the required drawings must also indicate the limit of any riparian zone onsite, as well as any areas where riparian zone vegetation will be cleared, cut or removed.

53. N.J.A.C. 7:13-13.4 sets forth the procedure for the revision of a Department delineation by application and N.J.A.C. 7:13-13.5 sets forth the procedure for the revision or suspension of a Department delineation by the Department. N.J.A.C. 7:13-13.4(i) and 13.5(b) establish the procedure by which the Department will alert the public to the nature of the proposed revision or suspension and to solicit public comments. In order to ensure that the public is adequately informed, whether an applicant initiates a revision or the Department initiates an emergency suspension, and to provide consistency between these subsections, N.J.A.C. 7:13-13.5(b)1iii has been modified on adoption to require that the Department’s notice include “an invitation for interested parties to submit written comments regarding the suspension and subsequent need for amendment of the suspended delineation.” N.J.A.C. 7:13-13.5(b)1iv has been similarly modified on adoption to require that the Department’s notice shall include “the mailing address and telephone number of a contact person within the Department who is able to discuss the suspension.”

54. N.J.A.C. 7:13-14.1(b) gives an example of a situation where the Department would evaluate the proposed transfer of an approval to a new owner, in order to determine compliance with the requirements of N.J.A.C. 7:13-14.1. The example being presented discusses a case where the Department would consider whether there is another means of accessing the site that would reduce the amount of disturbance to the channel, or which would avoid crossing the channel.
altogether, such as crossing through a neighboring property, as provided at N.J.A.C. 7:13-10.1. However, the Department does not require such an alternative analysis for all individual permits or under N.J.A.C. 7:13-10.1. Therefore, N.J.A.C. 7:13-14.1(b) has been modified on adoption to clarify that in “some cases” the Department would “during the review of an individual permit application” consider such alternatives.

55. As proposed, N.J.A.C. 7:13-14.1(c) provided that if the Department approves a regulated activity, and the subject property is subsequently sold to a new owner, the new owner must obtain a transfer of said approval before commencing or continuing any work authorized under the approval. This provision has been clarified on adoption to indicate that it applies only to the transfer of a general permit authorization or individual permit other than an individual permit based on a hardship exception (since N.J.A.C. 7:13-14.1(a)2 prohibits the transfer of an individual permit based on a hardship exception). Of the approvals listed at N.J.A.C. 7:13-1.3, which is referenced at N.J.A.C. 7:13-14.1 for purposes of transfers, an applicability determination or a permit-by-rule is transferable, but neither requires prior approval from the Department in order to undertake construction. Pursuant to N.J.A.C. 7:13-14.1(a)2, neither an emergency permit nor an individual permit based on a hardship exception can be transferred. Because a verification establishes jurisdictional limits only, it does not authorize any regulated activity. Consequently, the requirement for transferring an approval prior to commencing or continuing any work would necessarily apply only to general permits and individual permits other than individual permits based on a hardship exception.

56. N.J.A.C. 7:13-15.2(b) requires that a request for a pre-application conference should be directed to the engineering “section chief” or review engineer responsible for the county wherein the project is located. This has been modified on adoption to instead refer to the engineering “supervisor” as this is the appropriate person in the Department to receive such requests.

57. N.J.A.C. 7:13-15.3(a)3 and 4 have been modified on adoption to indicate that the site in question should be clearly outlined on the required maps “to scale” in order to provide the Department with the most accurate information on the site.
58. The notification letters required to be sent under N.J.A.C. 7:13-16.6(c), (d) and (e) note that comments made on an application should be sent to the engineering “section chief” responsible for the county wherein the project is located. This has been modified on adoption to instead refer to the engineering “supervisor” as this is the appropriate person in the Department to receive such information.

59. In the fee table at N.J.A.C. 7:13-17.1(g) (proposed as Table E and adopted as Table F) for the project element “Excavation, fill and/or grading,” a reference is made in the “qualifier” column for to projects that require a review of net fill calculations necessary for a bridge or culvert that is a major element. This reference to a “major element” is not relevant in the new rules, since the distinction between “major” and “minor” applications under the repealed rules was not continued. Therefore, the reference has been replaced on adoption with the explanation that the review is necessary when a review of hydrologic and/or hydraulic calculations is necessary, which is the equivalent under the new rules of a “major” element under the repealed rules.

60. In the fee table at N.J.A.C. 7:13-17.1(g) (proposed as Table E and adopted as Table F), no fee was listed for the transfer of an applicability determination or permit-by-rule. Since the Department does not charge a fee for an applicability determination under N.J.A.C. 7:13-5.1 or a permit-by-rule under N.J.A.C. 7:13-7.2, the Department will not charge a fee for a transfer of an applicability determination or permit-by-rule. The table has been modified on adoption to specify this, and to clarify that the $200 fee for the transfer of an approval applies to approvals other than applicability determinations and permits-by-rule.

61. The first paragraph of Appendix 1 has been modified on adoption to correct the citation to N.J.A.C. 7:13-9.7 regarding issuance of an individual permit for a regulated activity within an approximated flood hazard area. “Written permit” has also been replaced with the correct term, “individual permit.” Minor clarifications are also made to note 4, which do not change its meaning.
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 flood hazard areas and riparian zones comes solely from State statute, specifically N.J.S.A. 58:16A-50 et seq., 58:10A-1 et seq., 58:11A-1 et seq. and 13:1D-1 et seq. The Flood Hazard Area Control Act rules are not promulgated under the authority of, or in order to implement, comply with, or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal laws, Federal standards or Federal requirements.

The adopted new rules have two components: they provide for delineation of the limits of flood hazard areas and/or floodways, and they regulate certain activities in these areas and alongside waters in order to minimize flooding and related problems. The delineation portion of the State program has a comparable Federal counterpart, but the regulatory component of the State program does not.

The Federal Emergency Management Agency (FEMA) delineates some flood hazard areas in the State for the purposes of the Federal flood insurance program. However, there is no Federal agency or program that directly regulates activities in flood prone areas based on their potential flooding impacts. The Code of Federal Regulations, at 44 CFR Part 60, enables FEMA to require municipalities who participate in the National Flood Insurance Program (NFIP) to adopt certain flood hazard reduction standards for construction and development in 100-year flood plains. However, a community's participation in the NFIP is voluntary, and FEMA does not otherwise regulate land uses in flood hazard areas. Furthermore, the Federal flood reduction standards at 44 CFR Part 60 are administered by local governments.

While the Federal flood reduction standards include design and construction requirements for buildings, there are no restrictions on flood storage volume displacement comparable to this chapter. Whereas the Federal regulations are designed primarily to protect structures from the effects of flooding, the adopted new rules and amendments are also designed to ameliorate the
effects of development on flooding itself. These additional standards tend to reduce the size and
scope of some developments in the flood hazard area and also cause some developments to
relocate outside the flood hazard area completely. This does not necessarily incur costs to the
regulated community so much as it is likely to reduce the profit margin on potential development
of the flood hazard area. It is the Department's opinion that this impact is outweighed by the
increased public safety and reduced property damage and need for flood relief that results from
implementing these rules.

The delineation portion of the State program is comparable to the FEMA flood hazard area
delineation program. In fact, the Flood Hazard Area Control Act, at N.J.S.A. 58:16A-52b,
requires the Department to make floodway delineations identical to the floodway delineations
approved by FEMA wherever practicable. The Department does this as regards floodways.
However, in delineating flood hazard areas, the Department adds a factor of safety that makes
Department delineations somewhat more stringent than FEMA delineations. This is appropriate
in New Jersey for several reasons. First, New Jersey is unique in having the highest population
density in the nation, which gives rise to heavy development pressure. Second, in light of recent
flooding problems across the State, it is appropriate for the Department to take a conservative
approach. Finally, since the Department not only uses its own delineations but also accepts and
verifies delineations performed by applicants on a site-by-site basis, it is important to retain a
factor of safety to protect against possible errors.

Persons affected by this rule include property owners situated in flood hazard area and along
stream corridors. Property owners outside these areas are only incidentally affected by the rules,
in as much as reduced flood relief efforts will lower taxes while restrictions on land uses may
increase property values outside the flood hazard area. N.J.A.C. 7:13 also increases the cost of
design and construction for roadways (both public and private) but also increases the life span of
such roadways and reduces flood damage potential. Therefore, while the rules do place some
additional burden on local governments and developers proposing roads and buildings in flood
hazard areas, the added cost of compliance is necessary and appropriate to offset loss of life and
property.
7:7E-3.26 Riparian zones
(a) A riparian zone exists along every regulated water, except there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon*, stormwater management basin*, or oceanfront barrier island, spit or peninsula. Regulated waters are defined in the Flood Hazard Area Control Act rules at N.J.A.C. 7:13-2.2.

(b) The riparian zone includes the land and vegetation within each regulated water described in (a) above, as well as the land and vegetation within a certain distance of each regulated water as described in (c) below. The portion of the riparian zone that lies outside of a regulated water is measured landward from the top of bank. If a discernible bank is not present along a regulated water, the portion of the riparian zone outside the regulated water is measured landward as follows:

1. Along a linear fluvial or tidal water, such as a stream*[or swale]*, the riparian zone is measured landward of the feature's centerline;
2-3. (No change from proposal)
4. Along an amorphously-shaped feature, such as a wetland complex, through which a regulated water flows but which lacks a*[definable]* discernible* channel, the riparian zone is measured landward of the feature's centerline.

(c) The width of the riparian zone along each regulated water described in (a) above is as follows:

1. (No change from proposal)
2. The riparian zone is 150 feet wide along both sides of the following waters not identified in (c)1 above:
3. (No change from proposal)

(d)-(h) (No change from proposal)

CHAPTER 13
FLOOD HAZARD AREA CONTROL ACT RULES
SUBCHAPTER 1. GENERAL PROVISIONS

7:13-1.1 Purpose and scope
(a)-(f) (No change from proposal)

(g) USGS quad maps and Flood Hazard Area Technical Manuals can be obtained from the Department's Office of Maps and Publications at the *[following address:]* *address below.*

The Flood Hazard Area Technical Manual can also be downloaded from the website listed in (f) above.*

State of New Jersey
Department of Environmental Protection
Office of Maps and Publications
428 East State Street
P.O. Box 438
Trenton, New Jersey 08625-0438
Telephone: (609) 777-1039
7:13-1.2 Definitions

The following words and terms, when used in this chapter, have the following meanings unless the context clearly indicates otherwise:

"Anadromous water" means a water that supports anadromous fish, as identified by the New Jersey Department’s Division of Fish and Wildlife. Anadromous fish travel between salt water and fresh water or upstream to spawn, and N.J.A.C. 7:13-10.5(b) indicates how to determine which waters support anadromous fishery resources.

"Aquatic habitat enhancement device" means a device placed within and/or adjacent to a channel to enhance aquatic habitat, typically consisting of boulders, brush, deflectors, felled shoreline trees, low-flow channel structures, mud sills, rubble reefs, spawning/nursery structures and/or tire structures.

"Channel" means a linear topographic depression that continuously or intermittently confines and/or conducts surface water, not including transient erosional gullies and other ephemeral features that temporarily form after heavy rainfall. A channel can be naturally occurring or can be of human origin through excavation or construction. A channel includes both bed and banks.

"Drawing" means a graphic depiction of land, vegetation, water and/or structures and other physical features on paper, such as a blueprint, construction plan, cross-section, topographic map, architectural rendering or other similar illustration, which is submitted to the Department to describe an existing or proposed activity or condition.

"Fish habitat enhancement device" means a device placed within and/or adjacent to a channel to enhance fish habitat, typically consisting of boulders, brush, deflectors, felled
shoreline trees, low-flow channel structures, mud sills, rubble reefs, spawning/nursery structures and/or tire structures.]*

..."Flood hazard area" means land, and the space above that land, which lies below the flood hazard area design flood elevation. Structures, fill and vegetation that are situated on land that lies below the flood hazard area design flood elevation are described as being "in" or "within" the flood hazard area. The inner portion of the flood hazard area is called the floodway and the outer portion of the flood hazard area is called the flood fringe. Figures A and B at N.J.A.C. 7:13-2.3 illustrate these areas as well as the riparian zone along a typical water. The flood hazard area on a particular site is determined using the methods set forth at N.J.A.C. 7:13-3. There are two types of flood hazard areas:

1. Tidal flood hazard area*[,]* *in which the flood hazard area design flood elevation is governed by tidal flooding from the Atlantic Ocean*. Flooding in a tidal flood hazard area may be *influenced or contributed to or influenced* by stormwater runoff from inland areas, but *(is primarily the result of elevated water levels)* *(the depth of flooding)* generated by the tidal rise and fall of the Atlantic Ocean *(is greater than flooding from any fluvial sources)*; and

2. Fluvial flood hazard area*[,]* *in which the flood hazard area design flood elevation is governed by stormwater runoff*. Flooding in a fluvial flood hazard area may be *influenced or contributed to or influenced* by elevated water levels generated by the tidal rise and fall of the Atlantic Ocean, but *(is primarily the result of)* *(the depth of flooding generated by)* stormwater runoff *(from inland areas)* *(is greater than flooding from the Atlantic Ocean)*.

"Flood hazard area design flood" means a flood equal to the 100-year flood plus an additional amount of water in fluvial areas to account for *(expected runoff increases due to future development of the drainage area)* *(possible future increases in flows due to development or other factors)*. This additional amount of water also provides a factor of safety in cases when the 100-year flood is exceeded. N.J.A.C. 7:13-3 describes the various methods of determining the flood hazard area design flood for a particular water as well as the additional amount of water to be added in various situations.
"Low-flow aquatic passage" means the ability of aquatic species to travel upstream and downstream in a waterway without impediment during low-flow conditions in a channel. Natural channel beds often possess small rivulets that serve to provide aquatic passage in this way during low-flow conditions, which can occur during dry periods of the year. Bridges, culverts and other *man-made* structures may also be designed to provide low-flow aquatic passage by inclusion of a linear depression throughout the bottom of the structure in the direction of flow, which collects water during low-flow conditions and allows aquatic species to pass through the structure without impediment.

"100-year flood" in fluvial areas means a flood that is expected to occur as a result of a 100-year storm, which is a storm event estimated to have a one percent probability of being equaled or exceeded within a one-year period for a given geographic location and/or watershed. In tidal areas, a "100-year flood" means a flood caused by a tidal surge in the Atlantic Ocean, which has a one percent probability of being equaled or exceeded within a one-year period.

"Structure" means any assemblage of material by humans, including, but not limited to, a berm, bridge, bulkhead, building, cable, causeway, culvert, dam, dike, embankment, fence, jetty, levee, pavement, piling, pipe, post, railroad, retaining wall, roadway, stormwater management basin, tower, utility pole or wire. Vegetation is not a structure. Soil bioengineering material that includes vegetation as well as other material is a structure.

"Temporary" means a regulated activity that occupies, persists and/or occurs on a site for no more than six months. For example, a fill or structure is temporary if, within six months of its placement, the fill or structure is removed from the site, all disturbed regulated 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.
"Tree" means a woody plant which is five inches or greater in diameter at a height of 4.5 feet above the ground.*

"Verification" means a document issued by the Department under N.J.A.C. 7:13-6, which establishes the flood hazard area design flood elevation, flood hazard area limit*[and/or the]* floodway limit *[and/or riparian zone limit]* on a site.

"Water" means a collection of water on the surface of the ground, including, but not limited to, a bay, brook, creek, ditch, lake, pond, reservoir, river*[or]* stream *[or swale]*. A water also includes the path or depression through which the water flows or is confined. A water that is piped, relocated or otherwise modified remains a water. A storm sewer is not a water unless it was constructed to replace or divert a previously existing water.

7:13-1.3 Types of permits and approvals
(a)-(c) (No change from proposal)
(d) A person submitting an application under this chapter shall, to the extent that the person is aware, notify the Department of all facts relevant to the review of the application including, but not limited to, the presence of regulated areas and of threatened or endangered species onsite, history of flooding and previous flood damages onsite and the location of easements and other encumbrance on the property. Failure to provide all necessary information of which the applicant, its consultants, engineers, surveyors or agents is aware may result in the denial of an application or the suspension or termination of an approval, and may subject the applicant, its consultants, engineers, surveyors or agents to enforcement action *[under]* pursuant to N.J.A.C. 7:13-19 for submittal of false information.
(e) (No change from proposal)

7:13-1.4 Delegation of authority
(a)-(b) (No change from proposal)
(c) A county governing body that has assumed delegation shall permanently retain, and make available for Department review, a copy of all documents, plans, maps, memoranda and notes necessary to document that it has discharged its delegated duties for each application it processes. The Department shall review these records at least *[annually]* **biannually**. The Department can at any time terminate delegation if it determines that the county governing body has failed to properly administer the authority delegated to it, or has failed to maintain the necessary documentation.

(d)-(e) (No change from proposal)

7:13-1.5 Creation of a county water resources association

(a) (No change from proposal)

(b) The county governing body shall appoint the members of the county water resources association. Appointed members may include the chief administrative officer or executive of a county planning agency, office of the county engineer, county utility authority, county health department, county mosquito commission, *[county]* **local** Soil Conservation District, county parks agency and any other person with relevant experience or training.

SUBCHAPTER 2. EXTENT OF REGULATORY AUTHORITY

7:13-2.1 Permit requirement

(a) (No change from proposal)

(b) Except as provided in (c) **or (e)** below, a person undertaking any regulated activity in a regulated area shall do so only in accordance with one of the following:

1-4. (No change from proposal)

5. A CAFRA or waterfront development permit, pursuant to N.J.A.C. 7:7 and N.J.A.C. 7:7E, provided:

i. The CAFRA or waterfront development permit was *[accepted]* **declared** by the Department as complete for final review on or after (effective date of these rules); and

ii. (No change from proposal)
(c) Undertaking a regulated activity in a regulated area does not require an approval listed at (b) above in the *[following]* cases:* listed 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. The regulated activity is *[currently approved under a valid stream encroachment permit pursuant to this chapter, provided the stream encroachment permit was accepted]* *part of a project for which all elements that were subject to the Flood Hazard Area Control rules in effect prior to (effective date of these rules) have been approved under a permit issued pursuant to those rules, provided:*

   i. The regulated activity is specifically approved under the permit, or was not subject to the requirements of this chapter prior to (effective date of these rules);

   ii. The application for the permit was received* by the Department *as* *and*

       was* complete for review prior to (effective date of these rules); *and*

   iii. The permit is valid when the regulated activity is undertaken;*

2. The regulated activity is *[currently approved]* *part of a project for which all elements in a tidal flood hazard area that were subject to N.J.A.C. 7:7 and N.J.A.C. 7:7E in effect prior to (effective date of these rules) have been approved* under a valid CAFRA or waterfront development permit, *pursuant to N.J.A.C. 7:7 and N.J.A.C. 7:7E, provided the CAFRA or waterfront development permit was accepted]* *provided:*

   i. The regulated activity is specifically approved under the permit, or was not subject to the requirements of N.J.A.C. 7:7 and N.J.A.C. 7:7E prior to (effective date of these rules);

   ii. The application for the permit was received* by the Department *as* *and*

       was declared* complete for final review prior to (effective date of these rules); *[or]* *and*

   iii. The permit is valid when the regulated activity is undertaken;
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 and N.J.A.C. 7:7E, prior to (effective date of these rules) and both of the following applies:

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 prior to (effective date of these rules), pursuant to N.J.A.C. 19:4-4.2; or*

*3.*  

4. 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 and N.J.A.C. 7:7E,* prior to (effective date of these rules) and one of the following applies:

i. The regulated activity is *currently approved* under a valid *municipal building or construction permit, which was approved prior to (effective date of these rules); or* *approval, issued prior to the (effective date of these rules), which enables commencement of construction of the regulated activity on a specific lot and/or easement; or*

ii. The regulated activity does not require *a municipal building or construction permit* *an approval identified in (c)4i above* and one or more of the following construction activities were completed onsite prior to (effective date of these rules):

(1)-(3) (No change from proposal)

(d) If a regulated activity is approved under a qualifying approval listed at (c) above, and the regulated activity is subsequently revised by the issuing entity, the original approval continues to satisfy the requirements of (c) above provided the Department determines that the revision will not result in one or more of the following:

1-2. (No change from proposal)

3. *For regulated activities under a qualifying approval under (c)1 or 2 above, additional* regulated activities *on site* *within a regulated area* that have
not been previously reviewed by the Department under N.J.A.C. 7:7, 7:7E and/or this chapter, as applicable; and/or

4. (No change from proposal)

(e) If railroad activities proposed in a flood hazard area or riparian zone are exempt from State regulation under Federal law, no permit shall be required under this chapter for that activity. However, the railroad shall provide the Department with the application material normally required for the proposed activity at least 90 calendar days prior to the railroad commencing the activity. For emergency activities, the information described at N.J.A.C. 7:13-12.1(c) shall be provided to the Department via telephone and/or fax, as listed at N.J.A.C. 7:13-1.1(f), as soon as possible after the emergency is discovered, and in no event later than the day the activity is authorized or commences, whichever occurs first.*

7:13-2.2 Regulated waters

(a) All waters in New Jersey are regulated under this chapter except for the following:

1-2. (No change from proposal)

3. Any segment of water that has a drainage area of less than 50 acres, provided one or more of the following applies:

i. The water has no definable discernible channel;

ii. The water is confined within a lawfully existing, manmade conveyance structure or drainage feature, such as a pipe, culvert, ditch, channel or basin including any water that historically possessed a naturally-occuring, discernible channel, which has been piped, culverted, ditched or similarly modified; and/or

iii. (No change from proposal)

7:13-2.3 Regulated areas

(a) For each regulated water, as described at N.J.A.C. 7:13-2.2, the Department identifies and regulates the water and the area surrounding it in two different ways, resulting in the regulated areas described at (a)1 and 2 below:

1. (No change from proposal)
2. A riparian zone exists along every regulated water, except there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon, stormwater management basin, or oceanfront barrier island, spit or peninsula. The regulated water itself is also part of the riparian zone. The methods for determining the limits of the riparian zone are described at N.J.A.C. 7:13-4.1.

(b) The flood hazard area and riparian zone described at (a)1 and 2 above generally overlap. Figures A and B below illustrate a typical water and each of these regulated areas. This chapter sets forth the specific requirements applicable to activities in each regulated area.

SUBCHAPTER 3. DETERMINING THE FLOOD HAZARD AREA AND FLOODWAY

7:13-3.2 Selecting a method for determining the flood hazard area and floodway along a regulated water
(a)-(c) (No change from proposal)
(d) The flood hazard area and floodway shall be determined using only one method for each regulated water on a site, except in the following cases:

1. (No change from proposal)
2. If Method 3 is used to delineate the flood hazard area but no FEMA floodway map exists for the section of regulated water in question, and determining the floodway is necessary to demonstrate compliance with the requirements of this chapter, the applicant shall use Method 4 to calculate the floodway.
FLOW CHART FOR DETERMINING THE FLOOD HAZARD AREA ON A SITE\(^1\)

1. This chart is provided for information purposes only as an aid to applicants who are deciding which method is most appropriate for determining the flood hazard area and floodway on a site. This chart supplements, but does not supersede, the text at N.J.A.C. 7:13-3. If there is any discrepancy between this chart and N.J.A.C. 7:13-3, the rule text shall govern.

2. A complete list of Department delineated waters can be found in Appendix 2.
3. As noted at N.J.A.C. 7:13-3.2(c), an applicant may choose to submit hydrologic and hydraulic calculations to delineate the flood hazard area and floodway where no Department delineation exists.

4. N.J.A.C. 7:13-3.4 describes the requirements which a FEMA study must meet in order to be used to determine the flood hazard area and floodway on a site. Not all FEMA studies may be used.

5. As noted at N.J.A.C. 7:13-11.1(f) and (g), certain projects such as bridges and culverts alter the hydraulic capacity of a channel or flood hazard area. It therefore may be necessary to provide a hydraulic analysis for such projects to demonstrate that flood elevations will not be increased offsite.

6. Flood hazard areas are either tidal or fluvial. See the definitions at N.J.A.C. 7:13-1.2 for more detail.

7. Calculations are sometimes necessary to demonstrate compliance with fill restrictions at N.J.A.C. 7:13-10.4. Method 5 does not provide the information needed for such calculations. Therefore in absence of a State delineation or FEMA study, Method 6 must be used.

7:13-3.3 Flood hazard area and floodway based on a Department delineation (Method 1)

(a) This section sets forth the procedure for determining a flood hazard area *design flood elevation* and floodway *limit* from a Department delineation. Appendix 2 of this chapter lists the Department delineated waters of New Jersey. Requests for copies of a Department delineation, including flood profiles and maps, as well as any questions regarding the use, derivation or modification of these delineations, should be directed to the Department's Office of Floodplain Management at the following address:

State of New Jersey
Department of Environmental Protection
Bureau of Dam Safety and Flood Control
P.O. Box 419
Trenton, New Jersey 08625-0419
Telephone: (609) 984-0859

(b)-(d) (No change from proposal)
7:13-3.4 Flood hazard area and floodway based on a FEMA flood insurance study (Methods 2 through 4)
(a)-(e) (No change from proposal)
(f) Under Method 4 (FEMA hydraulic method):
   1. The flood hazard area design flood elevation and floodway limit shall be based on a standard step backwater analysis and determined as follows:
      i-ii. (No change from proposal)
      iii. A hydraulic analysis shall be performed to determine the floodway limit using the 100-year flow rate reported by FEMA for the regulated water,*[based on equal conveyance reduction]*assuming a maximum rise of 0.2 feet in the 100-year flood elevation.*The floodway limits shall be calculated assuming equal conveyance reduction, unless the applicant demonstrates (prior to the submission of an application for a verification to the Department) that due to the topography of the area, the proximity of structures to the channel and/or other physical characteristics of the watershed or flood hazard area, use of another method will more optimally calculate the floodway limits at a given location.*

7:13-3.5 Flood hazard area determined by approximation (Method 5)
(a) This section sets forth the procedure for approximating a flood hazard area *design flood elevation* using the method described in chapter Appendix 1. This method does not provide a floodway limit. Therefore, the Department shall issue an individual permit for a regulated activity within an approximated flood hazard area only if the project meets the requirements at N.J.A.C. 7:13-9.7.
(b)-(e) (No change from proposal)

7:13-3.6 Flood hazard area and floodway determined by calculation (Method 6)
(a) This section sets forth the procedure for determining a flood hazard area *design flood elevation* and floodway *limit* via hydrologic and hydraulic calculations. An applicant may use Method 6 to determine the flood hazard area and floodway along any regulated water for
which no Department delineation exists. If a Department delineation does exist on a site, the applicant shall use Method 1 as set forth at N.J.A.C. 7:13-3.3.

(b) (No change from proposal)

c) Under Method 6, the flood hazard area design flood elevation and floodway limit shall be based on a standard step backwater analysis and determined as follows:

1. (No change from proposal)

2. *[A]* *For a tidal flood hazard area, a hydraulic analysis shall be performed to determine the flood hazard area design flood elevation using the 100-year flow rate determined under (c)1 above;*

3. **For a fluvial flood hazard area, a** *hydraulic analysis shall be performed to determine the flood hazard area design flood elevation using 125 percent of the 100-year flow rate determined under (c)1 above; and

*[3]* *[4]*. A hydraulic analysis shall be performed to determine the floodway limit using the 100-year flow rate determined under (c)1 above, *[based on equal conveyance reduction]* assuming a maximum rise of 0.2 feet in the 100-year flood elevation. *The floodway limits shall be calculated assuming equal conveyance reduction, unless the applicant demonstrates (prior to the submission of an application for a verification to the Department) that due to the topography of the area, the proximity of structures to the channel and/or other physical characteristics of the watershed or flood hazard area, use of another method will more optimally calculate the floodway limits at a given location.*

SUBCHAPTER 4. DETERMINING THE RIPARIAN ZONE

7:13-4.1 The riparian zone

(a) A riparian zone exists along every regulated water, except there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon*, stormwater management basin,* or oceanfront barrier island, spit or peninsula.
(b) The riparian zone includes the land and vegetation within each regulated water described in (a) above, as well as the land and vegetation within a certain distance of each regulated water as described in (c) below. The portion of the riparian zone that lies outside of a regulated water is measured landward from the top of bank. If a discernible bank is not present along a regulated water, the portion of the riparian zone outside the regulated water is measured landward as follows:

1. Along a linear fluvial or tidal water, such as a stream *[or swale]*, the riparian zone is measured landward of the feature's centerline;
2-3. (No change from proposal)
4. Along an amorphously-shaped feature, such as a wetland complex, through which a regulated water flows but which lacks a *[definable]* *[discernible]* channel, the riparian zone is measured landward of the feature's centerline.

(c) The width of the riparian zone along each regulated water described in (a) above is as follows:

1. (No change from proposal)
2. The riparian zone is 150 feet wide along both sides of the following waters not identified in (c)1 above:
   i. Any *[upstream tributary to a trout production water]* *[trout production water and all upstream waters (including tributaries)]*;
   ii. Any trout maintenance water and all upstream *[waters (including) tributaries]* within one *linear* mile *
   as measured along the length of the regulated water*;
   iii. Any segment of a water flowing through an area that contains documented habitat for a threatened or endangered species of plant or animal, which is critically dependent on the regulated water for survival, and all upstream *[waters (including) tributaries]* within one *linear* mile *
   as measured along the length of the regulated water*; and
   iv. (No change from proposal)
3. (No change from proposal)

(d) (No change from proposal)
SUBCHAPTER 5. APPLICABILITY DETERMINATIONS

7:13-5.1 General provisions for applicability determinations
(a)-(c) (No change from proposal)
(d) After reviewing an application for an applicability determination, the Department shall:
1. (No change from proposal)
2. Inform the applicant in writing that:
   i. The Department is unable to determine whether this chapter applies to the proposed activities because the limit of the flood hazard area *and/or riparian zone* onsite cannot be determined without additional information. Therefore, the Department shall not issue an applicability determination until the applicant obtains a *flood hazard area* verification under N.J.A.C. 7:13-6;
   ii-iii. (No change from proposal)
(e)-(g) (No change from proposal)

SUBCHAPTER 6. VERIFICATIONS

7:13-6.1 General provisions for verifications
(a) A *flood hazard area* verification is a document containing the Department's approval of the flood hazard area design flood elevation on a site, includes either a flood hazard area limit or an indication that the entire site is in a flood hazard area, and may also include a floodway limit *and/or a riparian zone limit, if applicable.*
(b) The flood hazard area design flood elevation, flood hazard area and/or floodway limits on a site shall be determined in accordance with the procedures outlined in N.J.A.C. 7:13-3. *The riparian zone limits on a site shall be determined in accordance with N.J.A.C. 7:13-4.*
(c)-(d) (No change from proposal)
(e) A verification is valid for five years from its issuance date *[and shall not be extended]*, unless the verification is issued concurrently with a ten-year individual permit under N.J.A.C. 7:13-9.4(b), in which case the verification is valid for ten years from its issuance
date. A verification shall not be extended.* However, a verification can be reissued automatically with the issuance of a permit for a regulated activity at that site pursuant to (f) below and can be transferred at the time of sale of a property to which the verification applies to a new owner pursuant to N.J.A.C. 7:13-14.1.

(f) (No change from proposal)

(g) Within 90 calendar days after the Department issues a verification on a privately owned lot, or on a publicly owned lot other than a right-of-way, the applicant shall submit the following information to the clerk of each county in which the site is located, and shall send proof to the Department that this information is recorded on the deed of each lot referenced in the verification. Failure to have this information recorded in the deed of each lot and/or to submit proof of recording to the Department constitutes a violation of this chapter and may result in suspension or termination of the verification and/or subject the applicant to enforcement action pursuant to N.J.A.C. 7:13-19:

1-5. (No change from proposal)

SUBCHAPTER 7. PERMITS-BY-RULE

7:13-7.1 General provisions for permits-by-rule

(a)-(b) (No change from proposal)

(c) A regulated activity that meets the requirements of a permit-by-rule may be conducted without prior Department approval. However, if it is unclear whether a particular activity meets a permit-by-rule, the Department encourages applicants to obtain an applicability determination under N.J.A.C. 7:13-5.1 prior to commencing work, since unauthorized regulated activities may result in enforcement action pursuant to N.J.A.C. 7:13-19. Furthermore, a person may wish to obtain an applicability determination in order to demonstrate to a local government that a proposed activity meets a permit-by-rule.

(d) (No change from proposal)

1. (No change from proposal)

2. The notification shall be submitted to:

   Attn: Permit-By-Rule Notification
Prior to undertaking a regulated activity that fails to comply with any limit, condition or requirement of a permit-by-rule in this subchapter, the applicant must first obtain a general permit authorization (pursuant to N.J.A.C. 7:13-8), an individual permit (pursuant to N.J.A.C. 7:13-9, 10 and 11), an emergency permit (pursuant to N.J.A.C. 7:13-12) or a CAFRA or waterfront development permit (pursuant to N.J.A.C. 7:7 and 7:7E) for the regulated activity. Furthermore, a person may undertake a regulated activity under a permit-by-rule only up to any given limit specified by the permit-by-rule. For example, the placement of no more than five cubic yards of fill under the permit-by-rule at N.J.A.C. 7:13-7.2(b)3 means either the one-time placement of five cubic yards of fill or multiple placements of fill over time that cumulatively do not exceed five cubic yards. A person may also concurrently undertake activities under two or more permits-by-rule provided all activities meet the requirements of this subchapter. For example, a person could elevate a building under the permit-by-rule at N.J.A.C. 7:13-7.2(a)3, construct an addition to the building under the permit-by-rule at N.J.A.C. 7:13-7.2(a)4, and build a fence around the building under the permit-by-rule at N.J.A.C. 7:13-7.2(b)5, without requiring another approval under this chapter, provided each activity meets the descriptions of each applicable permit-by-rule.

Table A
SUMMARY OF PERMITS-BY-RULE
This Table is for informational purposes only. See N.J.A.C. 7:13-7.2(a) through (f) for specific applicable limits and requirements for each permit-by-rule

| (a) Activities that require 14-day prior notice to the Department |
1. Reconstructing a lawfully existing structure *[in a flood fringe]* *[outside a floodway]*

2. Constructing *in a disturbed riparian zone or* at or below grade *in a flood hazard area*

3. Elevating a building above the flood hazard area design flood elevation

4. Constructing an addition to a building of no more than 300 square feet *[in a flood fringe]* *[outside a floodway]*

5. Removing a major obstruction from a regulated water with machinery

6. Constructing a boat launching ramp of no more than 1,000 square feet

7. Constructing *[a fish]* *an aquatic* habitat enhancement device

8. Constructing a USGS-approved flow gauge or weir

(b) General construction and maintenance activities

1. Conducting normal property maintenance in a riparian zone

2. Removing a lawfully existing structure *[from a flood fringe]* *[outside a floodway]*

3. Placing no more than 5 cubic yards of fill material *[in a flood fringe]* *[outside a floodway]*

4. Repairing a lawfully existing structure

5. Constructing a fence

6. Construction in a tidal flood fringe that does not need a coastal permit

7. Constructing an addition above a building *[in a flood fringe]* *[outside a floodway]*

8. Constructing a non-habitable building of no more than 150 square feet *[in a flood fringe]* *[outside a floodway]*

9. Constructing an open structure with a roof *[in a flood fringe]* *[outside a floodway]* (e.g., car port, patio, pole barn)

10. Constructing an aboveground recreational structure (e.g., bleacher, picnic table, backstop)

11. Constructing an aboveground swimming pool *[in a flood fringe]* *[outside a floodway]*

12. Constructing an in-ground swimming pool

13. Constructing an open deck attached to a building

14. Constructing an open dock of no more than 1,000 square feet on an impounded water
15. Placing an aboveground fuel tank of no more than 2,000 gallons *[in a flood fringe]* *outside a floodway* 

16. Placing an underground fuel tank 

17. Filling an abandoned raceway 

18. Maintaining a manmade canal that passes through a regulated area 

(c) Activities associated with utilities 
1. Placing a utility pole 
2. Placing an open-frame utility tower *[in a flood fringe]* *outside a floodway* 
3. Jacking an underground utility line beneath a water 
4. Placing an underground utility line beneath existing pavement 
5. Attaching a utility line to the downstream face of a roadway that crosses a water 
6. Placing an underground utility line in a flood hazard area outside a riparian zone 

(d) Activities associated with roadways and parking areas 
1. Repaving a roadway or parking area *[in a flood fringe]* *outside a floodway* 
2. Placing an open guardrail along a public roadway 
3. Removing sediment by hand adjacent to a bridge, culvert or outfall along a public roadway 
4. Reconstructing a bridge superstructure above a flood hazard area 

(e) Activities associated with the storage of unsecured material 
1. Temporary storage of construction material *[in a flood fringe]* *outside a floodway* 
2. Incidental storage of material associated with a residence *[in a flood fringe]* 
3. Incidental storage of material associated with a non-residence *[in a flood fringe]* 
4. Operating an existing business that stores and distributes material 
5. Operating an existing hazardous waste facility 
6. Operating an existing solid waste facility 

(f) Agricultural activities 
1. Continuing ongoing agricultural activities that result in no fill 
2. Commencing new agricultural activities that result in no fill 
3. Undertaking soil conservation practices *[in a flood fringe]* *outside a floodway*
4. Constructing an agricultural building of no more than 1,000 square feet *[in a flood fringe]* *outside a floodway*

7:13-7.2 Permits-by-rule
(a) The permits-by-rule at (a)1 through 8 below apply to the specified construction and maintenance activities listed therein. Pursuant to N.J.A.C. 7:13-7.1(d), prior written notice to the Department is required for each of these permits-by-rule.

1. The reconstruction of a lawfully existing structure *[in a flood fringe]* *[outside a floodway]*, provided:
   i-iv. (No change from proposal)

2. Any construction activity *[at or below grade (such as a bicycle path, driveway, fishing or hunting area, garden, lawn, nature preserve, outdoor recreation area, park, parking area, picnic ground, playground, playing field, roadway, sidewalk or trail)]*, provided:
   i. *[The]* *If the activity is located in a flood hazard area, all construction is situated at or below grade and the* *existing ground elevation is not raised *(such as for the construction of a bicycle path, driveway, fishing or hunting area, garden, lawn, nature preserve, outdoor recreation area, park, parking area, picnic ground, playground, playing field, roadway, sidewalk or trail)*; 
   ii-v. (No change from proposal)

3. The elevation of a lawfully existing building *outside a floodway*, in order to reduce flood damage potential, provided:
   i. (No change from proposal)
   ii. *[The building is not located in a floodway;]
   iii.]* The lowest finished floor of the building is raised to at least one foot above the flood hazard area design flood elevation;
   *[iv]* *[iii]*. The area below the lowest finished floor of the building is not used for habitation and remains open to floodwaters, in accordance with N.J.A.C. 7:13-11.5(1);
*[v]* *[iv]*. No vegetation is cleared, cut or removed in a riparian zone, except for vegetation within 20 feet of the building if such disturbance is necessary to facilitate its elevation; and

*[vi]* *[v]*. All vegetated areas temporarily disturbed within the riparian zone are replanted with indigenous, non-invasive species upon completion of the regulated activity;

4. The construction of an addition that is connected to a lawfully existing building *[in a flood fringe]* *outside a floodway*, provided:
   i-v. (No change from proposal)

5-6. (No change from proposal)

7. The construction of *[a fish]* *an aquatic* habitat enhancement device provided:
   i-vii. (No change from proposal)

8. (No change from proposal)

(b) The permits-by-rule at (b)1 through 18 below apply to the specified construction and maintenance activities listed therein.

1. The disturbance of vegetation in a riparian zone for normal property maintenance.
   i. Normal property maintenance means an activity necessary to maintain a lawfully existing structure, lawn and/or garden and includes:
      (1)-(3) (No change from proposal)
      (4) *[Mowing]* *[Maintaining]* a field, lawn, park and/or easement that was lawfully established prior to October 2, 2006 and that has been *[periodically mowed]* *[maintained (such as through periodic mowing)]* since that date;
      (5)-(6) (No change from proposal)

   ii. (No change from proposal)

2. The removal of any lawfully existing structure *[from a flood fringe]* *outside a floodway*, provided:
   i-iv. (No change from proposal)

3. The placement of no more than five cubic yards of fill *[in a flood fringe]* *outside a floodway*, provided:
   i-iv. (No change from proposal)
4. (No change from proposal)
5. The construction of a fence, provided:
   i-iii. (No change from proposal)
   iv. One of the following conditions is satisfied:
      (1) (No change from proposal)
      (2) The fence is located in a floodway and has sufficiently large openings so as not to catch debris during a flood and thereby obstruct floodwaters, such as a barbed-wire, split-rail or strand fence. A fence with*small or no openings* *little or no open area*, such as a chain link, lattice or picket fence, does not meet this requirement;
6. (No change from proposal)
7. The construction of an addition above a lawfully existing building *[in a flood fringe]* *[outside a floodway]*, provided:
   i-v. (No change from proposal)
8. The construction of a non-habitable building *[in a flood fringe]* *[outside a floodway]*, such as a shed, animal shelter or storage area, provided:
   i-iv. (No change from proposal)
9. The construction of an open structure with a roof *[in a flood fringe]* *[outside a floodway]*, such as a car port, covered patio or pole barn, provided:
   i-vi. (No change from proposal)
10. (No change from proposal)
11. The construction of an aboveground swimming pool *[in a flood fringe]* *[outside a floodway]* associated with residential use, provided:
    i-iv. (No change from proposal)
12. The construction of an in-ground swimming pool *[associate]* *[associated]* with residential use, provided:
    i-iii. (No change from proposal)
    iv. No disturbance related to *the* regulated activity is located within 25 feet of any top of bank or edge of water;
    v-vi. (No change from proposal)
13. The construction of *an* deck that is connected to a lawfully existing building, provided:
   i-iv. (No change from proposal)
14. (No change from proposal)
15. The construction of an aboveground fuel tank of no more than 2,000 gallons *in a flood fringe* *outside a floodway*, within or adjacent to the building it serves, provided:
   i-iv. (No change from proposal)
16-18. (No change from proposal)
(c) The permits-by-rule at (c)1 through 6 below apply to the specified activities associated with utility lines listed therein.
   1. (No change from proposal)
   2. The placement of one or more open-frame towers *in a flood fringe* *outside a floodway* to support a utility line, provided:
      i-v. (No change from proposal)
   3. The placement of an underground utility line beneath a regulated water through directional drilling or "jacking," provided:
      i-v. (No change from proposal)
      vi. If the line is jacked or drilled beneath an open channel, the top of the line is placed at least four feet below the channel invert and remains *nominally* horizontal at this depth at least 10 feet beyond the top of each bank;
      vii. (No change from proposal)
      viii. No manhole is constructed within 10 feet of any top of bank or edge of water (unless situated within a paved *roadway* *surface*);
      ix-xi. (No change from proposal)
   4. The placement of an underground utility line beneath existing pavement within a regulated area (such as under an existing parking lot in the flood hazard area or under an existing roadway that crosses a regulated water), provided:
      i-vi. (No change from proposal)
vii. No manhole is constructed within 10 feet of any top of bank or edge of water
   (unless situated within a paved *roadway* *surface*);

viii-x. (No change from proposal)

5. The attachment of a utility line to a lawfully existing roadway that crosses a regulated
   water, provided:
   i-ix. (No change from proposal)

   x. No manhole is constructed within 10 feet of any top of bank or edge of water
      (unless situated within a paved *roadway* *surface*);

xi-xiii. (No change from proposal)

6. (No change from proposal)

(d) The permits-by-rule at (d)1 through 4 below apply to the specified activities associated with
roadways and parking areas listed therein.

   1. The repaving and/or resurfacing of a lawfully existing paved roadway or paved parking
      area *[in a flood fringe]* *outside a floodway*, provided:
      i-iii. (No change from proposal)

   2. The construction of a guardrail along a public roadway *approved* by a public entity,
      provided:
      i-ii. (No change from proposal)

3-4. (No change from proposal)

(e) The permits-by-rule at (e)1 through 6 below apply to the specified activities associated with
the storage of secured and/or unsecured material listed therein.

   1. The temporary storage of unsecured material *[in a flood fringe]* *outside a
      floodway*, which is necessary for a lawful construction activity, provided:
      i-iv. (No change from proposal)

   2. The storage in a regulated area of unsecured material incidental to *the use or
      maintenance of* a lawfully existing private residence (such as lawn and garden
      equipment and materials, shelters for animals, trash receptacles, toys, vehicles and
      wood piles), provided:
      i. (No change from proposal)
ii. The unsecured material is of an amount and nature typical for a residence. For example, this permit-by-rule does not authorize *the storage of* construction debris, roll-off containers, an inordinate number of vehicles or machinery or large piles of refuse;

iii-v. (No change from proposal)

3. The storage in a regulated area of unsecured material incidental to *the use or maintenance of* a lawfully existing business or other non-residential facility (such as dumpsters, vehicles and equipment), provided:
   i. No hazardous substances are stored unless:
      (1) The storage of hazardous substances is essential to the operation of the business or facility;
      (2) The hazardous substances are isolated from potential contact with floodwaters *[where possible]*; and
      (3) The hazardous substances are stored in accordance with all Federal, State and local laws;
   ii. The unsecured material is of an amount and nature typical for the subject business or non-residential facility. For example, this *[subparagraph does not permit]* permit-by-rule does not authorize the storage of construction debris, roll-off containers, an inordinate number of vehicles or machinery or large piles of refuse;

iii-v. (No change from proposal)

4. The storage in a regulated area of unsecured material that is necessary for the operation of a lawfully existing business or other non-residential facility, the primary function of which is to store and distribute material (such as a gravel pit, junk yard, landscaping business, lumber yard or vehicle dealership, rental facility or impoundment area), provided:
   i. No hazardous substances are stored unless;
      (1) The storage of hazardous substances is essential to the operation of the business or facility;
      (2) The hazardous substances are isolated from potential contact with floodwaters *[where possible]*; and
(3) The hazardous substances are stored in accordance with all Federal, State and local laws;
   ii-iv. (No change from proposal)
5-6. (No change from proposal)
(f) The permits-by-rule at (f)1 through 4 below apply to the specified agricultural activities listed therein.
   1-2. (No change from proposal)
   3. The continuation or commencement of soil conservation practices *[in a flood fringe]*
      *outside a floodway*, such as terracing, subsurface tile drainage or construction of a
diversion, a grassed swale or an excavated pond, provided:
      i. (No change from proposal)
      ii. The activities are approved in writing by the local Soil Conservation District or the
          USDA Natural Resource Conservation Service*, as appropriate*;
      iii-v. (No change from proposal)
   4. The construction of a building with no foundation *[in a flood fringe on land that has
      been actively farmed]* *outside a floodway*, provided:
      i. The building is *[not]* located on land that has been actively farmed since October 2, 2006;
      ii-vi. (No change from proposal)
SUBCHAPTER 8. GENERAL PERMITS

7:13-8.1 Standards applicable to all general permits
(a) This subchapter establishes general permits for certain regulated activities. Each general
permit describes the regulated activity authorized, including the size and type of regulated
activity and in some cases where in the flood hazard area or riparian zone the regulated activity
may be conducted. The Department may, by rulemaking in accordance with the Administrative
Procedure Act, N.J.S.A. 52:14B-1 et seq., rescind or modify an existing general permit or
establish new ones. The flood hazard general permits established in this subchapter are set forth
as follows:
*[1. General permit 1, set forth at N.J.A.C. 7:13-8.3, for sediment and debris removal from
canals by public entities, pursuant to the "Stream Cleaning Act" at N.J.S.A. 58:16A-
67;
2. General permits 2A through 2G, set forth at N.J.A.C. 7:13-8.4, for certain agricultural
activities designed by the NRCS;
public roadways by a public entity;
4. General permit 4, set forth at N.J.A.C. 7:13-8.6, for the maintenance and repair of
stormwater management structures and conveyance features by a public entity;
5. General permit 5, set forth at N.J.A.C. 7:13-8.7, for the relocation of a building on a site
to reduce flood damage;
6. General permit 6, set forth at N.J.A.C. 7:13-8.8, for the reconstruction of a private
residence damaged or destroyed by fire, flood or other natural disaster;
7. General permit 7, set forth at N.J.A.C. 7:13-8.9, which allows the construction of a
private residence, a residential addition or a structure appurtenant to a residence in a
tidal flood hazard area;
8. General permit 8, set forth at N.J.A.C. 7:13-8.10, for the construction of a utility line
across or along a water draining less than 50 acres;
9. General permit 9, set forth at N.J.A.C. 7:13-8.11, for the construction of a roadway or
footbridge across a regulated water that has a drainage area of less than 50 acres; and
10. General permit 10, set forth at N.J.A.C. 7:13-8.12, for the construction of a stormwater
outfall structure along a regulated water that has a drainage area of less than 50 acres.]*

*Table B

SUMMARY OF GENERAL PERMITS

This Table is for informational purposes only. See N.J.A.C. 7:13-8.3 through 8.12 for
specific applicable limits and requirements for each general permit

<table>
<thead>
<tr>
<th>Permit</th>
<th>Description</th>
<th>Citation</th>
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<tr>
<td>2A</td>
<td>Agricultural: Soil erosion control, bank stabilization or bank restoration</td>
<td>8.4(c)1</td>
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<td>2B</td>
<td>Agricultural: Channel cleaning</td>
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<td>2C</td>
<td>Agricultural: Constructing a roadway across a water</td>
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<td>Agricultural: Filling a manmade water for freshwater wetlands restoration</td>
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<td>2E</td>
<td>Agricultural: Creating a ford across a water to manage livestock</td>
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<tr>
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<td>Agricultural: Constructing a fence across or along a water to manage livestock</td>
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<td>2G</td>
<td>Agricultural: Constructing a pump or water intake along a water for livestock</td>
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<td>3</td>
<td>Bridge or culvert scour protection by a public entity</td>
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<td>Relocating a building to reduce flood damage</td>
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<td>10</td>
<td>Stormwater outfall along a water draining less than 50 acres</td>
<td>8.12*</td>
</tr>
</tbody>
</table>

(b) A regulated activity shall be authorized under a general permit only if the Department determines that *the* following requirements are satisfied:

1-9. (No change from proposal)

(c) (No change from proposal)

(d) Within 20 working days following the receipt of an application for an authorization under a general permit, the Department shall:

1. (No change from proposal)

2. Determine that all necessary information required by this chapter for a complete general permit application has not been provided, or that one or more submitted items are deficient, and request in writing that the applicant submit the missing *[or incomplete information]* *material and/or address any deficiencies* *within a reasonable time*
period. The Department may cancel the application if the *requested* information is not provided within 60 calendar days. The Department shall subsequently declare the application complete for review within 20 working days of receiving the requested information; or

3. If the Department does not take action under (d)1 or 2 above within 20 working days, the general permit application shall *automatically* be deemed complete for review. In such a case, the Department may request additional information, which is necessary to bring the application into compliance with the requirements of this chapter during the review of the application.

(e) (No change from proposal)

(f) If the Department fails to take written action on an application in accordance with (e) above, the general permit application shall *automatically* be deemed to *have been automatically* approved. This default approval is subject to any applicable conditions set forth in this chapter for the activities covered by the application for general permit authorization. Furthermore, default approval under this section shall not prevent the Department from taking enforcement action pursuant to N.J.A.C. 7:13-19 for any activity undertaken in violation of this chapter.

(g)-(j) (No change from proposal)

(k) A verification of the flood hazard area design flood elevation, *[flood hazard area and/or]* floodway limits *and/or riparian zone limits*, pursuant to N.J.A.C. 7:13-6, is not required prior to obtaining a general permit authorization under this chapter, except for certain cases as noted under general permits 5, 6 and 7 at N.J.A.C. 7:13-8.7, 8.8 and 8.9, respectively. *However, pursuant to Table F at N.J.A.C. 7:13-17.1, the $500.00 fee for a verification based on methods 1, 2, 3 and 5 (at N.J.A.C. 7:13-3.3, 3.4(d), 3.4(e) and 3.5, respectively) does not apply if the verification application is submitted concurrently with an application for any general permit authorization for which verification of the flood hazard area is required to determine compliance with the general permit.*

7:13-8.2 General permit conditions

(a) (No change from proposal)
(b) The following conditions apply to all general permit authorizations issued under this chapter:

1. Duty to comply: The permittee, its contractors and subcontractors shall comply with all conditions of the permit authorization, supporting documents and approved drawings. Any noncompliance with a permit authorization constitutes a violation of this chapter, and is grounds for enforcement action *under* *pursuant to* N.J.A.C. 7:13-19, as well as suspension and/or termination of the permit authorization.

2-5. (No change from proposal)

6. Proper oversight: The permittee shall ensure that all approved activities are undertaken using the best management practices available under the supervision and direction of an engineer *at all points necessary to ensure compliance with all permit conditions*.

7-10. (No change from proposal)

11. Inspection and entry: The permittee shall allow an authorized representative of the Department, *at reasonable times and* upon the presentation of credentials, to:

i. (No change from proposal)

ii. Have access to and copy*[, at reasonable times,]* any records that must be kept under the conditions of the permit authorization; and

iii. Inspect *[at reasonable times]* any facilities, equipment, practices or operations regulated or required under the permit authorization. Failure to allow reasonable access under this section shall be considered a violation of this chapter and subject the permittee to enforcement *[under]* *pursuant to* N.J.A.C. 7:13-19.

12. (No change from proposal)

(c) (No change from proposal)

(d) The Department may *[in some cases]* include in a general permit authorization a condition requiring a pre-construction meeting on the site of permitted activities. *[Such a]* *Any such* condition shall specify how many days prior to construction the permittee must notify the Department so that the pre-construction meeting can be scheduled.

(e) (No change from proposal)

7:13-8.3 General permit 1 for channel cleaning under the Stream Cleaning Act
(a) General permit 1 authorizes a county, municipality or a designated agency thereof to desnag a channel and/or remove accumulated sediment, debris and garbage which are obstructing flow in a channel. This section implements the provisions of the "Stream Cleaning Act" *in the Flood Hazard Area Control Act* at N.J.S.A. 58:16A-67.

(b)-(c) (No change from proposal)

(d) In addition to satisfying the requirements applicable to all general permits at N.J.A.C. 7:13-8.1(b), to qualify for general permit 1 authorization, a channel cleaning, clearing or desnagging project shall satisfy *all* of the following requirements:

1-2. (No change from proposal)

3. The project consists solely of either:
   
   i. The removal of accumulated silt, sediment, debris and/or garbage from a channel with a natural bed. This general permit does not authorize removal of material below the natural *bottom* of the channel; or

   ii. (No change from proposal)

4-9. (No change from proposal)

(e)-(f) (No change from proposal)

(g) Within 15 calendar days following the Department's receipt of an application submitted under (f) above for a project that does not involve sediment removal, the Department shall:

1. Notify the applicant that the application did not include the information required at (f) above, or that supplemental information is needed to determine if the activity complies with the general permit, and request the additional information. The Department may cancel the request for a general permit if the *requested* information is not provided within 60 calendar days. When the *requested* information is received, the Department shall, within 15 calendar days after receiving the *additional* information, take one of the actions in (g)2 or 3 below;

2-3. (No change from proposal)

(h) Within 60 calendar days following the Department's receipt of an application submitted under (f) above for a project that does involve sediment removal, the Department shall:
1. Notify the applicant that the application did not include information required at (f) above, or that supplemental information is needed to determine if the activity complies with the general permit, and request the additional information. The Department may cancel the request for a general permit if the requested information is not provided within 60 calendar days. When the requested information is received, the Department shall, within 60 calendar days after receiving the additional information, take one of the actions in (h)2 or 3 below;

2-3. (No change from proposal)

(i) If the Department fails to take written action on an application in accordance with (g) or (h) above, the application for general permit shall automatically be deemed to be approved. This default approval is subject to any applicable conditions set forth in this chapter for the activities covered by the application. Furthermore, default approval under this section shall not prevent the Department from taking enforcement action pursuant to N.J.A.C. 7:13-19 for any activity undertaken in violation of this chapter.

(j) If the Department notifies the applicant under (g)2 or (h)2 above that a channel cleaning, clearing or desnagging project is not authorized under this general permit, the Department shall provide the applicant with the technical reasons for the decision. If the Department's technical reasons are based upon an inability to determine the location of the natural channel bed, the Department shall, at the request of the applicant, assist in identifying the natural channel bed.

(k) (No change from proposal)

7:13-8.4 General permits 2A through 2G for agricultural activities designed by the NRCS

(a) This section sets forth general permits for seven agricultural activities in a regulated area. In addition to satisfying the requirements applicable to all general permits at N.J.A.C. 7:13-8.1(b), to qualify for a general permit under this section, an activity shall satisfy the requirements applicable to the specific general permit and shall:

1-2. (No change from proposal)

3. Be approved by and performed under the supervision of the USDA Natural Resource Conservation Service and/or local soil conservation district, as appropriate.

(b) (No change from proposal)
(c) Regulated activities satisfying (a) above shall qualify for authorization under one of the following general permits provided the conditions applicable to that general permit are satisfied:

1. General permit 2A: A soil erosion control, bank stabilization or bank restoration project, provided:
   i. The project is accomplished by re-sloping the eroded bank and planting vegetation where possible. Where these techniques alone will not stabilize erosion, or where more than 2,000 square feet of trees would be cleared, cut or removed using such methods, soil bioengineering, shall be used;
   ii-v. (No change from proposal)

2-7. (No change from proposal)

7:13-8.5 General permit 3 for bridge or culvert scour protection by a public entity

(a) This section sets forth a general permit that authorizes a public entity to place rip-rap and other stabilization material within or along regulated waters to replace material that has eroded away, in order to prevent the scouring of an existing bridge or culvert along a public roadway. The application requirements and review procedures for this general permit authorization are set forth at N.J.A.C. 7:13-8.1(c) through (e).

(b) In addition to satisfying the requirements applicable to all general permits at N.J.A.C. 7:13-8.1(b), a scour protection activity is eligible for authorization under general permit 3 only if:

1-2. (No change from proposal)

3. The stabilizing material placed in the channel is in the same location as the material that has eroded away since the bridge or culvert was originally constructed. This stabilizing material can be placed within any open void area that has been created by previous scour in the channel, and/or can replace any unconsolidated material in the channel, such as silt or sediment, which has subsequently been deposited in any such void area.

4. The amount of stabilizing material placed in the channel is no greater than necessary to replace the material that has eroded away (and which may have subsequently been replaced by unconsolidated material) since the bridge or culvert was originally constructed;

5-10. (No change from proposal)

7:13-8.6 General permit 4 for stormwater maintenance by a public entity
(a) This section sets forth a general permit that authorizes the maintenance, repair and replacement of lawfully existing stormwater management structures and conveyance features by a public entity*, in cases where such activities are regulated under this chapter*. This general permit does not authorize any new stormwater discharges or the expansion of an existing stormwater management or collection system. The application requirements and review procedures for this general permit authorization are set forth at N.J.A.C. 7:13-8.1(c) through (e).

(b) (No change from proposal)

7:13-8.7 General permit 5 for the relocation of a building to reduce flood damage
(a) (No change from proposal)
(b) In addition to satisfying the requirements applicable to all general permits at N.J.A.C. 7:13-8.1(b), the relocation of a lawfully existing building is eligible for authorization under general permit 5 only if:
1. (No change from proposal)
2. The building is not enlarged* (except for an addition that meets a permit-by-rule at N.J.A.C. 7:13-7.2)*;
3-6. (No change from proposal)
7. No vegetation is cleared, cut or removed in a riparian zone, except for vegetation within 20 feet of the *existing and/or proposed* building if such disturbance is necessary to facilitate its relocation. In such a case, all temporarily disturbed areas shall be replanted with indigenous, non-invasive vegetation upon completion of the project, including the area where the relocated building originally existed.
(c) (No change from proposal)

7:13-8.8 General permit 6 for the reconstruction of a damaged or destroyed residence
(a) (No change from proposal)
(b) In addition to satisfying the requirements applicable to all general permits at N.J.A.C. 7:13-8.1(b), the reconstruction of a lawfully existing private residence is eligible for authorization under general permit 6 only if:

1. The residence has been damaged or destroyed by fire, flood or other natural disaster within one year prior to application to the Department under this general permit authorization;
2. (No change from proposal)
3. The residence is not enlarged (except for an addition that meets a permit-by-rule at N.J.A.C. 7:13-7.2[(a)4]);
4-7. (No change from proposal)
5. No vegetation is cleared, cut or removed in a riparian zone, except for vegetation within 20 feet of the existing and/or proposed residence if such disturbance is necessary to facilitate its reconstruction. In such a case all temporarily disturbed areas shall be replanted with indigenous, non-invasive vegetation upon completion of the project including, if the residence is relocated, the area where the residence originally existed.

(c) (No change from proposal)

7:13-8.9 (No change from proposal)

7:13-8.10 General permit 8 for a utility line across or along a water with a drainage area of less than 50 acres

(a) (No change from proposal)

(b) In addition to satisfying the requirements applicable to all general permits at N.J.A.C. 7:13-8.1(b), a utility crossing is eligible for authorization under general permit 8 only if:

1-2. (No change from proposal)
3. It is authorized under a valid freshwater wetlands general permit 2 or 21, pursuant to N.J.A.C. 7:7A-5.2 or 5.21, respectively;
4-5. (No change from proposal)
7:13-8.12 General permit 10 for *a* stormwater outfall along a water with a drainage area of less than 50 acres

(a)-(b) (No change from proposal)

SUBCHAPTER 9. INDIVIDUAL PERMITS

7:13-9.2 Application requirements for an individual permit

(a) (No change from proposal)

(b) An application for an individual permit shall include the following:

1-6. (No change from proposal)

7. Six sets of drawings, signed and sealed by a engineer, land surveyor or architect, as appropriate, which contain the following information:

i-v. (No change from proposal)

vi. If construction is proposed in a regulated water, the drawings shall also include the following:

(1) *[An]* *[A thorough]* explanation of the *[exact]* *[proposed]* method of *[proposed]*construction;

(2)-(3) (No change from proposal)

vii. (No change from proposal)

(c)-(g) (No change from proposal)

(h) The Department shall accept for review an application for an individual permit for an activity located in an area under the jurisdiction of the Pinelands Commission, as defined at N.J.S.A. 13:18A-11, only if the applicant has first received a Certificate of Filing, *[a Notice of Filing]*, a Certificate of Compliance or *[an]* *[a]* Resolution of Approval from the Pinelands Commission for the proposed activity, as appropriate. For more information, contact the Pinelands Commission at (609) 894-7300 or through its website at www.state.nj.us/pinelands.

7:13-9.3 Application review procedures for a verification or individual permit

(a) This section sets forth the Department's application review process for verifications and individual permits with the following exceptions:
1. *[The]* *Pursuant to the Construction Permits Law at N.J.S.A. 13:1D-29 et seq.,* the* default approval provisions at (e) through (h) below do not apply to an application for an individual permit for an electric generating facility or for a petroleum processing or storage facility, including a liquefied natural gas facility, with a storage capacity of over 50,000 barrels; and

2. *[This]* *Pursuant to the Highlands Water Protection and Planning Act at N.J.S.A. 13:20-1 et seq., this* section does not apply to a regulated activity associated with a Major Highlands Development, the application requirements and review procedures for which are found in the Highlands Water Protection and Planning Act rules at N.J.A.C. 7:38.

(b) Within 20 working days following the receipt of an application *for a verification or individual permit*, the Department shall:

1. (No change from proposal)
2. Determine that all necessary information required by this chapter for a complete application has not been provided, or that one or more submitted items are deficient, and request in writing that the applicant submit the missing *information* *material and/or address any deficiencies* within a reasonable time period. The Department may cancel the application if the *information* is not provided within 60 calendar days. The Department shall *subsequently* declare the application complete for review within 20 working days of receiving the requested information; or
3. (No change from proposal)

(c)-(g) (No change from proposal)

(h) If the Department fails to take action on an application in accordance with (e) or (g) above, the application shall *automatically* be deemed to be approved. This default approval is subject to any applicable conditions set forth in this chapter for the activities covered by the application. Furthermore, default approval under this section shall not prevent the Department from taking enforcement action pursuant to N.J.A.C. 7:13-19 for any activity undertaken in violation of this chapter.

(i)-(l) (No change from proposal)
7:13-9.5 Individual permit conditions

(a) (No change from proposal)

(b) The following conditions apply to all individual permits issued under this chapter:

1. Duty to comply: The permittee, its contractors and subcontractors shall comply with all conditions of the permit, supporting documents and approved drawings. Any noncompliance with a permit constitutes a violation of this chapter, and is grounds for enforcement action *under* pursuant to N.J.A.C. 7:13-19, as well as suspension and/or termination of the permit.

2-5. (No change from proposal)

6. Proper oversight: The permittee shall ensure that all approved activities are undertaken using the best management practices available under the supervision and direction of an engineer *at all points necessary to ensure compliance with all permit conditions*.

7-10. (No change from proposal)

11. Inspection and entry: The permittee shall allow an authorized representative of the Department, *at reasonable times and* upon the presentation of credentials, to:

   i. (No change from proposal)

   ii. Have access to and copy*[at reasonable times,]* any records that must be kept under the conditions of the permit; and

   iii. Inspect *[at reasonable times]* any facilities, equipment, practices or operations regulated or required under the permit. Failure to allow reasonable access under this section shall be considered a violation of this chapter and subject the permittee to enforcement action *under* pursuant to N.J.A.C. 7:13-19.

12. (No change from proposal)

(c)-(e) (No change from proposal)

7:13-9.6 Cases where a verification is required prior to obtaining an individual permit

(a) Except as provided at (b) and (c) below, the Department shall issue an individual permit for a regulated activity only if the flood hazard area design flood elevation and floodway limit are
known and verified pursuant to N.J.A.C. 7:13-6.1. *An* applicant for an individual permit shall *therefore* demonstrate that:

1-4 (No change from proposal)

(b) A verification is not required prior to the issuance of an individual permit*if* *in either of the following cases*:

1. (No change from proposal)

2. Fill and/or an aboveground structure is proposed and *if the following apply* *it is clear to the Department from a visual inspection of submitted drawings that*:
   
   i. No habitable building, *which requires knowledge of the flood hazard area design flood elevation to determine compliance with this chapter; ii. No railroad, roadway or parking area is proposed, which requires knowledge of the flood hazard area design flood elevation to determine compliance with this chapter;

   *It is clear to the Department from a visual inspection of submitted drawings that*

   il. The proposed fill and/or structure is either located outside a floodway or will not obstruct flow in a floodway; and

   *It is clear to the Department from a visual inspection of submitted drawings that the flood storage displacement requirements of N.J.A.C. 7:13-10.4 are satisfied.

(c) Verification of the floodway limit is not required prior to the issuance of an individual permit for the construction a habitable building, railroad, roadway or parking area *if* *provided it is clear to the Department from a visual inspection of submitted drawings that*:

1. *It is clear to the Department from a visual inspection of submitted drawings that the proposed fill and/or structure is either located outside a floodway or will not obstruct flow in a floodway; and

2. *It is clear to the Department from a visual inspection of submitted drawings that the flood storage displacement requirements of N.J.A.C. 7:13-10.4 are satisfied.

7:13-9.8 Hardship exception for an individual permit
(a)-(b) (No change from proposal)

(c) To obtain an individual permit based on a hardship exception, the applicant shall submit an application pursuant to N.J.A.C. 7:13-9.2 and shall include the following additional information as applicable:

1. A description of *any potential impacts* of the proposed project upon the environment;

2. If the hardship exception *request* relates to the access requirements of N.J.A.C. 7:13-11.6, proposed access routes to and from the property during a flood;

3. *[The]* *If the hardship exception request relates to any potential impacts from or to flooding, the* projected height, velocity and duration of the floodwaters expected at the site during the flood hazard area design flood* as well as evidence that the project will not adversely affect the hydraulic capacity of any water so as to cause or increase flooding upstream and/or downstream of the proposed project*;

4. (No change from proposal)

5. A description of the existing development in the area and *any potential impacts* of the proposed regulated activities on that development;

6. *[Evidence that the project will not adversely affect the hydraulic capacity of any water so as to cause or increase flooding upstream and/or downstream of the proposed project; and]*

7) Any additional information that the Department determines is reasonable and necessary to evaluate whether the *request for a* hardship exception *request* meets the requirements of this section.

(d)-(e) (No change from proposal)

SUBCHAPTER 10. INDIVIDUAL PERMIT REQUIREMENTS WITHIN VARIOUS REGULATED AREAS

7:13-10.1 Requirements for a regulated activity in a channel

(a)-(b) (No change from proposal)
(c) The Department shall issue an individual permit for a channel modification only if the applicant demonstrates that, in addition to meeting the requirements of (b) above, the channel modification meets at least one of the following requirements:

1. The channel modification is necessary to *improve the ecological health of the regulated water and its riparian zone, or to* control existing flooding or erosion which poses an immediate threat to life, property or a lawfully existing structure; or

2. (No change from proposal)

(d) The Department shall allow the use of construction equipment to perform regulated activities in a channel (whether situated in a channel, reaching into a channel or driven across a channel) only if, in addition to meeting the requirements of (b) above, the following requirements are satisfied:

1-2. (No change from proposal)

3. Contact with flowing water is minimized where possible through the use of temporary bridges *[or]* *[ culverts, coffer dams and/or sediment control devices, which are removed after completion of the project;]*

4-6. (No change from proposal)

(e) A person shall not drive or operate a vehicle across a channel except *[where]* *[ in the following cases]*:

1-3. (No change from proposal)

7:13-10.2 Requirements for a regulated activity in a riparian zone

(a) This section sets forth specific design and construction standards that apply to any regulated activity *[that will result in the clearing, cutting or removing of vegetation]* *[proposed]* in a riparian zone. The width of the riparian zone is set forth at N.J.A.C. 7:13-4.1.

(b) No change from proposal.

(c) As used in this section, the total area of vegetation disturbed in a riparian zone shall include the following:

1. The area *of any vegetation* within the limit of disturbance shown on submitted drawings;

2. The area under the canopy of *any* trees to be cleared, cut or removed; and
3. All other areas from which any vegetation is to be temporarily or permanently cleared, cut or removed.

(d) The following table sets forth limits on the area of vegetation that can be disturbed for various regulated activities, provided the requirements for each activity as described in (e) through (r) below are satisfied, and provided the applicant demonstrates the following:

1-3. (No change from proposal)

4. All additional restrictions for the specific proposed activity described elsewhere in this chapter are satisfied. For example, while (o) below sets limits on disturbance to the riparian zone resulting from a flood control project, N.J.A.C. 7:13-11.12 includes further specific requirements to ensure that disturbance to the channel and riparian zone is avoided or minimized for such projects.

*Table C*

MAXIMUM ALLOWABLE DISTURBANCE TO RIPARIAN ZONE VEGETATION

<table>
<thead>
<tr>
<th>Proposed Regulated Activity</th>
<th>See Paragraph Below for Further Detail</th>
<th>Maximum Area of Vegetation Disturbance Based on the Width of the Riparian Zone</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>50-foot Riparian Zone</td>
</tr>
<tr>
<td>• Railroad or public roadway</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Crossing a water</td>
<td>(e)</td>
<td>5,000 ft²</td>
</tr>
<tr>
<td>Not crossing a water</td>
<td></td>
<td>2,000 ft²</td>
</tr>
<tr>
<td>Reconstructed Crossing a water</td>
<td>(f)</td>
<td>2,500 ft²</td>
</tr>
<tr>
<td>Not crossing a water</td>
<td></td>
<td>1,000 ft²</td>
</tr>
<tr>
<td>• Private roadway that serves as a driveway to one private residence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Crossing a water</td>
<td>(g)</td>
<td>1,500 ft²</td>
</tr>
<tr>
<td>Not crossing a water</td>
<td></td>
<td>600 ft²</td>
</tr>
<tr>
<td>Reconstructed Crossing a water</td>
<td>(h)</td>
<td>750 ft²</td>
</tr>
<tr>
<td>Not crossing a water</td>
<td></td>
<td>300 ft²</td>
</tr>
<tr>
<td>• All other private roadways</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
(e) The Department shall issue an individual permit for the construction of a new railroad or public roadway, which results in clearing, cutting and/or removing vegetation in a riparian zone, only if the following requirements are satisfied:

1. The total area of vegetation cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in *[Table B]* *Table C* above;

2-4. (No change from proposal)
(f) The Department shall issue an individual permit for the expansion or improvement of a lawfully existing railroad or public roadway, which results in clearing, cutting and/or removing vegetation in a riparian zone, only if the following requirements are satisfied:

1. The total area of vegetation cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in *[Table B]* *Table C* above, unless the applicant demonstrates that public safety cannot be adequately ensured without exceeding these limits. In such a case, the applicant shall provide 2:1 compensation for all cleared, cut and removed vegetation in excess of the limit set forth in *[Table B]* *Table C* in a manner described at (t) below;

2-3. (No change from proposal)

(g) The Department shall issue an individual permit for the construction of a new private roadway, which results in clearing, cutting and/or removing vegetation in a riparian zone, only if the following requirements are satisfied:

1. The total area of vegetation cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in *[Table B]* *Table C* above;

2-6. (No change from proposal)

(h) The Department shall issue an individual permit for the expansion or improvement of an existing private roadway, which results in clearing, cutting and/or removing vegetation in a riparian zone, only if the following requirements are satisfied:

1. The total area of vegetation cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in *[Table B]* *Table C* above;

2-3. (No change from proposal)

(i) The Department shall issue an individual permit to *[stabilize an eroded bank of a channel or impounded water.]* *restore to a stable condition a bank or channel, which has become eroded, unstable and/or ecologically degraded*, which results in clearing, cutting and/or removing vegetation in a riparian zone, only if the following requirements are satisfied:

1. If the *[eroded]*bank *or channel* is *[cut back to a stable slope]* *restored* and revegetated as described at N.J.A.C. 7:13-11.14(c)2, and the applicant demonstrates the project is necessary pursuant to N.J.A.C. 7:13-11.14(b), the area of vegetation cleared, cut and/or removed within the riparian zone is minimized;
2. If the *erosed* bank or channel is *stabilized* *restored* by any means other than that which is described in (i)1 above, the total area of vegetation permanently cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in *[Table B]* *Table C* above, unless the applicant demonstrates that the bank or channel cannot be adequately stabilized or restored without exceeding these limits. In such a case, the applicant shall provide 2:1 compensation for all areas permanently cleared of vegetation in excess of the limit set forth in *[Table B]* *Table C* in a manner described at (t) below; and

3. The total area of vegetation temporarily cleared, cut and/or removed within the riparian zone in order to provide access to perform the stabilization or restoration does not exceed the limits for temporary disturbance set forth in *[Table B]* *Table C* above*. All* *and all* such disturbed areas *shall be* replanted with indigenous, non-invasive vegetation* ; and*

(j) The Department shall issue an individual permit to construct a stormwater discharge (including the stormwater pipe leading to the discharge), which results in clearing, cutting and/or removing vegetation in a riparian zone, only if the following requirements are satisfied:

1. The total area of vegetation cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in *[Table B]* *Table C* above; and

2. No portion of the stormwater discharge, including any associated conduit outlet protection and/or conveyance swale, is placed within a 150-foot or 300-foot riparian zone, except in the following cases (note that new discharges along Category One waters and certain upstream tributaries are restricted in certain cases under the Stormwater Management rules at N.J.A.C. 7:8-5.5(h)):

   i. The reconstruction of an existing stormwater discharge provided:

      (1) (No change from proposal)

      (2) The volume, rate and quality of stormwater being discharged is not altered* .

      Compliance with this requirement shall be determined in accordance with the standards of the Department’s Stormwater Management rules at N.J.A.C. 7:8.*

   ii-iv. (No change from proposal)
(k) The Department shall issue an individual permit to construct a utility line, which crosses a regulated water and results in clearing, cutting and/or removing vegetation in a riparian zone, only if the following requirements are satisfied:

1. The total area of vegetation cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in *[Table B]* *Table C* above, unless the applicant demonstrates that:
   i. (No change from proposal)
   ii. The width of the trench required to safely install the utility line necessitates that disturbance to vegetation in the riparian zone exceeds the limits set forth in *[Table B]* *Table C*, as described at N.J.A.C. 7:13-11.9(b)4; and

2. (No change from proposal)

(l) The Department shall issue an individual permit to construct a utility line, which does not cross a regulated water but which results in clearing, cutting and/or removing vegetation in a riparian zone, only if the following requirements are satisfied:

1. The total area of vegetation cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in *[Table B]* *Table C* above;

2-3. (No change from proposal)

(m) The Department shall issue an individual permit for the construction of a new private residence, which results in clearing, cutting and/or removing vegetation in a riparian zone, only if the following requirements are satisfied:

1. The total area of vegetation cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in *[Table B]* *Table C* above;

2-3. (No change from proposal)

4. The applicant demonstrates the following:
   i. There is no other reasonable use for the site *under the applicable zoning for the property*, which would reduce or eliminate the impact to the riparian zone;
   ii. (No change from proposal)
   iii. All disturbance within the riparian zone is located at least 25 feet from any top of bank or edge of water and as far from the regulated water as possible, unless the
private residence is constructed adjacent to a *man-made tidal waterway*.

*manmade tidal water in cases where such waters possess a riparian zone*.

(n) The Department shall issue an individual permit for the construction of an addition to an existing building, or the construction of a building appurtenant to an existing building, such as a garage, barn or shed, which results in clearing, cutting and/or removing vegetation in a riparian zone, only if the following requirements are satisfied:

1. The total area of vegetation cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in *Table B* above; and
2. The applicant demonstrates the following:
   i. (No change from proposal)
   ii. All disturbance within the riparian zone is located at least 25 feet from any top of bank or edge of water and as far from the regulated water as possible*, unless the addition or building is constructed adjacent to a manmade tidal water in cases where such waters possess a riparian zone*.

(o) The Department shall issue an individual permit for the construction of a flood control project, which results in clearing, cutting and/or removing vegetation in a riparian zone, only if the total area of vegetation cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in *Table B* above, unless the applicant demonstrates that public safety cannot be adequately ensured without exceeding these limits. In such a case, the applicant shall provide 2:1 compensation for all cleared, cut and removed vegetation in excess of the limit set forth in *Table B* in a manner described at (t) below.

(p) The Department shall issue an individual permit for the construction of a public accessway or public access area along a tidal water, which results in clearing, cutting, and/or removing vegetation in a riparian zone, only if the following requirements are met:

1. The public accessway or public access area is designed in accordance with the public access to the waterfront rule, N.J.A.C. 7:7E-8.11*.[ Such]* in which case such* construction need not comply with (d)1 and 2 above;
2. (No change from proposal)
3. For any proposed parking area, the applicant demonstrates that there is no other *reasonable* *feasible* location onsite to construct the parking area, *that* *which* would reduce or eliminate the impact to the riparian zone;

(q) The Department shall issue an individual permit for the construction of a water dependent development along a tidal water, which results in clearing, cutting, and/or removing vegetation in a riparian zone, only if the following requirements are met:

1. (No change from proposal)

3. For any proposed development, the applicant demonstrates that there is no other *feasible* location onsite to construct the development *that* *which* would reduce or eliminate the impact to the riparian zone.

(r) The Department shall issue an individual permit for a regulated activity not listed in (e) through (q) above, which results in clearing, cutting and/or removing vegetation in a riparian zone, only if the following requirements are satisfied:

1. The total area of vegetation cleared, cut and/or removed within the riparian zone does not exceed the limits set forth in *Table B* *Table C* above;

2-4. (No change from proposal)

(s) If the Department determines that requiring an applicant to meet a limit of disturbance set forth in *Table B* *Table C* above constitutes a hardship under N.J.A.C. 7:13-9.8, and the Department subsequently grants an individual permit for an activity that exceeds that limit, the applicant shall provide 2:1 compensation for all cleared, cut and removed vegetation in excess of that limit set forth in *Table B* *Table C* in a manner described at (t) below.

(t) The 2:1 compensation required under (f)1, (i)*2*, (o), (r)4 and (s) above shall be accomplished as follows:

1. In the case of (f)1, (i)*2*, (o) and (s) above, at least twice the area of all cleared, cut and removed vegetation in excess of the limit in *Table B* *Table C* above shall be replanted;

2-3. (No change from proposal)

4. All replanting of vegetation shall be accomplished as described in (u) below and in one or both of the following ways*. *(Replanting vegetation that was removed in violation of this chapter does not constitute compensation under this section)*:
i. (No change from proposal)

ii. The applicant shall plant new trees in the riparian zone in an area that is *substantially* devoid of trees at the time of application because the trees were removed due to previous, lawful development. *[Replanting vegetation that was removed in violation of this chapter does not constitute compensation under this section.]*

(u) All replanting of riparian zone vegetation required under this section shall meet the following *requirements*:

1. All replanting shall be *located* in the riparian zone of the same regulated water as the cleared, cut or removed vegetation;

2. All replanting shall be *located* as close *in proximity* to the cleared, cut or removed vegetation as possible;

3. All replanting shall *[be]* *consist* of indigenous, non-invasive vegetation;

4. (No change from proposal)

5. The applicant shall monitor and maintain *the* replanted vegetation for at least three growing seasons to ensure proper establishment and survival; and

6. (No change from proposal)

(v) (No change from proposal)

7:13-10.3 Requirements for a regulated activity in a floodway

(a)-(b) (No change from proposal)

(c) Notwithstanding (b) above, the Department shall issue an individual permit for the following regulated activities in a floodway, provided all other requirements of this chapter are satisfied for each activity:

1-3. (No change from proposal)

4. The construction of a water control structure, such as a bridge, culvert, footbridge, dam or flood control project, in accordance with N.J.A.C. 7:13-11.7, 11.8, 11.11 and 11.12*,

   *respectively*;

5. (No change from proposal)
6. The restoration and/or stabilization of *an eroded* *a* bank *or channel*, in accordance with N.J.A.C. 7:13-11.14, which requires the placement of fill, provided:

i. The placement of the fill is necessary to protect nearby structures or trees from undermining or failure*, or to restore or improve the ecological health or habitat value of a regulated water,* and not simply to reclaim land that has been lost due to erosion; and

ii. (No change from proposal)

7-9. (No change from proposal)

7:13-10.4 Requirements for a regulated activity in a flood fringe
(a)-(b) (No change from proposal)
(c) The Department shall issue an individual permit for a regulated activity (or combination of regulated activities) in a flood fringe only if one of the following is satisfied:

1. (No change from proposal)

2. The regulated activity will displace no flood storage volume onsite, as calculated for both the *volume between the* flood hazard area design flood and the 10-year flood, *and the volume between the 10-year flood and the ground,* in accordance with (e) below; or

3. The regulated activity will displace no more than 20 percent of the flood storage volume onsite, as calculated for both the *volume between the* flood hazard area design flood and the 10-year flood, *and the volume between the 10-year flood and the ground,* and all flood storage displacement onsite will be compensated offsite as follows:

i-iii.(No change from proposal)

(d) (No change from proposal).

(e) The following shall apply to any regulated activity that is designed to displace no flood storage volume in accordance with (c)2 above:

1. The existing flood storage volume onsite *[VE]* *(Ve)* is the volume of floodwater that is able to occupy the flood fringe onsite before the proposed regulated activity is undertaken. To determine the existing flood storage volume, calculate the volume of space within the flood fringe between the flood elevation and the ground surface as it
exists on the date of application to the Department, and subtract the volume occupied by any structures that lawfully exist as of that date.

2. The proposed flood storage volume onsite \((V_P)\) is the volume of floodwater that will be able to occupy the flood fringe onsite once all proposed construction, excavation, filling and grading is completed. To determine the proposed flood storage volume, calculate the volume of space within the flood fringe between the flood elevation and the proposed ground surface, and subtract the volume occupied by any structures that will lawfully exist once all proposed construction is completed.

3. The proposed flood storage volume onsite \((V_P)\) shall be greater than or equal to the existing flood storage volume onsite \((V_E)\), for both the volume between the flood hazard area design flood and the 10-year flood, and shall be calculated according to the volume between the 10-year flood and the ground. Certain considerations should be made in calculating both \((V_P)\) and \((V_E)\), as set forth in (j) below. Additional flood storage volume can also be created onsite to compensate for proposed flood storage displacement in accordance with (m) below.

(f) Table C* Table D* below sets forth the percentage of flood storage volume that a regulated activity (or combination of activities) can lawfully displace in various geographic areas of New Jersey. As described in further detail in this section below, a project cannot displace more than 20 percent of the flood storage volume that originally existed onsite, and all proposed displacement onsite must ultimately be compensated offsite. Table C* Table D* indicates the dates from which the original and proposed flood storage volumes should be calculated for different geographic areas. Flood storage calculations shall be performed for both the volume between the flood hazard area design flood and the 10-year flood, and the volume between the 10-year flood and the ground, as described at (j) below, to show that the 20-percent and zero-percent limitations are met for both of these flood events.* areas*.

*Table C* *Table D*

ALLOWABLE PERCENTAGES OF FLOOD STORAGE VOLUME DISPLACEMENT

(*Table C* *Which* shall be met for both the volume between the flood hazard area design flood and the 10-year flood, and the volume between the 10-year flood and the ground*)
(g)-(i) (No change from proposal)

(j) The following factors shall be considered when calculating flood storage volumes under this section:

1. The flood storage displacement limits in this section apply to both the *volume between the* flood hazard area design flood and the 10-year flood*, and the volume *between the 10-year flood and the ground*. As such, applicants must demonstrate that a proposed project meets these limits for both floods unless the entire project lies above the 10-year flood elevation.

2. Flood storage displacement proposed above the 10-year flood elevation onsite must be compensated for by the creation of flood storage above the 10-year flood elevation. Similarly, flood storage displacement proposed below the 10-year flood elevation *onsite* must be compensated for by the creation of flood storage below the 10-year flood elevation. This applies whether the compensation occurs onsite, as described at (m) below, or offsite, as described at (o) below.

3. In cases where the 10-year flood elevation is not provided on State or Federal flood maps, calculations can instead be performed using a flood depth halfway between the flood hazard area design flood elevation and the lowest ground elevation *within the*
flood fringe onsite. For example, at a given cross-section through a site, if the flood hazard area design flood elevation onsite is 90.0 feet NGVD and the lowest ground elevation onsite within the flood fringe is 80.0 feet NGVD, flood storage calculations can be performed at that cross-section using a flood elevation of 85.0 feet NGVD at that location, if the 10-year flood elevation is unknown.

Furthermore, this halfway depth must be determined separately for each cross-section in the flood fringe, and at close intervals throughout the site in order to provide an accurate estimate of the upper and lower flood storage volumes. An illustration of how to properly calculate these volumes is provided in the Flood Hazard Area Technical Manual.*

4-7. (No change from proposal)

(k) The base flood storage volume onsite (V_1977, V_1980, V_2004 and/or V_2007) is the volume of floodwater that was able to occupy the flood fringe onsite on the appropriate date shown in Table C* Table D* depending on the geographic location of the project. To determine the base flood storage volume, calculate the volume of space within the flood fringe between the flood elevation and the ground surface as it existed on the appropriate date in Table C* Table D*, and subtract the volume occupied by any structures that lawfully existed on that date.

(l)-(m) (No change from proposal)

(n) Flood storage volume may be created onsite to compensate for regulated activities that displace flood storage as described in (m) above provided the onsite compensation:

1. Is created within or adjacent to the flood hazard area of the same water as the proposed flood storage displacement, or a tributary to the same water as the proposed flood storage displacement, provided the tributary lies upstream of the site or the flood hazard area of both waters connect onsite;

2-4. (No change from proposal)

(o) (No change from proposal)

(p) Flood storage volume can be created offsite to compensate for regulated activities that displace flood storage as described in (o) above provided the offsite compensation:
1. Is created within or adjacent to the flood hazard area of the same water as the proposed flood storage displacement, or a tributary to the same water as the proposed flood storage displacement, \*\*[if]\*\* provided the tributary lies upstream of the site or\*\* the flood hazard area of both waters connect onsite;

2-8. (No change from proposal)

(q)-(t) (No change from proposal)

(u) If the percentage of flood storage volume displacement on a site already exceeds a limit at *\[Table C]\* \*\[Table D]\* above due to activities that were previously undertaken in accordance with this chapter, the Department shall issue an individual permit for a new regulated activity on the site only if an equal amount of flood storage volume is created to compensate onsite for any displaced flood storage volume that would result from the new regulated activity, in accordance with (e) above. Compensatory flood storage volume shall not be created offsite in such a case, and shall only be created onsite, as described in (m) above. The volume of fill in excess of the limits in *\[Table C]\* \*\[Table D]\* does not need to be removed from the site.

(v) If the percentage of flood storage volume displacement on a site already exceeds a limit at *\[Table C]\* \*\[Table D]\* above due to activities that were previously undertaken in violation of this chapter, the Department shall issue an individual permit for a new regulated activity on the site only if the following requirements are satisfied:

1. (No change from proposal)

2. All displaced flood storage volume in excess of the limit in *\[Table C]\* \*\[Table D]\* is restored onsite; and

3. (No change from proposal)

(w) (No change from proposal)

7:13-10.5 Requirements for a regulated activity in or along a water with fishery resources

(a)-(c) (No change from proposal)

(d) Except as provided at (e) below, certain activities are prohibited during times when fish are breeding or are especially sensitive to disturbance. The following activities are prohibited during the restricted periods listed in *\[Table D]\* \*\[Table E]\* below:

1. (No change from proposal)
2. Any construction, excavation, filling or grading in the riparian zone, unless the applicant demonstrates that appropriate soil erosion and sediment control measures are in place which will prevent sediment from reaching the channel. All proposed measures shall meet the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90.

*[Table D]* **Table E**

RESTRICTED TIME PERIODS FOR WATERS WITH FISHERY RESOURCES

<table>
<thead>
<tr>
<th>Water and classification</th>
<th>Time period (inclusive) during which activities are prohibited</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Trout Waters</td>
<td></td>
</tr>
<tr>
<td>• All trout production waters except rainbow trout</td>
<td>September 15 through March 15</td>
</tr>
<tr>
<td>• Rainbow trout production waters</td>
<td>February 1 through April 30</td>
</tr>
<tr>
<td>• Trout stocked waters</td>
<td>March 15 through June 15</td>
</tr>
<tr>
<td>• Trout maintenance waters</td>
<td></td>
</tr>
<tr>
<td>• Any water located within 1 mile upstream of a trout stocked or a trout maintenance water</td>
<td></td>
</tr>
<tr>
<td>2. Non-Trout Waters</td>
<td></td>
</tr>
<tr>
<td>• Waters that support general game fish</td>
<td>May 1 through June 30</td>
</tr>
<tr>
<td>• Waters that support pickerel</td>
<td>Ice out through April 30</td>
</tr>
<tr>
<td>• Waters that support walleye</td>
<td>March 1 through May 30</td>
</tr>
<tr>
<td>3. Anadromous Waters</td>
<td></td>
</tr>
<tr>
<td>• All unimpeded tidal waters open to the Atlantic Ocean or any coastal bay</td>
<td>April 1 through June 30</td>
</tr>
<tr>
<td>• All waters identified as anadromous migratory pathways</td>
<td></td>
</tr>
<tr>
<td>• Delaware River upstream of U.S. Route 202</td>
<td>April 1 through June 30 and September 1 through November 30</td>
</tr>
</tbody>
</table>
- Delaware River between U.S. Route 202 and Interstate 276 (Pennsylvania Turnpike-Bridge) * March 1 through June 30
- Delaware River between Interstate 276 (Pennsylvania Turnpike-Bridge) and Interstate 295 (Delaware Memorial Bridge) * March 1 through June 30 and September 1 through November 30
- Tidal portions of Raccoon, Rancocas Creek, Crosswicks Creeks and Cooper River
- All unimpeded tidal waters open to the Delaware River downstream of Interstate 295 (Delaware Memorial Bridge) *
- Tidal portions of the Maurice River, Cohansey River and Salem River
- March 1 through June 30 and October 1 through November 30

(e) An applicant may request that the Department reduce, extend or otherwise modify a timing restriction listed in Table D*. The Department shall grant such a request if one or more of the following requirements is satisfied:

1-4. (No change from proposal)

(f) The Delaware River Basin Commission (DRBC) may impose timing restrictions in addition to those listed in Table D* above on certain activities in waters under DRBC jurisdiction. Contact the U.S. Fish and Wildlife Service's River Basin Coordinator through the DRBC at (609) 883-9500 for information on these additional timing restrictions.

7:13-10.6 Requirements for a regulated activity in a documented habitat for threatened or endangered species

(a) (No change from proposal)

(b) For the purposes of this chapter, the Department identifies present and/or documented habitat for most threatened or endangered wildlife species using the Landscape Project method, which focuses on habitat areas required to support local populations of threatened and endangered wildlife species. This method is further described in the Flood Hazard Area
Technical Manual, available from the Department at the address listed at N.J.A.C. 7:13-1.1(g).
The report entitled New Jersey's Landscape Project provides additional information on mapping methodology and is available at the website www.nj.gov/dep/fgw/ensphome.htm or by contacting the address given below. The Department's Landscape Maps may be updated periodically and may be obtained via file download from www.nj.gov/dep/fgw/ensphome.htm or through the Interactive I-map NJ website: www.state.nj.us/dep/gis/imapnj/imapnj.htm or by writing to the Division of Fish and Wildlife, Endangered and Nongame Species Program at:

The Landscape Project

*State of New Jersey Department of Environmental Protection *
*NJ*Division of Fish and Wildlife Endangered and Nongame Species Program

*[PO]* **P.O.** * Box 400

Trenton, NJ 08625-0400

(c)-(g)  (No change from proposal)

SUBCHAPTER 11.  INDIVIDUAL PERMIT REQUIREMENTS FOR VARIOUS REGULATED ACTIVITIES

7:13-11.1 Requirements that apply to all regulated activities

(a)-(c)  (No change from proposal)

(d) A permittee shall obtain all necessary approvals from the USDA Natural Resource Conservation Service or its designee prior to commencing any activity *designed or overseen by the NRCS, which is* approved in an individual permit issued under this chapter.

(e) If neither the Soil Conservation District nor the USDA Natural Resource Conservation Service has jurisdiction over an activity approved in an individual permit issued under this chapter, the permittee shall commence the activity only if the following soil erosion and sediment control standards*, as specified in the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90, are implemented:

1-4. (No change from proposal)

(f) The Department shall issue an individual permit for a regulated activity that adversely impacts a property not owned by an applicant only if the applicant demonstrates that one or more
of the requirements at N.J.A.C. 7:13-9.2(f) are satisfied for each adversely impacted property. A regulated activity shall be considered to adversely impact a property not owned by an applicant if the activity meets any of the following requirements (for the purpose of determining compliance with (f)3, 4 and 5 below, calculations shall be rounded to the nearest 0.1 feet):

1-3. (No change from proposal)

4. The *applicant owns (or has development rights on) both sides of a regulated water, and the* regulated activity *[is located in a floodway, spans a regulated water and]* will cause the flood hazard area design flood elevation to increase by more than 0.2 feet on any property not owned by the applicant; and/or

5. The *applicant owns (or has development rights) on only one side of a regulated water, and the* regulated activity *[is located in a floodway, does not span a regulated water and]* will cause the flood hazard area design flood elevation to increase by more than 0.1 feet on any property not owned by the applicant.

(g) (No change from proposal)

7:13-11.2 Requirements for stormwater management

(a)-(b) (No change from proposal)

(c) The Department shall issue an individual permit for a stormwater management basin located within or discharging within a flood hazard area only if the following requirements are satisfied:

1-3. (No change from proposal)

4. If the elevation of the lowest discharge orifice or weir in the basin lies below the flood hazard area design flood elevation, the discharge pipe shall be equipped with mechanical devices *where appropriate* to prevent floodwater from backing up the pipe into the basin.

7:13-11.3 Requirements for excavation, fill and grading activities

(a) (No change from proposal)

(b) The Department shall issue an individual permit for excavation, fill and/or grading only if the following requirements are satisfied:

1. (No change from proposal)
2. Any slope of **greater than** 50 percent *[or greater]* *(a ratio of two horizontal to one vertical)* is stabilized using soil bioengineering, retaining walls, rip-rap or other appropriate slope protection;

3. The excavation, fill and/or grading does not endanger the integrity of any existing structure; *and*

4. *[No permanently excavated area extends below the seasonal high water table, unless the excavation is for a stormwater management basin that meets the requirements of the Stormwater Management rules at N.J.A.C. 7:8. This does not include temporary excavation to construct foundations, footings or utility lines; and]*

5. *[All excavated material is disposed of lawfully.]*

7:13-11.5 Requirements for a building

(a)-(m)  *(No change from proposal)*

(n) The Department shall issue an individual permit for a garage with a floor below the flood hazard area design flood elevation as described at (l)2 above, whether attached to or below a private residence or freestanding, only if the garage meets the following requirements:

1-4. *(No change from proposal)*

5. The deed of the property is modified to *[state the following (the)* *[disclose (h)5i through iv below. The]* modified deed shall be filed with the local county clerk, a copy of which shall be provided to the Department within 90 calendar days of the issuance of the individual permit*]*:

i. *(No change from proposal)*

ii. That the garage and driveway are likely to be inundated by floodwaters*, which may result in damage and/or inconvenience*;

iii-iv. *(No change from proposal)*

(o) The Department shall issue an individual permit for a habitable building with an enclosed area below the flood hazard area design flood elevation, which is not a crawl space or garage as described at (m) and (n) above, *respectively*, *only if the enclosed area meets the following requirements:

1-4. *(No change from proposal)*
(p) A flood vent constructed in the outer wall of a building shall meet the following requirements *(unless otherwise required under the New Jersey Uniform Construction Code at N.J.A.C. 5:23)*:

1-4. (No change from proposal)

(q) (No change from proposal)

7:13-11.6 Requirements for a railroad, roadway or parking area
(a)-(e) (No change from proposal)

(f) The Department shall issue an individual permit to construct or reconstruct a private roadway and/or parking area that serves a building, or group of buildings, not covered by (c), (d) or (e) above, such as a commercial business, house of worship, office complex, shopping center or residential subdivision of two or more private residences, only if one of the following requirements is satisfied:

1. The travel surface of each proposed private roadway and parking area that serve the building or group of buildings is constructed at least one foot above the flood hazard area design flood elevation;
2. (No change from proposal)
3. The applicant demonstrates the following:
   i-iv. (No change from proposal)
   v. An adequate number of permanent signs are posted in prominent locations indicating which private roadways and parking areas are subject to flooding in the following cases:
      (1) The roadway and/or parking *area* serves a residential subdivision of two or more private residences; or
      (2) (No change from proposal)

(g) (No change from proposal)

7:13-11.7 Requirements for a bridge or culvert
(a)-(e) (No change from proposal)
(f) The Department shall issue an individual permit to construct or reconstruct a bridge or culvert in or across a Class A water that has a channel width of five feet or more as follows:

1. (No change from proposal)
2. If spanning under (i) below is not feasible due to *prohibitively high construction costs*, unstable substrate, adverse impacts to flooding and/or an irregular channel configuration, and the applicant meets the waiver requirements at (m) below, the channel shall be spanned with a smaller structure and adjoining side-relief culverts shall be constructed as described in (j) below.
3. If spanning the channel with side-relief culverts under (j) below is not feasible due to *prohibitively high construction costs*, unstable substrate, adverse impacts to flooding and/or an irregular channel configuration, one circular or elliptical culvert, or a system of culverts, shall be constructed as described in (k) below.
4. (No change from proposal)

(g) The Department shall issue an individual permit to construct or reconstruct a bridge or culvert in or across a Class B water, or a Class A water that has a channel width of less than five feet, as follows:

1. (No change from proposal)
2. If spanning under (i) below is not feasible due to *prohibitively high construction costs*, unstable substrate, adverse impacts to flooding and/or an irregular channel configuration, the channel shall be spanned with a smaller structure and adjoining side-relief culverts shall be constructed as described in (j) below.
3. If spanning the channel with side-relief culverts under (j) below is not feasible due to *prohibitively high construction costs*, unstable substrate, adverse impacts to flooding and/or an irregular channel configuration, and the applicant meets the waiver requirements at (m) below, one circular or elliptical culvert, or a system of culverts, shall be constructed as described in (k) below.
4. (No change from proposal)

(h) The Department shall issue an individual permit to construct or reconstruct a bridge or culvert in or across a Class C water as follows:

1. (No change from proposal)
2. If spanning under (i) below is not feasible due to *excessive cost* *prohibitively high construction costs*, unstable substrate, adverse impacts to flooding and/or an irregular channel configuration, the channel shall be spanned with a smaller structure and adjoining side-relief culverts shall be constructed as described in (j) below.

3. If spanning the channel with side-relief culverts under (j) below is not feasible due to *excessive cost* *prohibitively high construction costs*, unstable substrate, adverse impacts to flooding and/or an irregular channel configuration, one circular or elliptical culvert, or a system of culverts, shall be constructed as described in (k) below.

4. (No change from proposal)

(i) Spanning a channel under (f)1, (g)1 and (h)1 above shall be accomplished as follows:

1-2. (No change from proposal)

3. No armoring shall be placed under or across the channel bed, unless such armoring is necessary to prevent scour along the proposed abutments or footings. In such a case, the armoring shall be buried beneath at least two feet of native substrate *where feasible*.

(j) Spanning a channel with adjoining side-relief culverts under (f)2, (g)2 and (h)2 above shall be accomplished as follows:

1-3. (No change from proposal)

4. No armoring shall be placed under or across the channel bed, unless such armoring is necessary to prevent scour along the proposed abutments or footings. In such a case, the armoring shall be buried beneath at least two feet of native substrate *where feasible*.

(k) One circular or elliptical culvert, or a system of parallel circular and/or elliptical culverts, under (f)3, (g)3 and (h)3 shall be constructed as follows:

1-2. (No change from proposal)

3. The invert of the in-channel culvert shall be installed at least two feet below the invert of the natural channel *where feasible*;

4-5. (No change from proposal)

(l) A circular, elliptical or box culvert under (f)4, (g)4 and (h)4 shall be constructed as follows:

1. Where feasible:

   i. The invert of the culvert shall be installed at least two feet below the invert of the natural channel *where feasible*;
7:13-11.9 Requirements for a utility line

(a) (No change from proposal)

(b) The Department shall issue an individual permit to construct or reconstruct a utility line across or under a channel or water only if the following requirements are satisfied, as applicable:

1-5. (No change from proposal)

6. A utility line that conveys a gas or liquid is protected in one of the following ways:

i-ii. (No change from proposal)

iii. It is encased within a steel sleeve, or *[covered]* **protected above** by a 0.25inch *thick* stainless steel plate, and covered by at least three feet of stable material consisting of native substrate in the channel or water; or

iv. If the applicant demonstrates that it is not feasible to provide at least three feet of coverage beneath the channel or water, and that there is no feasible alternative location for crossing the channel or water where at least three feet of coverage is provided, the utility line is either:

1) (No change from proposal)

2) Covered by as much stable material consisting of native substrate in the channel or water as feasible, protected above by a **0.25-inch thick** stainless steel plate*[at least 0.25 inches thick]*, and encased with six inches of concrete around the sides and bottom;

7-8. (No change from proposal)

9. The following requirements are satisfied for each utility line that crosses a channel or water, unless the applicant demonstrates that one or more of these requirements is not feasible or that another configuration would pose less risk to life, property and the environment:

i. Each utility line is placed *[horizontally]* **nominally horizontal** under the entire channel or water, and remains *[horizontal]* **so** beyond each bank for a
distance equal to twice the height of the bank, or 10 feet, whichever is greater. If there is no *discernible* bank, the utility line shall remain nominally horizontal for at least 10 feet beyond the normal edge of water;

ii. The inclined portion of each utility line approaching the channel or water has a slope no steeper than 50 percent (a ratio of two horizontal to one vertical); and

iii. Encasement extends under the entire channel or water and 10 feet beyond each top of bank. If there is no discernible bank, the utility line shall be encased for at least 10 feet beyond the normal edge of water.

(c) (No change from proposal)

(d) The Department shall issue an individual permit to construct or reconstruct a manhole associated with a utility line in a regulated area only if the following requirements are satisfied:

1. The manhole is constructed at least 10 feet from any top of bank or edge of water (unless situated within a paved roadway);

2-4. (No change from proposal)

(e) (No change from proposal)

(f) The Department shall issue an individual permit that allows, over the five-year term of the permit, the necessary and periodic maintenance, repair or replacement of any damaged or unsafe section of a lawfully existing above or below ground utility line in a regulated area only if the following requirements are satisfied:

1. The applicant submits an application for an individual permit which, in addition to the normal application requirements, includes the following:

   i. (No change from proposal)

   ii. Details of the types of repairs and maintenance, repair and/or replacement activities that can be expected to occur during the five-year period, including typical drawings of anticipated repairs and a construction sequence;

2-5. (No change from proposal)

7:13-11.12 Requirements for a flood control project

(a) (No change from proposal)
(b) The Department shall issue an individual permit for a flood control project only if the applicant is a public entity, and the applicant provides a detailed analysis of the existing flooding problem that is to be mitigated. At minimum, this analysis shall include the following:

1-2. (No change from proposal)

3. A cost-benefit analysis for the proposed flood control project, which includes a comparison of any adverse environmental impacts that may be caused by the project with the benefits for flood relief for each investigated alternative;

4-6. (No change from proposal)

(c)-(d) (No change from proposal)

7:13-11.14 Requirements for bank stabilization and channel restoration

(a) This section sets forth specific design and construction standards that apply to any bank stabilization of a bank or channel restoration project proposed in any regulated area.

(b) The Department shall issue an individual permit to stabilize an eroded bank or channel, which has become eroded, unstable and/or ecologically degraded, only if the applicant provides a detailed analysis of the existing erosion problem that is to be corrected. At minimum, this analysis shall include the following:

1. A complete description of the existing erosion problem onsite including:
   i. The likely causes of the erosion; and
   ii. A history of the site and the drainage area, including any previous attempts to stabilize or restore the bank or channel; and
   *ii. The likely causes of any erosion, instability or ecological degradation;

2. A demonstration of why the selected stabilization or restoration methods (as described at (c) below) are the most suitable for the site. At minimum, this demonstration should include and discuss the following (see Flood Hazard Area Technical Manual, available from the Department at the address listed at N.J.A.C. 7:13-1.1(g), for examples):
   i. The location of any headcut if a headcut in the channel is if present. A headcut is a sudden change in elevation in the stream bed, which usually occurs at the
leading edge of a forming gully, and is indicative of erosive forces that are likely to continue to wash away the natural channel;

ii. Any upstream or downstream stressors that may have contributed to and/or exacerbated any erosion, that needs to instability or ecological degradation, which should be addressed as part of the project;

iii. How future development in the drainage area could impact the bank and/or channel and the proposed stabilization and/or restoration;

iv. The anticipated lifetime of the proposed stabilization or restoration and

[v] *3* A maintenance and monitoring plan to ensure the success of the proposed stabilization or restoration, which includes:

[vi] *i*. An action plan in case of future failure of the project; and

[vii] *ii*. A plan to reduce the likelihood of future erosion, instability and ecological degradation onsite.

(c) The Department shall issue an individual permit to stabilize an eroded bank or channel, which has become eroded, unstable and/or ecologically degraded, only if the stabilization project is accomplished as follows:

1. The project is designed by an individual with experience in stream fluvial geomorphology (and soil bioengineering if used on site), as evidenced by documentation supplied with the individual permit application;

2. Where possible, a localized eroded bank or destabilized channel is stabilized simply restored solely by cutting back the bank to a stable slope and planting with vegetation suitable for stabilization. Generally a slope of no more greater than 50 percent (a ratio of two horizontal to one vertical) is recommended to stabilize an eroded bank;

3. Where nuisance flooding is a related issue, flood capacity outside the regulated water is increased by terracing the overbank areas where appropriate, so that the channel is not forced to convey excessive flows (see the Flood Hazard Area Technical Manual, available from the Department at the address listed at N.J.A.C. 7:13-1.1(g), for examples);
4.* If cutting the bank and planting vegetation as described in *[(b)]* *[(c)]* *2 above cannot *adequately restore the channel and/or* fully prevent erosion due to excessive channel velocity, or if cutting the bank would destroy vegetation in excess of that which is allowed at N.J.A.C. 7:13-10.2(i), soil bioengineering is used to stabilize the eroded bank *and/or restore the channel*. In designing soil bioengineering installations, the existing soil characteristics, the *[bank’s]* *bank and/or channel's* physical structure and the hydrologic conditions on site shall be considered; *[5]* *[4]*. The Department shall issue an individual permit for bank stabilization *or channel restoration* that is not accomplished solely using vegetation or soil bioengineering, as described in *[(c) 1 through 4]* *(c)2 and (c)3* above, *respectively,* only if the applicant demonstrates that, given the velocity and configuration of the adjacent channel and/or other conditions of the site, vegetation and/or soil bioengineering alone are not adequate to stabilize the bank *and/or restore the channel*; and *[6]* *[5]*. The Department shall issue an individual permit for the lining or piping of a channel in order to stabilize erosion only if the applicant demonstrates the following: i-iii.(No change from proposal)

*(d). In cases where nuisance flooding is a related issue, flood capacity outside the regulated water shall be increased by terracing the overbank areas where appropriate, so that the channel is not forced to convey excessive flows (see the Flood Hazard Area Technical Manual, available from the Department at the address listed at N.J.A.C. 7:13-1.1(g), for examples).*

SUBCHAPTER 12. EMERGENCY PERMITS

7:13-12.1 Requirements for issuing an emergency permit
(a)-(b) (No change from proposal)
(c) An applicant for an emergency permit shall provide the Department with the following by telephone, and in addition by fax, electronic mail or letter, if possible:
   1-9. (No change from proposal)
10. If notice to the Department is also made by fax, electronic mail or letter, photographs of the area in question and a *sketch* *drawing* of the proposed emergency activities, where feasible.

(d) (No change from proposal)

(e) No public notice or fee is required for an emergency permit. However, either an individual permit (which requires public notice and an application fee) or a general permit authorization (which requires an application fee, except for general *permit* *permits 1 and* 6) must be obtained after an emergency permit is issued under N.J.A.C. 7:13-12.2.

7:13-12.2 Procedures after an emergency permit is issued

(a) The permittee shall commence the approved emergency activities within 30 calendar days after the Department's verbal approval of the emergency permit, unless extended in accordance with (d) below. If the emergency activities are not commenced within 30 calendar days of the *Department's* verbal approval, the emergency permit is void.

(b) Once commenced, all regulated activities authorized under the emergency permit shall be completed, and the emergency permit shall expire, *by* *within* 60 calendar days *after* *of* the Department's verbal approval, unless extended in accordance with (d) below. If the regulated activities authorized under the emergency permit are not completed by this expiration date, these regulated activities shall cease until an individual permit, general permit authorization or another emergency permit is obtained from the Department for the regulated activities.

(c) The permittee shall submit to the Department a complete application for an individual permit or a general permit authorization for the completed activities within 90 calendar days *after* *of* the Department's verbal approval of the emergency permit, unless extended in accordance with (d) below. The application shall include the following:

1-2. (No change from proposal)

(d)-(e) (No change from proposal)

SUBCHAPTER 13. REVISION OF AN APPROVAL

7:13-13.1 Revision of a verification
(a) This section applies to the revision of a flood hazard area design flood elevation, flood hazard area limit, floodway limit*, riparian zone limit* and/or other related feature on an approved drawing after a verification has been issued. A verification must be valid in order to be revised. A revision shall not extend the term of a verification.

(b) (No change from proposal)

(c) There are two types of verification revisions, as follows:

1. A minor revision of a verification is a change in the flood hazard area design flood elevation, flood hazard area limit, floodway limit*, riparian zone limit* and/or other related feature, which does not require the Department to review detailed engineering calculations in order to determine that the revision is accurate. Any type of verification under N.J.A.C. 7:13-6 can be the subject of a minor revision. Examples of a minor revision include *the following, provided no review of calculations is required*:
   i-ii. (No change from proposal)
   iii. Revising a previously approved *riparian zone limit or* metes and bounds description of the flood hazard area limit and/or floodway limit to more closely match their actual location;
   iv-v. (No change from proposal)

2. (No change from proposal).

(d)-(e) (No change from proposal)

(f) An application for a minor revision of a verification shall include the following:

1. (No change from proposal)

2. One *[LURP-1]* LURP* application form completed as described at N.J.A.C. 7:13-15.1(f);

3-4. (No change from proposal)

5. A detailed written description of the proposed revisions to the flood hazard area design flood elevation, flood hazard area limit, floodway limit*, riparian zone limit* and/or other related feature; and

6. Six sets of revised drawings, signed and sealed by an engineer, land surveyor or architect, as appropriate, prepared in accordance with the application requirements for a verification at N.J.A.C. 7:13-6.1(c). For each revised flood hazard area design flood
elevation, flood hazard area limit, floodway limit*, riparian zone limit* and/or other related feature, the applicant shall submit both the originally approved drawings showing the approved elevation, limits and/or features and new drawings showing the revised elevation*, limits and/or features.

(g) (No change from proposal)

(h) After reviewing an application for a revision of a verification, the Department shall:
   1. Notify the applicant that the application did not include all the material required at (f) or (g) above, or that supplemental information is needed to determine if the application complies with this chapter, and request the missing information. The Department may cancel the application if the *requested* information is not provided within 60 calendar days. When the requested material is received, the Department shall take one of the actions in (h)2 or 3 below;
   2-3. (No change from proposal)

(i) (No change from proposal)

(j) Within 90 calendar days after the Department revises a verification on a privately owned lot, or on a publicly owned lot other than a right-of-way, the applicant shall submit the following information to the clerk of each county in which the site is located, and shall send proof to the Department that this information is recorded on the deed of each lot referenced in the verification. Failure to have this information recorded in the deed of each lot and/or to submit proof of recording to the Department constitutes a violation of this chapter and may result in suspension or termination of the verification and/or subject the applicant to enforcement action pursuant to N.J.A.C. 7:13-19:
   1-4. (No change from proposal)
   5. The following statement: "The State of New Jersey has determined that all or a portion of this lot lies in a flood hazard area. Certain activities in flood hazard areas are regulated by the New Jersey Department of Environmental Protection and some activities may be prohibited on this site or may first require a permit from the Department of Environmental Protection*. Contact the Division of Land Use Regulation at (609) 292-0060 for more information prior to any construction onsite."
7:13-13.2 Revision of a general permit

(a) (No change from proposal)

(b) The Department shall only issue a minor revision to a general permit. A minor revision is a change in a project element that does not require the Department to review detailed engineering calculations in order to determine whether the revised project element complies with this chapter, whereas a major revision involves the review of calculations, which does not apply to general permits under this chapter. Examples of a minor revision include the following: provided no review of calculations is required:

1-3. (No change from proposal)

4. Adjusting the size, shape or location of a proposed structure or activity;

5. Reducing the level of proposed development on site, such as deleting a proposed structure or activity, or reducing its footprint.

(c) (No change from proposal)

(d) An application for a revision of a general permit shall include the following:

1. (No change from proposal)

2. One LURP application form completed as described at N.J.A.C. 7:13-15.1(f);

3-5. (No change from proposal)

6. Six sets of drawings, signed and sealed by an engineer, land surveyor or architect, as appropriate, which detail the proposed activities and show the project elements to be revised, including existing and proposed topography if fill or grading is proposed. All topography shall reference NGVD, or include the appropriate conversion factor to NGVD, unless the applicant demonstrates that such reference is not necessary. The limit of any riparian zone onsite shall also be shown, as well as any areas where riparian zone vegetation will be cleared, cut or removed.

(e) After reviewing an application for a revision of a general permit, the Department shall:

1. Notify the applicant that the application did not include all the material required at (d) above, or that supplemental information is needed to determine if the application complies with this chapter, and request the missing information. The Department may...
cancel the application if the *missing* requested* information is not provided within 60 calendar days. When the requested material is received, the Department shall take one of the actions in (e)2 or 3 below;

2-3 (No change from proposal)

(f) (No change from proposal)

7:13-13.3 Revision of an individual permit

(a)-(b) (No change from proposal)

(c) There are two types of individual permit revisions, as follows:

1. A minor revision of an individual permit is a change in a project element that does not require the Department to review detailed engineering calculations in order to determine whether the revised project element complies with this chapter. Examples of a minor revision include the following, provided no review of calculations is required:

i-iii.(No change from proposal)

iv. Adjusting the size, shape or location of a proposed structure *or activity*; and

v. Reducing the level of proposed development on site, such as deleting a proposed structure *or activity,* or reducing its footprint.

2. (No change from proposal)

(d) (No change from proposal)

(e) An application for a minor revision of an individual permit shall include the following:

1. (No change from proposal)

2. One *[LURP-1]* *LURP* application form completed as described at N.J.A.C. 7:13-15.1(f);

3-5. (No change from proposal)

6. Six sets of drawings, signed and sealed by an engineer, land surveyor or architect, as appropriate, which detail the proposed activities and show the project elements to be revised, including existing and proposed topography if fill or grading is proposed. All topography shall reference NGVD, or include the appropriate conversion factor to NGVD, unless the applicant demonstrates that such reference is not necessary. *The
limit of any riparian zone onsite shall also be shown, as well as any areas where riparian zone vegetation will be cleared, cut or removed.*

(f) (No change from proposal)

(g) After reviewing an application for a revision of an individual permit, the Department shall:
   1. Notify the applicant that the application did not include all the material required at (e) or (f) above, or that supplemental information is needed to determine if the application complies with this chapter, and request the missing information. The Department may cancel the application if the *missing* requested information is not provided within 60 calendar days. When the requested material is received, the Department shall take one of the actions in (g)2 or 3 below;
   2-3. (No change from proposal)

(h) (No change from proposal)

7:13-13.4 Revision of a Department delineation by application

(a) This section applies to the revision of a flood hazard area design flood elevation, flood hazard area limit, floodway limit and/or other related feature on a flood hazard area delineation that has been promulgated by the Department. Appendix 2 of this chapter lists the *Department delineated* waters of New Jersey.

(b) There are two types of delineation revisions, as follows:
   1. A minor revision of a delineation is a change in the flood hazard area design flood elevation, flood hazard area limit, floodway limit and/or other related feature, which does not require the Department to review detailed engineering calculations in order to determine that the revision is accurate. Examples of a minor revision include *the following, provided no review of calculations is required*:
      i-iv. (No change from proposal)
   2. (No change from proposal)

(c) (No change from proposal)

(d) An application for a minor revision of a Department delineation shall include the following:
   1. (No change from proposal)
2. One *[LURP-1]* *[LURP]* application form completed as described at N.J.A.C. 7:13-15.1(f);
3-5. (No change from proposal)

(e) After reviewing an application for a minor delineation revision, the Department shall:
1. Notify the applicant that the application did not include all the material required at (d) above, or that supplemental information is needed to determine if the application complies with this chapter, and request the missing information. The Department may cancel the application if the *[missing]* *[requested]* information is not provided within 60 calendar days. When the requested material is received, the Department shall take one of the actions in (e)2 or 3 below;
2-3. (No change from proposal)

(f)-(g) (No change from proposal)

(h) After reviewing an application for a major delineation revision, the Department shall:
1. Notify the applicant that the application did not include all the material required at (g) above, or that supplemental information is needed to determine if the application complies with this chapter, and request the missing information. The Department may cancel the application if the *[missing]* *[requested]* information is not provided within 60 calendar days. When the requested material is received, the Department shall take one of the actions in (h)2 or 3 below;
2-3. (No change from proposal)

(i) If the Department determines that a major delineation revision is accurate and necessary, the Department shall proceed with the revision as follows:
1. The Department shall publish notice of its intent to revise the delineation in the New Jersey Register, *[one newspaper of local circulation]* *[as well as in the official newspaper of each affected municipality (or in a newspaper of general circulation in each affected municipality if there is no official newspaper)]* and *[in]* one newspaper of regional circulation (relative to the location of the project). This notice shall include:
   i-iv. (No change from proposal)
2. (No change from proposal)
3. Upon consideration of the available information and public comments, if the
Department concludes that revising the delineation is in the best interest of public
health, safety and welfare, the Department shall:
   i. (No change from proposal)
   ii. (No change from proposal)
   iii. Publish a public notice describing the revision in *[one newspaper of local
circulation and]* *the official newspaper of each affected municipality (or in a
newspaper of general circulation in each affected municipality if there is no
official newspaper) as well as in* one newspaper of regional circulation (relative
to the location of the project); and
   iv. (No change from proposal)

(j) (No change from proposal)

7:13-13.5 Revision or suspension of a Department delineation by the Department
(a) If the Department determines, independent of an application pursuant to N.J.A.C. 7:13-13.4,
that an existing *Department* delineation *as listed in Appendix 2* underestimates the extent
of the floodway and/or flood hazard area, and that it is in the best interest of public health, safety
and welfare to revise a delineation, the Department shall do one of the following:
   1-2. (No change from proposal)
(b) To initiate an emergency one-year suspension of a delineation as described in (a)2 above,
the Department shall:
   1. Publish notice of its intent to suspend the delineation in the New Jersey Register, *[one
newspaper of local circulation]* *as well as in the official newspaper of each affected
municipality (or in a newspaper of general circulation in each affected
municipality if there is no official newspaper)* and *in* one newspaper of regional
circulation (relative to the location of the project). This notice shall include:
   i. (No change from proposal)
   ii. The reason the Department is suspending the delineation; *[and]*
   iii. *[A request for public]* *An invitation for interested parties to submit written*
   comments regarding the *([proposed]*)*suspension and subsequent need for
   amendment of the suspended delineation*[*]* *; and

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iv. The mailing address and telephone number of a contact person within the Department who is able to discuss the suspension.

2-3. (No change from proposal)

(c)-(d) (No change from proposal)

(e) If the Department approves an individual permit under this chapter for an activity which alters the flood hazard area design flood elevation, flood hazard area limit and/or floodway limit of a regulated water, such as the construction of a flood control project, or the construction, modification or removal of a bridge or culvert, the Department shall automatically revise the delineation as necessary after the construction is completed. No public notice or hearing is necessary to revise a Department delineation in such a case.

SUBCHAPTER 14. TRANSFER, SUSPENSION AND TERMINATION OF AN APPROVAL

7:13-14.1 Transfer of an approval

(a) (No change from proposal)

(b) The Department shall not transfer an approval if doing so would alter a basic condition or premise upon which the original approval was granted or would otherwise circumvent a requirement of this chapter. For example, an existing lot may be shaped in such a way that the owner must construct a road across a channel in order to access the rear portion of the lot in order to construct a house. In some cases, the Department would, during the review of an individual permit application, consider whether there is another means of accessing the site that would reduce the amount of disturbance to the channel, or which would avoid crossing the channel altogether, such as crossing through a neighboring property. If the owner of a lot demonstrates that there is no feasible means of accessing the rear portion of the lot without crossing the channel, the Department would authorize a road crossing provided all other requirements of this chapter are met. However, if the owner of the lot first obtains an individual permit for such a road crossing, and then sells the lot to an adjacent land owner who already has a roadway across the channel, the
basic premise upon which the individual permit was granted no longer exists. Therefore, the Department would not approve the transfer of the approval to the new owner in such a case.

(c) If the Department approves a regulated activity *under a general permit authorization or an individual permit that is not based on a hardship exception,* and the subject property is subsequently sold to a new owner, the new owner must obtain a transfer of said approval before commencing or continuing any work authorized under the approval. Should the new owner engage in a regulated activity without the prior transfer of the approval, the approval shall be void and the new owner shall be in violation of this chapter and subject to enforcement action pursuant to N.J.A.C. 7:13-19.

(d)-(f) (No change from proposal)

SUBCHAPTER 15. APPLICATION REQUIREMENTS

7:13-15.1 General provisions
(a)-(e) (No change from proposal)
(f) All *LURP* application forms submitted under this chapter shall be completed as directed by the form for the type of application being requested. The *LURP* form requires basic information regarding the applicant and the proposed activities, such as the name and address of the applicant and any designated agents, the specific location of the project, the types of applications being requested and a brief description of the activities being proposed. Where signatures are required on the form, original signatures shall be provided. The form also requires State plane coordinates for the approximate center of the site, except as provided at (f)1 and 2 below. The accuracy of the State plane coordinates shall be within 50 feet of the actual center point of the site. For assistance in determining the State plane coordinates for a site contact the Department's Geographic Information (GIS) Office at (609) 777-0672.

1-2. (No change from proposal)

7:13-15.2 Pre-application conference
(a) (No change from proposal)
(b) A pre-application conference can be requested by telephone, electronic mail or by writing to the address listed at N.J.A.C. 7:13-1.1(f). Such a request shall be directed to the engineering supervisor or review engineer responsible for the county wherein the project is located and shall include a description of the project.

(c)-(g) (No change from proposal)

7:13-15.3 Application report
(a) An application report required under this chapter shall include the following (photocopies of maps and documents are acceptable, except for the *LURP* application form, which must include original signatures):

1. (No change from proposal)
2. One original *LURP* application form, completed as described at N.J.A.C. 7:13-15.1(f);
3. One copy of a USGS quad map with the site clearly outlined *to scale*;
4. One copy of a municipal tax map with the site clearly outlined *to scale*;
5-7. (No change from proposal)

7:13-15.5 Environmental report
(a) An environmental report required under this chapter shall include the following, as applicable:

1-2. (No change from proposal)
3. An analysis of any potential adverse impacts to the following resources and a detailed description of how potential adverse impacts shall be minimized. This analysis shall include all temporary and permanent adverse impacts of each proposed activity, whether onsite or offsite, as follows:
   i-iii. (No change from proposal)
   iv. Threatened or endangered species: if a survey for threatened or endangered species is required under N.J.A.C. 7:13-10.6*(e)*, it shall meet the requirements of (c) below; and
   v. (No change from proposal)
(b) If it is determined that a proposed project is likely to cause an adverse impact to any resource listed in (a)3 above, the environmental report shall include the following material, in addition to the information required at (a) above:

1. (No change from proposal)
   4. A plan to mitigate *to* the effects of all unavoidable adverse impacts.

(c) If the Department requires a survey for threatened or endangered species under N.J.A.C. 7:13-10.6[(d)]*(e)*, the survey shall be performed by a person with education and experience in wildlife biology, zoology and/or botany, as appropriate, and shall include the following:

1-8. (No change from proposal)

SUBCHAPTER 16. PUBLIC NOTICE OF APPLICATIONS

7:13-16.3 Public notice requirements for an application for an individual permit

(a)-(c) (No change from proposal)

(d) An application for an individual permit for utility line *maintenance,* repair or replacement pursuant to N.J.A.C. 7:13-11.9(f) is not subject to the public notice requirements of (a) above. Instead, the applicant shall provide public notice of the individual permit application and of each repair and replacement as follows:

1-2 (No change from proposal)

7:13-16.4 Documenting public notice of an application

(a) For applications that require public notice under this subchapter, the following shall be submitted to the Department to demonstrate that public notice was provided:

1. The original certified U.S. *Postal Service* receipt for each public notice that was mailed, mounted on 8 1/2-inch by 11-inch paper. All certified mail shall be sent with return receipts requested. An applicant shall submit either the white postal receipt or the green return receipt card with an application. However, the green cards, if not sent with the application, shall be sent collectively to the Department once they are received from the post office by the applicant;

2-3. (No change from proposal)
7:13-16.5 Newspaper notice
(a) Newspaper notice required for an application under this chapter shall consist of either a legal notice or a display add (at the applicant's discretion) published *in one newspaper of local circulation and* in the official newspaper of the municipality (or in a newspaper of general circulation in the municipality if there is no official newspaper) as well as in* one newspaper of regional circulation (relative to the location of the project). The newspaper notice shall include:

1-4. (No change from proposal)

7:13-16.6 Contents of public notice of an application
(a) Except for the newspaper notice provided under N.J.A.C. 7:13-16.5, public notice required under this subchapter shall include the following:

1. A copy of the completed *LURP* application form that was submitted to the Department for the application;
2. (No change from proposal)
3. If an application includes a request for a hardship exception under N.J.A.C. 7:13-9.8, the letter required under (a)2 above shall also include the following:
   i-ii. (No change from proposal)
   iii. The citation and subject matter of each requirement in this chapter for which the hardship exception is *being* requested.
(b) (No change from proposal)
(c) The letter required in (a)2 above for an application for a verification shall state:
This letter is to notify you that an application for a flood hazard area verification will be submitted to the State of New Jersey Department of Environmental Protection (Department) for the site described on the attached application form. The Department regulates construction within flood hazard areas and riparian zones adjacent to certain waters. This application is a request for the Department to verify the extent of these areas on the subject property. A flood hazard area verification does not approve any construction. A separate application must be made to the Department if regulated activities are proposed within these areas. If you have any
comments or questions regarding this application, please write to the Department at the following address and include a copy of the first page of the attached application form.

   Attn: Engineering *[Section Chief]* *Supervisor* for (the county or counties where the property that is the subject of the application is located)
   State of New Jersey Department of Environmental Protection
   Division of Land Use Regulation
   P.O. Box 439
   Trenton, New Jersey 08625-0439

Your comments must be sent within 15 calendar days of your receipt of this letter to ensure that the Department will be able to consider your concerns during its review of this application. You can submit comments after this date but the Department may not be able to address your concerns. You can also contact the Department by telephone at (609) 292-0060 and can obtain general information about the flood hazard area program at the following website: www.nj.gov/dep/landuse.

(d) The letter required in (a)2 above for an application for an individual permit shall state:

This letter is to notify you that an application for a flood hazard area permit will be submitted to the State of New Jersey Department of Environmental Protection (Department) for the project described on the attached application form. A flood hazard area permit is required for this project because some or all of the work is proposed in a flood hazard area or in a riparian zone. If you have any comments or questions regarding this application, please write to the Department at the following address and include a copy of the first page of the attached application form:

   Attn: Engineering *[Section Chief]* *Supervisor* for (the county or counties where the property that is the subject of the application is located)
   State of New Jersey Department of Environmental Protection
   Division of Land Use Regulation
   P.O. Box 439
   Trenton, New Jersey 08625-0439

Your comments must be sent within 15 calendar days of your receipt of this letter to ensure that the Department will be able to consider your concerns during its review of this application. You can submit comments after this date but the Department may not be able to address your
concerns. You can also contact the Department by telephone at (609) 292-0060 and can obtain
general information about the flood hazard area program at the following website:
www.nj.gov/dep/landuse.
(e) The letter required in (a)2 above for a joint verification and individual permit application
shall state:
This letter is to notify you that an application for a flood hazard area verification will be
submitted to the State of New Jersey Department of Environmental Protection (Department) for
the property described on the attached application form. The Department regulates construction
within flood hazard areas and riparian zones adjacent to certain waters. This application is a
request for the Department to verify the extent of these areas on the subject property. In addition,
an application for a flood hazard area permit will also be submitted to the Department for the
project described on the attached application form. A flood hazard area permit is required for this
project because some or all of the work is proposed in a flood hazard area or in a riparian zone. If
you have any comments or questions regarding this application, please write to the Department
at the following address and include a copy of the first page of the attached application form:

   Attn: Engineering *[Section Chief]* *Supervisor* for (the county or counties where the
property that is the subject of the application is located)
   State of New Jersey Department of Environmental Protection
   Division of Land Use Regulation
   P.O. Box 439
   Trenton, New Jersey 08625-0439
Your comments must be sent within 15 calendar days of your receipt of this letter to ensure that
the Department will be able to consider your concerns during its review of this application. You
can submit comments after this date but the Department may not be able to address your
concerns. You can also contact the Department by telephone at (609) 292-0060 and can obtain
general information about the flood hazard area program at the following website:
www.nj.gov/dep/landuse.

SUBCHAPTER 17. APPLICATION FEES
7:13-17.1 Application fees

(a) At *[Table E]* *Table F* below, this subchapter sets forth the fees for an application for the following:

1-2. (No change from proposal)

3. An individual permit, pursuant to N.J.A.C. 7:13-9 *[though]* *10 and* 11;

4-5. (No change from proposal)

(b) (No change from proposal)

(c) The total application fee for a given project is calculated by summing the following:

1. The *appropriate* fee for each project element to be covered by *[an]* *any* individual permit *[if any]*;

2. The *appropriate* fee for *[the appropriate]* *any* verification *[if any]*;

3. The *appropriate* fee for any general permit authorization, revision or transfer for which an application is submitted.

(d) (No change from proposal)

(e) If a project requires approval under this chapter, and also requires *[Coastal Area Facilities Review Act (CAFRA)]* *any CAFRA*, waterfront development, coastal wetlands and/or freshwater wetlands approvals issued under the respective rules for these regulatory programs, the application fee for the project shall be calculated as follows:

1-2. (No change from proposal)

(f) (No change from proposal)

(g) For the purpose of determining the application fee for the review of a linear project, such as a verification of a flood hazard area limit or an individual permit for a bank stabilization project where a review of calculations is necessary, the length of the feature shall be measured along the centerline of the channel. Along *[intermittent streams and impounded areas such as lakes or ponds]* *regulated waters* where no channel is discernible, the length of the channel (for calculating fees under this section) shall be determined by measuring the approximate centerline of the *[feature]* *regulated water*.

*[Table E]* *Table F*

APPLICATION FEES
Verification (N.J.A.C. 7:13-6)

<table>
<thead>
<tr>
<th>Type of Verification</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Method 1 (Department delineation method)</td>
<td>$500.00</td>
</tr>
<tr>
<td>Method 2 (FEMA tidal method)</td>
<td>$500.00</td>
</tr>
<tr>
<td>Method 3 (FEMA fluvial method)</td>
<td>$500.00</td>
</tr>
<tr>
<td>Method 4 (FEMA hydraulic method)</td>
<td>$3,000 plus $300.00 per each 100 linear feet of channel (or portion thereof)</td>
</tr>
<tr>
<td>Method 5 (Approximate method)</td>
<td>$500.00</td>
</tr>
<tr>
<td>Method 6 (Calculation method)</td>
<td>$3,000 plus $300.00 per each 100 linear feet of channel (or portion thereof)</td>
</tr>
</tbody>
</table>

Note: The $500.00 fee for methods 1, 2, 3 and 5 above does not apply if the verification application is submitted concurrently with *an* either of the following:

1. An application for any general permit authorization for which verification of the flood hazard area is required to determine compliance with the general permit; or *with an*
   *2. An individual permit application solely for the construction of one private residence (which is not being constructed as part of a larger residential subdivision), the construction of a residential addition and/or the construction of a building appurtenant to a private residence, such as a garage, barn or shed.

General Permit Authorization (N.J.A.C. 7:13-8)

<table>
<thead>
<tr>
<th>Type of General Permit</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>General permits 1 and 6</em></td>
<td><em>No fee</em></td>
</tr>
<tr>
<td>General permits 2A, 2B, 2C, 2D, 2E, 2F, 2G, 3, 4, 5, 7, 8, 9 and 10</td>
<td>$500.00</td>
</tr>
</tbody>
</table>

Individual permit (N.J.A.C. 7:13-9 through 11)

<table>
<thead>
<tr>
<th>Project Element</th>
<th>Qualifier</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Review of hydrologic and/or hydraulic calculations necessary</td>
<td>$3,000 plus $300.00 per each 100-foot segment of channel (or portion thereof)</td>
</tr>
<tr>
<td>---------------------</td>
<td>---------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>Review of hydrologic and/or hydraulic calculations not necessary</td>
<td>$1,000</td>
</tr>
<tr>
<td>Bank stabilization, reestablishment, or protection</td>
<td>Review of hydrologic and/or hydraulic calculations necessary (except as noted below)</td>
<td>$4,000</td>
</tr>
<tr>
<td>Bridge, culvert, footbridge, low dam or other water control structure (including up to 200 feet of channel modification if necessary for the placement of the water control structure)</td>
<td>Review of hydrologic and/or hydraulic calculations necessary for a bridge or culvert that provides access to one private residence (which is not being constructed as part of a larger residential subdivision)</td>
<td>$2,000</td>
</tr>
<tr>
<td></td>
<td>Review of hydrologic and/or hydraulic calculations not necessary</td>
<td>$1,000</td>
</tr>
<tr>
<td>Channel modification</td>
<td>Review of hydrologic and/or hydraulic calculations necessary</td>
<td>$3,000 plus $300.00 per each 100-foot segment of channel (or portion thereof)</td>
</tr>
<tr>
<td></td>
<td>Review of hydrologic and/or hydraulic calculations not necessary</td>
<td>$1,000</td>
</tr>
<tr>
<td>Excavation, fill and/or grading</td>
<td>Review of net fill calculations necessary (except as noted below)</td>
<td>$4,000</td>
</tr>
<tr>
<td></td>
<td>Review of net fill calculations not necessary and project consists solely of excavation, fill and/or grading</td>
<td>$1,000</td>
</tr>
<tr>
<td>Review of net fill calculations necessary and project consists solely of one private residence that is not being constructed as part of a larger residential subdivision (including any appurtenant structure such as a garage, barn or shed)</td>
<td>No fee</td>
<td></td>
</tr>
<tr>
<td>Review of net fill calculations necessary for a bridge or culvert <em>[that is a major element]</em> <em>where review of hydrologic and/or hydraulic calculations is also necessary</em></td>
<td>No fee</td>
<td></td>
</tr>
<tr>
<td>Hardship exception</td>
<td>Request associated with one private residence that is not being constructed as part of a larger residential subdivision (including any appurtenant structure such as a garage, barn or shed)</td>
<td>No fee</td>
</tr>
<tr>
<td>Private residence</td>
<td>One private residence that is not being constructed as part of a larger residential subdivision (including any appurtenant structure such as a garage, barn or shed)</td>
<td>$1,000</td>
</tr>
<tr>
<td>Addition and/or new appurtenant structure to an existing private residence, such as a garage, barn or shed</td>
<td>$1,000</td>
<td></td>
</tr>
<tr>
<td>Retaining wall</td>
<td><em>Extends</em> 4 feet or more above <em>the</em> ground</td>
<td>$4,000</td>
</tr>
<tr>
<td><em>Extends</em> less than 4 feet above <em>the</em> ground</td>
<td>$1,000</td>
<td></td>
</tr>
<tr>
<td>Sediment removal from a channel</td>
<td>Each sediment removal project</td>
<td>$1,000 plus $100.00 per each 100-foot</td>
</tr>
<tr>
<td>Qualifier</td>
<td>Area of Impact</td>
<td>Fee</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------</td>
<td>---------------------------------------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>Base fee for any major development</td>
<td>Any size project</td>
<td>$2,000</td>
</tr>
<tr>
<td>Additional fee for the review of groundwater recharge calculations (pursuant to N.J.A.C. 7:8-5.4(a)2) per area of land disturbed by the project</td>
<td>Up to 3 acres</td>
<td>$500</td>
</tr>
<tr>
<td></td>
<td>More than 3 acres and up to 10 acres</td>
<td>$1,000</td>
</tr>
<tr>
<td></td>
<td>More than 10 acres and up to 100 acres</td>
<td>$2,000</td>
</tr>
<tr>
<td></td>
<td>More than 100 acres</td>
<td>$4,000</td>
</tr>
<tr>
<td>Additional fee for the review of runoff quantity calculations (pursuant to N.J.A.C. 7:8-5.4(a)3) per area of land disturbed by the project</td>
<td>Up to 3 acres</td>
<td>$500</td>
</tr>
<tr>
<td></td>
<td>More than 3 acres and up to 10 acres</td>
<td>$1,000</td>
</tr>
<tr>
<td></td>
<td>More than 10 acres and up to 100 acres</td>
<td>$2,000</td>
</tr>
<tr>
<td></td>
<td>More than 100 acres</td>
<td>$4,000</td>
</tr>
<tr>
<td>Additional fee for the review of water quality calculations (pursuant to N.J.A.C. 7:8-5.5) per area of impervious surface under review</td>
<td>Up to 1 acre</td>
<td>$500</td>
</tr>
<tr>
<td></td>
<td>More than 1 acre and up to 3 acres</td>
<td>$1,000</td>
</tr>
<tr>
<td></td>
<td>More than 3 acres and up to 10 acres</td>
<td>$2,000</td>
</tr>
<tr>
<td></td>
<td>More than 10 acres</td>
<td>$4,000</td>
</tr>
<tr>
<td>Additional fee if any vegetation is removed within a Special Water Resource Protection Area (pursuant to N.J.A.C. 7:8-5.5(h))</td>
<td>Any size project</td>
<td>$2,000</td>
</tr>
</tbody>
</table>
Revision of a verification, general permit authorization or individual permit

(N.J.A.C. 7:13-13.1 through 13.3)

<table>
<thead>
<tr>
<th>Qualifier</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Each major revision</td>
<td>Fifty percent of the original permit application fee for each project element to be revised</td>
</tr>
<tr>
<td>Each minor revision</td>
<td>$200.00 per element to be revised</td>
</tr>
</tbody>
</table>

Revision of a Department delineation (N.J.A.C. 7:13-13.4)

<table>
<thead>
<tr>
<th>Qualifier</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Each major revision</td>
<td>$3,000 plus $300.00 per each 100-foot segment of channel (or portion thereof) to be re-delineated</td>
</tr>
<tr>
<td>Each minor revision</td>
<td>$200.00</td>
</tr>
</tbody>
</table>

Transfer an approval (N.J.A.C. 7:13-14.1)

<table>
<thead>
<tr>
<th>Qualifier</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Transfer of an applicability determination or permit-by-rule</em></td>
<td><em>No fee</em></td>
</tr>
<tr>
<td><em>[Per]</em> <em>[Transfer of any other]</em> approval <em>[transferred]</em></td>
<td>$200.00</td>
</tr>
</tbody>
</table>

(h)-(j) (No change from proposal)

SUBCHAPTER 19. ENFORCEMENT

7:13-19.2 Grace period applicability; procedures
(a) Each violation identified in *[Table F]* *[Table G]* at (f) below by an "M" in the Type of Violation column, for which the conditions of (d)1 through 6 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 F]* *[Table G]* 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 F]* *[Table G]* 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 G* at (f) below but is comparable to a violation designated as "M" in *Table G* 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 calendar days as described at (e) below.

2. If the violation is not listed in *Table G* at (f) below and is not comparable to a violation listed in *Table G* but the violation meets all of the criteria at (d)1 through 9 below, then the violation is minor. The minor violation shall be subject to a grace period of 30 calendar days as described at (e) below.

3. If the violation is not listed in *Table G* at (f) below but is comparable to a violation designated as "NM" in *Table G*, 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 G* at (f) below and is not comparable to a violation listed in *Table G*, 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 a grace period.

5. Comparability of a violation to a violation in *Table G* 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 G* unless the violation also meets the criteria at (d)7 through 9 below.

(d)-(e) (No change from proposal)

(f) The designations of violations of the Flood Hazard Area Control Act and this chapter as minor (M) and non-minor (NM) are set forth in *Table G* below. The violation descriptions are provided for informational purposes only. In the event that there is a conflict between a violation description in *Table G* and the rule to which the violation description corresponds, the rule shall govern.

*Table G*

MINOR AND NON-MINOR VIOLATIONS
<table>
<thead>
<tr>
<th>Rule Citation</th>
<th>Violation Description</th>
<th>Type of Violation</th>
</tr>
</thead>
<tbody>
<tr>
<td>N.J.A.C. 7:13-1.3(d)</td>
<td>Failure of an applicant, or any consultant, engineer, surveyor or agent employed by an applicant, to provide all necessary information to the Department which is relevant to an application. Submittal of false information by the applicant, its consultants and/or agents.</td>
<td>NM</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-1.4(a)2ii</td>
<td>Failure of a delegated county governing body to uphold the requirements of this chapter</td>
<td>NM</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-1.4(c)</td>
<td>Failure of a delegated county governing body to permanently retain a copy of all required documents that document that it has discharged its delegated duties</td>
<td>NM</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-2.1(a)</td>
<td>Initiating a regulated activity in a regulated area not in conformance with a permit-by-rule, general permit authorization, individual permit, emergency permit or appropriate CAFRA or waterfront development permit.</td>
<td>NM</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-6.1(g)</td>
<td>Failure of an applicant to record the metes and bounds description of a verified flood hazard area and/or floodway limit on the property deed within 90 calendar days of issuance of the verification</td>
<td>NM</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-6.1(g)</td>
<td>Failure of an applicant to submit proof to the Department of recording of the metes and bounds description of the verified flood hazard area and/or floodway limit on the property deed within 90 calendar days of issuance of the verification</td>
<td>M</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-8.2</td>
<td>Failure to comply with all conditions of a general permit except as indicated directly below</td>
<td>NM</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-8</td>
<td>Failure to submit to the Department any documentation required by a general permit</td>
<td>M</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-9.<em>[2]</em></td>
<td>Failure to comply with all conditions of an individual permit except as indicated directly below</td>
<td>NM</td>
</tr>
<tr>
<td>----------------------</td>
<td>---------------------------------------------------------------------------------</td>
<td>-----</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-9</td>
<td>Failure to submit to the Department any documentation required by an individual permit</td>
<td>M</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-12.2</td>
<td>Commencement of activities authorized under an emergency permit later than 30 calendar days after verbal approval; failure to complete commenced activities within 60 calendar days after verbal approval; failure to file a complete permit application and “as built” drawings for completed activities within 90 calendar days after verbal approval; and failure to modify the activities to comply with the requirements of this chapter where directed to do so by the Department.</td>
<td>NM</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-13</td>
<td>Failure of an applicant to record a revised verification</td>
<td>NM</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-13</td>
<td>Failure of an applicant to provide proof that a revised verification has been properly recorded</td>
<td>M</td>
</tr>
<tr>
<td>N.J.A.C. 7:13-16.1(c)</td>
<td>Failure of an applicant to comply with notice requirements</td>
<td>NM</td>
</tr>
</tbody>
</table>
APPENDIX 1:

APPROXIMATING THE FLOOD HAZARD AREA DESIGN FLOOD ELEVATION

As described in detail at N.J.A.C. 7:13-3, the Department and FEMA have adopted flood mapping along many of the State's waters. In absence of a Department delineation, or a FEMA flood insurance study that meets the requirements of N.J.A.C. 7:13-3.4(b), an applicant may use the approximation method described at N.J.A.C. 7:13-3.5 in conjunction with this appendix. Note that this method approximates only the flood hazard area design flood elevation. This method does not approximate the floodway limit. Many activities are restricted within floodways and some calculations cannot be performed if the floodway limit is unknown. Therefore, the Department shall issue a *[written]* *individual* permit for a regulated activity within an approximated flood hazard area only if the regulated activity meets the requirements at N.J.A.C. 7:13-[8.7]* *[9.7]*.

HOW TO USE METHOD 5 (APPROXIMATION METHOD)
1. Determine which Watershed Management Area (WMA) the project is located within based on Figure 5 below. The Department can help in this determination at the applicant's request.2
2. Determine the contributory drainage area (CDA) of the water in question. USGS provides topographical mapping that can be used to make this determination. The Department can also help in this determination at the applicant's request.
3. Find the approximate depth of flooding from Table 1 below based on the WMA and CDA.
4. Find the low point elevation of each roadway crossing or other water control structure within 1 mile downstream of the site.3 Figure 1 illustrates a typical roadway profile with a low point.
5. The approximate flood hazard area design flood elevation will be the higher of the following (see Figures 1 through 4):
   - The depth from Table 1, measured above the average streambed.4
   - The depth from Table 2, measured above the highest roadway low point described in 4 above.

NOTES
1. See Appendix 2 for a complete list of delineations and N.J.A.C. 7:13-3.3 for more detail.
2. If a project spans more than one WMA, the approximate flood hazard area shall be determined separately within each WMA.
3. Some roadway or railroad crossings over very large bridges need not be included if the Department determines that such crossings will not affect flooding on the site. Contact the Department for further information.
4. The average streambed is the general "smooth" grade of the bottom *of* the channel, and does not include small pockets of erosion, individual boulders*[.]* or *other* minor irregularities. The average streambed always has a positive slope toward downstream.

Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Statement addressing the requirements of Executive Order 27 (1994) permit the public to understand accurately and plainly the purpose and expected consequences of these new rules, and I hereby authorize this adoption.

__________________________
Date

LISA P. JACKSON
Commissioner